



Neutral Citation Number: [2019] EWCA Civ 368

Case No: C7/2016/4663

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
MRS JUSTICE WHIPPLE DBE
JR/14157/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2019

Before :

LORD JUSTICE FLOYD
and
LORD JUSTICE HADDON-CAVE

Between :

THE QUEEN (on the application of)
SHAH

Appellant

- and -

THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Respondent

Mr Michael Biggs (instructed by Mayfair Solicitors) for the Appellant
Mr Steven Kovats QC (instructed by Government Legal Department) for the Respondent

Hearing date: 20th December 2018

APPROVED JUDGMENT

LORD JUSTICE HADDON-CAVE:

Introduction

1. The issue in this appeal is whether an application by the Appellant for Tier 4 status was made under the “*online application process*” as defined in rule A34 of the Immigration Rules or under the “*specified application form*” process as defined in rule 34A of the Immigration Rules.
2. On this question is said to turn the lawfulness of the Respondent (“the SSHD”)’s decision letter dated 19th August 2014 treating the Appellant’s application for Tier 4 status as invalid.

Background Facts

3. The Appellant is a national of Pakistan. He was born on 16th January 1976. He entered the UK on 10th June 2009 with leave to enter valid from 7th May 2009 to 31st August 2010. The Appellant subsequently obtained further leave to remain valid until 25th July 2014. However, on 6th March 2014, the SSHD wrote to the Appellant informing him that, in view of his non-attendance at his course of studies, the SSHD was curtailing the Appellant’s leave to remain pursuant to paragraph 323A(a)(ii)(2) of the Immigration Rules until 5th May 2014 and that before such date the Appellant must either leave the UK or submit a fresh application for leave to remain.
4. On 3rd May 2014, the Appellant applied for leave to remain as a Tier 4 (general) student migrant. He used a website-based application process described by the SSHD as a “*print and send*” application process. He completed the 12-page application form by filling it in electronically on-line, printed it out, signed it by pen and sent it by post to the SSHD at the requisite address (namely “*UK Visas & Immigration, Tier 4, PO Box 500, Durham DH99 1WJ*”) specified on the last page of the form, together with a number of accompanying documents including a college offer letter and a copy of his passport.
5. On 8th May 2014, the SSHD wrote to the Appellant acknowledging receipt of the Appellant’s application (“*Form T4M(W)*”) and informing the Appellant that his application would be passed on to the casework unit and that he would receive further correspondence from the SSHD giving him instructions for the next steps in making his application. The address which the SSHD used for this and all previous and subsequent correspondence with Appellant was the address which the Appellant had specified in his application form (namely, “*57 Stainforth Road, Ilford, Essex IG2 7EL*”).
6. On 12th May 2014, the SSHD wrote to the Appellant regarding the submission of biometric information in the following terms:

“As part of your application you must have your biometric information (scanned fingerprints and photograph) taken.

Next Steps:

You must have your biometric information taken as soon as possible, which should be no later than 15 working days from the date of this letter”

7. The letter went on to explain what the Appellant needed to do to obtain his biometric information, namely by taking the letter and a form of identity with him to a Post Office and paying the requisite fee of £19.20 for the service. The letter explained that there was no need to book an appointment to provide biometric information; applicants could simply visit a participating Post Office and wait in line. The letter also attached a separate document containing a barcode with the legend: *“WHEN ENROLLING YOUR BIOMETRICS AT A POST OFFICE LTD BRANCH YOU MUST BRING THIS PAGE WITH YOU”*.
8. On 20th June 2014, the SSHD sent a reminder to the Appellant “to enrol your biometric information within the given timeframe”.
9. On 24th June 2015, the Appellant emailed the SSHD stating that he had not received any letter about biometric information.
10. On 30th June 2014, the SSHD wrote to the Appellant in similar terms to the earlier letter of 12th May 2014 requiring his biometric information within 15 working days and attaching another barcode document.

11. On 28th July 2014, the SSHD wrote again to the Appellant in the following terms:

“Following your recent application on form Tier 4 you should have received a biometric enrolment letter telling you that, as part of the application process, you had to have your biometric information (scanned fingerprints and photograph) taken.

The letter informed you that you had 15 working days in which to have your biometric information taken. Our records show that you failed to comply with this instruction without providing us with a reasonable explanation.

Next Steps:

You now have 17 working days (from the date of this letter) in which to visit a participating Post Office to have your biometric information taken. Your application may be rejected as invalid if you do not provide your biometric information.”

12. The letter included similar information to the earlier letters of 12th May 2014 and 30th June 2014 regarding the process for enrolling his biometric information at a Post Office and attaching another barcode document.
13. On 19th August 2014, the SSHD wrote to the Appellant stating that his Tier 4 application was being returned because it was invalid (and inviting the Appellant to submit a further application). The letter went on to explain in detail the reasons why the application was invalid in the following terms:

“Your application must meet the requirements of paragraph 34A of the Immigration Rules (HC395), as well as the Immigration and Nationality (Fees) Regulations and The Immigration (Biometric Registration) Regulations. The relevant requirements

are listed below and a cross in a box below shows that you have not met that requirement.

- You must attend at a participating Post Office, to provide your biographical and biometric information, by the dates specified in any subsequent notification we send you following receipt of your application, or as otherwise agreed by us.*

Your application is invalid because it does not meet one or more of the above requirements and we are therefore returning it to you. We have placed a cross in the relevant box(es) above to show which requirement(s) you have not met.

We sent you a letter on date and a further reminder letter on date stating that you must attend at a participating Post Office, for you to provide your biometric information as part of your application for leave to remain in the United Kingdom. Our records show that to date you have not attended at a participating Post Office, within the timescales stated in the biometric notification letter and you have not provided a reasonable explanation for this, therefore your application is invalid.”

14. The Appellant challenged the SSHD’s decision of 19th August 2014 by way of judicial review.
15. The Appellant claimed that he only received the SSHD’s letter of 30th June 2014 and did not receive any of the SSHD’s previous letters. However, the Appellant has produced no evidence to support that assertion and there is no reason to suppose that the Appellant did not receive all of the above letters or evidence. I proceed on the basis that he did receive all such letters.

The Legislation Framework

The Immigration Rules

16. The relevant paragraphs of the Immigration Rules then in force, namely paragraphs A34, 34, 34A, 34B, are set out in full in an Appendix to this judgment.

The Immigration (Biometric Registration) Regulations 2008

17. The Immigration (Biometric Registration) Regulations 2008 provide as follows:

“3. – Requirement to apply for a biometric immigration document

(1) [A] person subject to immigration control must apply for the issue of a biometric immigration document where he –

- (a) satisfies the condition in paragraph (2); or*
- (b) is a person falling within paragraph (3).*

(2) *The condition is that whilst in the United Kingdom the person makes an application –*

(a) for limited leave [to enter or remain] ...

...

(5) Where a person is required to apply for a biometric immigration document, that application must be made on the form or in the manner specified for that purpose (if one is specified) in the immigration rules.”

“Consequences of a failure to comply with a requirement of these Regulations

(1) Subject to paragraphs (3) and (4), where a person who is required to make an application for the issue of a biometric immigration document fails to comply with a requirement of these Regulations, the Secretary of State –

(a) may take any, or any combination, of the actions specified in paragraph (2)...

...

(3) Where a person is required to apply for a biometric immigration document under [regulation 3(2)(a) or (b) or regulation 3A(2)(a) or (b)] or as a dependant of [such] a person [...] and fails to comply with a requirement of these Regulations, the Secretary of State –

...

(b) must treat the person’s [application for leave to enter or remain or for entry clearance] as invalid ...”

Tier 4 Applications

18. Ms Kelly Thompson, Senior Executive Officer in the Home Office, explained the background and history to Tier 4 leave to remain applications, of which the SSHD receives some 100,000 a year. She explained that there was, originally, only one way of making Tier 4 applications which involved downloading the appropriate specified form as a PDF from the Home Office website, completing the form by hand and submitting it by post, with supporting documents, to the SSHD (the “*original application*” method).
19. In October 2012, the Home Office introduced a second method of making Tier 4 applications, namely what was referred to as the “*print and send*” method, which involved applicants filling in the application form online and then printing and sending the application form by post, with supporting documents, to the SSHD (the “*print and send*” method). This method aimed to simplify the application process and meet some of the recommendations of the court in *R (Basnet) v. SSHD* [2012] UKUT 113. The “*print and send*” method proved increasingly popular with applicants. It also had the benefit of helping people transition to a more digital procedure.

20. In June 2013, the Home Office introduced a third method of making Tier 4 applications, namely the “*online application process*” and discontinued the “*original application*” method. The “*online application process*” method allowed applicants to fill in the application form online and also transmit it to the SSHD online, although supporting documents still had to be sent to the SSHD by post.
21. In August 2014, the “*print and send*” method was discontinued, leaving the “*online application process*” method as the only method for Tier 4 applications.
22. Thus, at the relevant time when the Appellant made his Tier 4 application in May 2014, there were two Tier 4 application methods operating, namely the “*print and send*” method and the “*online application process*”.

The Immigration Rules

23. The choice of two options for Tier 4 applications at the time was reflected in the Immigration Rules then in force. Paragraph A34 of the Immigration Rules provided:

“A34. An application for leave to remain in the United Kingdom under these Rules must be made either by completing the relevant online application process in accordance with paragraph A34 (iii) or by using the specified application form in accordance with paragraphs 34A to 34D. [Emphasis added]

(i) “The relevant online application process” means the application process accessible via the website of the United Kingdom Border Agency and identified there as relevant for applications for leave to remain for the immigration category under which the applicant wishes to apply.

(ii) “Specified” in relation to the relevant online application process means specified in the online guidance accompanying that process.”

24. Accordingly, pursuant to Rule A34, Tier 4 applicants had two alternative ways to make an application for leave: either (i) by completing “*the relevant online application process*” as defined, or (ii) by using the “*specified application form*” as defined. (The SSHD submits that the above “*print and send*” method equated to the “*specified application form*” option referred to in Rule A34.)

(i) The “online application process”

25. Rule A34(iii) laid down the following specific requirement under the “*online application process*” as regards the provision of biometric information:

“A34(iii)When the application is made via the relevant online application process:

...(b) if the online application process requires the applicant to provide biometric information that information must be provided as specified.

...”

26. Rule A34(iv) laid down the following consequences of non-compliance with Rule A34(iii):

“A34(iv) Where an application for leave to remain in the United Kingdom is made by completing the relevant online application process, the application will be invalid if it does not comply with the requirements of paragraph A34(iii) and will not be considered.”

27. The Home Office website www.ukba.homeoffice.gov.uk explained that an applicant using the “online application process” must send the application electronically via the internet to the Home Office and it could not be sent by post.

(ii) The “specified application form” method

28. Rule 34 provided that an application form was “specified” when:

“(i) it is posted on the website of the United Kingdom Border Agency of the Home Office,

(ii) it is marked on the form that it is a specified form for the purpose of the immigration rules,

(iii) it comes into force on the date specified on the form and/or in any accompanying announcement.”

29. Rule 34A laid down requirements for applications using the “specified application form” method:

“34A Where an application form is specified, the application or claim must also comply with the following requirements:...

(iv) if the application form and/or related guidance notes require the applicant to provide [biometric]¹ information, such information must be provided as specified.

(v) an appointment for the purpose stated in subparagraph (iv) must be made and must take place by the date specified in any subsequent notifications by the Secretary of State following receipt of the application, or as agreed by the Secretary of State.”

(vi) where the application or claim is made by post or courier or submitted in person:

the application or claim must be accompanied by the photographs and documents specified as mandatory [etc....]”

¹ The text of the archived version of Rule 34A reads “biographical information” but is common ground that this is an obvious textual error and it should read “biometric information”.

30. Rule 34B provided that:

“34B Where an application form is specified, it must be sent by prepaid post to the United Kingdom Border Agency of the Home Office, or submitted in person at a public inquiry office to the United Kingdom Border Agency of the Home Office save for the following exceptions [...]”

31. Rule 34C provided the following consequence of non-compliance:

“34C Where an application or claim in connection with immigration for which an application form is specified does not comply with the requirements of paragraph 34A, such application or claim will be invalid and will not be considered.”

32. The Home Office website www.ukba.homeoffice.gov.uk explained that an applicant using the “*print and send*” method (i.e. the “*specified application form*” method), could fill in the form and make payment online, but the form had to be printed out and sent or couriered to the Home Office, or applications could be made in person.

33. It will be noted that there were similar provisions for both “*the relevant online application process*” and “*specified application form*” methods as regards (a) the necessary provision of biometric information (see Rule A34(iii)(b) and Rule 34A(iv) respectively) and the consequences of non-compliance with those provisions, namely invalidity (see Rule A34(iv) and Rule 34C respectively).

34. The SSHD took the view, unsurprisingly it might be thought, that the Appellant had used the “*print and send*” method, having filled out the “*specified application form*” and then printed, signed and sent the form to the Home Office by post.

Grounds

35. The Appellant sought Judicial Review of the Respondent’s decision to reject his application. Permission was given on two grounds:

- (1) The “*print and send*” method was actually the “*online application*” and not the “*specified application form*”, hence the Respondent was proceeding on the wrong legal basis when rejecting the application.
- (2) The Respondent retained, and should have exercised, her discretion to use the biometric data from his old applications rather than require the submission of new ones.

36. Whipple J dismissed the application on both grounds. The single Lord Justice granted permission to appeal on the “*print and send*” issue but refused it on the discretion issue.

Judgment below

37. Whipple J held that the Appellant’s argument that the “*print and send*” method used by the Appellant was an “*online application*” was unsustainable. Her reasoning is found at paragraphs [18]-[27] of her Judgment and can be summarised as follows.

38. First, the Appellant and anyone else using the “print and send” process would have seen, at the point they were about to access the form and complete it, the following legend in the middle of the screen:

“This application is a specified application form for the purposes of paragraph 34 of the Immigration Rules”.

39. Second, at a later stage in the process when an applicant was about to “*print and finish*”, the process is described on the screen as:

““Print and send” application for leave to remain...”

40. Third, after the form has been submitted electronically and payment has been made, a screen appears with the following information “*About your application*”:

“...you have not yet submitted your application. To do this, you must send the official document to us, as detailed on that document”.

41. Fourth, the Appellant did, in fact, print off the form, and signed and dated it, and sent this hard copy marked “*Tier 4 (General) April 2013*” to the Home Office by post.

42. Fifth, the fact that payment was made on-line was unsurprising and not material to the characterisation of the process as a whole. Whipple J continued (at paragraph [25]):

“This was a single process and cannot be split into two, with the first part being “on-line” and the second part being “print and send” – that would not reflect the reality. None of the forensic points made by Mr Biggs, pointing to the use of the words “on-line” in connection with the use of this form, and other fragments of evidence which he suggested showed that this was an on-line process, came close to displacing the obvious inference, that this was the use of a “specified form” for the purposes of rule 34. It was not an on-line application.”

43. Sixth, Whipple J agreed with an earlier decision of the President of UTIAC, McCloskey J, in *R (on the application of Wasif) v Secretary of State for the Home Department (rule 34 – “print and send”)* IRJ [2015] UKUT 0270 (IAC) who held that under paragraphs 34A – 34K of the Immigration Rules there were two options for the submission of completed Tier 4 leave to remain applications. The first option, the “*online application*”, required the submission of the application form online and the provision of supporting documents by post to the Home Office. The second option, “*print and send*”, required the applicant to print the completed form and send it by post, with any accompanying documents, to the Home Office. The “*print and send*” instruction does not amount to an on-line application.

44. Seventh, in any event, Whipple J held that, if the SSHD had a residual discretion to use any biometric information provided by the Appellant at an earlier occasion, she was not required to exercise it and was plainly acting within her power in treating the application as invalid as required by regulation 23(3) of the regulations.

45. I pause to correct a point of detail. Whipple J suggested in paragraph [22] of her judgment that the form is “submitted electronically” at the stage when payment has been made on-line. This is not, in fact, correct. Unlike the “*online application process*”, at no stage in the “*print and send*” method is the application form intended to be submitted electronically. Indeed, as the instructions make expressly clear, the “*specified application form*” had to be printed out and sent by post to the Home Office, together with the accompanying documents. This correction to the Judge’s summary of the facts only serves to strengthen her conclusion in paragraph [25], namely this was a “*print and send*” application not an “*on-line*” application.

Issues

46. The appeal raises the following two issues, a substantive issue and a materiality issue:
- (1) Substantive issue: Whether, on a correct application of the Immigration Rules, the Appellant’s Tier 4 leave to remain application on 3rd May 2014 was an “*on-line*” application as the Appellant contends, or a “*specified application form*” application as the SSHD contends.
 - (2) Materiality: Whether (if the Appellant is right about the first issue) the SSHD’s error was material, *i.e.* whether the SSHD’s assumption in her decision letter of 19th August 2014 that the Appellant’s application did not meet the requirements of paragraph 34A of the Immigration Rules was material.

Submissions

Appellant’s submissions

47. In his able submissions on behalf of the Appellant on the first issue, Mr Michael Biggs put his case both positively and negatively. He submitted, on the one hand, that the “*print and send*” application used by the Appellant positively met the definition of an “*on-line application process*” in paragraph A34(i) of the Immigration Rules. He also submitted, on the other hand, that by contrast the “*print and send*” application used by the Appellant did not meet the requirements for the “*specified application form*” method laid down by paragraph 34 of the Immigration Rules. He made essentially five main points as follows.
48. First, it was apparent from the opening page of the Home Office website which applicants had to access that they were being asked to conduct an on-line application because the page contained the introductory words “*Online application for leave to remain (permission to stay) in the UK, and a biometric residence permit, as a Tier 4 Student or as a dependent of a Tier 4 student.*”
49. Second, the SSHD’s evidence was that there was not much, if any, distinction between the “*online*” and “*print and send*” application methods; both for instance required payment on-line and accompanying documents to be sent by post.
50. Third, with the exception of the printing and sending, the application “*print and send*” application process, including payment, was essentially online; and whilst it was true that it might be necessary to submit documents by post, this was also the case for what the SSHD accepted was the “*online process*”.

51. Fourth, the “*print and send*” method relied upon by the SSHD did not conform to the requirements of the Immigration Rules because the form was not marked that it was “*a specified form for the purpose of the immigration rules*” and there was no date “*specified on the form*” as to when the form came into force in accordance with paragraphs 34(ii) and (iii) of the Immigration Rules.
52. Fifth, accordingly, since the “*print and send*” process used was online and since it did not meet the requirements of paragraph 34, it has to be the “*relevant online application process*” under paragraph A34(i) of the Immigration Rules.
53. As regards the second issue, materiality, Mr Biggs submitted that the SSHD’s error was material because paragraphs 34A(ii) and (iii) of the Immigration rules imposed potentially different requirements relating to the submission of biometric information compared with paragraph A34(iii), and it was at least possible that the SSHD might have come to a different decision following the the Appellant’s failure to enrol his biometric information as requested. In particular, the SSHD might have had resort to the Appellant’s biometric information which the Appellant said was already held electronically by the SSHD. The test for materiality was set out by this Court in *R (Smith) v. North East Derbyshire PCT* [2006] EWCA Civ 1291 at paragraph [10] (s. 31(2A) of the Senior Courts Act 1981 was only brought into effect with respect to judicial review proceedings in the Upper Tribunal issued on or after 6 August 2016).

SSHD’s submissions

54. We were assisted by the written skeleton argument of Mr John-Paul Waite and the oral submissions of Mr Steven Kovats QC on behalf of the SSHD. The SSHD’s case was that the “*print and send*” method was the “*specified application form*” method and complied with all the requirements of paragraph 34; but, in any event, any error was not material because the same decision of invalidity was inevitable given the Appellant’s failure to enrol his biometric data.

Analysis

First issue: substantive issue

55. In my view, it is quite clear that the “*print and send*” method used by the Appellant was the “*specified application form*” method under paragraphs A34-34D of the Immigration Rules and it was not an “*on-line application*”. The reasons are, frankly, obvious (a) from the face of the official website and the form, (b) from what in fact the Appellant did and (c) from a sensible reading of the Immigration Rules. I expand on these points below.

(a) The website and form

56. First, the UKVI’s website showed the choices available to a Tier 4 applicant included:

“Tier 4 Student print and send application. Print and send application for leave to remain (permission to stay) in the UK, and a biometric residence permit as a Tier 4 Student or as a dependent of a Tier 4 Student.”

Tier 4 Student online application. Online application for leave to remain (permission to stay) in the UK, and a biometric residence permit as a Tier 4 Student or as a dependent of a Tier 4 Student.”

57. Second, the Appellant and anyone else using the “*print and send*” process would have seen, at the point they were about to access the form and complete it, the following legend in the middle of the screen:

“This application is a specified application form for the purposes of paragraph 34 of the Immigration Rules”.

58. Third, at a later stage in the process when an applicant was about to “*print and finish*”, the process is described on the screen as:

““Print and send” application for leave to remain...”

59. Fourth, after the form has been submitted electronically and payment has been made, a screen appears with the following information

“About your application”:

“You have not yet submitted your application. To do this, you must send the official document to us, as detailed on that document”.

(b) The Appellant’s actions

60. In my view, these instructions could not be clearer or more unambiguous. It is instructive, as Whipple J noted, that the Appellant plainly understood the process that was described and followed it.

61. The Appellant duly filled in the form on-line, printed the form, and signed and dated it (2nd October 2014).

62. The following instructions appear:

“Next steps for your application

Collate your supporting documents and post them with your official document within 15 working days to:

*UK Visas & Immigration,
Tier 4,
PO Box 500,
Durham,
DH99 1WJ*

If you use Recorded or Special Delivery, this will help us record the receipt of your document and supporting documents. Make sure that you keep the Recorded or Special Delivery number.

What happens next?

Please aim to send your documents as soon as possible following submission of your documentation. If we have not received your documents by day 5 we will send you a reminder letter.

Once we have received all the supporting documents, we will send you a biometric notification letter inviting you to enrol your fingertips and facial image, if required.”

63. The Appellant then duly sent the hard copy, together with his supporting documents, to the Home Office by pre-paid post on 3rd October 2014 and safe receipt was acknowledged.

(c) *The Immigration Rules*

64. First, the “*print and send*” method was quite obviously not an “*on-line application*” for the simple reason that the application had to be made by post and not on-line. It was an express requirement of paragraph 34B of the Immigration Rules that the completed “*specified application form*” had to be sent by pre-paid post to the Home Office. It could not be submitted on-line. Put simply, the “*print and send*” application method was what it said on the tin, *i.e.* “*print and send*”.
65. Second, the Appellant fully complied with the requirements of paragraph 34B and, having filled in the relevant “*specified application form*” on-line, printed and sent off the form to the Home Office by pre-paid post to the requisite address. Proof-of-the-pudding was, therefore, that the Appellant did precisely what it said on the tin: namely, “*print and send*” the application form to the Home Office.
66. Third, Mr Biggs’ reliance variously on (i) the words on the opening page of the website “*Online application...*”, (ii) the fact that payment was made on-line and (iii) the fact that both methods required sending additional documents by post, is not to point. He ignores, or seeks to downplay, the fundamental point that the application form itself could not be submitted on-line but had to be printed and sent by post to the Home Office. The application, therefore, was made by “*print and send*” not on-line.
67. Fourth, Mr Biggs’ submission that the electronic application form was non-compliant with paragraph 34(ii) of the Immigration Rules - because it did not itself contain a reference to the fact that it was a “*specified form*” in the body of the form - was, frankly, unreal. The words “*This application is a specified application form for the purposes of paragraph 34 of the Immigration Rules*” appear physically right beside the icon of the form which applicants are required to click on to open up the form. In my view, this was plainly sufficient to satisfy the requirements of paragraph 34(ii) of the Immigration Rules that “*it is marked on the form that it is a specified form*”.
68. Fifth, Mr Biggs’ submission that the electronic application form was non-compliant with paragraph 34(iii) of the Immigration Rules - because it did not itself contain a reference to the date when it came into force in the body of the form - was equally unreal. The words “*April 2014*” appear physically immediately beneath the form icon and on the top right of the first page of the form when one clicks on the icon and opens it, underneath the words “*Tier 4(General)*”. Nobody looking at the form could be in any doubt as to what the reference therein to “*April 2014*” was intended to be: it was clearly the date when the form was live and came into force. In my view, this is plainly

sufficient to satisfy the requirements of paragraph 34(iii) of the Immigration Rules that an application form is a specified form when “*it comes into force on the date specified on the form*”.

69. I echo Whipple J’s pertinent observation that none of the ‘forensic’ points made by Mr Biggs, come close to seeking to displace what is obvious, namely that this was a “*specified form application*” and not an “*on-line application*”.
70. For the above reasons, I endorse and uphold Whipple J’s decision on the substantive issue. I also agree with McCloskey J’s decision in *Wafi (supra)*.

Second issue: Materiality

71. In view of my conclusion on the first issue, it is not necessary to determine the second issue, materiality, which does not arise since there was no error by the SSHD.

Conclusion

72. For the reasons set out above, in my view, Whipple J was right to dismiss the Appellants’ claim for judicial review and, accordingly, this appeal should be dismissed.

LORD JUSTICE FLOYD

73. I agree.

Appendix (1)

Specified forms and procedures for applications or claims in connection with immigration

A34. *An application for leave to remain in the United Kingdom under these Rules must be made either by completing the relevant online application process in accordance with paragraph A34 (iii) or by using the specified application form in accordance with paragraphs 34A to 34D.*

- (i) *"The relevant online application process" means the application process accessible via the website of the United Kingdom Border Agency and identified there as relevant for applications for leave to remain for the immigration category under which the applicant wishes to apply.*
- (ii) *"Specified" in relation to the relevant online application process means specified in the online guidance accompanying that process.*
- (iii) *When the application is made via the relevant online application process:*
 - (a) *any specified fee in connection with the application must be paid in accordance with the method specified;*
 - (b) *if the online application process requires the applicant to provide biometric information that information must be provided as specified;*
 - (c) *if the online application process requires supporting documents to be submitted by post then any such documents specified as mandatory must be submitted in the specified manner within 15 working days of submission of the online application;*
 - (d) *if the online application process requires the applicant to make an appointment to attend a public enquiry office of the United Kingdom Border Agency the applicant must, within 45 working days of submission of the online application, make and attend that appointment; and comply with any specified requirements in relation to the provision of biometric information and documents specified as mandatory.*
- (iv) *Where an application for leave to remain in the United Kingdom is made by completing the relevant online application process, the application will be invalid if it does not comply with the requirements of paragraph A34(iii) and will not be considered.*

Notice of invalidity will be given in writing and deemed to be received on the date it is given, except where it is sent by post, in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day.

34. *An application form is specified when:*

- (i) *it is posted on the website of the United Kingdom Border Agency of the Home Office,*

- (iii) *it is marked on the form that it is a specified form for the purpose of the immigration rules,*
- (iv) *it comes into force on the date specified on the form and/or in any accompanying announcement.*

34A *Where an application form is specified, the application or claim must also comply with the following requirements:*

- (i) *Subject to paragraph A34 the application or claim must be made using the specified form,*
- (ii) *any specified fee in connection with the application or claim must be paid in accordance with the method specified in the application form, separate payment form and/or related guidance notes, as applicable,*
- (ii) *any section of the form which is designated as mandatory in the application form and/or related guidance notes must be completed as specified,*
- (iv) *if the application form and/or related guidance notes require the applicant to provide [biometric] information, such information must be provided as specified,*
- (v) *an appointment for the purposes stated in subparagraph (iv) must be made and must take place by the dates specified in any subsequent notification by the Secretary of State following receipt of the application, or as agreed by the Secretary of State,*
- (vi) *where the application or claim is made by post or courier, or submitted in person:*
 - (a) *the application or claim must be accompanied by the photographs and documents specified as mandatory in the application form and/or related guidance notes,*
 - (ab) *those photographs must be in the same format specified as mandatory in the application form and/or related guidance notes, and*
 - (b) *the form must be signed by the applicant, and where applicable, the applicant's spouse, civil partner, same-sex partner or unmarried partner, save that where the applicant is under the age of eighteen, the form may be signed by the parent or legal guardian of the applicant on his behalf,*

34B *Where an application form is specified, it must be sent by prepaid post to the United Kingdom Border Agency of the Home Office, or submitted in person at a public enquiry office of the United Kingdom Border Agency of the Home Office, save for the following exceptions:*

- (i) *an application may not be submitted at a public enquiry office of the United Kingdom Border Agency of the Home Office if it is an application for:*
 - (a) *limited or indefinite leave to remain as a sole representative or retired person of independent means*

- (ba) *limited or indefinite leave to remain as a Tier 1 (Exceptional Talent) Migrant, Tier 1 (Entrepreneur) Migrant, Tier 1 (Investor) Migrant or Tier 1 (Graduate Entrepreneur) Migrant,*
 - (b) *indefinite leave to remain as a victim of domestic violence,*
 - (c) *a certificate of approval for a marriage or civil partnership,*
 - (d) *a Tier 2, Tier 4 or Tier 5 (Temporary Worker) sponsorship licence,*
 - (e) *Indefinite leave to remain as a businessperson, investor or innovator,*
 - (f) *an extension of stay or indefinite leave to remain on the basis of long residence in the United Kingdom, or*
 - (g) *a Designated Competent Body endorsement under the Tier 1 (Exceptional Talent) category.*
- (ii) *an application may be sent by courier to the United Kingdom Border Agency of the Home Office if it is an application for:*
- (a) *limited or indefinite leave to remain as a sole representative, retired person of independent means or as a Tier 1 Migrant or Tier 2 Migrant;*
 - (b) *limited leave to remain for work permit employment, as a seasonal agricultural worker, for the purpose of employment under the Sectors-Based Scheme.*
 - (c) *Indefinite leave to remain as a businessperson, investor or innovator, or*
 - (d) *limited leave to remain as a Tier 5 (Temporary Worker) Migrant.*
- (iii) *an applicant may submit an application online where this option is available on the United Kingdom Border Agency's website*
- (iv) *an application may not be sent by pre-paid post, and must be made online, if it is an application for a Tier 2, Tier 4 or Tier 5 (Temporary Worker) sponsorship licence.”*