



Neutral Citation Number: [2019] EWCA 500 Civ

Case No: C6/2017/0456

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal (Immigration and Asylum Chamber)
Upper Tribunal Judge Kamara
JR/14899/2015 judgment of 16 November 2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2019

Before :

SIR ERNEST RYDER, SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE FLOYD
and
LADY JUSTICE ROSE

Between :

The Queen oao SAIFUL ISLAM
- and -
SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Appellant

Respondent

Stephen Knafler QC (instructed by **Westbrook Law Ltd**) for the Appellant
Zane Malik (instructed by **Government Legal Department**) for the Respondent

Hearing date: 7 March 2019

Approved Judgment

Lady Justice Rose:

1. This is an appeal against the decision of the Upper Tribunal (Immigration and Asylum Chamber) (Judge Kamara) dismissing the Appellant's judicial review claim. The Appellant sought judicial review of the Respondent Secretary of State's decision made on 7 October 2015 refusing the Applicant further leave to remain as a Tier 1 (Entrepreneur) Migrant. The appeal raises a point on the proper construction of the provision in the Immigration Rules specifying the documents that the Appellant ('Mr Islam') has to send in with his application for leave to remain in those circumstances.
2. Mr Islam is a national of Bangladesh. He was granted leave to enter the United Kingdom as a student from 22 November 2007. That leave was extended either as a Tier 4 (General) Student or as a Tier 1 (Post-Study Work) Migrant until 25 February 2013. Shortly before his leave to remain expired, Mr Islam made an unsuccessful application for leave to remain as a Tier 1 (Entrepreneur) Migrant. Once he had exhausted his rights to challenge the refusal of that application, Mr Islam made a fresh application on 17 July 2015 for leave to remain as a Tier 1 (Entrepreneur) Migrant. That application was dismissed by the Respondent with the right to seek administrative review on 7 October 2015. Administrative review was refused on 27 October 2015. Mr Islam issued a judicial review claim against that decision in the Upper Tribunal. The hearing of that claim took place before Upper Tribunal Judge Kamara and judicial review was refused in a decision dated 16 November 2016. Permission to appeal to this Court was granted by Leggatt LJ on 8 May 2018.

The relevant immigration rules

3. The grant of leave to enter and leave to remain to would-be migrant workers is determined by a points-based system set out in Part 6A of the Immigration Rules. There are five "Tiers" for different kinds of migrant workers from Tier 1 for applicants who are highly skilled workers, entrepreneurs and investors to Tier 5 for applicants who are temporary workers. An applicant for each tier must score a certain number of points to show that he has the "attributes" relevant to that Tier. The attributes needed are set out in tables in a series of appendices to the Immigration Rules showing the number of points scored by the applicant if he succeeds in showing that he has the attributes listed there.
4. The requirements for leave to remain as a Tier 1 (Entrepreneur) Migrant are set out in paragraph 245DD of Part 6A in sub-paragraphs (a) to (s). The relevant ones for our purposes are:
 - i) In sub-paragraph (b) that the applicant has a minimum of 75 points under paragraphs 35 to 53 of Appendix A relating to investment or business activity;
 - ii) in subparagraph (c) that the applicant has a minimum of 10 points under paragraphs 1 to 15 of Appendix B relating to English language proficiency;
 - iii) in subparagraph (d) that the applicant has a minimum of 10 points under paragraphs 1 to 2 of Appendix C relating to funds available to maintain the migrant.

5. Appendix A contains a table, Table 4, in which the requirements for each attribute are described in more detail together with the points available. Subparagraph (h) of 245DD provides that where the applicant is being assessed under Table 4 of Appendix A, the Secretary of State must be satisfied, amongst other things, that the applicant has genuinely established a business in the UK and continues to operate that business. Subparagraph (j) of 245DD provides that in making the assessment under subparagraph (h), the Secretary of State will assess the balance of probabilities taking into account a number of factors set out there including the evidence submitted, the viability of the business plan that the applicant is required to submit, his previous educational and business experience and “any other relevant information”. Subparagraph (m) of 245DD provides that:

“(m) The Secretary of State reserves the right to request additional information and evidence to support the assessment in (h) ... and to refuse the application if the information or evidence is not provided. Any requested documents must be received by the Secretary of State at the address specified in the request within 28 calendar days of the date of the request.”

6. The 75 points that Mr Islam needed to score to comply with the requirement in section 245DD(b) were therefore those in Table 4 of Appendix A. Generally, 25 points are available to an applicant who can satisfy requirements (a) to (d) in the first row of Table 4. However, paragraph 36B of Appendix A states that an applicant in Mr Islam’s position who is applying for leave to remain and was last granted leave to remain as a Tier 1 (Post-Study Work) Migrant will only be awarded the 25 points if he has the attributes described under the provisions in (b)(ii), (b)(iii) or (d) in Table 4. Mr Islam applied on the basis that he was entitled to 25 points under paragraph (d) in Table 4. The attributes he needed to show to pick up those points were that he was applying for leave to remain; he was last granted leave as a Tier 1 (Post-Study Work) Migrant; and he has access to not less than £50,000. He can then pick up another 25 points if he can show that the money is held in one or more regulated financial institutions and another 25 points if he can show that the money is held in and disposable in the UK, thus earning his 75 points in total.
7. Table 4 further provides that in order to score the points under (d), there are two additional requirements. Those additional requirements as they apply in Mr Islam’s case are (simplifying slightly):
- i) that since before 11 July 2014 and up to the date of his application he has been continuously engaged in business activity and has been either registered with HM Revenue and Customs as self-employed or registered with Companies House as a director of a business;
 - ii) he has been working since before 11 July 2014 and up to the date of his application continuously in a qualifying occupation and provides the specified evidence in paragraph 41-SD.
8. The way in which an applicant goes about showing that he has the attributes to be awarded the necessary points is strictly prescribed by the Rules; it is by providing the specified documents. Thus paragraph 41-SD of Appendix A lists the specified documents which the applicant must supply with his application in order to show that

he has the necessary attributes set out in Table 4 to score the 75 points needed. Paragraph 39B of Part 6A of the Immigration Rules provides:

“39B(a) Where these Rules state that specified documents must be provided, that means documents specified in these Rules as being specified documents for the route under which the applicant is applying. If the specified documents are not provided, the applicant will not meet the requirement for which the specified documents are required as evidence.

(b) Where these Rules specify documents that are to be provided, those documents are considered to be specified documents, whether or not they are named as such, and as such they are subject to the requirements in (c) to (f) below.

...

(d) Specified documents must be originals, not copies except where stated otherwise.

(e) Specified documents must contain, or the applicant must provide, full contact details to allow each document to be verified”.

9. Going back to Appendix A, the documents that are specified documents for the purposes of evidencing that the additional requirements in Table 4 as applied to an applicant for leave to remain who was last granted leave to remain as a Tier 1 (Post-Study Work) Migrant are set out in paragraph 41-SD(e). The relevant ones for the present appeal are those at paragraph 41-SD(e)(iii):

“(e) If the applicant is applying for leave to remain, and has, or was last granted, leave as a ... Tier 1 (Post-Study Work) Migrant, he must also provide the following evidence that he meets the additional requirements set out in Table 4:

...

(iii) one or more of the following specified documents covering (either together or individually) a continuous period commencing before 11 July 2014 ... up to no earlier than three months before the date of his application:

(1) advertising or marketing material, including printouts of online advertising, that has been published locally or nationally

(a) showing the applicant's name (and the name of the business if applicable) together with the business activity; or

(b) where his business is trading online, confirmation of his ownership of the domain name of the business's website.

(2) article(s) or online links to article(s) in a newspaper or other publication showing the applicant's name (and the name of the business if applicable) together with the business activity,

(3) information from a trade fair, at which the applicant has had a stand or given a presentation to market his business, showing the applicant's name (and the name of the business if applicable) together with the business activity, or

(4) personal registration with a UK trade body linked to the applicant's occupation; ...”

10. I agree with the submission of Mr Malik appearing for the Respondent that “published” here must mean “distributed” in relation to leaflets and similar hand-out material.

11. The Rules provide for what happens if an applicant fails to submit all the specified documents with his application. In general, as already mentioned, paragraph 39B(a) of Part 6A will operate to treat the applicant as not having met the requirement to which the specified documents are directed. However, the Secretary of State has a limited power to ask the applicant to make good any deficiency in the documents provided. For the purposes of this appeal the relevant paragraph is paragraph 245AA which was inserted into Part 6A of the Immigration Rules with effect from 6 September 2012. Paragraph 245AA provides so far as relevant:

“245AA. Documents not submitted with applications

(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).

(b) If the applicant has submitted specified documents in which:

(i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);

(ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(iii) A document is a copy and not an original document; or

(iv) A document does not contain all of the specified information;

the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents.

The requested documents must be received at the address specified in the request within 7 working days of the date of the request.

(c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State 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.

(d) If the applicant has submitted a specified document:

(i) in the wrong format; or

(ii) which is a copy and not an original document; or

(iii) which does not contain all the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) the website of the organisation which issued the document, or

(3) the website of the appropriate regulatory body;

the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. ...”

12. Thus where there is a deficiency in the documents provided by the applicant, the Secretary of State can ask for the correct documents to be sent or can, exceptionally waive the deficiency and grant the application.

Mudiyanselage

13. The leading authority on the operation of the points-based system for migrants in the Immigration Rules is *Mudiyanselage and others v The Secretary of State for the Home Department* [2018] EWCA Civ 65 (*‘Mudiyanselage’*). Underhill LJ (with whom Sir Colin Rimer and Sir Brian Leveson P agreed) considered in particular the extent of the “evidential flexibility policy” or ‘EFP’ adopted by the Secretary of State to allow an applicant to correct any mistakes in the documents accompanying the application. Underhill LJ set out the evolution of the points-based system since 2009 when the need for some evidential flexibility was first recognised by a process instruction addressed to the caseworkers processing applications. His conclusion having surveyed the different versions of the relevant provisions and the case law considering them was that there is no longer a general policy to allow correction of minor errors. Evidential flexibility will only apply in the particular cases provided for by paragraph 245AA: [54]. He recognised that the reduced scope for flexibility

increased the potential for harsh outcomes. He went on (referring to the points-based system as ‘PBS’) to say that the ‘clear message’ from the authorities he had cited was that:

“56. ... occasional harsh outcomes are a price that has to be paid for the perceived advantages of the PBS process. It is important not to lose sight of the fact that the responsibility is on applicants to ensure that the letter of the requirements of the PBS is observed: though that may sometimes require a good deal of care and attention to detail, because of the regrettable complexity of the Rules, it will normally be possible to get it right.”

14. Underhill LJ in *Mudiyanselage* then turned to consider, under the heading “*When is a specified document not a specified document?*”, the circumstances in which paragraph 245AA applies, namely when does a document submitted stray so far from what is required that it cannot properly be described as a specified document at all so that the deficiency in the document cannot be corrected or waived. How much information can be omitted from the submitted document for it still to be a specified document for the purposes of paragraph 245AA(b)(iv) or (d)(iii)? Underhill LJ said at [58]:

“58. ... Identifying exactly what that phrase is intended to cover needs some unpacking. It cannot have been intended that a document that simply showed none of the specified information at all would be covered by the rule. If, to take an extreme example by way of illustration, the requirement were that the document showed that an applicant had a PhD but what was submitted showed instead that he or she had only an MA, that could not sensibly be described as a case where the document “did not contain all of the required information”: it did not contain the essential information required and would simply be the wrong document. That is common sense, but it is reinforced by the phraseology of “not ... *all of* the specified information”. It is accordingly, I believe, necessary to distinguish between, on the one hand, cases where the information which is missing is so wholesale as to affect the fundamental character of the document and, on the other, cases where it is secondary, so that it makes sense to say that the document is still of the kind specified albeit that it does not contain the particular information in question. Such a distinction seems to me to reflect the underlying policy behind the rule, as reflected in the reference in the introductory section of the Guidance to “minor errors”.”

15. Underhill LJ then considered each of the six appeals before the Court. In the case of Mr Mudiyanselage himself, the deficiency in the documents was that the letter showing that he had access to a minimum level of funds for a continuous period stated only a period shorter than the required 90 days. Mr Mudiyanselage’s case was that this was an error and the funds had in fact been held by that institution for much longer. Underhill LJ held that a document that supplies information covering the wrong period could not be described as a document in the wrong format so as to fall

within paragraph 245AA(b)(ii). It does not appear to have been argued that the document fell within paragraph 245AA(b)(iv) as not containing all of the specified information. The case of another appellant, Mr Khan, concerned paragraph 41-SD(e)(iii)(1) referring to advertising and marketing material. Underhill LJ said that the provision was poorly drafted because it did not say in terms that the material should be dated. He thought that this was implicit in the introductory words of sub-sub-paragraph (iii) which require that the material “cover” the specified period, “which must mean that it should be demonstrable from the documents that they did so”. He noted that counsel for Mr Khan did not submit to the contrary: [82]. Mr Khan had submitted print outs of pages from a website but they were all either undated or dated from two years previously and so did not cover the period. The judge recorded that the issue proceeded before the court on the basis that Mr Khan could not rely on paragraph 245AA but might be entitled to rely on the arguably wider terms of the evidential flexibility policy. Given that the Judge had already concluded that it was paragraph 245AA or nothing, that disposed of the appeal. However, he went on to consider whether Mr Khan’s case fell under head (iv) of paragraph 245AA(b) because Mr Khan had submitted specified documents which did not contain all the specified information namely dates demonstrating that they related to the specified period. He said:

“92 ... If it were necessary to decide the point I think that the answer would depend on whether the documents in question were simply undated or whether they bore dates showing that they covered a different period from that specified. In the former case it would be natural to describe the advertising materials as specified documents and the missing dates simply as specified information which they failed to contain, but in the latter it seems to me that a document which is required to cover period A but which on its face covers period B is simply the wrong document: the distinction may seem fine but I believe that it makes sense. As it happens, it appears to be the case that some of the materials supplied by Mr Khan were dated and some were not; but even in relation to those which were not he would have fallen at the next hurdle because even the undated materials were in fact from the wrong period and he would therefore not have been able to supply the missing information.”

16. In the event he dismissed Mr Khan’s appeal. The incorrect dating of documents submitted was also an issue in the appeal of Ms Negbenebor who tried to rely on paragraph 41-SD(e)(iii)(4) by submitting a document from a UK trade body which did not relate to the specified period because it was dated before the date which was three months before the date of her application. Underhill LJ upheld the reasoning of the Upper Tribunal Judge in rejecting the submission that the document fell within paragraph 245AA because the problem with the document was that it was dated too early and so was the wrong document: see [105] of Underhill LJ’s judgment. He went on to dismiss the other appeals save for one which was allowed by consent. Sir Brian Leveson P in a concurring judgment said:

“145. ... These are hard edged decisions but the requirements of the PBS, the Rules and the Guidance are precise. Those who seek to make applications of this nature must take the utmost care to ensure that they comply with the requirements to the letter; they cannot expect discretionary indulgence beyond the very limited areas provided by evidential flexibility. To such extent as this is not already obvious, it would be of value if any form or document made available to applicants to assist them made clear the vital importance of ensuring that the material provided meets the precise requirements of the Rules on the basis that it cannot be assumed that there will be a subsequent chance to correct or supplement that which has been provided.”

17. Mr Malik, appearing for the Respondent drew our attention to the authorities in which this Court has considered the points based system and has recognised that the objective of the system is to enable the Secretary of State to process a large number of applications in a fair, predictable, simple and reasonably expeditious way according to clear objective criteria: see for example *EK (Ivory Coast) v SSHD* [2014] EWCA Civ 1517, [2015] Imm AR 367 at [28] and *Kaur v SSHD* [2015] EWCA Civ 13 at [41].

The refusal of Mr Islam’s application

18. Mr Islam submitted his application on 17 July 2015, so the period which his specified documents had to cover for the purposes of paragraph 41-SD(e) of Appendix A was before 14 July 2014 to after 17 April 2015. The documents which Mr Islam sent with his application for leave to remain as a Tier 1 (Entrepreneur) Migrant all purported to fall within paragraph 41-SD(e)(iii)(1) namely:

“(1) advertising or marketing material, including printouts of online advertising, that has been published locally or nationally

(a) showing the applicant's name (and the name of the business if applicable) together with the business activity; or

(b) where his business is trading online, confirmation of his ownership of the domain name of the business’s website.”

19. Mr Islam sent:

i) Six print outs of online advertising:

a) The first is dated 12 August 2014 {page 149}. It gives the name of the company Legend Marketing Company Ltd and contains a detailed description of the company’s business. It also provides contact details of the company’s consultants Mr Saiful Islam and Mr Rahman.

b) The second is dated 18 November 2014 {151} and contains the name of the company Legend Marketing Company Ltd but the print out is in too small a font to be read, even with a magnifying glass.

c) The third is an undated print out from the website ‘Scoot’ {151} also containing the name of the company, again with a detailed description

of the business and referring to “Mr Saif” in a customer endorsement. It states that the company has been trading since 2012 and gives the year of Scoot’s copyright in the material as 2014.

- d) The fourth is dated 18 February 2015 {158} and gives the name and a brief description of the company as marketing consultants in Lincoln.
 - e) The fifth is dated 27 April 2015 from the Sun Newspaper and shows the name and a short description of the company but beyond that the print is too small to read.
 - f) The sixth is dated 16 July 2015 {161} and gives the name and short description of the company but no further details.
- ii) Four copy leaflets or brochures:
- a) The first leaflet contains the name of the company and a description of its business and says that it was printed on 3 July 2013.
 - b) The second leaflet is identical to the first but says it was printed on 12 March 2014.
 - c) The third leaflet is the same as the first two but was printed on 8 July 2014.
 - d) The fourth is a more substantial brochure printed on 4 May 2014 and is the only brochure which names Mr Islam as the company consultant, with a picture of him. {148}
20. Mr Islam wrote a covering letter with his application in which he said that his company had been established on 21 December 2012 and he had been trading actively since then. He referred to his earlier unsuccessful Tier 1 (Entrepreneur) Migrant application on the basis of the same company which he had then operated with a partner called Mr Rahman. Mr Rahman had since lost interest in the business left the country. Mr Islam said that the business had initially started as a management consultancy but since Mr Rahman left, it concentrated on marketing consultancy as he has experience in that sector. He attached some contracts as proof of his regular trading and a business plan and market research. He sent with his application accounts for the business from January to December 2014 and from January to July 2015 and his annual return to Companies House on June 2015.
21. Mr Islam was notified on 7 October 2015 of the refusal for leave to remain because the evidence he had submitted in relation to marketing and advertising material did not cover a continuous period commencing before 11 July 2014 up to no earlier than three months before the application. This was because the five printouts of online advertising he had provided in support of his business Legend Marketing Company Ltd did not establish that they were published before 11 July 2014 up to no earlier than three months before the date of his application. In fact none of them was dated before 11 July 2014. Further the brochures that he had provided for his business did not demonstrate that they were published locally or nationally showing his name during the relevant period. As no other evidence from paragraph 41-SD(e)(iii) had

been submitted, Mr Islam had not demonstrated that he met the requirements. The letter then stated that in accordance with paragraph 245AA(c) the Secretary of State was not required to request missing information in this instance. The letter notified him of his ability to seek administrative review of the decision to refuse leave.

22. Mr Islam applied on 20 October 2015 for administrative review. This was rejected by letter of 27 October 2015. Again the Respondent determined that Mr Islam had failed to provide evidence that met the requirements of paragraph 41-SD(e)(iii) of Appendix A of the Immigration Rules. The letter said:

“The leaflets that you supplied are dated 03 July 2013 and 12 March 2014. They therefore do not cover a continuous period commencing before 11 July 2014 up to no earlier than three months before the date of your application. You have also failed to provide evidence that they have been published locally or nationally. Leaflets that you have provided do not meet the requirements of paragraph 41-SD(e)(iii)(1) of Appendix A of the Immigration Rules ...”.

23. The Secretary of State therefore maintained the original decision.

The Upper Tribunal’s Decision

24. UTJ Kamara noted at [32] of her decision that it was not in dispute that the items of evidence relied upon by Mr Islam did not individually meet the requirements of paragraph 41-SD(e)(iii)(1). She said:

“[Counsel’s] argument was that the applicant’s documents, when considered cumulatively, met the requirements of the Rules and this was allowed for in the Rules. That argument is unattractive. A straightforward reading of the Rule indicates that the reference to “*one or more*” is to the possibility of an applicant providing specified documents which fall within one or more of the four categories. It is not an invitation to submit a plethora of documents which do not meet the seven separate requirements required under the first category.”

25. The Judge said that none of the five documents printed from the Internet was dated prior to 11 July 2014. One of them was dated 12 August 2014 and one was dated 18 November 2014. Clearly neither of those either showed trading prior to 11 July 2014 or demonstrated trading for a continuous period up to 17 April 2015. Two other printouts were dated 18 February 2015 and 27 April 2015. But neither of those demonstrate trading from a continuous period commencing before 11 July 2014. Even taken together there was a complete absence of evidence of trading prior to 11 July 2014.
26. Turning to the four brochures, she noted that those were all printed before 11 July 2014. But the judge said they did not amount to evidence of continuous trading up until at least April 2015. Further, three of the brochures did not refer to Mr Islam’s marketing consultancy but to a company offering consultancy in management, business and marketing. Three of the brochures did not name the applicant and nor

was there any evidence to show that any of the brochures had been published locally or nationally: [37].

27. She held that it was therefore apparent that Mr Islam did not submit a specified document as described in paragraph 41-SD(e)(iii)(1)(a). Given the inadequacy of the evidence about the registration of the domain name for the business website the judge concluded that the Secretary of State was entitled to conclude that he did not meet the requirements for the award of points for the Attributes.
28. UTJ Kamara then turned to the alternative argument that the Secretary of State ought to have contacted Mr Islam to request that he make good the deficiencies in his application because the documents did not contain all of the specified information within the meaning of paragraph 245AA(b)(iv). She said:

“41. ... The grounds assert that there is only one reason for refusal. However, that argument is not entirely accurate because it is evident that there were multiple deficiencies with each item of evidence provided in support of that application, even if the deficiencies all related to advertising or marketing material or the registration of the domain name. Accordingly, even had the applicant been invited to submit evidence to show that his material had been published locally or nationally, this would not have addressed the fact that none of the documents he submitted met the timeframe required under the Rules.

...

43. It was properly open to the respondent to decide that the applicant failed to provide the evidence required by [paragraph 41-SD(e)(iii)(1)(a) and (b)] for the reasons set out above. Owing to the multiple difficulties with the applicant’s evidence, this cannot be considered a case falling within 245AA(b)(iv), that is “A *document*” does not contain all of the specified information. In the applicant’s documents, not one met the seven components set out in SD-41(e)(iii) and his application was not rescued by the submission of the domain name of his website.”

29. She therefore held that the Secretary of State did not err in relying on paragraph 245AA(c) “owing to the sheer quantity of omitted information”.

The appeal

30. There are two broad grounds of appeal. The first is whether the documents provided by Mr Islam did indeed satisfy the requirements of paragraph 41-SD(e)(iii)(1). The second is whether, if they did not, the Secretary of State was required to ask Mr Islam for additional information in accordance with paragraph 245AA.

Did Mr Islam's documents satisfy the requirements of paragraph 41-SD(e)(iii)(1)?

31. Mr Islam accepts that the website screen shots provided with his application did not satisfy paragraph 41-SD(e)(iii)(1)(b) because he did not show that he owned the domain name of the business' website. All the material submitted went to satisfying paragraph 41-SD(e)(iii)(1)(a).
32. The first ground of appeal can be broken down as follows:
 - i) Must each of the specified documents on which Mr Islam relies to cover the relevant period show that it has been published locally or nationally or is it enough that they have in fact been published locally or nationally? If there is no such requirement then the Respondent was wrong to reject Mr Islam's application on the grounds that he had failed to provide evidence of this. If there is a requirement that the documents show this, Mr Islam accepts that although the internet screen shots inherently show that they are published at least nationally, the brochures on which he relies to cover the end of the relevant period do not show this.
 - ii) Did the documents on which Mr Islam relies to cover the period all comply with paragraph 41-SD(e)(iii)(1)(a) by showing his name and the name of the business together with the business activity? If they did, then the Respondent was wrong to reject his application on this ground. If they did not, was this a deficiency that could be remedied in response to a request under paragraph 245AA(b)(iv)? If so, the Respondent was wrong to decline to exercise her discretion to ask Mr Islam for the additional information.
33. On the question whether the specified documents include documents showing that the advertising or marketing material were published locally or nationally, in my judgment the answer is that they do not. The structure of paragraph 41-SD(e)(iii)(1) is clear. The opening words "advertising or marketing material ... that has been published locally or nationally" describe the category of documents covered to be contrasted with articles in a newspaper in category (2), information from a trade fair in category (3) or personal registration in category (4). Following the description of the document is in each case the stipulation as to what the document must "show". Documents in paragraph (1)(a) must show the name and nature of the business as must documents in paragraphs (2) and (3). There is thus no requirement that the documents "show" that they were published locally or nationally. This distinction between what documents must "be" and what documents must "show" or "state" or "confirm" is repeated elsewhere in paragraph 41-SD, for example in paragraph 41-SD(c)(i) which deals with the letter from the financial institution holding the funds confirming the amount of money available. Looking at the 12 requirements for this document it is clear that some of them describe what the document must be (an original and not a copy, issued by an authorised official, produced within 31 days) and some stipulate what the document must show, state or confirm (the name of the applicant, the account number, minimum balance available etc).
34. This makes sense because it reflects the typical content of a letter of the sort described. Mr Malik fairly accepted that even though a leaflet or brochure may well be published locally or nationally it is very rare for the leaflet or brochure itself to show, state or confirm that on its face. Mr Malik referred to ways in which an

applicant could show that the brochure was published locally or nationally, such as by producing a letter from a mailing company or a local business which distributes leaflets door to door saying that they have mailed or distributed leaflets for the applicant's business. Those suggestions, however, only confirm my view that since there is no such reference to that kind of document anywhere in the paragraph, and since the applicant is supposed to be able to satisfy the additional requirement in Table 4 by supplying the specified documents set out in the paragraph, it cannot be the case that he has to show that the advertising or marketing material was published. For some kinds of advertisement, for example an advertisement printed in a magazine or a newspaper it will be obvious that it was published nationally or locally. Online advertisements are of that kind. But the kinds of marketing material accepted by the Respondent as falling within the class are not limited to those kinds. Where the marketing material is not of itself the kind that is published nationally or locally it is not open to the Respondent in effect to require an additional specified document which is not listed or to require the document itself to show or state something which is not prescribed in the paragraph as needing to be shown or stated by the document. Mr Malik said that if this is not a requirement, it would be open to an applicant to supply brochures with his application that had been printed but simply kept in a cupboard. Mr Knafler countered by asking why anyone would spend money to print leaflets and yet not distribute them, unless the business was a complete fiction and that is not suggested in this case. Those submissions seem to me beside the point; the point being that the rules are highly prescriptive as to what the applicant must do and they do not prescribe that the applicant must show that the marketing material was published locally or nationally, only that he must provide marketing material that has been published locally or nationally.

35. Mr Knafler pointed out that if the Respondent doubts that the leaflets or brochures printed were in fact published because he is not satisfied that the applicant genuinely has established and continues to operate that business, he may exercise the power in paragraph 245DD(m) to ask for additional information and evidence about publication so that he can be satisfied that the applicant is genuinely operating the business pursuant to paragraph 245DD(m). That was not done here. In my judgment therefore Judge Kamara erred in so far as she based her decision to reject Mr Islam's judicial review on the grounds that there was no evidence to show that any of the four brochures had been published locally or nationally. The question of whether the absence of that information gave rise to a duty on the part of the Respondent to consider whether to exercise the power in paragraph 245AA(b) or (d) does not therefore arise.
36. I turn then to determine whether the documents were documents that covered a continuous period commencing before 11 July 2014 and ending no earlier than 17 April 2015 and that showed Mr Islam's name and the name and activity of his business. To make sense of the provision it must be construed so that what is required to be "continuous" is not in fact the period itself but the coverage of the documents showing the trading of the business from the start date to the end date of that period.
37. I consider that the Judge erred in holding that the documents provided could not be considered cumulatively. She construed the reference to the ability to provide "one or more of the following documents" as meaning only that the applicant could provide a document which fell within more than one of the categories listed in (1) to (4) and not

that he could cover the period by providing a number of documents within a single category (1). I disagree with that construction. The paragraph makes it clear that the documents can cover the period “(either together or individually)”. Further, the Judge’s construction makes it almost impossible for the applicant to show that he meets the additional requirement. A particular difficulty for applicants seeking to produce the documents specified by paragraph 41-SD(e)(iii) is that they have to show that the business was active over a period of several months, about nine months in Mr Islam’s case, but they have to do so by submitting documents many of which inherently take the form of a snapshot of that business activity taken at a particular moment. The print out of a website will bear the date on which it was downloaded and printed out – it is necessarily a one-off item. If it bears a date before 11 July 2014 it does not demonstrate anything more than that on that particular date, the business was advertising its services. If it bears a date after 17 April 2015 it does not show that the business was operating before 11 July 2014. Articles in newspapers for sub-sub-paragraph (2) are also inevitably published on a single date and a trade fair within sub-sub-paragraph (3) will have taken place over one or two days; a presentation is given in an hour or so on a single day. The applicant must in my judgment be allowed to provide more than one document in a particular category which, as the paragraph says, together cover the period.

38. The first step therefore is to consider whether Mr Islam submitted at least one document that showed his name, the name of the business and the business activity before 11 July 2014 and at least one after 17 April 2015. If he did not, then he did not satisfy the requirement and one must consider whether that is a deficiency that could be remedied under paragraph 245AA(b). If he did do so, one must then go on to consider whether the documents show that the business’s operation was continuous over that period. For the start date, there is no difficulty because the fourth brochure dated 4 May 2014 contains all the information that the applicant is required to show. However, for the end date, Mr Knafler was not able to point to any document provided by Mr Islam that post-dated 17 April 2015 and contained the three necessary pieces of information, Mr Islam’s name, the name of the business and the business activity. The only documents bearing a date later than 17 April 2015 were the print outs of the Sun Newspaper website dated 27 April 2015 and a print out from the Independent Newspaper website dated 16 July 2015. Those give the name of the company and describe the business but there is no link in them to Mr Islam himself.
39. Mr Knafler argued that it was not necessary to show any single document with all three pieces of information with a date after 17 April 2015. Provided that some of the documents provided showed the business operating before 14 July 2014, some of them showed it operating after 17 April 2015 and some of them showed the connection with Mr Islam then that was sufficient. It was, he said, as plain as a pikestaff that the business being advertised in all the material provided was Mr Islam’s business. I cannot accept that as a likely construction of the provision. I also cannot accept Mr Knafler’s argument that the word “and” in parentheses in paragraph 41-SD(e)(iii)(1)(a) should be read as disjunctive. It therefore appears that the advertising and marketing material that Mr Islam submitted with his application did not include material covering the period commencing before 11 July 2014 and ending no earlier than 17 April 2015 showing all information required in paragraph 41-SD(e)(iii)(1)(a).

40. I therefore turn to whether the Secretary of State ought to have considered whether to exercise her discretion under paragraph 245AA to contact Mr Islam to ask for the correct document because a specified document he submitted “does not contain all the specified information”. The original decision of 7 October 2015 stated that no additional documents were requested because paragraph 245AA(c) applied - the application fell for refusal on other grounds. It did not state what those other grounds were. The administrative review notice also stated only that the decision of the original caseworker not to require missing evidence was in accordance with paragraph 245AA(c). Judge Kamara held that the Secretary of State was not obliged to exercise her discretion because there were multiple deficiencies with each item provided by Mr Islam in support of the application: [41] – [45]. This conclusion flowed from her decision, which I have held to be incorrect, that each item submitted had to show all the information and the documents could not be considered together. In my judgment, the two print outs of online advertising dated 27 April and 16 July 2015 were specified documents since they were advertising and marketing material that had been published locally or nationally. They contained two of the three pieces of information required by paragraph 41-SD(e)(iii)(1)(a) namely the name of the business and the business activity. They did not show the third piece of information, Mr Islam’s name. Applying the test enunciated by Underhill LJ in *Mudiyanselage* those print outs were not “the wrong document” and the information missing was not so wholesale as to affect their fundamental character, particularly given the other material that had been provided. Mr Islam’s situation is different from that of Mr Khan, another appellant in *Mudiyanselage*, because the dates of Mr Islam’s documents do cover the correct period from pre-11 July 2014 to post-17 April 2015. The print outs seem to me to fall exactly within the class of documents to which paragraph 245AA(b)(iv) is directed, they are specified documents that do not contain all the information that they should because they are missing one piece of information. The Secretary of State was therefore required to consider whether to ask Mr Islam to provide some other document which was dated after 17 April 2015 and contained all three elements of the information required.
41. There was no reason to suppose Mr Islam could not provide a document with the missing information, particularly since some of the earlier dated documents provided did contain all three pieces of information. I do not agree with Judge Kamara that the Secretary of State was entitled to rely on paragraph 245AA(c) because she could assume that Mr Islam would have provided the most relevant evidence in his possession. If that were the correct test, then the Secretary of State would never be required to consider whether to exercise his or her discretion. Paragraph 245AA was inserted precisely because the Secretary of State acknowledges that because of the number and complexity of the documentary requirements, it sometimes happens that an applicant, even though taking the utmost care, does not supply everything requested or does not provide the best information that they have. The documents on which the appeals have focused were only a few of the many documents - bank statements, company documents, company accounts, invoices and service contracts, the business plan and market research - that Mr Islam sent.
42. I do not see how, therefore, the Secretary of State could properly have concluded that if Mr Islam was able to provide a different print out or a more recent brochure post-dating 17 April showing his name as well as the name of the business and a description of the business activity, that his application would fall to be refused for

some other reason. The decision notice states that Mr Islam was awarded 10 points for his English language skills. All the other sections of the form contain the standard wording stating that his application was not assessed for that attribute.

43. The question was raised at the hearing as to how an applicant is expected to show the continuity of his business over the relevant period. If an applicant shows, for example that he took part in a trade fair before 11 July 2014 and another trade fair within three months of his application date, is that enough or is there some requirement to produce documents to counter any suggestion that he may have closed down his business in the interim, even if that interim is less than a year, as in Mr Islam's case? Mr Islam has provided a substantial brochure printed shortly before the start of the relevant period and has produced at least some documents containing all the necessary information published between the two key dates. Mr Malik did not appear to have a ready answer as to how many documents published in the intervening months the applicant needs to provide in order to satisfy the continuity requirement. It does not appear that the Secretary of State turned her mind to this point and we did not hear submissions on the issue, or on the issue of whether paragraph 245AA(b)(i) (documents missing from a sequence) would apply.
44. In these circumstances I would allow the appeal and quash the decision so that the Secretary of State can allow Mr Islam the opportunity to provide the missing specified information and his application can be considered afresh.

Lord Justice Floyd

45. I agree.

Sir Ernest Ryder, Senior President of Tribunals

46. I also agree.