



IAC-AH-SAR-VI

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

Appeal Numbers: IA/38967/2014  
IA/38983/2014  
IA/38978/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8<sup>th</sup> February 2016**

**Decision & Reasons Promulgated  
On 4<sup>th</sup> April 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MR HEMANT TULSIDAS CHAVDA (FIRST APPELLANT)  
MRS KOMALBEN HEMANT CHAVDA (SECOND APPELLANT)  
[V C] (THIRD APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr Z Nasim, Counsel instructed by Milestone Chambers  
For the Respondent: Ms S Sreeraman, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellants**

1. The appellants seek, with permission, to appeal the decision of the First-tier Tribunal Judge Hosie who dismissed their appeals. They had appealed the Secretary of State's

refusal of the first appellant's application for leave to remain as a Tier 1 (Entrepreneur) Migrant and his wife and child's, (the second and third appellants') applications as the dependants.

2. The applications were made on 8<sup>th</sup> August 2014 and the decisions refusing their applications were made on 8<sup>th</sup> October 2014 further to paragraph 245DD of the Immigration Rules, specifically 245DD(b) and paragraph 319C(b) in relation to the first appellant's wife, and paragraph 319H(b) in relation to the appellant's son. The appellants are citizens of India born on 16<sup>th</sup> September 1979, 27<sup>th</sup> July 1984 and [ ] 2007 respectively.
3. The first appellant's application was refused by the respondent with reference to Appendix A under which the appellant was required to score 75 points in relation to attributes and with specific reference to the requirements under paragraph 41-SD and 46-SD of Appendix A.
4. In summary the respondent's rejection of his application was as follows. The appellant stated he had access to £50,000 held in his name to invest in a business in the UK as specified under provision (d) in the first row of Table 4 of Appendix A of the Immigration Rules. He had only supplied a business bank letter and business bank statements. The evidence did not meet the criteria specified under Appendix A because the bank letter and bank statements were in the name of his business and not in his own name. This did not confirm that he had access to these funds. Secondly, the appellant had not provided a third party declaration accompanied by a letter from a legal representative to confirm that he had access to those funds. As a result he did not satisfy the requirements of paragraph 41-SD(c)(i) of Appendix A. As his funds were held in a business bank account they were not classed as invested funds. Paragraph 45 of Appendix A of the Immigration Rules stated that where an applicant was relying on funds which had already been invested, the specified documents listed under paragraph 46-SD must be submitted. The appellant had submitted a business bank letter, a business bank statement, accountant's letter and accounts, and an HMRC bill but the accounts he provided failed to demonstrate that he had invested £50,000 into a UK business.
5. Secondly, as he was applying under provision (d) of Table 4 he was required to demonstrate he met the following additional criteria:

*“(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, and*
- (iii) since before 11<sup>th</sup> July 2014 and up to the date of his application, has been continuously engaged in business activity which was not, or did not amount to, activity pursuant to a contract of service with a business other than his own and, during such period, has been continuously:*

(1) *registered with HM Revenue & Customs as self employed, or*

(2) ...

(iv) *[since before 11 July 2014 and up to the date of his application, has continuously been 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."*

6. At this point in the refusal letter the Secretary of State also stated "you have demonstrated that you satisfy (i), (ii), and (iii) above" and that the appellant had provided a job title listed in Appendix J but it was stated that the appellant had not complied with requirement (iv) above with reference to paragraph 41-SD(e), because he had not provided the evidence specified in paragraphs 41-SD(e)(iii) and (iv).
7. It was submitted that in relation to 41-SD(e)(iii) the evidence he had submitted in relation to marketing material was not acceptable because the business card did not state the services which his business provided, whilst evidence from Facebook was not acceptable as it was social media and therefore not a local or national form of advertising.
8. Secondly, the evidence was not acceptable as it did not cover a continuous period commencing before 11<sup>th</sup> July 2014 up to no earlier than three months before the date of his application because the leaflet, business card and Facebook printouts provided were not dated whilst the newspaper advert was not dated before 11<sup>th</sup> July 2014. Although he had provided domain name ownership evidence before 11<sup>th</sup> July 2014 the domain was registered to Md Nazir Ahmed.
9. Furthermore the evidence he had submitted in relation to the trading contract was not acceptable as it did not cover a continuous period commencing before 11<sup>th</sup> July 2014 up to no earlier than three months before the date of his application. This was because the contract provided with Swift Mobile Valeting was dated 5<sup>th</sup> May 2014 but no contract had been provided which was dated within three months of his application date which was 8<sup>th</sup> August 2014.
10. Additionally the contract between his business and Swift Mobile Valeting was not acceptable because it did not state the duration of the contract.
11. He had not provided any evidence that he qualified for points under any of the other provisions in the first row of Table 4.

12. The First-tier Tribunal Judge dismissed the appeal on the basis of the evidence provided to satisfy Table A (d)(iv) with reference to 41-SD paragraph (e)(iii) and (iv).
13. An application for permission to appeal was made on the basis that the Judge had not allowed the appeals on the basis that the respondent's decision was not in accordance with the law as the Secretary of State had not applied paragraph 245AA of the Immigration Rules and that the Rules under paragraph 245 AA were discretionary. The judge had failed to take into account new evidence. Secondly the judge had erred in treating the date of application as the 'cut off' point for considering the evidence since the appellant had not provided 'new evidence'. The appellant was rather 'explaining' the evidence already provided. In any event the judge had not taken into account Section 85(4) of the Nationality Immigration and Asylum Act 2002. It was also asserted that the judge had failed to consider Article 8.
14. Permission was granted on the basis that it was arguable that the judge may have erred in specifically refusing to take into account some, unspecified, evidence, so concluding that the appellant failed under the Immigration Rules. He did not give reasons for rejecting evidence that elsewhere in the decision the judge himself refers to as a continuum of evidence all of which was material.
15. At the hearing before me, Mr Nasim submitted that the judge seemed to accept that the appellant met the Immigration Rules and suggested particularly at paragraph 23 that the judge found that the appellant was entitled to rely on the funds. The position was that there was no new evidence put into the frame. Even if it were the case that the question of access to funds had been raised, the Statement of Changes in relation to HC 628 suggested that it was now possible for an applicant to rely on funding available to the applicant's business and indeed there was a letter from the accountant. That said, Mr Nasim made it clear that he relied on paragraph 41-SD(a)(i) which was whether the funding was available to the applicant. He was not relying on the bank account in relation to the applicant's business which was not formally a company. Even if that were not the case, the judge was correct at paragraph 23 of the decision and should have considered the evidential flexibility Rule at paragraph 245AA. The respondent should have given the appellant the opportunity to address the omission. At this point I referred the parties to paragraph 41-SD(c)(i). Mr Nasim submitted that documents E1 to E2 were evidence that merely omitted the applicant's name but this was evidence that could easily have been obtained, and indeed was identifiable from the remaining documentation within the file presented to the respondent with the application.
16. There was also reference within the decision, [paragraphs 24 and 25], that at Table 4(d)(iv), the appellant has to show that he has been continuously working in an approved occupation. Mr Nasim pointed out that this business plan was in fact produced to the respondent and the judge was in error at paragraph 25 stating that that was not the case. This was evidence that was before the respondent. There were also promotional leaflets in the bundle. It was the appellant's claim at the hearing

before me that the respondent had sent back the business plan together with other documentation and indeed on the Home Office file there was a letter from Farringtons Solicitors dated 6<sup>th</sup> August 2014 referring to the documentation which included the business plan.

17. Mr Nasim also submitted that paragraphs 23 and 26 of the decision by Judge Hoshi were inconsistent. The contract provided to the respondent was dated 5<sup>th</sup> May but commenced on 16<sup>th</sup> May 2014. I note that there is an incorrect date cited within the decision.
18. I asked Mr Nasim if the business cards were dated, and they appeared not to be. The appellant had, however, set up a website before 11<sup>th</sup> July 2014 as required by the Rules, and he had also adduced evidence in relation to Facebook before 11<sup>th</sup> July 2014 but this was rejected by the respondent. That documentation did have a date of 25<sup>th</sup> July 2014 on it.
19. Ms Sreeraman submitted that under Table 4 of Appendix A at sub-Section (d) he needed to show that he had access to funds and this would be evidenced in line with the requirements at paragraph 41-SD(a)(i). The documents must state the appellant's name and indeed at 41-SD(c)(6) the documents must state the appellant's name. The judge had stated that the funding requirement was made out but even if the judge had made an error in the finding at 23, she was not under an obligation to allow this appeal and Ms Sreeraman referred to paragraph 245AA(c). There was no name on the documents.
20. There were further omissions in relation to paragraph 41-SD(e)(iii) and (iv). The Facebook evidence was not acceptable and did not comply with mandatory requirements. The domain name was not registered to the appellant and the advertising material did not fall in line with the Regulations and the contract did not cover the correct dates because it was dated 5<sup>th</sup> May and was not within the three months specified time of the application. The judge was entitled to find that the appellant had not met the requirements.
21. Mr Nasim stated that the appellant maintained that he had submitted the invoices and the website images were sent in with the application and these had not been considered.
22. It would appear to me that the judge although directing himself correctly in relation to **Ahmed & another (PBS admissible evidence) v SSHD** [2014] UKUT did not consider that some of the documentation was before the respondent when in fact it was. For example the judge identified that the business plan was not before the Secretary of State when in fact it was [paragraph 25]. Ms Sreeraman accepted the business plan was before the Secretary of State. That error of fact was an error of law.
23. I do not accept that paragraph 245AA(b) applies such that there is an onus on the Secretary of State to contact the applicant or his representative in writing and request

the correct documents. That is a matter for the Secretary of State and within the discretion of the Secretary of State. There is no doubt however that the unaudited accounts provided by the chartered certified accountants showed that the first appellant was trading as Claringdons Accountant and Business Consultancy and therefore this confirmation could have been obtained from other elements of the documentation provided with the application. In that instance I find that there is no error in the judge's conclusion at paragraph 23 in relation to access to funds. The First-tier Tribunal Judge heard the appeal, directed himself with respect to Ahmed and he found at paragraph 26 of his decision that

'The first appellant has shown that he £50,000 was held in the UK and disposable at the date of the application in terms of paragraph (d) (v) of Table 4 Appendix A'.

No challenge was made in relation to this finding in the Rule 24 response submitted by the Secretary of State. I therefore accept the Judge's finding in this respect.

24. Turning back to the requirements under Table 4 section (d) it was accepted by the respondent and as recorded at paragraph 24 of the determination, that the applicant:

- (i) *was applying for leave to remain,*
- (ii) *has or was granted leave as a Tier 1 (Post-Study Work) Migrant, and*
- (iii) *that since before 11<sup>th</sup> July 2014 and up to the date of his application has been continuously engaged in business activity which was not or did not amount to activity pursuant to a contract of service with a business other than his own and, during such period has been continuously*
  - (1) *registered with HM Revenue and Customs as self-employed, or*
  - (2) *registered with Companies House as the director of a new or existing business. Directors who are on the list of disqualified directors provided by Companies House will not be awarded points.*

25. The judge at paragraph 24 noted that the notice of refusal by the Secretary of State accepted that paragraphs (i) (ii) and (iii) of (d) were met and that continuous business activity for the required period has been satisfied.

26. The key contention comes in relation to Table 4 (d) (iv) which I have cited above and which needs to be read with Appendix A, paragraph 41-SD(e):

*“(e) If the applicant is applying under the provisions in (d) in Table 4 he must also provide:*

- (i) *his job title,*
- (ii) *the Standard Occupational Classification (SOC) code of the occupation that the applicant has been working in since before 11 July 2014 or 6 April 2015 (as applicable), up to the date of his application, which must appear on the*

*list of occupations skilled to National Qualifications Framework level 4 or above, as stated in the Codes of Practice in Appendix J,*

- (iii) *one or more of the following specified documents showing that the business was active before 11 July 2014 or 6 April 2015 (as applicable) and that it remained active throughout the period leading up to the date of his application (if the applicant or his entrepreneurial team member does not own the domain name of the business's website, then the evidence in (2) may not be provided, and he must instead provide one or more of the documents specified in (1),(3),(4) or (5)):*
- (1) *advertising or marketing material, including printouts of online advertising, that has been published locally or nationally and showing the applicant's name (and the name of the business if applicable) together with the business activity, or, where his business is trading online confirmation of his ownership of the domain name of the business's website,*
  - (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,*
  - (4) *information from a trade fair, 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*
  - (5) *personal registration with a UK trade body linked to the applicant's occupation; and*
- (iv) *one or more of the following specified documents showing that the business was trading before 11 July 2014 up to no earlier than three months before the date of the application:*
- (1) *one or more contracts for service. If a contract is not an original the applicant must sign each page. Each contract must show:*
    - (a) *the applicant's name and the name of the business,*
    - (b) *the service provided by the applicant's business;*
    - (c) *the name of the party or parties involved in the contract and their contact details, including their full address, postal code, telephone contact number and any email address; and*
    - (d) *the duration of the contract or, or*
  - (2) *one or more original letters from UK-regulated financial institutions with which the applicant has a business bank account, on the institution's headed*

*paper, confirming the dates the business was trading during the period referred to at (iv) above*

27. Under (iii) the respondent asserted that the appellant had to provide a specified document covering either together or individually a continuous period commencing before 11<sup>th</sup> July 2014 up to no earlier than three months before the date of his application. One of those requirements was advertising or marketing material including printouts of online advertising that had been published locally or nationally.
28. The fact is that the respondent had already accepted in relation to (d)(iii) that since before 11<sup>th</sup> July 2014 the appellant had been continuously engaged in business activity and indeed was registered with HM Customs as self-employed. If that were the case it would seem remarkable that the appellant would produce business cards which could not be construed by the respondent as referring to a period commencing before 11<sup>th</sup> July 2014. It should be clear from the rules identified above that the appellant does not have to produce evidence of a continuous period of three months. There is no requirement in the rules which were applicable at the date of decision that the appellant's business cards should be dated.
29. There was a letter on file from Farringdons Solicitors dated 8<sup>th</sup> August 2014 and which Ms Sreeraman accepted, which specifically referred to documentation showing the appellant purchasing a domain name and with screenshots of the material, published business leaflets which he circulated locally in his community.
30. The appellant's case is that he also submitted invoices with the application which were not referred to and which could, taken together with the remaining marketing and advertising material, could show material with his name and dates on it. Indeed, even if that were not the case, the business cards read with the Facebook documentation, identifies his name and business and the promotional leaflets were stated to be published in the community (thus locally) and satisfy Table 4(d)(iii) that the appellant has been continuously engaged in business activity. The Facebook documentation and which was in the respondent's bundle and thus was before the Secretary of State at the date of decision cites that it was created on 1<sup>st</sup> April 2014 and the date of 25<sup>th</sup> July is also identifiable on the face of the document (although in very small print). Paragraph (iii) states that the documents can be taken either '*together or individually*'. The business card together with Facebook advertising and the business plan and promotional leaflets do identify the appellant's name and can be dated. I am satisfied that paragraph (e) (iii) is fulfilled as the rule refers to 'one or more of the following specified documents' and that those documents can be read together. The rule under Table 4(d)(iii) is not that there must be three months of trading but that there should be trading *before 11<sup>th</sup> July 2014 and up to the date of his application*. The Facebook advertising of the business predates the 11<sup>th</sup> July 2014 and the respondent accepted in the notice of refusal that the business was continuously trading to the date of application on 8<sup>th</sup> August 2014.



31. I turn to Paragraph 41-SD(e)(iv) which requires “one or more of the following documents showing trading which must cover (*either together or individually*) a continuous period before 11<sup>th</sup> July 2014 up to no earlier than three months before the date of his application: (1) one or more contracts for service”.
32. It was asserted that the contract provided was not acceptable because the contract provided with Swift Mobile Valeting was dated 5<sup>th</sup> May 2014 and no contract had been provided which was dated within three months of his application date which was 8<sup>th</sup> August 2014. Additionally the contract between his business and Swift Mobile Valeting was not acceptable because it did not state the duration of the contract.
33. What this does not state is that the appellant must show a continuous period of trading for three months up to 11<sup>th</sup> July 2014. It is clear that the contract does relate to a period of trading which carries on from 16<sup>th</sup> May 2014, which is within the three month time limit of the application (8<sup>th</sup> August 2014), and as the judge found at paragraph 27 the contract was ongoing until it was terminated. Thus the duration was specified. The contract did not have to be time limited according to the rules applicable as at the date of the decision. The judge stated
- ‘he has provided a contract with Swift mobile valeting and Claringdons. This contract is dated 5 May 2014. This does not mean it cannot be taken into account because it predates the period under consideration. The commencement date is 16 May 2015 and the contract is ongoing until it is terminated. This was evidence which was before the decision maker.’* (The judge in fact identified it as 2015 but I find this was a typing error as the contract commences from 16<sup>th</sup> May 2014)
34. I find that there was an error of law for the reason given above in the decision of Judge Hosie but I retain the findings as indicated above and I set that decision aside the First-tier Tribunal decision and I allow the appeals under the Immigration Rules.

No anonymity direction is made.

Signed

Date 22<sup>nd</sup> March 2016

Deputy Upper Tribunal Judge Rimington

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because of the complexities within the evidence.

Signed

Date 22<sup>nd</sup> March 2016

Deputy Upper Tribunal Judge Rimington