



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/16451/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 10 July 2014  
Ex Tempore**

**Determination  
Promulgated  
On 29 July 2014**

**Before**

**THE HONOURABLE MR JUSTICE HADDON-CAVE  
UPPER TRIBUNAL JUDGE HANSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR PRABHDEEP SINGH  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr Walker, Home Office Presenting Officer

For the Respondent: Mr Turner, instructed through the Direct Access provisions

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Creswell promulgated on 12 November 2013 whereby the judge allowed Mr Prabhdeep Singh's appeal against the Secretary of State's decision to refuse his application for leave to remain in the United

Kingdom as a Tier 1 (Entrepreneur) under paragraph 245DD of HC 395 (as amended).

2. The grounds of the application asserted that the First-tier Tribunal found that the appellant succeeded on Article 8 but (a) failed to deal with the Gulshan test and (b) failed to make any findings of fact whatsoever as regards Mr Singh's private life.
3. The matter came before Upper Tribunal Judge Hanson, who set aside the First-tier Tribunal Judge's judgment and gave further directions as to the conduct of this matter which included further submissions to be made by both sides.
4. Mr Turner, who appears for Mr Singh but did not appear below, put in written submissions dated 31 March which surprisingly, as Mr Avery pointed out in his written submissions of even date, referred to the wrong Rules. The relevant Rules which were the subject matter of the appeal are those helpfully appended to Mr Avery's submissions namely those in force between 6 April 2013 and 30 April 2013. These read as follows:

"41-SD The specified documents in Table 4 and paragraph 41 are as follows:

- (a) The specified documents to show evidence of money available to invest are one or more of the following specified documents:

...

- (ii) for money held in the UK only, a recent personal bank or building society statement from each of the UK financial institutions holding the funds which confirms the amount of money available to the applicant (or the entrepreneurial team if applying under the provisions in paragraph 52 of this Appendix). The statement must satisfy the following requirements:

- (1) the statements must be original documents and not copies;
- (2) the bank or building society holding the money must be based in the UK and regulated by the Financial Services Authority;
- (3) the money must be in cash in the account, not individual savings accounts or assets such as stocks and shares;
- (4) the account must be in the applicant's own name only (or both names for an entrepreneurial team), not in the name of a business or third party;
- (5) each statement must be on the institution's official stationery and confirm the applicant's name and, where relevant, the applicant's entrepreneurial team

partner's name), the account number, the date of the statement, and the financial institution's name and logo;

- (6) the bank or building society statement must have been issued by the authorised official of that institution and produced within the three months immediately before the date of the application; and
- (7) if the statements are printouts of electronic statements from an online account, they must be either accompanied by a supporting letter from the bank, on the company headed paper, confirming the authenticity of the statements, or bear the official stamp of the bank in question on each page of the statement; ...”

- 5. Mr Turner accepted that his client could not comply with these Rules at the time of the relevant decision by the caseworker. He nevertheless submitted that he is entitled to rely on the “evidential flexibility” policy that was in existence at the time. There are a number of problems with that submission which we have pointed out to Mr Turner in the course of the hearing.
- 6. The first is that Rule 245AA, which was promulgated and came into force on 6 September 2012, reads as follows:

“245AADocuments not submitted with applications

- (a) where Part 6A or any Appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).
- (b) If the applicant has submitted specified documents in which:
  - (i) some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
  - (ii) a document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
  - (iii) a document is a copy and not an original document; or
  - (iv) a document does not contain all of the specified information;

the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing and request the correct documents.

The requested documents must be received at the address specified in the request within seven working days of the date of the request.”

7. It is abundantly clear from the plain wording that the Rule is directed towards documents which actually exist at the time. It is equally plain that on the facts Mr Singh did not fall within any of (b)(i), (ii), (iii) or (iv). Undaunted, Mr Turner sought to shift ground and rely on a further part of 245AA under subparagraph (d) which reads as follows:

“(d) If the applicant has submitted a specified document:

- (i) in the wrong format; or
- (ii) which is a copy and not an original document; or
- (iii) which does not contain all of the specified information, but the missing information is verifiable from:
  - (1) other documents submitted with the application,
  - (2) the website of the organisation which issued the document, or
  - (3) the website of the appropriate regulatory body;

the application may be granted exceptionally, provided the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements.”

It was not clear to the court, however, why Mr Turner sought to rely alternatively on subparagraph (d) since it seems to us plain that Mr Singh did not fall within those relevant criteria either.

8. Mr Turner shifted ground again to what he thought was safer territory in relation to the evidential flexibility policy version 1.1. This was considered by the Upper Tribunal in Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295 (IAC) by Mr Justice McCloskey and Upper Tribunal Judge Clive Lane. In that judgment the court said as follows:

“15. The cornerstone of the second ground of appeal, properly analysed, consists of an assertion. The assertion is to the effect that an ‘evidential flexibility’ policy of sorts survived the introduction of paragraph 245AA. The latter provision of the Rules came into operation on 06 September 2012. It is common ground that paragraph 245AA governed all of the applications for entrepreneurial migrant status generating this cluster of appeals. The FtT’s primary reason for rejecting this ground of appeal was the absence of any evidence that some policy, independent and freestanding of paragraph 245AA, also applied to these applications: see [32]. We endorse this reasoning and conclusion. In doing so, we highlight the distinction between argument and evidence. The question of whether a policy exists, in whatever

context it arises, is a question of fact. This ground of appeal fails because it has no supporting evidence, direct or inferential.”

9. Mr Turner asked for an adjournment, which we gave him this morning in order to garner such evidence. He then produced some screenshots from the UKBA “Archived” website entitled “PBS process instructions and evidential flexibility guidance for caseworkers, 2009 to 2013” which he submitted demonstrated that version 1.1 of the evidential flexibility policy still existed, albeit that some of it might have migrated into further versions of 245AA.
10. Mr Walker for the Secretary of State has not had an adequate opportunity to consider all these materials, produced by Mr Turner, nor have we. We park its admissibility for the moment because, even if Mr Turner is correct that he is able to produce evidence to suggest that the evidential flexibility policy still exists in some form, there is a much more fundamental problem which he faces. There is a clear direction to caseworkers in this policy as follows (emphasis added):

“We will only go out for additional information in certain circumstances which would lead to the approval of the application. Before we go out to the applicant we must have established that evidence exists, or have sufficient reason to believe the information exists. Examples include, (but are not limited to):

1. bank statements missing from a series;
2. evidence of specific qualifications has been provided previously;
3. evidence detailed on a CAS/courses missing;
4. named deposits on bank statements from an employer, but no wages slips provided.

...

The evidence listed in Annex A is not exhaustive but provides caseworkers with guidance as to circumstances when evidence can be requested.”

Annex A lists a variety of case types where information or certificates or wage slips are missing. It refers, for instance in relation to a Tier 1 (Entrepreneur), to “missing information from the required letters/documents”.

11. It is a condition precedent to the requirement for the caseworker to seek further evidence that the caseworker must have established that either “the evidence exists” or that the caseworker “has sufficient reason to believe that the [missing] information exists”.
12. This is consistent with the decision in SSHD v Rodriguez [2014] EWCA Civ 2 that the evidential flexibility policy was not designed to give an applicant the opportunity to remedy any defect or inadequacy in the application or supporting documentation so as to save the application from refusal after substantive consideration. The purpose is quite obviously to enable an

applicant who has left out, for instance, one bank statement out of a series or forgotten to include a particular certificate to remedy that minor error or oversight. The purpose of the policy is not to enable the applicant to create fresh documentation.

13. Undaunted by this, Mr Turner seeks to shift to ground again by suggesting that the caseworker was somehow at fault in not having requested further information, as he put it, and giving Mr Singh an opportunity to go to the bank and get the bank to draw up the relevant document. This was a breathtaking submission of nil merit.

14. The caseworker's clear decision and findings are recorded in the GCID case record sheet dated 15 April 2013 as follows:

“Reason for refusing application:

Applicant isn't named on the third party bank letter. Third party bank letter missing for two of the bank accounts. App has no access to funds.”

15. Mr Turner then sought to criticise the Secretary of State on the hoof by suggesting that there is no evidence that the caseworker considered the evidential flexibility policy. He ignores the basic point. There was simply no evidence before the caseworker that “the [missing] evidence existed and no evidence that the caseworker had any reason to believe that the missing information existed”.

16. The fundamental problem which Mr Turner persistently ignores is the fact that the policy speaks in the present, not the future tense. We repeat: it is trite that the purpose of the policy is not to enable applicants to go away and create new documents or new information as Mr Turner's argument supposes. The purpose of the policy and the proviso is simply to enable applicants who fail to include in the documents submitted particular pages or information which already exists.

17. Mr Turner's hypothesis that the caseworker should have enabled the applicant to go away and get the bank to create new documents showing his access to these funds is arrant nonsense. That is entirely contrary to the proviso in the policy set out above and to the basic purpose of the evidential flexibility policy itself.

18. The fact of the matter is that Mr Singh was not able to comply with the Rules because the relevant documentation simply did not exist. However many times we pointed that out to Mr Turner he persisted in arguing heretically that the policy (a) required caseworkers to point out defects in documentation and (b) such defects could then be cured by the manufacture or production of future documents. If that was right it would drive a coach and horses through paragraph 245AA and the well-known purpose of the policy itself. Mr Turner's submission in our judgment was obviously wrong and a waste of the Court's valuable time.

## **Article 8**

19. The original grounds of appeal also submitted that the Secretary of State had failed to consider Article 8 of the ECHR. We proceeded to hear submissions on the Article 8 point. Mr Turner chose to make submissions. We can deal with them very shortly.
20. It is axiomatic that where an applicant falls outside the Rules the applicant has to satisfy the Gulshan test and demonstrate that there are exceptional, compelling or compassionate circumstances to justify deciding the matter on Article 8 grounds outside the Rules. Mr Turner's submissions ignored Gulshan entirely. Further, his submissions about Article 8 fell woefully short of an Article 8 case, let alone fulfilling the high test in Gulshan. We reject that further grounds of appeal also.
21. For all those reasons in our judgment this appeal is on any analysis hopeless and is dismissed.

## **Decision**

1. **The First-tier Tribunal Judge materially erred in law. His decision has been set aside. We remake the decision as follows. This appeal is dismissed.**

### **Anonymity**

2. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as no application for anonymity has been made and is not justified on the facts.

Signed

Date

Mr Justice Haddon-Cave