



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

Appeal Number: IA/38916/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 25 November 2014**

**Decision & Reasons Promulgated  
On 28 November 2014**

**Before**

**THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE  
UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**BALATHEEPAN ARUNTHVASELVAM**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr P J Lewis of Counsel instructed by Jein Solicitors

For the Respondent: Mr M Shilliday, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal with the leave of First-tier Tribunal Judge Shimmin. When granting permission to appeal he noted that the appellant was seeking permission to appeal (in time) against the decision of the First-tier Tribunal (Judge Prior), who in a decision promulgated on 11 September 2014 dismissed the appellant's appeal against the Secretary of State's decision to refuse him leave to remain as a Tier 1 (Entrepreneur) Migrant. Judge Shimmin noted that the grounds of appeal argued that the First-tier Tribunal judge erred, first of all, in misdirecting himself as to the

admissibility of evidence. Pausing there, it is frankly accepted by Mr Shilliday for the Secretary of State that the judge did err in this respect, but there is an issue as to whether that error is material for reasons which we will explain.

2. The second error, it was said, was that the First-tier Tribunal judge misdirected himself about the operation of the evidential flexibility policy. First-tier Tribunal Judge Shimmin said that it was arguable that the judge had misdirected himself in respect of the evidence which was admissible, but all grounds of appeal were to remain open. There was an arguable error of law.
3. We take the facts from paragraph 2 of the determination of the First-tier Tribunal.
4. The appellant was born on 3 April 1981, is male, and a national of Sri Lanka. He first entered the United Kingdom on 25 September 2006 on a student visa, obtained extensions of his leave and was finally granted, on 20 July 2011, leave to remain in the United Kingdom as a Tier 1 (Post-Study) Migrant until 20 July 2013. On 18 July 2013 the appellant made an application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points-based system, or PBS. That application was refused on 6 September 2013, and a decision was made to remove the appellant from the United Kingdom. He duly appealed under the Nationality, Immigration and Asylum Act 2002.
5. The relevant paragraph of the Immigration Rules (“the Rules”) is paragraph 245DD. Its requirements include a requirement which I shall refer to generically as ‘access to funds.’ The appellant’s case was that he had access to funds made available by Maristela Bibiyan and Paramakurusamy Thuraielvam, which were held in the Pan Asia Bank. The documents which he supplied with his application were a letter from the Pan Asia Bank addressed to the Visa Officer dated 10 July 2013 headed:

“Confirmation of balance as at 9 July 2013  
Mr Paramakurusamy Thuraielvam

At the request of the above client, we hereby confirm that he has been maintaining the following fixed deposits with our Wellawatte Branch. (Details were then set out).

We also confirm that the above fixed deposits have been maintaining jointly with Mrs Maristela Bibiyan Thuraielvam and further confirm that there are no credit facilities against these deposits and they can be withdrawn at any time prior to the maturity date subject to a lower rate of interest.”

6. He also supplied a document addressed to The Home Office from Maristela Bibiyan, with her address, dated 12 July 2013:

“Dear Sir/Madam

Declaration from Third Party Sponsor

I, Maristela Bibiyan [and she gave her address] do hereby declare that I have in my personal bank account at Pan Asia Banking Corporation P.L.C. Wellawatte Branch fixed deposits amounting to £81,000 jointly with my husband Paramagurusamy Thurai selvam as at 9 July 2013. I have with the consent of my husband made available and disposable a sum of £50,000 to Mr Arunthavaselvam Balatheepan to invest in his business activities in the United Kingdom.

Please contact me if you need any further information”

and then a further document headed: Ram Balasubramaniyam (with his address), Solicitor & Attorney at Law, also dated 12 July:

“To whom it may concern

I have known Maristela Bibiyan [and he gave her address] for over twenty years. She has in her personal bank account at Pan Asia Banking Corporation P.L.C. Wellawatte Branch fixed deposits amounting to £81,000 jointly with her husband, Paramagurusamy Thurai selvam. I am aware that she has with the consent of her husband made available and disposable a sum of £50,000 to Mr Arunthavaselvam Balatheepan to invest in his business activities in the United Kingdom.”

7. The appellant also provided a three-page printout from his website headed “Selvam Consultancy”. One page was headed “Service”. The second page was headed “About Us”. The third page gave his contact details.
8. In the reasons for refusing the application the Secretary of State referred first of all under the heading “Access to Funds” to the funds held in the Pan Asia Bank. The Secretary of State listed the materials that had been provided and went on to say:

“The Immigration Rules state:

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

- (a) The specified documents to show evidence of the money available to invest are one or more of the following specified documents:
  - (1) A letter from each financial institution holding the funds to confirm the amount of money available to the applicant:
    - each letter must be an original document and not a copy;
    - be on the institution’s official headed paper;
    - been authorised by an official of that institution;
    - have been produced within three months immediately before the date of the application;
    - confirm that the institution is regulated by the appropriate body;

- state the applicant's name;
- state the date of the document;
- confirm the amount of money from the applicant's own funds;
- confirm the amount of money provided to the applicant from any third party (if applicable) that is held in that institution;
- confirm the name of each third party and their contact details, including their full address including postal code, landline number and email address, and
- confirm that if the money is not in an institution regulated by the FSA, the money can be transferred into the UK."

The Secretary of State continued:

"The documents you have submitted do not meet the above criteria for the reasons stipulated below:

'The letter from the Pan Asia Bank does not name you as the recipient of the third party funds. It also does not state the funds are available for use in the UK .....and it is plain from our reading of the document from the Pan Asia Bank that it does not comply with the requirements of the relevant paragraph of the Rules'."

The Secretary of State then said, quoting the relevant paragraph of the Rules:

"If the applicant is applying using money from a third party he must provide all of the following specified documents:

- (1) An original declaration from every third party that they have made the money available for the applicant to invest in a business in the United Kingdom containing various details including -
  - the name of the third party and the applicant
  - the date of the declaration, and so on, and
  - the relationship of the third party to the applicant."

9. Now it is apparent if one goes back to the declaration from the third party, the declaration from Maristela Bibiyan, that that did not contain any description of her relationship with the appellant and it is also apparent that there was no declaration at all from Mr Paramakurusamy Thuraielvam. So it seems to us that in both of those respects the material supplied was not in conformity with the requirements of the Rules.

10. Finally, the Secretary of State on this aspect turned to the requirements of the letter from the legal representative. The Secretary of State set out the requirements in the Rules and said:

“The document you have provided from the legal representative is not acceptable for the following reasons:

- It does not contain your signature or the signatures of Marisela Bibiyan and Paramagurusamy Thuraielvam;
- It does not contain the contact details of the two sponsors;
- It does not state the relationship between you and the third parties”

Those criticisms, for what it is worth, are also made out. However, as the First-tier Tribunal pointed out in its determination, at paragraph 14, these are not the requirements set out in the relevant paragraphs of Appendix A to the Rules. We observe, parenthetically, that the requirements in the relevant paragraphs of Appendix A were not in fact met by the declaration from the legal representative.

11. Finally, the Secretary of State referred to the print-out from the website and made the point that no advertising material had been provided in support of the application, only a print-out of the web page, and it seems to us again on the proper construction of the Rule that that was the right. A website by itself it seems to us is not marketing material or advertising that has been published locally or nationally.
12. The First-tier Tribunal dealt with the case in a fairly succinct manner. It is true, as Mr Shilliday conceded, that the First-tier Tribunal did appear to misdirect itself about what evidence was admissible on the appeal (in paragraph 17 of the determination). At paragraph 16 the First-tier Tribunal made the point that it was not the appellant’s case that his application, which he had made without legal advice, met the requirements of the Rules. This is a reflection of an important and, in our judgment, accurate concession about the application. The Appellant argued that the respondent, that is the Secretary of State, had failed to exercise evidential flexibility as required by published guidance and he thus failed to act in accordance with the law.
13. The Tribunal then referred to the points-based system evidential flexibility guidance, a copy of which we have been given, and made the point that the Tribunal was not satisfied that the appellant could rely on the guidance. The Tribunal then quoted a passage from the guidance:

“Under the evidential flexibility process if there are minor errors or omissions on a valid application but there is enough evidence to show the application would otherwise be granted, you may contact the migrant to request missing documents and/or information.”

14. In our judgment the defects in this application were such that they could not be described as minor problems or omissions. The guidance gives examples such as documents, for example -
- bank statements which are missing from a series;
  - evidence detailed on a Confirmation of Acceptance for Studies or Certificate of Sponsorship which is missing;
  - photocopies of required documents have been received or a document is in the wrong format.
15. It seems to us that on the proper construction of this policy the defects in this application were not such as to fall within this guidance. They were more fundamental. There was not enough material submitted with the application to show that the application was going to succeed. Nor could it be inferred from the material that had been submitted that it would succeed. Many matters had been left out and it could not be inferred from what was submitted that the application would succeed.
16. For those reasons therefore although we do not agree with the analysis of the First-tier Tribunal in all respects, it seems to us that any errors of law were immaterial. This appeal must be dismissed.

Signed

Date 28/11/2014

Mrs Justice Elisabeth Laing DBE