Upper Tribunal
Immigration and Asylum Chamber

JR/168/2019

Field House,
Breams Buildings
London
EC4A 1WR

Heard on: 26th July 2019

BEFORE

UPPER TRIBUNAL JUDGE KEITH

Between

The Queen (on the application of Syed Hassan Kazmi and Asad Raza Kazmi)

Applicants

v

Secretary of State for the Home Department

Respondent

Mr S Ahmed, instructed by 12 Bridge Solicitors, on behalf of the Applicant
Mrs J Gray, instructed by the Government Legal Department appeared on behalf of the Respondent.

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APPLICATION FOR JUDICIAL REVIEW
JUDGMENT

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The application

(1) The applicants, nationals of Pakistan, applied on 10 January 2019 for judicial review of the respondent's decision of 10 October 2018, (the 'Decision') to refuse their applications for leave to remain, as Tier-1 entrepreneurs. The Decision was maintained, following administrative review, by a decision dated 22 November 2018. In terms of the applicants' previous

immigration histories, the applicants were initially granted entrepreneur visas, which were valid until 19 March 2015. They unsuccessfully applied to extend their leave to remain, and brought judicial review proceedings, which were unsuccessful. In those proceedings, permission to proceed was refused both on the papers and at an oral renewal hearing by Vice-President Ockelton, on 1 June 2017. Nevertheless, in light of what they regarded as favourable comments on the genuineness of their business by Vice-President Ockelton at the oral renewal hearing, the applicants renewed their application for leave to remain on 26 June 2017. The respondent refused that application on 27 March 2018. They then made a further application, which is the subject of the Decision, on 10 July 2018, which they seek to challenge on the grounds below.

Grounds of permission application

(2) Ground (1) was that the respondent had failed to follow its evidential flexibility policy. In particular, the Decision did not explain whether the respondent had assessed the evidence relating to the applicants' employment of people; or considered the exercise of her discretion in the event of any gaps in evidence. The applicants were concerned that the respondent had stopped considering any evidence, or any exercise of her discretion, when she noted that the applicants were overstayers at the date of their application. She may otherwise have concluded that the applicants met the Immigration Rules.

(3) Grounds (2) and (3) were effectively one ground. The respondent had criticised the applicants for the lack of "Full Payment Submissions" ('FPS') data under the "Real Time Information" procedure of the PAYE regulations, for evidence that they were employing the correct number of people. FPS data was required under paragraph 50 of appendix A of the Immigration Rules. The respondent ignored the fact that that submission of FPS data, required on each employee's pay day, was optional under the PAYE Regulations at the time that the applicants were employing their employees. In applying this requirement, the respondent had ignored alternative sources of evidence that were permissible under tax legislation, such as wage books. When Mr Ahmed made his oral submissions to me, this ground changed. The applicants instead asserted that they had provided the FPS data, which the respondent unlawfully declined to accept as valid. Mr Ahmed made no application to amend the ground but both representatives were able and content to deal with issue at the hearing before me.

(4) Ground (4) asserted that the respondent had failed to exercise discretion by waiving the requirement that the applicants should not be overstayers, when the applicants were genuinely trading, paying taxes and employing people.

(5) In seeking permission, the applicants seek orders quashing the Decision and the subsequent administrative review decision of 22 November 2018.

Upper Tribunal permission

On 4 March 2019, Upper Tribunal Judge Kebede refused permission to proceed on the papers, concluding that the evidential flexibility provisions did not extend to waiving the requirement not to have overstayed at the date of the visa applications. The FPS data for each salary payment had still not been provided.

6) At an oral hearing on 11 April , Upper Tribunal Judge Kamara granted permission on the basis that "*it is arguable that the exceptional circumstances set out by the applicants in their letter of representation which accompanied the applications were not taken into account in refusing them on the basis of overstaying and therefore it is arguably unclear what the respondent's decision would have been if evidential flexibility had been extended*." Permission was granted on all grounds.

The basis of the respondent's resistance to the orders sought

7) The respondent served an Acknowledgment of Service on 8 February 2019 and detailed Grounds of Defence on 23 May 2019.

8) In relation to ground (1), the respondent asserted that its Evidential Flexibility Guidance applies in the context of a request for further evidence. It does not apply in situations where the applicants do not, for other reasons, meet the Immigration Rules. The applicants had not identified which part of the guidance the respondent had failed to apply. Page [5] of the Guidance explicitly stated that "*if the application falls for the refusal for a reason which could not be addressed by requesting additional information, for example under general grounds of refusal then you must not request further evidence*."

9) In the applicants' cases, the respondent refused leave to remain on general grounds of refusal and so the respondent did not make a request for further information. Being an

overstayer was a valid reason to not request further information. The statement in the Decision that a request for additional information "*would not have changed the outcome*" was obvious in what it was referring to, when the Decision was read as a whole. There was no lack of clarity in the Decision.

10) In relation to grounds (2) and (3), according to the rules on Tier-1 applications, and contrary to the applicants' assertions, whatever was otherwise optional under tax legislation, it was mandatory for the applicants to provide 'FPS' data for their employees under appendix A of the Immigration Rules. There was no policy which stated that the applicant need not provide FPS data, if there was no wider mandatory requirement under tax legislation. In any event, the applicants had registered under the RTI process on 30 October 2013 and FPS data was available for both employees, for the majority of their employment. The applicants had not provided the required FPS data and there was no good reason for them not to have done so, particularly when the respondent had previously identified this as an omission, in an earlier application. The applicants had submitted their Tier-1 application on 11 July 2018 in the full knowledge that they had not included suitable FPS data.

11) Vice-President Ockelton had merely commented, when refusing permission in the previous judicial review application on 8 June 2017, that if a further application were made with all accompanying documentary requirements, the respondent might be persuaded to waive the requirements under paragraph 245 DD(g), i.e. the requirement not to be overstayers. He did so in the context of his view that from what he had read and heard it was sufficient him to think that the applicants' business was genuine. However, Vice-President Ockelton was not committing the respondent to such a decision, nor, with respect, could he do so. The applicants had not had valid leave to remain since 19 March 2015.

Legal Framework

12) Paragraph 245DD of the Immigration Rules provides:

"245DD. Requirements for leave to remain

To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant

does not meet these requirements, the application will be refused.

Requirements:

(a) The applicant must not fall for refusal under the general grounds for refusal, except that paragraph 322(10) shall not apply, and must not be an illegal entrant.
(b) The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.
(c) The applicant must have a minimum of 10 points under paragraphs 1 to 15 of Appendix B.
(d) The applicant must have a minimum of 10 points under paragraphs 1 to 2 of Appendix C.
(e) The applicant who is applying for leave to remain must have, or have last been granted, entry clearance, leave to enter or remain:
(i) a Tier 1 (Entrepreneur) Migrant,
(ii) a Tier 1 (Graduate Entrepreneur) Migrant, or
(iii) a Start-up migrant, having previously held leave as a Tier 1 (Graduate Entrepreneur) Migrant.
(g) The applicant must not be in the UK in breach of immigration laws except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded."

13) Paragraph 50 of Appendix A of the Immigration Rules goes on to state:

"50. If the applicant is required to score points for job creation in Table 5 or Table 6, they must provide all of the following specified documents:

(a) printouts of Real Time Full Payment Submissions showing that the applicant complied with Pay As You Earn (PAYE) reporting requirements to HM Revenue & Customs in respect of each relevant settled worker as legally required, and has done so for the full period of employment used to claim points. These must show every payment made to each settled worker as well as any deductions"

14) Paragraph 245AA provides:

"(a) Subject to sub-paragraph (b) and where otherwise indicated, where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the decision maker (that is the Entry Clearance Officer, Immigration Officer or the Secretary of State) will only

consider documents received by the Home Office before the date on which the application is considered.
(b) If the applicant has submitted the specified documents and:
(i) specified evidence is missing from the documents; or
(ii) a document is in the wrong format (for example, if a letter is not
on letterhead paper as specified); or
(iii) DELETED
(iv) a document does not contain all of the specified information;
the decision maker 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 10 working days of the date of the request.
(c) Documents will not be requested where the decision maker does not think that the submission of missing or correct documents will lead to a grant because the application will be refused for other reasons.
(d) If the applicant has omitted to provide specified evidence, or submitted it in the wrong format, but the missing information is verifiable from other documents provided with the application or elsewhere, the decision maker may grant the application despite the error or omission, if they are satisfied that the applicant meets all the other requirements of the Rules."

Page [4] of the respondent's Evidential Flexibility Guidance: Points Based System - version 8 (in force at the date of the Decision) states:

"When evidential flexibility applies in PBS applications

The requirements of each PBS route, including the evidence which must be submitted, are set out in the Immigration Rules. This means applicants should provide all information and evidence on which they rely to support their application at the outset of the process. However, it is recognised that if an applicant makes a minor error or omission with the supporting evidence they provide, then in some circumstances it may be appropriate to contact them and invite them to provide additional information. Guidance on how to consider applications submitted prior to 24 November 2016 can be found in the guidance archive on Horizon.

The circumstances when a decision maker can request

additional information are set out in the evidential flexibility rule in paragraph 245AA in part 6A of the Immigration Rules.

Paragraph 245AA only applies to specified documents. Specified documents are route specific and are documents the applicant has to provide in order to meet the requirements of the Rules. A request for further information can only be made under evidential flexibility when the applicant has made a valid application.

Additional information can only be requested once and only in the specific circumstances set out in paragraph 245AA(b). These are where:
•documents (for example bank statements) are missing from a sequence – for the definition of this see 'Documents missing from a sequence'
•a document has been submitted but is in the wrong format, for example, where a document contains all of the substantive information required by the Immigration Rules but should have been submitted on letterheaded paper
•the document submitted with the application is a copy and an original document is required
•a document does not contain all of the specified information – for example, if an employer's letter has been provided that does not confirm the applicant's gross annual salary or that the employer needs to employ the applicant in their current role for the foreseeable future

If a specified document does not include all the specified information, you do not need to write to an application where the missing specified information can be obtained from one of the following:
•other documents submitted with the application
•the website of the organisation which issued the document
•the website of the appropriate regulatory body, for example, the Financial Conduct Authority

You must only request additional information under paragraph 245AA if you have reason to believe the information exists and that the applicant would meet the requirements of the Immigration Rules if they were given a further opportunity to provide that information. If the application falls for refusal for a reason which could not be addressed by requesting additional information, for example, under general grounds for refusal then you must not request further evidence under paragraph 245AA. If you are unsure, you must discuss this with your senior case worker or line manager."

The applicants' oral submissions

In relation to grounds (2) and (3), Mr Ahmed referred to the respondent's evidential flexibility guidance, in particular page [75] of the applicants' bundle, paragraph [175]. It referred to a requirement of employment of two workers, with the stipulations that they be employed for at least twelve months. He referred to the two employees of the applicants on whom they sought to rely as meeting appendix A of the Immigration Rules. I will refer to them as employee 'A' and employee 'B.' Employee A had been employed from 1 October 2013 to 30 September 2015. Employee B had been employed from 1 October 2013 to 13 November 2015. The applicants asserted that they had begun submitting FPS data to HM Revenue & Customs on 30 October 2013, and had done so for a period longer than 12 months required by appendix A.

The crux of grounds (2) and (3) was whether the applicants had complied in providing FPS data to the respondent, in terms required by appendix A. Mr Ahmed referred to 3 annual RTI submissions for each of the relevant tax years, copies of which were at page [347] onwards of the applicants' bundle. In the Decision, the respondent refused to accept the annual RTI submissions as adequate, and declined to award any points under appendix A. The respondent stated:

"*RTI full payment submissions you have provided are not sufficient as you have only provided some of the individual monthly submissions per employee which show tax and national insurance payments per month. From the RTIs and wage slips you have provided we have calculated a total of 1,538 working hours.*"

Mr Ahmed pointed out that the respondent had mistaken the annual RTI submissions for monthly FPS data. Annual RTI submissions were sufficient. Mr Ahmed urged me to consider the case of **R (on the application of Saiful Islam) v SSHD [2019] EWCA Civ 500** where the Court of Appeal, including the Senior President of Tribunals, was critical of the respondent's assertion that a Tier-1 applicant had not provided mandatory evidence, when in fact he had. While FPS data was not an issue in Mr Islam's case, the print-outs he provided were not the wrong documents, and even if they were in the wrong format, the information missing was not so wholesale as to affect their fundamental character, particularly given the other material that had been provided.

In relation to grounds (1) and (4), the respondent always had a residual discretion. The respondent had unlawfully fettered her discretion by failing to consider whether to waive the

requirement that the applicants should not be overstayers at the date of their most recent Tier-1 application.

The respondent's oral submissions

The applicants had overstayed unlawfully in the United Kingdom since 26 May 2015. They had not submitted further valid applications for leave to remain until 27 June 2017, over two years later, which were in any event refused. Vice-President Ockelton had not bound the respondent in any way. He had merely suggested that the respondent may be willing to waive the requirement that the applicants should not be overstayers. In the case of **Mudiyanselage v SSHD [2018] EWCA Civ 65** Lord Justice Underhill emphasised that occasional harsh outcomes are the price that has to be paid for the perceived advantages of the points-based system process.

The applicants had made two applications after Vice-President Ockelton's refusal of permission. On the first occasion they had omitted any RTI information. Even in their most recent application, they had failed to include FPS data and had instead submitted annual RTI submissions. Considering the question of evidential flexibility, the point of the policy was not to require that additional documents should be sought where the applicants fell to be rejected on other grounds.

This was not a case of missing documents in a sequence, or merely in a different format but containing all of the relevant information. The applicants had not provided FPS data. The provisions of paragraph 50 of appendix A were quite specific as requiring FPS submissions for *every payment* and the summary, single-line, annualised RTI statements did not meet that requirement. **Islam** as an authority did not disturb the principles established in **Mudiyanselage**, and the Court of Appeal in the former case had expressly considered the latter. There was no good reason for the applicants' failure to provide FPS data.

Discussion and conclusions

Grounds (1) and (4)

Paragraph 245AA(c) of the Immigration Rules is clear that documents will not be requested where a decision maker does not think that the submission of missing or correct documents will lead to a grant because the application will be refused for other reasons. The respondent's Guidance states the same. That is precisely what occurred in this case. The Decision was

clear on the point, stating (at page [126] of the applicants' bundle):

"Please note, on this occasion we have not carried out full verification checks on the documents you submitted or the statements that you have made on your application form as your application falls for refusal on other grounds as outlined above."

I am satisfied that the respondent was entitled not to pursue enquiries about FPS data, as the applicants have had no lawful leave to remain since 26 May 2015. This is not a statutory appeal and the applicants have not sought leave to remain on human rights grounds, outside the Immigration Rules, under article 8 of the ECHR. The applicants' case is limited to their assertion that but for the requirement of the Immigration Rules that they are not overstayers, they would meet the financial and business requirements of those rules. No other personal circumstances are advanced by the applicants, which they said that the respondent failed to consider. The respondent did not ignore the evidence presented in the application. She assessed it, concluded it was deficient, and on the basis that the applicants could not meet the requirements as overstayers, enquired no further. I am satisfied that that was a decision that was properly open to her and does not amount to an unlawful fetter on her discretion, merely an application of a points-based system. The applicants seek leave to remain under that very points-based system. As submitted by Mrs Gray, there may be harsh consequences as the result of such a system, as made clear in **Mudiyanselage**, but the Decision was not the result of the respondent unlawfully fettering her discretion.

Grounds (2) and (3)

Paragraph 50(a) of appendix A requires FPS printouts that show "every payment" for "each settled worker." For later periods not under challenge, the applicants appear to have provided FPS data (for example, for employees in May 2017, at [158] of the applicants' bundle). Inexplicably, they did not do so for the period on which they sought to rely i.e. between 2013 and 2015. Instead, they provided annual RTI submissions, which, as is clear from the copies of them in the applicants' bundle, are single line statements for each employee at the end of each year, showing pay to date, without a schedule of each payment. The annual RTI statements do not show payments for each pay date. For example, they would not show a casual worker who stops work after a short period and restarts work at a later date. The RTI statements are a 'snap shot', rather

than what the FPS data records (in real-time), which is a pattern of payments over time.

The respondent was entitled to reject the annual RTI submissions, as insufficient to meet paragraph 50 of appendix A. They do not show a pattern of payments. Paragraph 50 requires precisely that. The absence of a pattern of payments explains why the respondent raised concerns that the annual RTI submissions appeared to relate to a single month. Contrary to Mr Ahmed's assertions, the pattern of payments is relevant to periods of working under the points-based system and are of a different nature to an annual snap-shot. The respondent's refusal to accept annual statements as sufficient is all the more understandable when the applicants have provided FPS data for other periods. They have not explained why FPS data is not available for the periods on which they seek to rely.

Conclusions

15) For the above reasons, I conclude that the Decision cannot be impugned on public law grounds. The respondent did not fetter her discretion when refusing to waive a requirement that the applicants should not be overstayers. The respondent was entitled to conclude that the evidence provided to her did not meet the requirements of paragraph 50 of appendix A of the Immigration Rules. She was not required to ask for additional, different tax records.

Decision

16) The application for judicial review is refused on all grounds.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **8 August 2019**

UTIJR6

JR/168/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen (on the application of Syed Hassan Kazmi and Asad Raza Kazmi)

Applicants

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Keith

Upon judgment being handed down on 8 August 2019, neither counsel was in attendance.

It is ordered that

(1) The judicial review application is dismissed in accordance with the judgment attached.

(2) I order, therefore, that the judicial review application be dismissed.

Permission to appeal to the Court of Appeal

(3) Neither party has sought permission to appeal to the Court of Appeal. I refuse permission to appeal to the Court of Appeal for the same reasons that I have refused the orders sought for judicial review.

Costs

(4) The applicants shall pay the respondent's reasonable costs, to be assessed if not agreed.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **8 August 2019**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an applicant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).