



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

Appeal Number: IA/39248/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11 September 2015**

**Decision & Reasons
Promulgated
On 30 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MUDASSAR SHAFIQUE
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

Representation:

For the Appellant: Mr S Kandola, Senior Presenting Officer
For the Respondent: Mr T Khan, Counsel, St Paul's Chambers

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Amin sitting at Hatton Cross on 2 January 2015) allowing the claimant's appeal under the Rules against the decision of the Secretary of State to refuse his application for leave to remain in the UK as a Tier 1 Entrepreneur Migrant under the points-based system. The First-tier Tribunal did not make an anonymity direction, and I do not

consider that the claimant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

2. The claimant made his application on 28 July 2014, and it was refused on 22 September 2014 on the ground that he had not provided sufficient evidence of his application, as specified under Appendix A of the Immigration Rules, to be awarded points for attributes.
3. The claimant had provided a bank letter in the name of the third party funder, the third party declaration, and a letter from a legal representative. But the third party declaration was not acceptable because it did not contain both his signature and the signature of his entrepreneurial team partner, as well as that of the third party. He had submitted a separate document which contained both his signature and that of his entrepreneurial team partner. But as this was a separate document to the third party declaration, it was not acceptable evidence.
4. It was also not shown that since before 11 July 2014 and up to the date of his application, he had been continuously working in an occupation which appeared on the list of occupations skilled to national qualifications framework level 4 or above, as stated in the codes of practice at Appendix J, and had provided the specified evidence in paragraph 41-SD. Although he had provided a job title that was listed in Appendix J, the only evidence he had submitted to demonstrate that he was active in that occupation as part of his business were two contact agreements, online marketing and advertisements from facebook, twitter, free ads, and scoot; and company stationery which showed his company's website address. The evidence he had submitted in relation to marketing material and advertising material was not acceptable as it did not cover a continuous period commencing before 11 July 2014 up to no earlier than three months before the date of his application. There were no dates shown on any of the online advertisements he had submitted. Checks on the domain checking website showed that the website was registered on 7 July 2014, but did not show the name of the individual who had registered the website.

The Hearing before, and the Decision of, the First-tier Tribunal

5. Both parties were legally represented before Judge Amin. Mr Khan of St Paul's Chambers Solicitors appeared on behalf of the claimant.
6. In his subsequent decision, the judge set out his findings and conclusions at paragraphs 30 onwards. At paragraphs 30 to 32 he addressed the question of whether the third party declaration was valid and in accordance with the Rules. At paragraphs 33 to 38, the judge addressed the question of whether the marketing material showed continuous advertising before 11 July 2014. As there is no issue about the judge's findings and conclusions on the topic of the marketing material, I only set out below the judge's findings on the third party declaration:
 30. I find that the Appellant has met the requirements of Paragraph 41 SD (b) (i). It was accepted by both parties that the declaration at A1, page 4 did not contain the signatures of the Appellant and his

entrepreneurial partner. However, these signatures were contained in a separate document drawn up by solicitors in the UK (A1, p3). Paragraph 245AA (b) (iv) gives the SSHD a discretion to contact the Appellant where a document does not contain all the information required.

31. In this appeal the Appellant had a letter from the Home Office in August informing him the timescale in which his application would be decided and that if any documents or information was missing the Home Office would contact him. There was thus a legitimate expectation that the SSHD would, before making her decision, contact the Appellant. She failed to do so and therefore her decision in this regard is not in accordance with the law.
32. Alternatively, I find that the missing information from the specified document submitted was clearly verifiable from other documents (see Paragraph 245(d)) of the Immigration Rules). The letter at page 3, A1 clearly sets out the missing information and hence this was easily verifiable by the SSHD. For these reasons, I find that the SSHD refusal under Paragraph 41 SD (b) (i) in relation to the third party declaration was not in accordance with the law.

7. The judge went on to allow the appeal under the Immigration Rules.

The Application for Permission to Appeal

8. A member of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal. He argued that the judge had erred in law in allowing the appeal under the Rules. Evidential flexibility did not apply in this case. The Court of Appeal in **Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2** found the evidential flexibility policy was not designed to give an applicant the opportunity first to remedy any defect or inadequacy in the application or supporting documentation so as to save the application from refusal after substantive consideration. The judge had also misdirected himself at paragraph 8 where he said that he was not prevented from having regard to postdecision evidence provided that it related to the facts at the date of decision and cast light on what the position was at that date.

The Grant of Permission

9. On 20 April 2015 First-tier Tribunal Judge Colyer granted the Secretary of State permission to appeal, holding that both asserted errors of law were arguable.

The Hearing in the Upper Tribunal

10. At the hearing before me, I received extensive submissions from both Mr Kandola and Mr Khan on the application of paragraph 245AA to the third party declaration, in the light of the unchallenged finding of the First-tier Tribunal Judge that the other requirement put in issue by the refusal letter had in fact been met. Mr Khan agreed that the judge had been wrong to allow the appeal outright, and so the question which arose on re-making was whether the appeal should be allowed on the ground that the decision

was not in accordance with the law. Mr Kandola said he would leave this to my discretion, and I reserved my decision on this question.

Reasons for Finding an Error of Law

11. On any view, the judge was wrong to allow the appeal outright. The third party declaration did not meet the requirements of the Rules, and so the claimant could only succeed in his appeal on the ground that the refusal decision was not in accordance with the law. To this end, the claimant needed to establish that the Secretary of State had been wrong to make a decision on his application without giving him an opportunity to rectify the defect in the third party declaration, or without otherwise exercising evidential flexibility in accordance with paragraph 245AA of the Rules.
12. The judge also misdirected himself on the issue of the admissibility of evidence at paragraph 8. As this was a point-based system appeal, he could only take into account the evidence that had been provided with the application.
13. The general rule is that the Tribunal may consider any evidence which it thinks is relevant to the substance of the decision appealed against, including evidence which concerns a matter arising after the date of decision: Section 85(4) of the Act. But pursuant to Section 85A(3) of the Act, this general rule does not apply if-
 - (b) the immigration decision concerned an application of a kind identified in the immigration rules as requiring to be considered under a “Points Based System”; and
 - (c) the appeal relies wholly or partly on grounds specified in section 84(1) (a), (e) or (f).
14. The above is known as Exception 2, and where Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it-
 - (i) was submitted in support of, and at the time of making, the application to which the immigration decision related, [or]
 - (ii) relates to the appeal in so far as it relies on grounds other than those specified in subsection (3)(c), [or]
 - (iii) is adduced to prove that a document is genuine or valid.

The Re-Making of the Decision

15. I do not consider this is a wrong format case. The problem with the third party declaration was not that it was in the wrong format, but that it did not contain a vital ingredient, namely the signatures of the entrepreneurial team members as well as the signature of the third party funder. Looking at the matter through the prism of paragraph 245AA, it would be more

accurate to describe the defect in the document as being one where not all the specified information has been provided.

16. I consider it was reasonable for the case worker assessing the application not to give the claimant the opportunity to provide a new third party declaration which met all the requirements. There was no reason to suppose that such a declaration existed at the date of application. For, if it had existed, the claimant would have provided it with his application, rather than providing a third party declaration which did not contain all the specified information. The claimant could rely on a new third party declaration in support of a new application, but he could not rely on a newly generated third party declaration in support of his existing application.
17. If the judge had upheld the case worker's other objections to the specified documents provided with the application, this would have been the end of the road for the claimant. But as the judge found that these other objections were ill-founded, the claimant was in retrospect deprived of the benefit of the case worker giving consideration as to whether to exercise discretion under sub-paragraph (d) of paragraph 245AA. As Mr Kandola accepted, the case worker does not appear to have considered whether the missing specified information from the third party declaration was verifiable from other documents; and, if so, whether discretion should exceptionally be exercised in the applicant's favour. Accordingly, I allow the appeal on this ground.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claim in this appeal is allowed on the ground that the decision was not in accordance with the law, and a lawful decision on the claimant's application is awaited.

I make no anonymity direction.

Signed

Date

Judge Monson

Deputy Judge of the Upper Tribunal

