



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/22723/2013

THE IMMIGRATION ACTS

Heard at Field House
On 13th June 2014

Determination Promulgated
On 23rd June 2014

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MR MUHAMMAD NOUMAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Peterson of Counsel
For the Respondent: Mr Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Pakistan born on 6th January 1983. He seeks to appeal against the respondent's decision dated 2nd June 2013 refusing to vary his existing

leave to remain in the United Kingdom so as to become a Tier 1 (Entrepreneur) Migrant. His application was made on 27th March 2013.

2. The appeal came for hearing before First-tier Tribunal Judge Fletcher-Hill on 4th November 2013. The appeal was dismissed. Grounds of appeal were submitted contending in particular that the judge had failed to apply the evidential flexibility policy of **Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC)**. Leave to appeal was granted on that basis.
3. It is perhaps helpful to consider the refusal letter of 2nd June 2013. This perhaps highlights the areas of particular concern. The first area is whether or not the appellant has provided correct evidence to show access to funds of £50,000 being made available to him by a third party.
4. There is a letter from Alfalah Ltd; a declaration from Mr Amir Hassan and a letter from Mr Faisal Baloch. It is said that the bank letter is not acceptable because it does not include the full address including the postcode of Mr Amir Hassan. The bank statement that has been provided is not acceptable because it is for an account not in the appellant's name as required by paragraph 41-SD(a)(ii)(4) of Appendix A of the Immigration Rules. It also said that the account is with a financial institution not based in the United Kingdom and regulated by the Financial Services Authority.
5. A reply is made that it is apparent from the bank statement that is submitted with the letter from the Branch Manager that the address of Mr Hassan is clearly shown. Issue was taken that the respondent was incorrect to find that the bank was not one that was within the authorised banks.
6. Reliance is placed upon the evidential flexibility policy, particularly as now enshrined within paragraph 245AA of the Immigration Rules.
7. It is said that that should apply to documents submitted where one out of a sequence is missing or is in a wrong format or does not contain all the specified information. It was argued on behalf of the appellant that such admissions as identified in the financial documents fell well within the policy as envisaged.
8. The next issue relates to the documents that are required to be provided as set out in particular by the Immigration Rules under 41-SD, in particular 41-SD(c) and following. That requires in essence that the appellant provide the following:-
 - (1) his job title;
 - (2) the standard occupation classification (SOC) code of the occupation that the appellant is working in which must appear on the list of occupations skilled to national qualifications framework level 4 or above (codes of practice in Appendix J);

- (3) one or more of the following documents including, in particular in this case, advertising or marketing material which shows the appellant's name (and the name of the business if applicable), together with the business activity; and
 - (4) one or more contracts showing trading. The contracts must show the appellant's name and name of the business, the service provided by the appellant's business and the name of the other party or parties involved in the contract and their contract details, including their full address, postal code, landline phone number and any e-mail address.
9. Ms Peterson, in her skeleton argument, seeks to argue that all those documents and details were provided. Unfortunately, the website which was the matter dealing with advertising or marketing material was in its early stages and did not contain as required the appellant's name or the business activity.
10. Once again, she submits that that was a deficiency which was corrected and had the respondent checked the website immediately prior to making the decision, those details would be on it. She submits once again that it is a matter within the evidential flexibility policy that such detail could have been requested. In any event it was apparent she submits from the other material that was submitted what was his name and name of the business.
11. Reliance is placed in particular upon the contract as originally submitted. It was not a particularly detailed contract. It is to be seen within the respondent's bundle of documents.
12. It makes it clear that Itravelz Ltd agreed to act as a sales agent to Noble Travel Ltd. The purpose was to provide business development support in purchasing and selling tickets via the consultancy. The contractor, that is Itravelz Ltd, would be paid commission for the sale of the tickets. There was a restriction clause imposed at that time that services would only be provided to Noble Travel Ltd, although that restriction was lifted in a subsequent version of the contract.
13. Thus, the services to be provided were said to be consultancy services, consolidation and sale of tickets.
14. The appellant was described as a Director of Itravelz Ltd and the other contracting party being Noble Travel Ltd.
15. The appellant gave his job description as Director of Finance.
16. Thus she submits that he has provided his job title, his classification, the advertising or marketing material, namely the website and the contract that shows his name, the name of the business, the service provided and the name of the other parties involved in the contract.

17. She invites me to find therefore that so far as the purposes of the Rules are concerned that the appellant has done that which is required of him. The one shortcoming being the website and that clearly could have been the subject of clarification or request under the provisions of paragraph 245AA.
18. Mr Deller, who represents the respondent, indicated that it was a finely balanced position as to whether or not the omissions that were highlighted by the Secretary of State in the reasons for refusal were such that ought to have been the subject of the evidential flexibility policy. He invites my attention to the wording of paragraph 245AA and to the requirement "may" rather than "must".
19. He invites my attention however to the decision that was originally issued and to the indication that as the appellant was applying under provision (d) of Table 4 he is required to demonstrate that he met the following additional criteria, namely:-
 - (iv) is 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, stating the codes of practice in Appendix J provides the specified evidence in paragraph 41-SD.
20. He said that the whole purpose of having an occupation code was for an appellant to demonstrate a particular level of occupation and skill. In this case, to demonstrate that he had not only the job title of Director of Finance, but actually worked as such. The reality in this case he submits, as was accepted, is that the appellant was the sole Director and/or employee of Iltravelz Ltd. It was effectively his own business and he provided the labour and experience for it. He invites me to find therefore that it is not appropriate for him to describe himself as Director of Finance, because essentially he is directing nothing but himself.
21. In that connection it was relevant to note how SOC code 1131 defined Financial Managers and Directors. It defined it as follows:-

"Example job tasks - participates in the formulation of strategic and long-term business plans, assesses the implications for the organisation, financial mechanisms and oversees their implementation, plans external and internal audit programmes, arranges for the collection and analysis for counting, budgetary and related information, and manages the company's financial systems; determines staffing levels appropriate for accounting activities; assesses and advises on factors affecting business performance."
22. He submits that what is envisaged within that code is somebody who manages the business and does not run it as a sole practitioner.

23. Ms Peterson submits that although the appellant is running his own business for himself, he is entitled to use the descriptions that have been made. He is not only an employee but he is also a Director in that he is directing the course of his business.
24. She takes issue therefore with the finding of the First-tier Tribunal Judge at paragraph 34 of the determination that the appellant was not engaged in the business activity at the required level.
25. She submits that the appellant as an entrepreneur, by the very nature of being an entrepreneur, would be involved in running his own business or company. She submits that his involvement in establishing the company was more than work necessary to administer his business.
26. She submitted that a strict application of (1)(5) did not exclude sole occupation but rather required a number of skills to be met, one of which she invites me to find was met by the appellant in his description of Director of Finance.
27. The statement is made within the reasons for refusal that no reference was made to the appellant's role within the company or an example job task relating to the title and occupations listed. Ms Peterson seeks to argue that was precisely what detail was provided by the appellant.
28. In many ways this is an appeal involving a number of technical issues. The difficulty, having considered the arguments, is the extent to which the issues have been crystallised by either parties.
29. If the purpose of the coding is to exclude anyone who is a sole practitioner in the business, then perhaps that needs to be more clearly stated. Although the phrase:-

“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”

is stated in the decision, that does not seem to have been followed up because the decision maker then talks about a lack of role within the company or job task.

30. The Judge in the determination clearly touches upon the issue in paragraph 34, then seems to expand upon the matter in paragraph 35 speaking about income.
31. So far as the evidential flexibility policy is concerned as enshrined in paragraph 245AA, it does not automatically follow either that the appellant must be told where documents are in the wrong format or the authorities to request the correct documents.
32. However, the matters as set out in 245AA(d) are perhaps of some relevance. It seems that even if the specified document has been submitted in the wrong format or does

not contain all the specified information, if the missing information is verifiable from other documents, the application may be granted exceptionally. In one sense, although the address of Mr Hassan was missing from the letter, it was apparent from other documents. It does seem that that discretionary aspect of the Rule has not been considered as to whether or not it has application.

33. Looking at the decision letter it does seem to me that perhaps various strands of this matter have not been approached quite with the clarity of decision that might be expected, particularly in the light of 245AA.
34. I find the Immigration Judge, although attempting to deal with certain of the matters, has not perhaps dealt with others and that there is a lack of definition in the overall conclusions that have been arrived at. In those circumstances it seems that as a matter more of fairness and justice I shall set the decision aside.
35. I find that the original decision letter has significant omissions in it and lack of precision within it, such as not to be safely relied upon. I find, therefore, that it is not in accordance with the law, such that it should be reconsidered and if need be remade.
36. In the circumstances therefore the appeal is allowed to the limited extent that the appellant's appeal should be sent back to the respondent for further consideration and decision upon it.

Signed

Date 18.06.2014

Upper Tribunal Judge King TD