



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

Appeal Number: IA/33172/2013

THE IMMIGRATION ACTS

Heard at Manchester

On 13th June 2014

Determination

Promulgated

On 30th June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

**MR KANAGASINGAM SIVACHELVAN
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Jones of Jein Solicitors

For the Respondent: Ms Johnson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, Mr Kanagasingam Sivachelvan, date of birth 29th September 1980 is a citizen of Sri Lanka. On 22nd October 2012 the Appellant made an application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points-based system. That

application was refused by a decision made on 27th March 2013. A decision to remove the Appellant from the United Kingdom under Section 47 of the 2006 Act was also made. The Appellant appealed against those decisions.

2. The appeal was heard by First-tier Tribunal Judge Pickup on 9th December 2013. By a determination promulgated on 11th December 2013 Judge Pickup dismissed the Appellant's appeals.
3. By a decision made on 24th April 2014 Upper Tribunal Judge Allen granted permission to appeal against the decision of First-tier Tribunal Judge Pickup. Thus the matter appeared before me on 13th June 2014 to determine in the first instance whether or not there was a material error of law in the original decision by First-tier Tribunal Judge Pickup.
4. I have considered whether any of the parties to the present proceedings requires the protection of an anonymity direction. Taking account of all the circumstances it is not necessary to make an anonymity direction.
5. The Grounds of Appeal raised two issues:-
 - (a) The circumstances in which the application for leave to appeal may have been lodged out of time. That was dealt with by the Upper Tribunal Judge and is not now subject to review.
 - (b) The sole issue left within the appeal is the submission of an amended newspaper advertisement was in accordance with the Rules. It is suggested that the judge is in error in finding that the Respondent was not obliged to consider the amended newspaper advertisement under paragraph 245AA. It is also suggested that the judge erred in himself not taking account of the newspaper advertisement as the document was before the Respondent before the decision was taken.
6. With regard to the newspaper advertisement one had been submitted with the application but the document did not have the name of the Appellant on it. Because of the absence of that information the advertisement did not comply with paragraph 41-SD (c)(iii). The appellant's representative argued that this was merely a document in the wrong format and that a document in the wrong format includes evidence missing specified information such as, in this instance, an advertisement not containing the Appellant's name.
7. The judge at paragraph 29 has indicated that he does not accept that argument. With the original application made in October an advertisement had been submitted but that advertisement did not contain the required information under the Rules. There was a subsequent advertisement submitted but that was not until May 2012. That advertisement did contain the required details.
8. Paragraph 41-SD(c)(iii) of Appendix A provides as follows:-

“41-SD The specified documents in table 4 and paragraph 41, are as follows:

(c) If the applicant is applying under the provisions in (d) in Table 4, he must provide:

(iii) one or more of the following specified documents:

(1) advertising or marketing material, including printouts of online advertising, that had been published locally or nationally, showing the applicant’s name (and the name of the business if applicable) together with the business activity.”

9. The original advertising materials submitted by the Appellant did not have his name on it. The subsequent advertising materials did.
10. The issue between the parties is quite simple. It is the Appellant’s case that the advertisement submitted was merely an error in format which was rectified by submission of the further documentation or second advertisement. The contention on behalf of the Respondent is that the only piece of information required to be in the advertisement as mandatory was the applicant’s name and that was not on the original advertisement.
11. With regard to such documentation reference had been made to paragraph 245AA which provides as follows:-

“245AA Documents not submitted with application

- (a) Where part 6A or any appendices referred to in part 6A stated that specified documents must be provided, the UKBA will only consider documents that have been submitted with the application, will only consider documents submitted after the application where subparagraph (b) applies.
- (b) The sub-paragraph applies if the applicant has submitted:
 - (i) a sequence of documents and some of the documents in the sequence have been omitted ...;
 - (ii) a document in the wrong format; or
 - (iii) a document that is a copy and not an original document, the UK Border Agency will contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received by UK Border Agency

at the address specified in the request within seven 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.”

12. On the facts as presented within the case the Appellant had with the application submitted two contracts. As noted by the judge at paragraphs 18 and 19 of the determination the judge has accepted that two contracts were submitted with the application. The judge also accepted that the Respondent should have considered those documents. However the judge went on to find that the advertisement referred to did not contain the name of the Appellant and as such that advertisement did not meet the requirements of the Rules. For that reason the Appellant was not entitled to 25 points.

13. I would draw attention to the case of Nasim and Others (Raju: reasons not to follow? : Pakistan) [2013] UKUT 610 specifically paragraph 76 thereof:-

“76. Accordingly, the Respondent’s position, in cases such as the present, is that (as held in Khatel) Section 85A precludes a Tribunal, in a points-based appeal, from considering evidence as to compliance with the points-based Rules, where that evidence was not before the Respondent when she took her decision; but the Section does not prevent a Tribunal from considering evidence that was before the Respondent when she took the decision, whether or not that evidence reached the Respondent only after the date of the application for the purposes of paragraph 34F. Although our view of the matter is obiter, we concur.”

14. I would draw attention also to paragraph 34G of the Rules. That provides:-

“34G. For the purposes of these Rules, the date on which the application or claim (or a variation in accordance with paragraph 34E) is made is as follows:-

- (i) where the application form is sent by post, the date of posting,
- (ii) where the application form is submitted in person, the date on which it is accepted by a public enquiry office of the UKBA,
- (iii) where the application form is sent by courier, the date on which it is delivered to the UKBA, ...

(iv) where the application is made via the online application process, on the date on which the online application is submitted.”

15. In coming to a decision in this matter I have also taken account of Section 85A(3) and (4) of the 2002 Act.
16. The Rules require that the Appellant submit an advertisement in proper form to show at the date of the application that that advertisement had been made. That required as of October 2012 there was an advertisement that complied with the requirements of the Rules set out.
17. What the Appellant has shown that as of May 2013 there was an advertisement which complied with the requirements of the Rules. The documentation submitted by the Appellant in any event does not show that the Appellant could meet the requirements of the Rules with regard to paragraph 41-SD of Appendix A at the time of the application. It merely shows that as of May 2013 having appreciated there was a problem with his application the Appellant had rectified the problem and submitted a further document. That document the second advert does not however relate back to the date of the application.
18. In those circumstances the Appellant has not proved that at the date of the application he met the requirements of the Rules.
19. Accordingly for the reasons set out the Appellant did not at the time of the application have the required advertisement in accordance with paragraph 41-SD of Appendix A. The subsequent production of an advertisement that did comply with the requirements of that provision did not show that at the date of the application the Appellant complied with the requirements of the Rules but merely showed that subsequently the Appellant had rectified a defect in his case. That defect did not relate back to the date of the application. Therefore the Appellant could not succeed on that basis.
20. For the reasons set out the Appellant did not meet the requirements of the Rules. There is therefore no material error of law within the determination of Judge Pickup. The decision to dismiss this matter on all grounds stands.

Signed

Date

Deputy Upper Tribunal Judge McClure