Neutral Citation Number: [2018] EWCA Civ 2861

Case No: C7/2017/0197

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Upper Tribunal (Immigration and Asylum Chamber)
Upper Tribunal Judge Freeman

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2018

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE SIMON
and
LORD JUSTICE COULSON

- -

Between:

HARPREET SINGH	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

Mr Philip G Nathan (instructed by **Oaks Solicitors**) for the **Appellant**
Mr James Cornwell (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 5th December 2018

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Appellant is an Indian national who first came to this country in 2009 as a student. In 2012 he was granted Tier 1 (Entrepreneur) leave to remain for a three-year period expiring on 26 July 2015. Shortly before the expiry of that leave he made an application for further leave to remain on the same basis. One of the requirements was that he should be able to demonstrate that he had created the equivalent of two new full-time paid jobs for people settled in the UK and that these jobs had each existed for at least twelve months. In his application he in fact relied on jobs created for no fewer than seven employees – one employed by a company called Achievess Ltd and six by a company called Sea Birds Ltd.

2. By a decision letter dated 23 September 2015 the Appellant's application was refused because of what were said to be failures in three respects to comply with the highly prescriptive requirements of the Points-Based System part of the Immigration Rules. We are now only concerned with one of them, which I can summarise as follows:

   (1) In respect of the jobs relied on the Appellant was required by para. 46 of Appendix A to the Rules to provide "the specified documents in paragraph 46-SD".

   (2) Paragraph 46-SD (h) (iv) specified "duplicate payslips or wageslips" (I will from now on refer simply to "payslips") for each worker relied on.

   (3) It was claimed in the decision letter that he had not provided payslips in respect of the seven jobs.

3. It is the Appellant's case that he had in fact satisfied the requirements of the Rules in full. He commenced judicial review proceedings in the Upper Tribunal. Although no representative is named in the claim form the grounds were drafted by a firm of solicitors, Malik Law Chambers ("MLC"). They included, at para. 12, an averment that the Applicant had provided wage slips in relation to five of the seven employees. It is a puzzle why the averment is not made in relation to all seven; that point has not been explained or explored at any stage in the proceedings, but it is not necessary for our purposes to resolve it.

4. The Secretary of State in her Summary Grounds of Defence pleaded, at para. 20:

> "The Respondent has not received any wageslips or payslips for any of the employees whose employment is relied upon. The decision letter of 23 September 2015 plainly confirms that no payslips or wageslips have been received. Furthermore, the Respondent provides a copy of all the evidence received, and the CID note with detail consideration of all the evidence provided."

5. The reference to providing a copy of all the evidence is to the Secretary of State having filed with the Summary Grounds a copy of the Appellant's original application for leave to remain and what is said to be all the material provided with it. It is

common ground that the material filed by the Secretary of State with the Tribunal did not included copy payslips. However, I should note at this stage that the application form incorporates a table (table 3b2) which was required to be completed "to confirm the evidence provided to demonstrate the two full time jobs". The table has a number of columns, the last of which is headed "Pay statements to cover total period of employment created for each worker: Yes/No": it is clear (subject to one point to which I shall have to return) that that column was asking whether payslips had been provided. In the form as submitted this column was completed with a typed "YES" for five employees. However, since the Appellant was relying on seven employees a re-typed version of the table was also included: this had "Yes" in the relevant column for all seven. It is the Appellant's case that he was assisted in the preparation of the form by his accountants; although there is no evidence as to precisely what role they took, the re-typed version bears the stamp of a firm called A.K Saha.

6. The reference in the Summary Grounds of Defence to "the CID note" is to a printout of the contemporary GCID [General Case Information Database] Case Record Sheet. This shows the caseworker going systematically through the various requirements which the Appellant had to satisfy. In relation to the requirement to have created two full-time equivalent jobs, the caseworker goes through the material submitted in relation to each of the employees relied on. In fact, the copy supplied to us only covers four of them; this point too has never been explained or explored but it does not matter for present purposes. In relation to all four a note is made, in marginally different language each time, that no payslips have been provided.

7. Permission to apply for judicial review was refused on the papers by UTJ Smith. She indicated that she might have been disposed to grant permission as regards two of the alleged failures (of which it is unnecessary to give details), but she found that the Secretary of State's decision was nevertheless unchallengeable because of the failure to submit payslips. She took the view that it was clear that these had not been submitted, notwithstanding the statement in table 3b2 that they had been, for three reasons:

   (1) They were not in the bundle submitted by the Secretary of State.

   (2) There had been no application for an administrative review on the basis that they had been supplied.

   (3) The Appellant himself had not even now provided copies of the wage slips.

8. The Appellant renewed his application at an oral hearing, at which both he and the Secretary of State were represented. UTJ Kekic granted permission, saying simply:

> "Based on the contents of the application form and the generality of the Respondent's summary of the documents received from the Applicant, it is arguable that the specified documents (wageslips) were provided with the Applicant's Tier 1 application."

She did not explicitly give permission on the two points which UTJ Smith had thought might be arguable. In some circumstances this might have created a procedural problem, but as things have turned out that is fortunately not the case here.

9. The case came on for hearing before UTJ Freeman on 7 November 2016. Both the Appellant and the Secretary of State were represented, in the Appellant's case by Mr Mohammed Aslam of counsel. We have a transcript of the hearing, from which it is clear that Mr Aslam had been instructed at very short notice. It also appears from the transcript that he understood that he was appearing on a direct access basis, though he has since told the Appellant's current solicitors that that was a misunderstanding and that his instructions had come from MLC. In addition to the materials lodged with the Summary Grounds, as referred to above, the Appellant had, at the last minute and in breach of a timetable set by UTJ Kekic, submitted a full bundle of copies of the payslips which he said had been included with the original application. There was no witness statement or oral evidence from either party, save to the purely formal extent that the averments in the Claim Form and Summary Grounds were covered by statements of truth, in the one case by the Appellant and in the other by a solicitor at the Government Legal Department.

10. It was agreed between counsel that the only issue for the Tribunal was the straightforward factual question of whether the payslips had been included. The parties relied entirely on the documents. It was agreed that the Tribunal need only look at the entries in the table and in the GCID record relating to one of the employees relied on, Ms Jaffrey, since there were no material differences between the cases of any of the employees.

11. In a short ex tempore judgment UTJ Freeman dismissed the claim, holding that:

> "It has not been shown as more likely than not that the missing documents for Shareen Jaffrey and the other employees were sent in as claimed."

He gave two reasons for that conclusion:

(1) He said, like UTJ Smith, that the Appellant had not applied for an administrative review. He observed:

> "Such an application might not have succeeded if the Respondent had taken a stand on what she said had been sent in, but at least it would have allowed the earliest and best investigation possible."

(2) He relied on the fact that the GCID recorded that the wage slips had not been submitted. He observed that in *R (Mahmood) v Secretary of State for the Home Department* [2016] UKUT 57 (IAC) UTJ Grubb had approved the use of the GCID as a source of evidence.

12. The Appellant's grounds of appeal to this Court were drafted without legal assistance. However, when they were considered on the papers McCombe LJ noted that they appeared to raise similar points to those on which permission to appeal had been granted in three pending appeals relating to so-called "evidential flexibility". He granted permission and directed that the appeal be listed as soon as possible after those appeals were decided. Judgment was given in the lead evidential flexibility cases (in fact a slightly different selection) in January this year – see *Mudiyanselage v Secretary of State for the Home Department* [2018] EWCA Civ 65, [2018] 4 WLR 55.

13. Before us the Appellant has been represented by Mr Philip Nathan of counsel. He has helpfully distilled the pleaded grounds of appeal into two grounds. The first is that UTJ Freeman was wrong on the evidence before him to find that the payslips had not been provided. The second is that, even if they had not been, the case fell within the terms of paragraph 245AA of the Immigration Rules, which provides for a degree of evidential flexibility, and the Secretary of State should accordingly have drawn the failure to include the payslips to the Appellant's attention and given him the opportunity to remedy it. Mr Nathan also sought permission to add a third ground, which I will not seek to summarise here but to which I return at paras. 24-25 below. I take those grounds in turn.

(1) WAS THE UT's FACTUAL FINDING WRONG ?

14. Although these were judicial review proceedings the dispositive issue was a pure question of fact: were the payslips provided with the application or not ? Although it is fair to say that since there was no oral evidence we are in as good a position to decide that question as the Judge, the fact remains that we should only allow the appeal if we are persuaded that his finding was wrong.

15. If I had been in the Judge's position I would have reached the same conclusion as he did; and in any event I cannot say that his decision was wrong. He had no witness evidence (apart from the statements of truth), and the documentary evidence before him was extremely limited. It consisted, on the one hand, of the "Yes" entries in the relevant column on table 3b2 and, on the other, of the statements in the GCID record. It is fair to conclude that the Appellant or his accountants had assembled the relevant payslips for despatch, but what must have happened is either that they had then been carelessly left out of the package that was actually sent or that they had been carelessly lost at the Home Office between initial receipt and the processing by the caseworker. Neither possibility seems to me inherently more plausible than the other, but I think the balance has to be struck in favour of the Secretary of State, for the following reasons.

16. First, and primarily, it is the rule that where there is a dispute on the evidence in a judicial review application, the facts stated in the defendant's evidence will be accepted unless there has been an application to cross-examine the relevant witness or the evidence "cannot be correct". That rule was very recently re-stated by this Court in a case where the dispute was very similar to that before us: *R (Safeer) v Secretary of State for the Home Department* [2018] EWCA Civ 2518 (see per Nicola Davies LJ at paras. 16-19). (This decision is rather more relevant than that of *Mahmood* to which the Judge referred.) It follows that if the Appellant had wanted to challenge the accuracy of the GCID record he could and should have applied to cross-examine the responsible case-worker. In practice it was equally important for him to put in evidence statements from himself and/or his accountants saying precisely what had happened about the compilation and despatch of the application and supporting material (or, if they could not remember, at least what they were likely to have done, and why). Neither of those steps were taken. In the circumstances of this case, the absence of any particularised evidence from the Appellant seems to me to be for all practical purposes fatal.

17. I have to add that, even without the assistance of that rule, I am inclined to think that it is more likely that the mistake occurred at the Appellant's end than the

Respondent's. I accept, of course, that the application was important for him, and one would expect him to have taken great care to avoid mistakes; also that the Home Office handles a large number of applications and mistakes are bound sometimes to happen. But those considerations are, I think, outweighed by the fact that there were other, admitted, omissions in the material supplied, which were the subject of the other two reasons for rejection initially given. But this is very much a secondary point compared with the first, and I need not develop it further.

18. Mr Nathan drew attention to the fact that the caseworker could be seen himself or herself to have made an error in examining this aspect of the application, since the GCID entry records that Ms Jaffrey had worked 30 hours per week but then, nonsensically, answers "Yes" to the questions whether this was in excess of the Working Time Directive limits and whether there was evidence of an opt-out. He submitted that this error undermines the reliability of the record as a whole, and in particular the entries showing that no wage-slips had been submitted. This is a point that could have been pursued with the caseworker in cross-examination if their attendance had been required. I am bound to say that I am not sure how much it would have helped the Appellant, since to lose the payslips is an error of a different character from the making of a loose entry about the Working Time Directive. But in any event it certainly does not meet the high bar required by the rule enunciated in *Safeer* for rejecting the defendant's evidence without cross-examination: it does not show that the record that the payslips had not been provided "cannot be correct".

19. Mr Nathan also referred to a report published in 2012 by the Chief Inspector of Borders and Immigration which found that in the year ending on 31 March 2012 there were several cases of documents submitted by students with Tier 4 applications being lost in the Border Agency's UK office: see para. 5.18 of the report. He accepted that Mr Aslam had not put this report before UTJ Freeman, but he submitted that it showed that there was a real problem with lost documents and that the Secretary of State was obliged by her duty of candour to draw it to the Tribunal's attention. That submission is hopeless. The report concerned a period three years before that with which we are concerned and a different class of application, and the Inspector in fact in a subsequent paragraph (para. 5.21) describes the number of lost documents as "low in comparison with the overall number of applications". In truth it shows no more than what the Judge would have appreciated in any event, namely that any large organisation occasionally loses documents.

20. As we have seen, both UTJ Smith and UTJ Freeman attached importance to the fact that the Appellant did not seek an administrative review. I agree that that would probably have been a good idea, because, as UTJ Freeman observed, it would have prompted an early investigation and if (contrary to his finding on the balance of probabilities) the payslips had been submitted with the original application they might have been found. But I do not regard the point as being of central importance. As UTJ Freeman also observed, the review procedure does not itself allow for the submission of missing documents, and in the end the Tribunal had to decide for itself what had been included first time round.

(2) EVIDENTIAL FLEXIBILITY

21. I can take the legal background shortly because the ground has been cleared by *Mudiyanselage*. It was confirmed by our decision in that case that (as at the date with

which we are concerned) where an applicant under the Point Based System fails to supply information or documents required by the Rules the Secretary of State is only obliged to give them the opportunity to correct the error in the very specific circumstances set out in paragraph 245AA of the Rules.

22. Mr Nathan relied on two of the heads under paragraph 245AA – (b) (ii), which applies where "a document is in the wrong format (for example, if a letter is not on letterhead paper as specified)", and (d) (i), which is in substantially identical terms but without the parenthesis: in the former case Secretary of State may ask for the missing documents, and in the latter he may overlook the omission. He referred to schedules prepared by the Appellant or his accountants, and included with the application, which gave details of the monthly gross and net pay received by the relevant employees over the tax year. He said that these should be regarded as payslips, albeit in the wrong format, because they contained the same information as the payslips.

23. That submission does not correspond to any of the original judicial review grounds: those did refer to paragraph 245AA, but only in the context of one of the other defects relied on by the Secretary of State. Nor was it advanced by Mr Aslam in the Upper Tribunal, and it was accordingly not considered by UTJ Freeman. However, I need not consider whether those reasons prevent it being raised now, since in my view it is bad in any event. Even if the schedules did contain the same information as the payslips, which they appear to do in the case of Ms Jaffrey at least, they are a wholly different kind of document. What the Rules require, for understandable reasons, is duplicates of the actual payslips provided to the employees in question. This is a "wrong document", not a "wrong format", case. There is no essential difference from the case of *Igwe*, considered at para. 118 of the judgment in *Mudiyanselage*. In that case the appellant had failed to supply a Current Appointment Report from Companies House but said that the same information was available from other documents submitted and that the case could be regarded as falling within paragraph 245AA (b) (ii). The argument was rejected.

(3) THE NEW POINT

24. As mentioned above, Mr Nathan sought permission to rely on a new ground of appeal. He drew attention to the fact that the relevant column in table 3b2 refers to "pay statements". He said that that was not the same as "payslips", and that the documents to which I have referred at para. 22 above can properly be described as "pay statements". On this basis, of course, the form would not reflect the requirements of the relevant rule, since paragraph 46-SD (h) (iv) refers in terms to "duplicate payslips or wageslips"; but Mr Nathan submitted that it would plainly be unfair to reject an application which complied with the requirements of the official form on the basis that the Secretary of State had not ensured that those requirements reflected the rules. He told us that since the dates with which we are concerned the application form has been changed and the equivalent to table 3b2 is a series of boxes: the relevant box refers in terms to "payslips".

25. Mr Cornwell objected to permission being granted to take this point being raised now for the first time. We agreed to hear argument on it, without prejudice to whether we would admit it in due course. I am satisfied that the point is bad, and I would refuse permission on that basis. The starting-point is that "pay statements" is in fact the correct statutory name for what are generally referred to as payslips: see section 8 of

the Employment Rights Act 1996. I suspect that all accountants and book-keepers, and maybe most employers too, know that. Even if some applicants filling in the form might find the term unfamiliar it would not be difficult for them to obtain clarification. But even if the language used is potentially misleading the Appellant could only have got a case on its feet on this basis if he had adduced evidence that he and/or his accountants were in fact misled. No such evidence was adduced: worse, the Appellant's entire case in the Tribunal was premised on the basis that he and they did know that it was payslips that were required, since it was his case that they had been provided.

CONCLUSION

26. For those reasons I would dismiss this appeal. I have real sympathy for the Appellant because it is very hard that the system allows for no opportunity to correct administrative errors of the kind which the Upper Tribunal found that he made here. But judges have repeatedly, albeit reluctantly, concluded that the Secretary of State is within his or her rights to have an inflexible system of this kind, in which applicants have to take the consequences of their own mistakes: see the passages quoted at paras. 37, 43 and 51 of my judgment in *Mudiyanselage* and my own observations and those of the President of the Queen's Bench Division at paras. 54-56 and 145.

27. I should, finally, mention that the Appellant sought to put in evidence for the purpose of the appeal a lengthy witness statement complaining of the poor service and bad advice given to him by MLC, which has since closed as a result of action by the Solicitors Regulation Authority. It is not for us to express any view about the quality of their service to the Appellant. It is clear from my reasoning above that a fundamental problem for his case is the absence of any proper evidence adduced in the Tribunal; but we do not know how that came about or what helpful evidence could in fact have been given. If it is indeed the case that he has been let down by his lawyers that reinforces the sympathy that I feel; but it cannot be a basis for allowing this appeal.

Lord Justice Simon:

28. I agree.

Lord Justice Coulson:

29. I also agree.