



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

Appeal Number: IA/46529/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 4<sup>th</sup> February 2016**

**Decision & Reasons  
Promulgated  
On 8<sup>th</sup> July 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

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

Appellant

**and**

**MISS HARJIT KAUR  
(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellant: Mr. S Kotas, Home Office Presenting Officer

For the Respondent: Mr. M Biggs of Counsel instructed by Hiren Patel Solicitors

**DECISION AND REASONS**

1. This is an appeal against a decision by First-tier Tribunal Judge O'Garro promulgated on 4<sup>th</sup> August 2015, in which she allowed the appeal against the decision of the Secretary of State for the Home Department of 6<sup>th</sup> November 2014, to refuse the application made by Miss Harjit

Kaur for leave to remain in the UK as a Tier 1 (Entrepreneur) under the Points Based System.

2. The appellant before me, is the Secretary of State for the Home Department. However for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to the Secretary of State as the respondent.
3. Permission to appeal was granted by First-tier Tribunal Judge Holmes on 18<sup>th</sup> November 2015. The matter comes before me to consider whether or not the determination by First-tier Tribunal Judge O'Garro involved the making of a material error of law, and if so, to remake the decision.

### **Background**

4. The background to the appeal is uncontroversial. The appellant's immigration history is set out by the Judge at paragraphs [9] to [12] of her decision. It was the decision to refuse of the appellant's application made on 10<sup>th</sup> September 2014 for leave to remain as Tier 1 (Entrepreneur) in accordance with the Points-Based System of the Immigration Rules that gave rise to the appeal before the First-tier Tribunal.
5. The application was refused for the reasons set out in a decision letter dated 6<sup>th</sup> November 2014. The appellant was awarded no points for Attributes under Appendix A of the rules. The respondent referred to Appendix A, Table 4 (d) and the evidence submitted by the appellant. The respondent stated:

*"This evidence does not cover a continuous period, commencing on the 11 July 2014 & up to the date of your application, as stated in the immigration rules. Furthermore your website was not registered by you. No other evidence from paragraph 41-SD(e)(iii) has been submitted*

*The secretary of State is not satisfied, therefore, that you qualify for the award of points in this area. The acceptable evidence as defined in paragraph(s) 41 -SD and [46-SD] of Appendix A of the Immigration Rules must be provided in order for you to meet the criteria and be awarded points.*

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

6. The decision of the respondent went on to award no points for funds held in regulated financial institution(s), funds disposable in the UK or maintenance funds. The respondent stated:

*"...We have not assessed your application under all of the potentially relevant criteria, because even were you to be awarded points against such criteria and to meet the other requirements, your application would still fall for refusal on the basis of no advertisements prior to 11 July 2014. For that reason, it is not necessary to reach a conclusion as to the points that you might otherwise have scored and the other requirements you might otherwise have met. We reserve the right to consider these points criteria and other requirements in any future reconsideration of your application. "*

### **The appeal before the First-tier Tribunal**

7. On 4<sup>th</sup> July 2015, First-tier Tribunal Judge O'Garro heard the appeal and allowed the appeal for the reasons set out in a decision promulgated on 4<sup>th</sup> August 2015. Paragraphs [3] to [8] of her decision sets out the background to the respondent's decision of 6<sup>th</sup> November 2014. At paragraph [16] the Judge sets out the relevant extracts from the Immigration Rules and at paragraphs [20] to [34] she sets out her findings and conclusions. Having set out her findings and conclusions, the Judge found at paragraph [34] that the respondent's failure to follow her own policy and exercise her discretion in the circumstances, makes her decision not in accordance with the law. The Judge allowed the

appeal to the extent that the appellant's application remains outstanding before the respondent for a lawful decision to be made.

8. Insofar as is material to the appeal before me, the Judge states in her decision:

*"20. This appellant's application falls under Table 4 (d) as she has previously held leave as a Tier 1 (Post Study work) migrant and before the 11 July 2014 and up to the date of her application she has been continuously engaged in business activity as a director of a company, H & R Home Improvement which I noted was registered as a Company on 7 July 2014.*

*21. I note that Paragraph 41 of Appendix A states that an applicant will only be considered to have access to funds if the specified documents in paragraph 41-SD are provided.*

*22. As the appellant's application falls under Table 4(d), the required specified documents is found in paragraph 41-SD(e) and the issue for me to determine is whether the appellant had provided the required specified documents.*

....

*24. The bone of contention is whether the appellant submitted one of the documents found at 41-SD(e)(iii). This requires an applicant to submit at least one out of the four different types of specified documents listed.*

*25. The appellant has provided a letter showing her personal registration with a UK trade body linked to her occupation, which is building and construction. I have seen a letter from the Construction Industry Trade Alliance dated 4 July 2014 confirming the appellant's registration to that trade body. I also noted in the letter the appellant's representative submitted with her application that the letter from the Construction Industry Trade Alliance was listed at number 25 on the*

*list of documents that were submitted at the time she made her application*

*26. All the other specified documents the appellant submitted, such as advertising or marketing material and on-line links did not show dates covering the period before 11 July 2014. They in fact showed dates in September 2014.*

*27. However from my reading of the relevant paragraph, the appellant is only required to submit one of those documents from the listed in 41-SD(e)(iii) and I find she had submitted the required specified evidence when she made her application because she submitted the registration document from the Construction Industry Trade Alliance”*

9. I pause there to observe that the respondent does not challenge the finding made by the Judge that the appellant had submitted the required specified evidence as set out in 41-SD(e)(iii), when she made her application because she submitted the registration document from the Construction Industry Trade Alliance.

10. The Judge went on in her decision to consider whether the further requirement at 41-SD(e)(iv) was met by the appellant. She states:

*“28. In addition to the documents required in 41-SD(e)(iii), the appellant is also required to submit one of the specified documents as set out in 41-SD(e)(iv) which requires her to show trading covering the period before 11 July 2014.*

*29. The specified documents could be either a contract for services or a Bank letter confirming the date the business began trading.*

*30. The contract for services the appellant submitted post-dated 11 July 2014. I noted the date on the Contract for Service document she submitted had the date 2 September 2014*

*31. The appellant had submitted a bank letter but the bank letter which is dated 5 August 2014, does not have the required information in the letter, confirming that the appellant's business was trading before 11 July 2014*

*32. Having considered the evidence, in particular the bank letter, it is evident that it does not have the required information in the letter confirming that the appellant's business was trading before 11 July 2014.*

11. The Judge went on, at paragraph [33] of her decision to consider whether the respondent should have requested the specified documents under paragraph 245AA of the Immigration Rules. She noted that paragraph 245AA(b)(iv) permits the respondent to contact the applicant or his representative in writing and request the correct documents where an applicant has submitted specified documents in which the document does not contain all of the specified information. The Judge states at paragraph [34] of her decision:

*"34. Having considered Paragraph 245AA, I find that the Bank letter is a specified document which falls within 245AA(b)(iv). I find that as the bank letter submitted by the respondent was a specified document which had appeared to the respondent not to contain all the specified information, confirming the date the business began trading, the respondent should have acted in accordance with her policy found at 245AA (b) (iv) and requested the document."*

### **The Grounds of appeal**

12. The respondent notes the requirements set out at paragraph 41-SD(e) (iv) of Appendix A and claims that neither the contract nor the bank letter provided by the appellant with her application contained the specified information as defined by paragraph 41-SD(e)(iv). They did not confirm that the appellant's business was trading before 11 July 2014. The respondent states that evidential flexibility does not apply to this

case and as the appellant cannot satisfy the requirements of the Immigration Rules, the appeal should have been dismissed.

13. Before me, Mr Kotas submits that the Judge erred in her understanding of paragraph 245AA of the Immigration Rules and the respondent's evidential flexibility policy. He submits that the appellant had simply failed to provide evidence to establish that the appellant had been trading prior to 11<sup>th</sup> July 2014 and up to three months before her application. He submits that there was no evidence at all before the respondent of any trading before 11<sup>th</sup> July 2014 and the evidential flexibility would only apply when the respondent has reason to believe that the evidence exists.
  
14. In reply, Mr Biggs submits that it was properly open to the Judge to find as she did at paragraph [25] of her decision that the requirements of paragraph 41-SD(e)(iii) of Appendix A were met. He submits that the Judge properly went on to consider whether the requirements of paragraph 41-SD(e)(iv) of Appendix A were also met by the appellant and the Judge properly acknowledged at paragraphs [30] to [32] of her decision that the documents did not establish trading activity before 11 July 2014. He submits that, the Judge had found at paragraph [20] of her decision that the company was registered on 7<sup>th</sup> July 2014 and that prior to 11<sup>th</sup> July 2014 the appellant had registered with a UK trade body, the Construction Industry Trade Alliance. He submits that there was therefore prima facie evidence to establish that the company was trading as at 11<sup>th</sup> July 2014. The evidence provided in support of the application included a letter from the bank, but unfortunately the letter did not confirm that the business was trading before 11<sup>th</sup> July 2014. The letter from the bank was part of the specified evidence set out at paragraph 41-SD(e)(iv)(2) of Appendix A, and in accordance with paragraph 245AA(b)(iv) of the Immigration Rules, it was open to the respondent to contact the applicant or her representative requesting a letter from the bank that contained all of the specified information.

## **Discussion**

15. The only reason relied upon by the respondent in her decision letter of the 6<sup>th</sup> November 2014 for awarding the appellant no points for 'Attributes' under Appendix A is that, the respondent concluded, on the evidence before her, that the evidence did not cover a continuous period, commencing on the 11<sup>th</sup> July 2014 to the date of the appellant's application. The respondent simply stated "...Furthermore your website was not registered by you. No other evidence from paragraph 41-SD(e) (iii) has been submitted...". In other parts of the decision letter the respondent states that the appellant's application "...would still fall for refusal on the basis of no advertisements prior to 11<sup>th</sup> July 2014..".
16. Having rejected the application because she was not satisfied that the requirements of 41-SD(e)(iii) were met, it seems that the respondent had not expressly gone on to consider whether the further requirement at 41-SD(e)(iv) was met by the appellant.
17. If the Judge had agreed with the respondent's concerns with regard to the evidence relied upon by the appellant that would have been the end of the road for the appellant. But the Judge found that paragraph 41-SD(e)(iii) was satisfied by the registration document from the Construction Industry Trade Alliance. The Judge found at paragraph [27] of her decision that the appellant is only required to submit one of the documents from those listed in 41-SD(e)(iii). She found that the appellant had submitted the required specified evidence when she made her application, because she submitted the registration document from the Construction Industry Trade Alliance that is dated 4<sup>th</sup> July 2014. That finding is, as I say, not challenged by the respondent in the grounds of appeal before me.
18. I have carefully looked at the Certificate issued by the Construction Industry Trade Alliance dated 4<sup>th</sup> July 2014 that is relied upon by the appellant and the letter from them of the same date confirming that the



appellant had become a member of the organisation. The certificate and the letter certainly establish that the company of which the appellant is a Director became a member of a UK trade body linked to the appellant's occupation on 4<sup>th</sup> July 2014. Paragraph 41-SD(e)(iii) of Appendix A requires an application to provide one or more of the four specified documents (either together or individually) covering a continuous period commencing before 11<sup>th</sup> July 2014 up to no earlier than three months before the date of his application. The Certificate issued by the Construction Industry Trade Alliance confirms the membership as at 4<sup>th</sup> July 2014 and falls within the three month period before the date of the application, the application having been made on 10<sup>th</sup> September 2014.

19. It is uncontroversial that the appellant had provided a letter from the bank confirming that she is the sole authorised signatory to the business account held by the company of which she is a Director. The letter provides the account number and confirms that the company holds an active business current account. The letter confirms that the company has an active business account as at 5<sup>th</sup> August 2014 but does not, as is required by Paragraph 41-SD(e)(iv)(2) of Appendix confirm the dates the business was trading during the period before 11<sup>th</sup> July 2014.
20. In my judgment, it was open to the Judge to find that the letter from the bank does not contain all the specified information and that the respondent should therefore have acted in accordance with paragraph 245AA(b)(iv). She should at least have considered contacting the appellant or her representatives in writing to request the correct document containing all the specified information.
21. In my judgement, it was open to the Judge on the particular facts of this appeal to find that the appellant had been deprived of the benefit of the respondent giving consideration as to whether to exercise discretion under paragraph 245AA(b)(iv) of the Immigration Rules. In my

judgement it was therefore open to the Judge to allow the appellant's appeal to the extent that the appellant's application remains outstanding before the respondent for a lawful decision to be made.

22. It follows that in my judgment, the decision of the First-tier Tribunal discloses no material error of law and the appeal is dismissed.

**Notice of Decision**

23. The appeal is dismissed and the decision of the First-tier Tribunal shall stand.

24. No anonymity direction is applied for and none is made.

Signed

Date: 8<sup>th</sup> July 2016

Deputy Upper Tribunal Judge Mandalia

**FEE AWARD**

The First-tier Tribunal made no fee award and the decision of the First-tier Tribunal stands for the reasons given by First-tier Tribunal Judge O'Garro.

Signed

Date: 8<sup>th</sup> July 2016

Deputy Upper Tribunal Judge Mandalia