



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA410602014

THE IMMIGRATION ACTS

Heard at Field House
On 21 June 2017

Decision & Reasons Promulgated
On 23 June 2017

Before

THE HONOURABLE MR JUSTICE COLLINS

Between

**MISS KOOMUDINI FERNANDO KUMARUGE WATTE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Kannangara, Counsel, instructed via Direct Access
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. This appeal has a somewhat lengthy and complicated history. The application which was refused and which gave rise to the appeal process involved the application by this appellant for further leave to remain in this country as a Tier 1 Entrepreneur. The decision which is in issue was made as long ago as 30 September 2014.

2. Her appeal was dismissed by a First-tier Judge in a decision given on 29 April 2015 and there were three matters which the First-tier Judge relied on to justify the dismissal, namely first that the appellant had failed to demonstrate that she and her business partner had available as funds £50,000.
3. Secondly it was said that she did not meet the requirements of the relevant Rule, which I shall obviously come to in due course, relating to evidence of marketing and trading and thirdly that she could not meet the maintenance requirements in paragraph 1A, Appendix C. So far as that was concerned it has since been accepted both on appeal to this Tribunal and in the Court of Appeal that that particular basis of refusal was not made out and I need not go into it in any detail in this judgment.
4. The decision of the First-tier Judge was appealed with leave and the determination by Judge Smith was given dismissing the appeal on 14 August 2015. As I have said, she did not uphold the third ground, namely the failure to meet maintenance requirements but she did uphold the other grounds and she dismissed the appeal on the basis that the error made in relation to the third ground could not make any difference because of the failures on the other two grounds.
5. The case was taken to the Court of Appeal and leave to appeal was granted by the Court of Appeal in relation only to what was Ground 3, namely that there been a failure to apply the flexibility policy which in a sense supplemented the provisions of Rule 245AA of the Immigration Rules.
6. Leave to appeal on specific grounds relating to the failure to comply with what I have called Grounds 1 and 2 was refused so that it has to be accepted that there was a failure to meet the specific requirements of the Rules in relation to those issues. The question is whether the evidential flexibility policy ought to have been applied to enable the failures to, as it were, be overlooked because it is said that the necessary information was available and any gaps could properly have been filled.
7. The basis upon which permission was granted was the decision of the Supreme Court in **Mandalia v Secretary of State for the Home Department [2015] 1 WLR 4546**. In introducing that case Lord Wilson, who gave the judgment, with which all the other members of the court agreed, cited observations of Lord Justice Jackson that the Rules relating to what has been called the points-based system in Part 6A of the Rules had achieved a degree of complexity which even the Byzantine emperors would have envied and the point is made that it is exceedingly difficult for anyone, particularly if they do not have English as a first language, to navigate their way around the requirements because the purpose behind what has been described sometimes as a tick box approach is to enable those who are responsible for applying the Rules to be able to make decisions. It is considered undesirable to leave an area of discretion because that makes it very difficult for those making applications to know whether they do or do not have a good claim that can be made and the purpose of the Rules is to set out in detail what information is required and, what is of particular importance in the context of these sorts of applications, the manner in which that

information has to be given because particular documentation or particular forms of documentation are required in many instances.

8. The requirements which are material in this case are contained in Appendix A to the Rules and I have helpfully been provided with the necessary provisions. Table 4(c) deals with applications for leave to remain which include the application in relation to this application and the requirement is that the applicant has access to not less than £50,000.
9. There is no issue about the other requirements in (c), and in (d)(iii) it is required that since before 11 July 2014 and up to the date of the application the applicant had 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 in (iv), which again for the purpose of this case is material, it has to be established that since before 11 July 2014 and up to the date of the application had continuously been working in an occupation which was specified and, working meant the core service that the business provided to its customers or clients involves the business delivering a service in an occupation at the relevant level, and again, the important point there is access to £50,000.
10. In 41 it is provided that the applicant would only be considered to have access to funds if the specified documents in paragraph 41-SD were provided to show cash money to the amount required (this must not be in the form of assets), and it was required that the money remained available to the applicant until such time as it was spent for the purposes of the business or businesses.
11. And then we come to 41-SD and what is required in 41-SD(c) is that the specified documents must show evidence of the funding available to invest, whether from the applicant's own funds or from one or more third parties and for money held in the UK a recent personal bank or building society statement and so on and various other details which I do not think I need spell out for the purposes of what I have to decide because it will become clear what information was and was not, it was said, properly provided.
12. Now we come on to paragraph 46-SD, which requires following paragraph 46 that documentary evidence has to be provided in all cases and the specified documents set out in 46-SD and one of the requirements was that audited accounts had to be provided or, if audited accounts were not required, unaudited accounts and a report from an accountant who was a member of the UK Recognised Supervisory Body as defined in the 2006 Companies Act and those accounts must show the investment in money made directly by the applicant if that is material and various documentary evidence that the business has indeed been established and is in being.
13. It is accepted and indeed the grounds were refused by the Court of Appeal in relation to whether there had in fact been compliance with the first two issues, namely that she had not demonstrated that she and her business partner had

available funds of not less than £50,000 and secondly that she met the requirements of 41-SD(e)(iii) relating to evidence of marketing and trading. I should perhaps have referred specifically to that when I went through 46-SD, which required effectively the amount of money made available, and what was required by that was evidence of trading.

14. Now, as I say, it having been accepted that, the decision of the judge that she had not demonstrated those two matters having been upheld, the only question is whether the evidential flexibility policy should apply in order to show that the gaps in the information provided ought to be filled.
15. The starting point for the question of any flexibility is paragraph 245AA of the Rules, which provides by 245AA(b):

“If the applicant has submitted specified documents in which:

- (iv) a document does not contain all of the specified information the Secretary of State may contact the applicant or his representative in writing and request the correct documents.”

And then (d):

“If the applicant has submitted a specified document in the wrong format or which is a copy and not an original document or 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 that the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies and to refuse applications if these documents are not provided as set out in (b).”

16. Thus it is clear that the Rule provides that if a document does not contain all the specified information then that can lead to the Secretary of State requesting the correct documents but if they are not provided then it is made clear that there is the right to refuse applications if the documents are not provided.
17. So far as (d) is concerned if the document is in the wrong form but the missing information is verifiable from other material then the Secretary of State can grant the

application if satisfied that the specified documents are genuine and the applicant meets all the other requirements. Thus, so far as the Rule is concerned one can see the limits to the discretionary approach that is applicable.

18. The Secretary of State has issued guidance which changes from time to time and I have been reminded of the relevant guidance which deals with this issue and what is said there is, and of course this is guidance given to those responsible for dealing with applications: "You do not have to write to an applicant about a specified document if it does not contain all of the specified information where you can get the missing information from other documents etc."

19. That reflects entirely what is set out in 245AA(d), to which I have referred and I then come to additional information in relation to leave to remain and the page in question of the guidance in issue at the relevant time back in 2014 says:

"This page tells you about requesting additional information if there is missing evidence or evidence is not in an acceptable format. You must only request additional information in circumstances that would lead to the application being approved."

20. Of course, as will become apparent, it is important because if the application is not to be approved on grounds other than in relation to a failure to deal with specific information then obviously there is no point in requiring that additional information because it cannot lead to a decision to allow.

21. And it goes on:

"Before you request additional evidence you must have enough reason to believe the information exists. This is limited to cases where documents, for example bank statements, are missing from a series, photocopies have been received or a document is in the wrong format."

Again, that reflects largely what is set out in 245AA(b), to which I have referred, and it is said that the application must be refused if it would fall for refusal even if the missing information was provided or if a minor error was corrected and that missing information should not be requested if it could not change the decision on the case and any refusal should include if it is the case that there were minor errors but the request was not made because the case would fall for refusal on other grounds.

22. So essentially the meat of the guidance does not really vary significantly so far as I can see from what is set out in the Rule and indeed it is clear that it should not because the guidance cannot and should not override what is set out in a Rule but of course it can explain and can indicate how a particular matter should be dealt with within the Rule and the Rule of course does not have the limitations other than those specified in it.

23. Now, the question, as I say, is whether the failures to comply with what I have called issues 1 and 2 and what has been referred to in the judgment of Judge Smith which went to the Court of Appeal could have been cured or rather should have been cured by the application of the flexibility policy.
24. Mr Kannangara submits, as he has previously submitted in the appeal to the Court of Appeal, that the information missing in relation to the two issues was such as should and could have been properly supplemented. The second issue, which I shall deal with first, was whether essentially the document produced, which was dated 19 July, did not establish that the relevant trading material had existed as from 11 July 2014. That was dealt with specifically in the decision of the First-tier Judge where he referred to material which had been produced but the judge did not accept that the material was sufficient to establish that the requirement was met and indeed that finding of course has been upheld. So there was no evidence so far as he was concerned that established that the website was created and up and running prior to 11 July 2014.
25. It is important also to bear in mind that the Rules require that the evidence must have been submitted to the Secretary of State and it is not open to an applicant to rely on subsequent material in the appeal process, subject obviously to the evidential flexibility issue. So the question there is whether the error could and should have been supplemented and there should have been a request in accordance with the evidential flexibility approach to provide the necessary information.
26. The other issue, described as issue 1, was effectively whether the £50,000 was available. It is accepted that there was a shortfall of something over £1,000 and that, according to the appellant, was made up by a sum of something over £4,000, which in fact was the value of a motorcar which had been acquired and which was what the report which was provided showed as a tangible asset. The information set out the report from the so-called accountant, I say "so-called" because there is no evidence that the accountant qualified as such within the requirement of the Rule is singularly lacking in any detail because the sum of money in question is simply put as a tangible asset with no information as to what it in fact consisted of and where it came from. As I say, the evidence of the appellant was that it was the motorcar and that of course was put forward as an investment of in fact some £4,344. Again, it is set out in the report not as an investment but as a tangible asset although it may be in fairness that there is little difference in that.
27. What is submitted by Mr Clarke is that this is not a case where the policy could properly be applied to fill the gaps. Mr Kannangara has referred me to a decision of the Court of Appeal in **SH (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 426**, which concerned the application of the policy but that was a case related to the provision of qualifications from university which had not been provided in the proper form but there was evidence that he did in fact qualify as he should have done and it was accepted in that case that if he had submitted the material in the approved form he would have qualified and so would have had the

application that he was making granted, and so that falls, on the face of it, directly within what both 245AA and the guidance.

28. Similarly, in the Mandalia case the gap was some very few days because the bank statements produced showed the necessary funding for a period of 22 instead of a month, so there was a gap here for some, whatever it was, four or five days, and it was said in that case that there was other evidence which indicated that actually it was clear that the funding had existed for the relevant period and so the evidential flexibility should be applied. That again was a case where the gap once filled meant that the application would succeed.
29. What Mr Clarke submits here is that that is not the decision in the circumstances of this case because the starting point is of course the Rules and Mr Clarke draws my attention specifically to 245AA(c), which provides that documents will not be requested where a specified document has not been submitted, for example an English language certificate is missing, or where the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons and indeed that is reflected in the passages of the guidance to which I have already referred.
30. He then draws attention to 46 in the Appendix, which provides:

“Documentary evidence must be provided in all cases. The specified documents in paragraph 46-SD must be provided as evidence of any investment and business activity that took place when the applicant had leave as a Tier 1 (Entrepreneur) Migrant or a Tier 1 (Post-Study Work) Migrant”,

that is the starting point, as it were, because it is necessary to show that the business was set up and that there had been previous leave under either of those, and he goes on “and any investment made no more than twelve months before the date of the application for which the applicant is claiming points”, and then SD, as I say, sets out the relevant documentation.

31. The point made is that there is no indication as to the time when the investment which the motorcar represents was made. Furthermore, it is required that the accountant is qualified but again I have referred no evidence that that is indeed the position and so far as the question of advertising material is concerned there is a requirement that “one or more of the following specified documents covering a continuous period commencing before 11 July 2014 up to no earlier than three months before the date of the application”, “advertising and marketing material” and so on. That information simply is not produced and no doubt can be made available but is not produced.
32. It seems to me quite clear that Mr Clarke is right in what he submits that this is not a case in which the application of the evidential policy unless it goes far beyond that which it is designed to cover could result in the application being allowed. There were too many gaps in what was provided and however flexible the policy can be

said to be it does not, in my judgment, extend to cover the situation in this case. It may be that that is an over-harsh decision in one sense and it may be that the appellant has in fact complied but one thing that is clear is that what I have called the tick box approach does require that consideration is carefully given to what information is required and the form in which it is required.

33. Gaps can be filled in by evidential flexibility if they comply with what both 245AA and the guidance which follows the provisions of 245AA provide but what cannot be done by flexibility guidance is simply to supplement failures unless it is clear that there was material before the Secretary of State which did show that all that was required existed but maybe that there were omissions in the precise nature of the documentation and the information that was provided. That, I am afraid, in my judgment, does not apply in the circumstances of this case and I am satisfied that the decision of the First-tier Judge was correct, albeit maybe not for the correct reasons and that therefore this appeal must be dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.



Signed

Date: 22 June 2017

Mr Justice Collins

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

A handwritten signature in black ink, appearing to be 'M. Collins', written in a cursive style.

Signed

Date: 22 June 2017

Mr Justice Collins