



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/17366/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14th April, 2014

Determination Promulgated
On 15th May 2014
.....

Before

Upper Tribunal Judge Chalkley

Between

MOHAN RATHIESH BASKARAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Seehra of Counsel instructed by Indra Sebastian, Solicitors
For the Respondent: Mr E Tufan, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Sri Lanka, who was born on 10th April, 1987.

Immigration History

2. The appellant first entered the United Kingdom on 23rd September, 2007, with entry clearance as a student from 5th September, 2007, to 31st October, 2010. On 16th February, 2011, the appellant

was granted leave to remain as a Tier 4 (General) Student until 25th June, 2011. On 12th April, 2011, he was granted leave to remain as a Tier 1 (Post-Study Work) Migrant until 12th April, 2013, subject to conditions restricting employment and prohibiting recourse to public funds.

The Appellant's Application

3. On 28th March, 2013, the appellant made a combined application for leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based system. His business plan was slightly confusing, but it revealed that he was going to trade as 'A-Star-Tutors', offering tutoring services to students requiring additional help with GCSE biology, chemistry and physics as well as AS/A2 biology. However, the business plan suggests that students will also be tutored in mathematics and languages, apart from sciences and also suggests that tutoring will be offered to primary school pupils, lower school pupils and to "accounting degree level students".
4. On 8th May, 2013, the respondent refused to vary the appellant's leave to remain and gave directions for the appellant's removal from the United Kingdom. He appealed to the First-tier Tribunal and his appeal was heard by First-tier Tribunal Judge Adio, at Hatton Cross on 3rd February, 2014.

The Respondent's Refusal

5. In the respondent's letter of 8th May, 2013, she says, under the heading, "Appendix A: attributes", the following:-

"You have claimed 25 points for Access to Funds as required under provision (b) of Table 4 of Appendix A of the Immigration Rules.

On the basis of the documents you have provided, however, the Secretary of State is not satisfied that these meet the requirements specified under Appendix A of the Immigration Rules and you do not qualify for the award of 25 points in this area.

The reasons for this decision are detailed below.

You have claimed 25 points for having accessed £50,000 under provision (b) of Table 4 of Appendix A of the Immigration Rules.

You have provided sufficient evidence to demonstrate that you have access to at least £50,000.

As you are applying under provision (b) of Table 4, you are required to demonstrate that you meet the following additional criteria:

- (i) are applying for leave to remain,
- (ii) have, or were last granted leave as a Tier 1 (Post-Study Work) Migrant,
- (iii) were, on a date falling within three months immediately prior to the date of the application,
 - (1) registered with HM Revenue & Customs as self-employed, or
 - (2) registered as a new business in which he is a director or
 - (3) registered as the director of an existing business,
- (iv) are engaged in business activity, other than the work necessary to administer his business, 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,

You have demonstrated that you satisfy (i), and (ii) above.

For the requirement (iii) although you have provided copies of Form AP01 and AP03 from Companies House, these are not specified documents as stated in the Immigration Rules to demonstrate your registration as a Director. Consequently, we have been unable to take these documents into consideration when assessing your application.

Additionally, for requirement (iv) although you have provided a job title that is listed in Appendix J, the only evidence that you have submitted to demonstrate that you are active in that occupation as part of your business, A-Star-Tutors Limited, is a business card for A-Star-Tutors Limited which advertises that business.

However, that advertisement does not contain any sort of description of the companies business activity, therefore does not meet the requirements as listed in paragraph 41-SD(c)(iii) of Appendix A of the Immigration Rules.

Furthermore, you have provided no contracts detailing the services that your business offers to confirm that you are engaged in any business activity as claimed.

You have also submitted a Memorandum and Articles of Association for your business, but this is not a specified document and does not confirm that you are engaged in the business as claimed.

You have therefore not submitted the evidence specified at paragraph 41-SD(c) of Appendix A of the Immigration Rules.

As you have stated on your application form that no contracts have been submitted, there is no indication that any exist and this document does not form part of a series of documents. For this reason, we have not requested any additional evidence from you as per paragraph 245AA(c) of the Immigration Rules as paragraph 245AA(b) does not apply to your application.

As a result of the above, you have not demonstrated that you meet the requirements of the Rules to be awarded points under provision (b) of Table 4 of Appendix A.

You have submitted no evidence that you qualify for points under any other provisions in Table 4 of Appendix A, for example having access to £200,000 and, we have been unable to award points for this attribute in accordance with Appendix A of the Immigration Rules.”

6. The appellant’s application for leave to remain as A Tier 1 (Entrepreneur) Migrant under paragraph 245DD of HC 395 was, therefore, refused.
7. The judge found that paragraph 41-SD(b) of the Immigration Rules requires that specific documents referred to in Table 4 be supplied. The appellant had supplied forms AP01 and AP03, indicating that he had been appointed a director and company secretary of A-Star-Tutors *Limited*. However what was required was that the applicant must be registered as a director of the business in the UK and provide a Companies House document showing the address of the registered office in the UK, or head office in the UK if he has no registered office, and the applicant’s name, as it appears on the application form, as a director. The judge found that the appellant had not satisfied Table 4 of Appendix A with reference to paragraph 41-SD under Appendix A of the Immigration Rules. He found that this was not a situation where the form supplied was in the wrong format, simply that the appellant had not provided the document required at all. The judge found that forms AP01 and AP03 did not satisfy the requirements of the Rules.

8. By way of advertisement of his business, the appellant produced a copy of a business card. This simply referred to “private tutor”, the appellant’s full names and his degree along with his mobile telephone number, his email address and confirmation that he had been CRB checked. It said “AS/A2 biology and GCSE science”. The judge found, at paragraph 13 of his determination that the appellant satisfied the requirements of the Rules in this respect, as he had submitted a card advertising himself as a private tutor, but in actual fact the card appears to relate to the appellant, not to A-Star-Tutors *Limited*, nonetheless the judge accepted this document.
9. In his determination, Judge Adio noted at paragraph 14 of the determination that the appellant was required to submit with his application contracts detailing the services that his business offers to confirm that he is engaged in business activity as claimed. In his application form in answer to question G23 on page 27, he had ticked the box indicating that one or more contracts had been supplied with his application. In fact no contracts were supplied and the appellant accepted in oral evidence before the judge that he had not supplied any. The judge found in this respect he had not fulfilled the requirements of Appendix A of the Immigration Rules. The judge went on to find that the respondent was correct in not exercising discretion in favour of the appellant under paragraph 245AAD and dismissed the appellant’s claim under the Immigration Rules. The judge considered the appellant’s Article 8 human rights appeal since it had been raised in his grounds of appeal and at paragraph 16 of the determination said this:-

“16. With regard to Article 8 of the Human Rights Convention Mr Davidson did not argue this point but it is raised in the grounds of appeal, I am prepared to accept that the appellant has a private life in the United Kingdom as he has spent six years in the United Kingdom. The appellant has business skills to continue his business in Sri Lanka. I therefore find that it would not be disproportionate for the appellant to return to his country to put to use his qualifications and business experience. He has spent most of his life in Sri Lanka before coming to the United Kingdom and therefore it would not be disproportionate for the appellant to return to Sri Lanka.”

The judge dismissed the appeal.

The Appellant’s Challenge

10. The appellant’s application for permission to appeal contained two challenges. The first suggested that the judge had erred by finding that the respondent was correct in not exercising discretion under paragraph 245AA and the second suggested that the judge had erred in his consideration of Article 8, because he had not examined the strength of the appellant’s private life.
11. First-tier Tribunal Judge P J G White granted permission, finding himself satisfied that the judge had arguably made an error of law in concluding that paragraph 245AA of the Immigration Rules did not place the respondent under any obligation to seek further clarification or documents from the appellant before making her decision.
12. The appellant was represented by Ms Seehra of Counsel, who very kindly provided me with a copy of the Immigration Rules as they were at the date of decision. She pointed out that on the respondent’s website the Immigration Rules, as they were at May 2013, are not available but she confirmed that there was no appreciable difference in respect of the Rules as they related to this appeal. Counsel took me to the appellant’s business plan, a copy of which was contained within the bundle. She suggested that as the business plan made clear the company has its own website and introduced details of its business card she accepted that the name of the business did not appear on the business card, although the name of the appellant as a director and as the tutor did appear on it. She pointed out that the website contained full information about the services

offered and that it was intended that business card and brochures using the same design style would be provided for each tutor and that advertisements would appear in local newspapers and on social media.

13. Counsel told me that there were no written contracts at the date of the appellant's application. All the contracts he had were oral contracts with individual pupils. They had not been reduced to writing. She suggested that the judge had erred because the Secretary of State should have used her discretion under paragraph 245AA and written to the appellant requesting documents. The appellant did not have any written contracts at the time of application, but he provided evidence at paragraph 40 of his bundle showing that he was getting work from various tutoring agencies.
14. I examined page 40 of the bundle, which appeared to be a commission form in respect of the appellant from "Personal Tutors". She confirmed that Personal Tutors was not the appellant's business, but she pointed out that this form detailed his commission for work he had undertaken on behalf of another tutoring company. She confirmed that this did not relate to the appellant's business and could not therefore satisfy the requirement that the appellant produce written contracts.
15. Counsel suggested that under paragraph 245AA caseworkers are required to clarify any issues when considering applications and the caseworker could have made enquiries. There were, Counsel suggested, sufficient documents to satisfy the Secretary of State and the caseworker could and should have used paragraph 245AA to clarify the situation.
16. I pointed out to Counsel that the document at page 40 of the bundle did not meet the requirement that the appellant provide details of contracts. It merely showed work that he had undertaken on behalf of a different tutorial business.
17. Ms Seehra suggested that the judge had failed to conduct a proper assessment of the appellant's private life rights, notwithstanding the fact the appellant's Counsel who appeared on behalf of the appellant (not Ms Seehra) had not addressed the charge in respect of Article 8. The judge failed to take account of the fact that the appellant had been in an established business for over a year. He had spent time in the United Kingdom as a student. It could not be shown that any interference was necessary because the appellant was an entrepreneur who brought money into the United Kingdom and Counsel suggested that the judge had further erred by failing to refer anywhere to the Court of Appeal decision in *Secretary of State for the Home Department v Rodrigues* [2014] EWCA Civ 2 or to consider the policy attached to the decision.
18. Mr Tufan pointed out to me that the appellant had failed to produce any contracts with his application. He had ticked the box indicating that contracts were submitted but none were and, according to the appellant when he gave evidence before the First-tier Tribunal, none were in existence and the Secretary of State had not erred under paragraph 245AA because sub-paragraph (a) makes it quite clear that the Entry Clearance Officer, Immigration Officer or Secretary of State will only consider other documents that had been submitted with the application and will only consider documents submitted after the application where they meet the requirements of sub-paragraph (b). If the applicant has submitted specified documents in which:-
 - (i) some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);

- (ii) documents in the wrong format (for example, if a letter is not on letter headed paper as specified); or
 - (iii) a document is a copy and not an original document; or
 - (iv) a document does not contain all the specified information.
19. Here, none of the contracts were submitted and, it appears, did not exist. The judge did not err. *Rodrigues* places no obligation on the Secretary of State to request all documents from an appellant that were not supplied with the application. So far as Article 8 is concerned, the appellant entered the United Kingdom as a student originally and now does not satisfy the requirements of the Immigration Rules. There is nothing exceptional in *Gulshan (Article 8 – new Rules – correct approach) Pakistan* [2013] UKUT 640 (IAC) there were no compelling circumstances he invited me to dismiss the appeal. Responding briefly Counsel suggested that there was simply no consideration of the appellant’s private life. She submitted that the Secretary of State was wrong not to use flexibility under paragraph 245AA to allow the appeal.
20. I am grateful to Ms Seehra for her extensive submissions which I took careful note of. I do not believe it would be possible for anything further to be said on behalf of the appellant.
21. I have examined the appellant’s bundle which of course now includes documents that were not submitted to the Secretary of State. There are now in the appellant’s bundles copies of two tutoring contracts. However the contracts that have been provided are contract between students and with the appellant *personally*; they are not with ‘A-Star-Tutors Limited’. There is a reference in the bundle from one student and while it is signed and dated it does not give the student’s address.
22. In the letter from the appellant’s solicitors enclosing the application addressed to the UK Border Agency, they seek remind the Secretary of State that she has a

“Duty to request any further documents you need to process this application. Therefore, please request for further required necessary documents and do not refuse this application for any lack of document. Please refer to the evidential flexibility policy”.

I do not believe that the appellant was well-served by his solicitors, who clearly had not familiarised themselves with the flexibility policy or with paragraph 245AA. Had they done so, they would have ensured that the documents which the Immigration Rules required to be submitted to the UK Border Agency were in fact enclosed with it.

23. I do not believe that the judge has erred in law in his consideration of the appellant’s immigration appeal. The appellant had failed to provide specified evidence which the Immigration Rules called for. There is no obligation on the Secretary of State to provide legal advice to applicants; the evidential flexibility policy and Rule 245AA do not cover situations where the Secretary of State requires documents to be submitted with an application, but where no such documents have been submitted. In this case the reason they were not submitted was because they did not exist. There was no separate document from Companies House and while the documents which were supplied may very well prove that the appellant is registered as a director of the company, they are not the documents which the Rules require to be submitted. Contracts detailing the services that the business offers with customers were not in existence at the date of the application and indeed it appears from those copy contracts which had been submitted that the contracts were not with the company at all, but rather with the appellant in his personal capacity.

The Secretary of State had no reason to believe that the specified documents that were missing from the application ever existed and as it transpired, they never did.

24. So far as Article 8 is concerned, insofar as the judge failed to apply the Immigration Rules, he was wrong, but the appellant could not bring himself within the requirements of paragraph 276ADE and so any error on the part of the judge was not material. So far as the judge considered the Rules under Article 8 jurisprudence, I do not accept that the judge has erred. In my respectful view, there is nothing perverse in the judge's finding at paragraph 16. He noted that the appellant had spent six years in the United Kingdom first as a student and then as a post-study work migrant and was aware from the documents supplied on behalf of the appellant that he had been engaged as a tutor working for various tutoring companies. Counsel suggested that interference was simply not necessary because the appellant is investing £50,000 in the United Kingdom in a new business. However the appellant failed to meet the requirements of the Immigration Rules and he has no other basis for remaining in the United Kingdom. Given the considerable weight that the judge was required to give to the interests of the wider public in the effective maintenance of immigration control, he was entitled to conclude as he did. I have concluded that the First-tier Tribunal Judge did not err in law in his consideration of the appellant's Article 8 appeal.

Summary

25. The making of the previous decision involved the making of no error on a material point of law. I uphold the determination.

Upper Tribunal Judge Chalkley