Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13545/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 August 2014	**On 22 August 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

KIRAN MEDURI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Ahmed, Counsel instructed by Messrs Universal Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of India born on 30 August 1986, against the decision of First-tier Tribunal Judge C H Bennett who, sitting at Taylor House on 7 March 2014 and in a determination subsequently promulgated on 19 March 2014, dismissed the appeal of the Appellant against the decision of the Respondent dated 22 April 2013, refusing the Appellant's combined application for leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant under the Points-Based System and for a Biometric Residence Permit.

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2. The brief immigration history of the Appellant is that on 22 February 2009 he was granted leave to enter the UK as a student until 31 October 2010. On 21 October 2010 he was granted leave to remain as a Tier 1 (Post-Study Work) Migrant until 21 October 2012.

3. On 19 October 2012 he made the current application.

4. It would be as well at this stage, to set out below the First-tier Judge's summary as to the nature of the application insofar as is relevant to the present appeal that also sets out the basis upon which the Respondent refused the Appellant's application, as follows:

> "2. On 19 October 2012, Mr M applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points-Based System. What he stated in his application form and the accompanying documents was (in summary and so far as relevant) to the following effect.
>
> (a) He was a managing director and sole shareholder in Nexus Marketing Solutions Limited ('the Company').
>
> (b) He had a total of £50,000 available, held in a 'regulated financial institution' and 'disposable in the United Kingdom'. The funds were held, as to £30,000, in an account with the Santander Bank and, as to the balance of £20,000, in an account with Lloyds TSB Bank.
>
> (c) The Company had a contract with Tasri Limited signed by both Mr M (on behalf of the Company) and by Tasri Limited on 1 October 2012. Under that contract, Tasri Limited was to supply 'E-lites Electronic Cigarettes' and other merchandise, as well as marketing material to be used in connection with the sale of the electronic cigarettes to the company.
>
> (d) The 'SOC Code' relating to his position as managing director of the Company (see page 34 of the application form) was 1163, 'Retail and Wholesale Manager'.
>
> 3. To demonstrate the holding of the funds, Mr M included two statements, the one from Santander and the other from Lloyds. The first, the Santander statement, shows that the funds were held in an account in the name of Harhar Patel (Mr Patel). The closing balance, on 5 October 2012, was £40,690.24. The account with Lloyds was in Mr M's own name and was held at its East Ham High Street branch. After credit entries on 10 October 2012 of £2,500, 12 October 2012 of £1,500, 15 October 2012 of £2,500 and on 17 October 2012 of £9,500, the closing balance on that day 17 October 2012 was £21,047.77.
>
> 4. On 22 April 2013 the Secretary of State refused Mr M's application. She was not satisfied that the requirements of paragraph 245DD of the Immigration Rules, were fulfilled. Specifically, she was not satisfied that Mr M qualified for any points under Appendix A. The matters which concerned her were as follows:

(a) Mr M had not provided a current appointment report from Companies House demonstrating that, within the three months immediately prior to 19 October 2012,

(i) the Company had been registered (as a new or existing business), and

(ii) he (Mr M) was registered as a director,

(b) the evidence which Mr M had submitted, i.e. the contract between the Company and Tasri Limited indicated that the company's business was buying and selling electronic cigarettes – so that it was undertaking a retail business and therefore

(1) his position as managing director was

(i) not an occupation within the Codes of Practice in Appendix J appropriate for those holding National Qualifications Framework Qualification at level 4 or above, but

(ii) an occupation within the Codes of Practice appropriate for those having a National Qualifications Framework Qualification at level 3, and

(2) the advertisement for the Company's business did not show Mr M's name (albeit that it showed the name of the Company) and

(c) although Mr M had provided the two bank statements, the one from Santander and the other from Lloyds,

(1) the statement from Santander did not confirm that the £30,000 held in that account was available to Mr M, and

(2) Mr M had not provided a letter from Santander confirming the details required by paragraph 41-SD of Appendix A (I refer below to the specific requirements of paragraph 41-SD).

6. On 8 May 2013 Mr M gave notice of appeal. What he stated in the grounds of appeal was (in summary) that the Secretary of State's decision (singular) was

(a) not in accordance with the Immigration Rules or the 'guidance at the time of application', and

(b) unfair and unreasonable."

5. At paragraph 10 of his determination, the First-tier Judge recorded that paragraph 245DD of the Immigration Rules set out the requirements that an individual seeking leave to remain as a Tier 1 (Entrepreneur) Migrant had to satisfy if he was to be granted leave to remain. The Judge continued:

"The relevant requirement, in Mr M's case, is as set out in sub-paragraph (b) namely that

'the applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A'".

6. The Judge set out the relevant requirements of the Rules and its appendices as at 22 April 2013 (the date of the Respondent's decision) over paragraph 11 of his determination mindful of the fact that the Appellant's application was refused under paragraph 245DD and Appendix A on the basis that from the documents provided, the Respondent was not satisfied that the Appellant was entitled to the award of 25 points for access to £50,000 of funds, for the reasons that the Judge summarised in paragraph 4 of his determination.

7. At paragraphs 12 and 13 of the determination the Judge had inter alia this to say

"12. It is for Mr M to satisfy me, on the balance of probabilities, of the factual basis for the proposition that he qualified for the 75 points under Appendix A. It is apparent from the provisions of Appendix A which I have set out above, that his having access to the relevant funds (including the amount and that he has permission to use the funds to invest in the company's business) *may be proved only by the production of the 'specified documents'*, i.e. those documents specified in paragraph 41–SD; see paragraph 41(a) and (b). Those provisions do not permit proof by either the giving of oral evidence or in any other manner than the production of the specified documents."

8. At the outset of paragraph 13 of his determination, the Judge made reference to the observations of Viscount Sumner in Equitable Trust Company of New York v Dawson Partners [1927] 27 Lloyd's L.R. 49 at 52 that he considered to be apposite namely:

"There is no room for documents which are almost the same or which will do just as well".

9. The Judge continued at paragraph 13 as follows:

"Where the Rules specify the documents which must be produced to demonstrate a particular fact, documents of the kind specified must be produced. No other documents, even though they may be 'almost the same', will do. Nor is any other method of proof permitted".

10. Over paragraphs 19 to 21 of his determination, the First-tier Judge reasoned the basis upon which he concluded that the Appellant had not established that he had access to £50,000 "in the manner provided for in Table 4 and paragraphs 41 and 41-SD" and that therefore the Appellant did not qualify for the 75 points under paragraphs 35 to 53 of Appendix A or for leave to remain under paragraph 245DD.

11. At paragraph 22 of his determination, the Judge pointed out that he was mindful that on 22 April 2013 paragraph 245AA of the Immigration Rules subheaded "Documents not submitted with applications" provided, so far as is material to the present appeal that:

> "(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the UK Border Agency 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:
>
> (i) a sequence of documents and some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);
>
> (ii) a document in the wrong format;
>
> or
>
> (iii) a document that is a copy and not an original document,
>
> the UK Border Agency may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received by the UK Border Agency at the address specified in the request within 7 working days of the date of the request.
>
> (c) The UK Border Agency will not request documents where a specified document has not been submitted (for example an English language certificate is missing) or where the UK Border Agency 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.
>
> (d) If the applicant has submitted a specified document:
>
> (i) in the wrong format, or
>
> (ii) that is a copy and not an original document,
>
> the application may be granted exceptionally, providing the UK Border Agency is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The UK Border Agency 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)".

12. The First-tier Judge recorded the Appellant's representative's submission that by virtue of subparagraph (b)(i) the Respondent ought to have made contact with the Appellant before deciding the application so as to give him the opportunity to correct the deficiency. In response to that submission the Judge at paragraph 24 had this to say:

> "As to (b)(i) the Santander *statement* cannot, realistically, be categorised as a document which did *not contain all of the specified information*. It was a document of a different class or category. As indicated above, paragraph 41-SD(a) provides for the two categories of documents, i.e. those identified in sub-sub-paragraph (i) and (ii) respectively. Mr M's failure to submit a *letter* falling within sub-paragraph (a)(i) cannot properly be categorised as the failure to provide '*some of the documents in a sequence*' within paragraph 245AA(b)(i). It was a simple failure to provide a 'specified document' of a particular class or category. There was no 'sequence'. By virtue of paragraph 245AA(c) there was no duty to make contact with Mr M in relation to that omission."

13. At paragraph 26 of his determination and in response to the submission that the Rules themselves were unfair or involved procedural fairness, the Judge had inter alia, this to say:

> "(The) contention that the Rules themselves were unfair and/or involved procedural unfairness, either because they did not permit the giving of oral evidence, particularly in a case such as this where Santander had declined itself to vouch that the monies were available for Mr M's use, there is a very simple answer. I have no jurisdiction to determine whether the provisions of the Immigration Rules are or are not fair. If any challenge to their fairness is to be taken, the appropriate means of doing so is by way of judicial review. But over and above that I do not accept (the) submission. … The correct course, where an individual relies on funding from a third party, is to provide a letter within paragraph 41-SD(a)(i) and the documents required by sub-paragraph (b) i.e. the declaration from the third party and a letter from a legal representative vouching the validity of the signature."

14. In conclusion, the Judge for the reasons stated, expressed himself to be not satisfied that the Appellant qualified for any points under Appendix A and agreed with the Respondent's decision to refuse the application.

15. The Judge at paragraph 30 of his determination continued inter alia that:

> "The decision to refuse (the Appellant's) application for leave to remain was therefore correct and in accordance with the law and the Immigration Rules".

16. In granting permission to appeal, Upper Tribunal Judge Freeman considered it arguable that the letter provided in this case did come within the terms of paragraph 245AA (a) of the Rules where the necessary discretion arose under 245AA (b) (see above).

17. Prior to the hearing of the appeal and by letter dated 3 July 2014 the Respondent served her Rule 24 response in which at paragraph 3 the following was stated:

> "The grounds argue that the decision is not in accordance with the law for failing to apply evidential flexibility. It is clear that evidential flexibility would not have applied, as this was a case where more than one concern had been raised. For example, no current appointment report from Companies House, his position as managing director

was considered to be an occupation within the Codes of Practice for those having a National Qualifications Framework Qualification at Level 3, rather than level 4 or above, and the bank statements did not confirm that the funds were available to the Appellant".

18. In that regard the Respondent was no doubt referring to the provisions of paragraph 245AA(c) (see above).

19. This was indeed a matter that concerned the Respondent because the Appellant had failed to provide a Current Appointment Report from Companies House demonstrating that, within the three months immediately prior to the date of application the company had been registered (as a new or existing business) and that the Appellant was registered as a director (see (d) (iii) of Table 4).

20. Thus the appeal came before me on 12 August 2014 when my first task was to decide whether or not the determination of the First-tier Judge disclosed an error or errors on a point of law that may have materially affected the outcome of the appeal.

21. In terms of the absence of a Current Appointment Report from Companies House, Mr Ahmed submitted that a suitable document had been provided (see D1 of the Respondent's bundle before the First-tier Judge) headed "IN01 Incorporation Form" that he submitted provided all the necessary information that would otherwise have been reflected in the "specified document" and whilst he accepted that it was "not the specified document required" the Appellant had in his application form at G.20 "ticked the box confirming that the specified document had been supplied to demonstrate the Appellant's current registration as a director".

22. Mr Ahmed submitted that saying that the Appellant would submit a current report taken together with the fact that he had submitted an IN01 form stating that he did apply to be appointed as a director "should have put the Respondent on notice of the fact that it was missing".

23. Mr Ahmed notably repeated however that he accepted "that he did not meet the substantive requirement of the Rule".

24. He thus relied on the provisions of 245AA(d)(i) namely that it was a specified document "in the wrong format".

25. Further, submitted Mr Ahmed, issue was taken with the Respondent's decision as stated in the refusal letter, that the Appellant was not working in an occupation that appeared on the list of occupations skilled to National Qualifications Framework Level 4 or as stated in the Codes of Practice in Appendix J. The basis of that conclusion was that in the view of the Respondent, the job title did not appear on the list of occupations and in addition from the evidence that had been provided, it was clear to the Respondent that the Appellant was buying and selling Electronic Cigarettes. This was therefore a retail business which was shown in the Codes of Practice as National Qualifications Framework 3 and not 4.

26. Mr Ahmed submitted that this was a misconception of the Appellant's business. It was a marketing name "Nexus Marketing Solutions Limited". In that regard further material including a business advertisement had been provided to the First-tier Judge at the hearing.

27. Notably Mr Ahmed did however most fairly accept that he took "on board that my present submissions are not on the point", bearing in mind that at paragraph 28 of the Judge's determination, he had referred to Section 85A (4) (a) that prohibited him from considering any evidence that was not submitted "in support of and at the time of making, the application, that the Appellant had made on 19 October 2012".

28. As I pointed out to Mr. Ahmed,, the First-tier Judge was entitled to consider only that evidence, namely the contract with Tasri Limited and it was on the basis of that contract, that the Judge was not satisfied that "the business was anything other than the buying and selling of electronic cigarettes".

29. Notably Mr Ahmed again informed me that he "fully took on board that my present submissions are not on the point".

30. Mr Ahmed, who regrettably arrived late for the hearing before me, requested an adjournment for the purposes of preparing and submitting a draft of amended grounds upon which he would formally seek leave.

31. That adjournment request was strenuously opposed by Mr Wilding who maintained that having heard Mr Ahmed's submissions it was apparent that it did not take "this case any further".

32. The Appellant's application had been refused for four reasons all of which were approved by the First-tier Judge within his detailed determination. Those four reasons were as follows:

> "1. There was not a current appointment report from Companies House – a matter that was accepted.
>
> 2. The Secretary of State had refused the application under the NQF 4 which was a requirement of Table 4(d) (iv) and the Secretary of State had viewed the company as a retail business.
>
> 3. The contract provided for Tasri Limited did not show the services provided.
>
> 4. The documents submitted by Santander were not in the Appellant's name and the bank had not provided a letter confirming the details required by paragraph 41-SD of Appendix A".

33. Mr Wilding continued that he had noted with some concern, a concern that I shared, Mr Ahmed's reference to the box ticked by the Appellant at G.20 of the application

form relating to a specified document that in the event did not exist at that time. Above and beyond that, on the basis of the box ticked, it arguably amounted to a false representation in an application form that raised a concern as to whether the Secretary of State should have refused the application under paragraph 322(1) of the Rules.

34. Finally, submitted Mr Wilding, the appeal had "been through several eyes not least the permission to appeal grant of 17 June 2014". There was no reasonable basis under which any such application to amend the grounds could not have been made in the months preceding the hearing before me. Mr Wilding maintained that "no joy can be had from the service of such amended grounds".

35. For like reason I informed Mr Ahmed that I was not satisfied that the appeal could not be justly determined without there being an adjournment and I therefore refused his request.

36. There was common ground between myself and the parties, that UTJ Freeman had not granted permission to appeal in terms of the challenge to the First-tier Judge's Article 8 ECHR findings.

37. Having then proceeded with the hearing and my consideration of the parties' further submissions, I reserved my determination.

Assessment

38. I have had no difficulty in concluding that the determination of the First-tier Judge did not disclose errors on a point of law not least such as may have materially affected the outcome of the appeal.

39. It is apparent to me that the Rules in this regard are clear. Paragraph 41-SD of Appendix A states that an applicant will only be considered to have access to funds if the specified documents in paragraph 41-SD are provided.

40. In that regard the Appellant had not provided a Current Appointment Report from Companies House as required.

41. As I pointed out to Mr Ahmed in the course of his submissions, Form IN01 submitted with the Appellant's application clearly stated:

> "This is a summary of the information submitted to Companies House on 27/08/2012. This document does not indicate that the submission has been successful. You will receive **separate** notification when the submission has been accepted or rejected" (Their emphasis).

42. It is further apparent to me, as indeed it was to the Secretary of State in refusing the Appellant's application, that the document that he submitted with his application was not (as he indicated by ticking box G.20 of his application form) the specified

document required under the Rules, namely a Companies House Current Appointment Report, but was indeed something described as a summary of the information submitted to Companies House as regards Nexus Marketing Solutions Limited (indeed incorrectly spelt at the heading of the form as "Solilutions").

43. First and foremost I do not regard that as the same document as a Companies House Current Appointment Report but in a different format. I am reinforced in that conclusion by consideration of the fact that the document produced does not include all the information included in the CAR. It does not, for example, include the date of appointment as a director. It follows that the document provided by the Appellant and upon which he relied, was not a document in the wrong format, it was a different document.

44. As was observed by Sullivan LJ in Alam and Others v Secretary of State for the Home Department [2012] EWCA Civ 960, whilst a rigid application of the Rules may have in some cases, harsh results, that cannot operate to undermine a procedure designed to deal with large numbers of applications in a relatively efficient way.

45. Of course that is not the only basis upon which the Appellant's application was rightly refused and his appeal subsequently properly dismissed.

46. I observed in the course of the hearing before me that Mr Ahmed, in taking issue with the finding that on the evidence the Appellant had provided it was clear that he was buying and selling Electronic Cigarettes, drew my attention to an advertisement of the company in the bundle before the First-tier Judge at page 20. Quite apart from the fact that the Judge quite properly refused to consider this evidence mindful of the provisions of Section 85A(4)(a) I could not help but observe, that contrary to Mr Ahmed's contention that the company was wider-based, that the opening remarks of the advertisement stated inter alia:

> "Nexus Trading specialises in the distribution of e-cigarettes in the UK. The company currently deals in three e-cigarette brands namely … Nexus Trading focuses on providing specialised innovative and customer-centric solutions. …
>
> We are the choice distributor of [the three companies named therein] brands of e-cigarettes."

47. So apart from the failure to provide a CAR – the specified document required by the Rules that Mr Ahmed (subject to his reliance on the provisions of paragraph 245AA(b)(ii)) accepted, the Appellant clearly failed to comply with the requirement of Table 4(d)(iv) because, on the evidence submitted with the Appellant's application, it was apparent to the Respondent that the company was "a retail business shown in the Codes of Practice as NQF 3 and not Level 4 or above as required."

48. Further it was apparent that the contract provided for the company did not show the services provided as required by the Rules. In addition the documents submitted by

Santander Bank were not in the Appellant's name. The bank had not provided a letter that the funds were available to the Appellant in compliance with the provisions of 41-SD(a)(i).

49. Further and as the Judge rightly pointed out in terms at paragraph 26 of his determination, an entrepreneur has to invest the money he says he is going to invest. If the money is not in his control he has to show it will entirely be under his control and that is why either he produces a letter stating it is available to him (paragraph 41-SD (a) (i)) or there is a declaration from the banker of the third party together with a letter from a legal representative vouching the validity of the signature. No such evidence was provided.

50. As Mr Wilding rightly observed, in any event, if the money was available for the Appellant to use why was it not transferred to him. It would then be in a bank account in his own name.

51. As the Judge further and rightly found at paragraph 26 of his determination, evidential flexibility did not take the Appellant any further.

52. In that regard I had drawn the parties' attention to Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295 (IAC) that held inter alia that:

> "The question of whether a policy exists is one of fact. There is no evidence that some policy on evidential flexibility, independent and freestanding of paragraph 245AA, survived the introduction of that paragraph in the Immigration Rules".

53. Upon my reading of the determination as a whole I find that it cannot even arguably be said that the First-tier Judge failed to take relevant material into account or that his decision was perverse or irrational in the Wednesbury sense. This is not a case where the first-tier Judge's reasoning was such that the Tribunal were unable to understand the thought processes that he employed in reaching his decision. I find that the Judge properly identified and recorded the matters critical to his decision on the material matters raised before him in the appeal. The findings that he made were clearly open to him on the evidence and thus sustainable in law.

Conclusion

54. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and I order that it shall stand.

Signed Date 20 August 2014

Upper Tribunal Judge Goldstein