



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/20171/2013

THE IMMIGRATION ACTS

Heard at Field House
On 9th September 2014

Determination Promulgated
On 20th October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

ABDULWAHAB MOHAMMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Williams, Williams Hortor Law & Mediation
For the Respondent: Mr P Nath, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant appeals with permission a decision of First-tier Tribunal Judge Perry, promulgated on 2nd July 2014, in which the judge dismissed the Appellant's appeal against the Respondent's refusal, dated 17th May 2013, of the Appellant's application made under the Points Based system as a Tier 1 (General) Migrant, in combination with a removal decision of the same date.
2. Permission was granted on the basis that the Appellant had raised Article 8 and Article 3 grounds which the judge decided he would not determine.

3. In light of the clear obligation on judges to determine all Grounds of Appeal before them I indicated at the commencement of the hearing to the representatives that the decision was plainly vitiated by legal error. No fact finding exercise had been conducted at the First-tier in connection with either human rights or international protection issues. In those circumstances it is appropriate that the case be remitted to the First-tier Tribunal for a proper consideration of those Grounds of Appeal.
4. The grounds also raised challenges in respect of the points based decision, in respect of which permission was “not refused”, although no reasoning was given in relation to them. All grounds were therefore available to the Appellant before me.
5. These PBS grounds challenge Judge Perry’s conclusion that the Appellant had failed to establish that he was entitled to 35 points for previous earnings in excess of £55,000. These Grounds of Appeal are almost impenetrable, being dense and difficult to follow, but, insofar as they were distilled in the skeleton argument and orally before me, they relate to the judge’s treatment of the documentary evidence required by the Immigration Rules.
6. Appendix A at paragraph 19(a) states that an applicant must provide at least two different types of the specified documents in paragraph 19-SD(A), from two or more separate sources, as evidence for each source of previous earnings.
7. Appendix A at paragraph 19(b) states:
 - (b) If the applicant is claiming points for self-employed earnings made in the UK, he must also provide the specified documents in paragraph 19-SD(B) to show that;
 - (i) he is registered as self-employed,
 - (ii) he was registered as self-employed during the period(s) of self-employment used to claim points, and
 - (iii) he was paying class 2 national insurance contributions during the period(s) of self-employment used to claim points.
8. I find that the grounds directed to explanations as to why documentation cannot meet the requirements of the Rules, for example, the improbability of emails being on headed notepaper, miss the point, which is simply that they do not meet the rule. Similarly the arguments railing against the rules are misconceived: the rules are the rules. These parts of the grounds were reiterated tenaciously before me in submissions, but do not take the case any further because they do not establish an error of law by the judge. The grounds and submissions directed to “otherwise not in accordance with the law” were also confused by containing references to guidance dated July 2013, the relevant date in this case being 17th May 2013.
9. The judge was required to resolve a dispute as to whether or not the Appellant's earnings from Sword Event Guard Limited of £1,669.48, appropriately identifiable

from the Appellant's NatWest Bank accounts as automated credits from the employer could be corroborated by payslips which, whilst reflecting the relevant amount, identified the employer and were consistent with a schedule of hours worked and payments received, were deficient in the context of the requirements at paragraph 19(FD) which required that the payslips be on "company headed notepaper or stamped and signed as authentic by the employer". Mr William's vehement argument that the decision is flawed because wages slips are not usually on headed notepaper does not assist the Appellant, not least because that is not the only form of evidence accepted.

10. The arguments centering on paragraph 245AA have more force because the Appellant's ground of appeal, as clarified at the First-tier, included the ground that the respondent had not contacted him and provided him with any opportunity to rectify his errors, and the judge has not explained to the Appellant why he concluded that paragraph 245AA did not assist him. The judge might have considered that the Respondent should have exercised discretion to approach the Appellant on the basis that the payslips were "in the wrong format". In this regard I note that the Respondent's position on the point was made clearer when on 20th May 2013, days later, the PBS evidential flexibility guidance was officially clarified to include the explanation that "wrong format" covers documents which contain all of the substantive information required by the Immigration Rules, but which are not laid out in the way described in the Rules, and the example provided is precisely where a specific documentation should be submitted on letter headed paper. Later guidance relied on by Mr Williams's, shows that by July 2013 additionally payslips which carried the name of the employer were in fact regarded as sufficient. At the first tier the Appellant sought to rely on a letter from the employer dated 20 May, on headed note paper, confirming the details of the transactions. That was a letter which, if it had been submitted with the application, would in any event have been sufficient to corroborate the information of bank statements, even absent payslips, and so tends to confirm that had a further documentary evidence request been made, adequate evidence would have followed. Consistent with that position the file shows the Home Office addressed the issue in submissions before the judge, not on the basis that it would have been wrong in principle to approach the Appellant in the context of the specific evidence of the payslips, but rather that there was no need for an officer to do so because even if that evidential point had resolved in the Appellant's favour the refusal would still have followed, because there were other problems with the application and lack of specified evidence. The Rule at 245AA provides that no contact should be made unless the evidence sought would lead to the grant of the application. It is in that context that the point in these grounds is insufficient to bring the Appellant's appeal home.
11. It became apparent as the case unfolded before me that there were at least two other issues which were pertinent. The Appellant's salaried income was approximately £36,000; he needed, and sought to show, an income in excess of £55,000, through additional self employment income. Again the Appellant's self-employed earnings were demonstrated in his bank statements, by automated credits consistent with the

invoices raised against three clients. However in the context of evidence of self employment there are further hurdles in the Rules.

12. The Judge found a difficulty arose with correspondence from the chartered certified accountants. That evidence was rejected by the Respondent and the Judge, for a failure to give a breakdown of salary, dividends, profits, tax credits and dates of net payments earned. On scrutiny the evidence from Frank J & Co attached with the tax returns in the Respondent's bundle confirms not only the gross and net amounts for the Appellant's self-employed earnings, but indicates the profit figure of £18,294, and sets out in the analysis of income summaries the breakdown of salary and the relevant dates of earnings. What it does not do is to indicate the nil receipts in terms of dividends; tax credits. However as Mr Nath readily accepted at the hearing before me, and consistent with the case of **Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295**, which states that the requirements of paragraph 41-SD (A)(i), and so analogously the position here with paragraph 19-SD, "are to be construed reasonably and sensibly, in their full context", the insistence of a rendering of nil balances, is not, on a sensible reading of the rule, required in circumstances where they are not applicable. Accordingly there is merit in the grounds assertion that the evidence of the Accountant has been wrongly treated.
13. However that too is not the complete picture. The rules require self employed earnings to be corroborated by additional specified documentation, and there is no such additional corroboration. Mr Williams' reliance on policy guidance issued in July 2014 referring to the ability to corroborate self employed earnings by an official tax document showing the Unique tax reference does not assist the Appellant as it was not applicable at the date of decision. At the date of decision evidence from the tax office was admissible. In the context of the self assessment completed by the Appellant's accountants and forwarded in this case it would only become sufficient when it had been duly stamped and assessed by the tax office and the tax levied. There is no evidence of that position. Accordingly there is a failure to provide specified evidence in this context.
14. The final hurdle facing the Appellant is the requirement to provide evidence of his satisfaction of the national insurance requirements set out at 19(b). In this regard the Appellant did not meet the actual requirements rather than just the issue of the specified evidence. The documentation in the Appellant's bundle at page 34 reveals that although the Appellant contacted the HM Revenue and Customs helpline for the self-employed in March 2013, and received a leaflet, he was on his own evidence of contact in march 2013 not, in the context of paragraph 19(b), registered as self-employed during the 2012 period, nor as required at (19(b)(ii) paying class 2 national insurance contributions during the period of self-employment. He registered and paid in arrears. That is also shown by the letter dated 30th March 2013 from the National Insurance Contributions Office showing that on the basis of the information provided, the Appellant says following the March contact, an outstanding liability for 6th May 2012 to 6th October 2012 and from 7th October 2012 to 6th April 2013. The letter was not submitted with the application as shown by the fact that the document reveals that it was used to pay the outstanding amounts on 21st May 2013. At best the

document in the bundle is only evidence of registration as self-employed from 30th March. The evidence that the Appellant was previously registered as self-employed in 2010 does not, despite Mr. William's vigorous assertions, help him. It follows that even if the Appellant had been contacted he could not provide evidence to show that he met the Rules, and there is no merit in the Appellant's ground that the judge's failure to explain to the Appellant why 245AA did not assist him is an error which if corrected could have led to a different outcome.

15. In conclusion, whilst there is no dispute before me that the Appellant met the thresholds of the relevant earnings requirements in respect of actual previous earnings from salary and self-employment, the judge made no error in dismissing his appeal on the grounds that he had failed to establish the position by specified evidence. It follows that the decision to dismiss the Appeal on rules based grounds is not vitiated by material errors of law. I do not set it aside and so it stands.
16. As the case of **R (on the application of Hafiz) v SSHD [2014] EWHC 1342** confirms, there is no room in a points-based system for a "near miss" principle, and there is no basis for a judge to simply grant an application which is shown on the day of hearing to be able to meet the rules if they were being applied at that date. In **Patel and Others v SSHD [2013] UKSC 72** Carnwath LJ drew attention to the justifiable difference in the treatment of Article 8 Private Life considerations, and cases requiring favourable treatment outside of the Rules on the application of family values to the point that a near miss under the PBS Rules cannot provide substance to a human rights case which is otherwise lacking in merit. That is not to detract from the principle that when considering Article 8 the context of the failure of the Immigration Rules may be of relevance. In the instant case, the weight to be attached to the formal requirements of immigration control as described in the points-based system will be a matter to be assessed in the round, including factors relevant to the Appellant's failure to meet the said requirements, as well as those relating Family Life, English language ability and financial independence, and any other matters that the judge in the context of the remitted hearing reasonably finds relevant.

Decision

17. The decision of the First-tier Tribunal dismissing the Appellant's appeal on immigration grounds reveals no material errors of law requiring it to be set aside and it stands. The decision of the First-tier Tribunal to dismiss the Appellant's appeal on Article 3 and Article 8 grounds, without consideration of the same, is vitiated by legal error and is set aside and the appeal remitted to the First-tier Tribunal for determination on those grounds.

Signed
E Davidge

Date 20 October 2014

Deputy Upper Tribunal Judge Davidge