



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/15280/2013

THE IMMIGRATION ACTS

Heard at Field House  
On Friday 7 February 2014

Determination Promulgated  
On Monday 3 March 2014

Before

MR JUSTICE HICKINBOTTOM  
UPPER TRIBUNAL JUDGE McGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BASSEY MOSES BASSEY

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer  
For the Respondent: Mr Francis Junior, UK Immigration Consultants

DETERMINATION AND REASONS

Introduction

1. The Respondent Bassey Moses Bassey was born on 23 March 1978. He arrived in the United Kingdom on 1 August 2005, with leave to enter as a student, which was later extended to December 2010 when he was granted leave to remain until

December 2012 as a Tier 1 (Post Study Work) Migrant. On 8 December 2012, he made an in-time application for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points Based System. That application was refused by the Secretary of State on 22 April 2013; but the Respondent successfully appealed to the First-tier Tribunal (Tribunal Judge Coleman), the determination being promulgated on 5 December 2013. The Secretary of State now appeals against that determination.

### The Law

2. Paragraph 245DD of the Immigration Rules (HC 395) sets out the requirements an applicant must satisfy to qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant. That paragraph provides that:

“If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.”

3. For this appeal, the relevant requirement is found in paragraph 245DD(b):

“The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.”

4. Paragraph 36 of Appendix A provides that the available points are set out in Table 4. The Respondent sought to satisfy the requirements of (d) of that table which were, at the date of the Secretary of state’s decision in this case, as follows:

“(d) The applicant:

(i) is applying for leave to remain,

(ii) has, or was last granted, leave as a Tier 1 (Post-Study Work) Migrant,

(iii) was, on a date falling within the three months immediately prior to the date of application,

(1) registered with HM Revenue and Customs as self-employed,  
or

(2) registered as a new business in which he is a director, or

(3) registered as a director of an existing business,

(iv) is working in an occupation which appears on the list of occupations skilled to National Qualifications Framework level 4 or above, as stated in the Codes of Practice in Appendix J, and provides the specified evidence in paragraph 41-SD. ‘Working’ in this context means that the core service his business provides to its customers or clients involves the business delivering a service in an occupation at this level. It excludes any work involved in administration, marketing or website functions for the business, and

(v) has access to not less than £50,000.

To obtain the requisite points, the table requires the money referred to in (v) to be held in one or more regulated financial institutions, and to be disposable in the United Kingdom.

5. Of these requirements, it is common ground that the Respondent satisfied those in (d)(i)-(iii). This appeal focuses on the requirements in (d)(iv) and (v).
6. With regard to Table 4(d)(iv), Appendix J to the Rules sets out relevant skill levels, in the form of Standard Occupational Classification (SOC) codes which are based on the comprehensive SOC scheme designed for the Office of National Statistics. The scheme is designed to cover all jobs. Paragraphs 2 and 3 of the Introduction to Appendix J indicate that, where in the Rules a job or occupation is relevant, the most appropriate match for that job within the SOC scheme, as set out in the tables in the appendix, is based on the job description, i.e. on what the job in fact involves. The various jobs in the scheme are defined by reference to "Example job tasks", "Related job titles", and "Salary rates" for both "New entrant" and "Experienced". Having categorised all jobs thus, the scheme allocates them to levels within a hierarchy known as National Qualifications Framework ("NQF").
7. In his application, the Respondent said that he held the post of Marketing Manager in a company called E-Business and E-Marketing Enterprise Limited which offered various services to web-based business. He did not give an SOC code in the application, but Mr Junior submitted that he fell within SOC code 1132, "Marketing & Sales Manager"; and the Secretary of State always understood that he claimed to fall within that coded occupation.
8. SOC code 1132 falls into NQF level 6. The "Example job tasks" for that occupation are as follows:

"Example job tasks:

- Liaises with other senior staff to determine the range of goods and services to be sold;
- Discusses employer's and clients' requirements, plans and monitors surveys and analyses customers' reaction to products;
- Controls the recruitment and training of staff;
- Produces and/or assesses reports and recommendations concerning marketing and sales strategies."

The "Related job titles" are "Marketing director" and "Sales director". The salary rates are £28,500 for a new entrant and £44,200 for an experienced person.

9. Paragraph 41-SD of Appendix A to the Immigration Rules provides that the evidence referred to in Table 4(d) – which the applicant must provide with his application – was, at the relevant time, as follows:

"(i) his job title,

- (ii) the Standard Occupational Classification (“SOC”) code of the occupation that the applicant is working in, which must appear on the list of occupations skilled to [NQF] level 4 or above, as stated in the Codes of Practice in Appendix J,
- (iii) one or more of the following specified documents:
- (1) advertising or marketing material, including printouts of online advertising, that has been published locally or nationally, showing the applicant's name (and the name of the business if applicable) together with the business activity,
  - (2) article(s) or online links to article(s) in a newspaper or other publication showing the applicant's name (and the name of the business if applicable) together with the business activity,
  - (3) information from a trade fair(s), at which the applicant has had a stand or given a presentation to market his business, showing the applicant's name (and the name of the business if applicable) together with the business activity, or
  - (4) personal registration with a UK trade body linked to the applicant's occupation; and
- (iv) one or more of contracts showing trading. If a contract is not an original the applicant must sign each page. The contract must show:
- (a) the applicant's name and the name of the business,
  - (b) the service provided by the applicant's business; and
  - (c) the name of the other party or parties involved in the contract and their contact details, including their full address, postal code and, where available, landline phone number and any email address.”

We pause to mark that these provisions are not now current – they change frequently, and were amended from 1 October 2013 (HC 628).

10. Similarly, paragraph 41-SD(c) of Appendix A sets out the specified documents to show evidence of available funding for the purposes of Table 4(d)(v) including, by sub-paragraph (i), a letter from each financial institution holding the funds to confirm that the money is available. That sub-paragraph sets out thirteen requirements for such a letter, including the following relevant to this appeal:

“... Each letter must:

...

(6) state the applicant’s name...,

...

(10) confirm the amount of money available from any third party (if applicable) that is held in that institution,

(11) confirm the name of each third party and their contact details, including their full address including post code, and where available landline telephone number and any email address,

...”

## The Respondent' Application

11. The Respondent provided the following documents in support of his application which, we remind ourselves, was made on 8 December 2012.
12. In respect of the requirements in Table 4(d)(iv), he provided (i) a printout of a web advertisement on Craigslist, dated 7 December 2012 and timed at 19.31 (ii) a screen capture of a blog in which the Respondent described his business, the print out being dated 7 December 2012 and timed at 19.32, (iii) a Companies House Current Appointments Report for the company E-Business and E-Marketing Enterprise Limited, showing that it was created on 7 December 2012 at 19.38, it had a paid up capital of £1 and the Respondent was the secretary and sole director, and (iv) a contract dated 4 December 2012 between the company and Reja Global for "consultancy on e-commerce as per client's requirement" from 1 February to 31 July 2013 at £1,000 per month.
13. In respect of the requirements of Table 4(d)(v), he provided:

- (i) A bank statement for an account with Ecobank Nigeria Ltd in the name of Akpakpan Monday John, dated 3 November 2012, showing a credit of just over \$150,000 as at that date, all but about \$6,000 having been transferred into the account two days previously. The statement has this endorsement on it, signed by the Branch Manager:

"This is to confirm that Mr Akpakpan Monday John has been maintaining a bank account bearing number 0202058549 at this bank. Mr Akpakpan Monday John has US Dollar \$151,071.42 in his own name available for investment in the United Kingdom on this date 03 November 2012."

The Respondent's name is nowhere shown.

- (ii) A declaration by Mr John dated 31 October 2012 confirming that he has that amount in that bank that day, and saying:

"... [O]ut of this amount I will make GBP \$85,000 available to Mr Bassey Moses Bassey for his proposed business in the United Kingdom. The above mentioned fund is ready for disposal in the United Kingdom for the applicant's proposed business if his Tier 1 Entrepreneur application is granted as applying for."

The declaration gives Mr John's personal details, and is signed by Mr John.

- (iii) A letter from Mr Smart Esheet, an attorney-at-law, dated 31 October 2012, confirming the declaration was duly made by Mr John.

## The First-tier Tribunal Determination

14. It is unfortunate that the decision letter dated 22 April 2013 referred to an out-of-date version of Table 4(d)(iv), one which changed to that set out above on 13 December 2012. The version relied upon was as follows, namely that the applicant:

“is engaged in business activity, other than the work necessary to administer his business, in an occupation which appears on the list of occupations skilled to National Qualifications Framework level 4 or above, as stated in the Codes of Practice in Appendix J, and provides the specified evidence in paragraph 41-SD.”

That was also the version considered at the hearing before the First-tier Tribunal. The main change in December 2012 was that “engaged in business activity” was replaced by simply “working”; but, importantly, both versions require the applicant to show that he is engaged in “an occupation which appears on the list of occupations skilled to National Qualifications Framework level 4 or above”. Furthermore, references to business activity are still found in the current version of Table 4(a)(iii)(1), (2) and (3). Consequently, rightly in our view, neither party before us suggested that the change was material in this appeal.

15. Before Judge Coleman, it was submitted on behalf of the Secretary of State that, in the context of a requirement under Table 4(d)(iv) that the applicant was working in an occupation at SOC level 4 or higher, the Respondent had produced insufficient evidence that he was engaged in business activity. Only one advertisement had been produced, and that was on an open public platform; the blog post had little information about the business provided; and the contract did not comply with the rules because it did not have the Respondent’s name on it. Furthermore, the financial evidence was deficient, because the bank statement/endorsement did not have the Respondent’s name on it, as required; nor did it make clear that the funds were available to the Respondent (although Mr John’s declaration was to that effect).
16. The judge rejected those submissions. She found that the Respondent had, in substance, complied with the requirements of paragraph 41-SD(c) of Appendix A. An online advertisement on a public platform satisfied the requirement for “advertising or marketing material” in (ii)(1). The contract did not contain the Respondent’s name; but that, said the judge, fell within the “evidential flexibility policy” of the Secretary of State: had the Secretary of State raised the issue with the Respondent, he could easily have rectified that default. The contract did not have to show “business activity”: “Again that is not required by the Rules”, she said (paragraph 19). In respect of the financial information, the Judge held that, where there was a third party investor, the required letter from the bank need not say how much money is available to the investor – that could be dealt with, as in this case, by a declaration from the investor himself.
17. In the event, she allowed the appeal.

## The Grounds of Appeal

18. Mr Deller relied on two substantive grounds of appeal:

Ground 1: The judge erred in stating that the contract need not evidence business activity, and proceeding on the basis that the Respondent did not need to show business activity. Table 4(d)(iii)(1), (2) and (3) all still referred to business activity; and (iv) referred to “trading”. The Rules do require an applicant to show business activity, in the context of an occupation at NQF level 4 or higher; and the evidence produced by the Respondent in this case was insufficient to do so.

Ground 2: On the evidence submitted with the application, the Respondent had failed to satisfy a number of the detailed specific requirements in the Rules, namely (i) a letter from a financial institution holding the relevant funds confirming the amount available to the applicant and specifically naming him; and (ii) a contract incorporating the applicant’s name, the evidential flexibility policy having no application.

### Ground 1

21. It is clear from her determination read as a whole (but particularly from paragraphs 18-19) that the Judge proceeded on the basis that, for an application for leave to remain as an entrepreneur, an applicant does not have to show any particular level of business activity, and that the requirements of Table 4(d)(iv) are met if the specified evidence required by paragraph 41SD of Appendix A is supplied.
22. However, Table 4(d)(iv) imposes two discrete requirements upon an applicant. First, he is required to show that he is “engaged in business activity” (or, now, “working”) “ in an occupation which appears on the list of occupations skilled to [NQF] level 4 or above...”. Second, he is required to “[provide] the specified evidence in paragraph 41-SD”. The relationship between these two requirements is clear: although the occupation requirement cannot be satisfied without provision of the specified documents (see paragraph 39B of the Immigration Rules), if those documents are provided that is not necessarily sufficient to satisfy a decision-maker that the applicant is indeed working in an occupation of at least NQF level 4. Therefore, even where the specified evidence requirements are satisfied, the applicant must still show that he has satisfied the occupation requirement.
23. An applicant has to identify and show the SOC occupation which most closely fits the job which he or she does, by reference to the functions, duties and responsibilities of that job. However, to be able to do that and show that the job is at NQF level 4 or higher, the business itself must be of such size and standing that it requires someone to fulfil the substantive functions of a job at the relevant level; and the applicant must be the person who fulfils that function.

24. Although the provisions require the business to be up-and-running – hence the need, e.g., to provide evidence of business activity and trading – the SOC provisions refer to “new entrants”, and the nature of entrepreneurship means that a business may be at only an early stage when an application for leave as an entrepreneur is made. However, where the level of trading at the date of application is only modest, an applicant may still be able to satisfy the occupation requirement of Table 4(d)(iv), for example by showing that there are plans and strategies for growth and, on the basis of those plans, a reasonable prospect of the business growing to such a size and standing that it will warrant someone performing the functions of an job at NQF level 4 or higher. Given that an applicant is required to have a minimum amount of investment capital available – in this case £50,000 – if the business venture is seriously intending to have employees (or even a single employee) at that level, whilst of course one cannot be prescriptive, usually there will be available business plans for how that investment will be made and how the business is to be structured and run. Therefore, in an application, it is open to an applicant to show that, despite the early stage at which his business might be, there are firm plans and intentions for it to be of such a size and standing that, in due course, it will require someone to perform functions, duties and responsibilities in a particular job at NQF level 4 or higher, and that person will be the applicant.
25. However, all of that needs an evidential foundation. It is obviously insufficient for an applicant merely to assert that he or she aspires to and intends setting up a business, even where that applicant can show access to sufficient funds.
26. In this case, there was and is no such evidential foundation. As at the date of the application, there was no evidence that the Respondent performed any of the “Example job tasks” set out in paragraph 8 above, or anything like. There was no evidence that he had performed any services for anyone; and, although he produced the contract for services for a period in 2013, he provided no evidence that there were (or were in future to be) any other staff than himself. There was no evidence that he produced or assessed reports and recommendations concerning marketing and sales strategy, or even that he had any such strategy. There was no suggestion that the Respondent had any plan for the future of the business.
27. Unfortunately, the Judge in this case simply failed to grapple with all the relevant issues. In our view, she focused too much on the specific evidence required by paragraph 41-SD, without properly considering the more fundamental question of what the Respondent in fact did, and what he might reasonably be expected to do in the future; or the substantive requirement of Table 4(d)(iii) that the applicant must be in an occupation at a particular SOC level.
28. In our view, on the evidence before her, had she considered the issue, the Judge could not but have concluded that that the Respondent could not satisfy that requirement. There was no evidence here upon which the judge could properly find that the Respondent had an occupation falling within SOC Code 1132 or any occupation falling within NQF Level 4 or above; and no evidence upon which a finding could be made that, in the future, the business would likely be of such a size



and standing that it would require a marketing and sales manager doing the sorts of things set out in the example tasks set out in SOC code 1132 or in any job at NQF level 4 or higher, at a level of job function envisaged in those levels of the NQF scheme. Indeed, the evidence falls very far short of arguably showing that requirement to have been satisfied.

## **Ground 2**

29. It was submitted by Mr Deller that, in the evidence submitted with the application, the Respondent had failed to satisfy two of the specific requirements in the Rules, namely (i) a letter from a financial institution holding the relevant funds confirming the amount available to the applicant, and (ii) a contract incorporating the applicant's name, the evidential flexibility policy having no application.
30. Given our conclusion on Ground 1 – which is determinative of this appeal and the appropriate disposal – we need not deal with Ground 2. In the circumstances, we would merely make reference to the recent illuminating decision of Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2, which emphasises that, where the Rules impose a mandatory requirement for a specified document to be submitted with an application for leave – on the basis that, if it is not produced, then the application will be refused – given the importance of consistency and predictability in this area, there is no scope for imposing an obligation on the Secretary of State to enquire after documents if they are not submitted. Consequently, although the crucial and determinative issue in this case is (and, in our view, always was) whether the Respondent applicant had satisfied the substantive requirement of Table 4(d)(iii), it should not be thought that we consider the issues raised by Mr Deller as to the specified evidence requirements of paragraph 42SD of Appendix A were necessarily without merit. In respect of them, we simply make no findings.

## **Decision**

30. For the reasons we have given, we consider the Immigration Judge erred in law; and her decision is set aside. It is remade as follows: the Secretary of State's appeal is allowed, and the Respondent's appeal against the decision of the Secretary of State's is dismissed.

**Signed**

**The Hon Mr Justice Hickinbottom**

**Dated 24th February 2014**