

IN THE UPPER TRIBUNAL  
EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

JR/7806/2018

Field House,  
Breams Buildings  
London  
EC4A 1WR

4 November 2019

**THE QUEEN**  
**(ON THE APPLICATION OF MR ZI YE)**

Applicant

and

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

Respondent

**BEFORE**

**UPPER TRIBUNAL JUDGE L SMITH**

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Mr A Pipe, instructed by Lin & Co Solicitors appeared on behalf of the Applicant.

Mr Z Malik, instructed by the Government Legal Department appeared on behalf of the Respondent.

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**ON AN APPLICATION FOR JUDICIAL REVIEW**

**APPROVED JUDGMENT**

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JUDGE SMITH: This is a challenge to the Respondent's decision dated 3 September 2018, maintained following administrative review on 11 October 2018, refusing the Applicant further leave to remain as a Tier 1 Entrepreneur. Permission to apply for judicial review was granted by Judge Blum at an oral hearing on 24 July 2019 in the following terms:

"1. Paragraph 47 of Appendix A of the Immigration Rules prohibits investment in a UK business that manages property '..for the purpose of renting it out or resale'. Mr Pipe accepted that the transactions in the applicant's bank account relating to 'rent' were prima facie 'suspicious'. It is nevertheless arguable, on the particular facts of this case, that the applicant's business did not manage property for rental purposes and that a duty arose to give the applicant an opportunity to provide an explanation for the transactions in light of the other documentary evidence suggesting the applicant's business did not own any property and had not received any rental income and in the absence of evidence that a service charge was levied in respect of rent collected by the company.

2. The respondent did not appear to expressly reject the explanation provided by the applicant in his Administrative Review request, but concluded that the original caseworker's decision was one he was entitled to make based on the documents submitted with the application. The Tribunal may wish to consider the scope of Administrative Review, particularly with respect of AR2.3 and AR2.11(d) (relating to 'case-working errors'), given the need for Administrative Review to be an efficacious remedy, **R (on the application of Prathipati) v Secretary of State for the Home Department (discretion - exceptional circumstances)** [2018] UKUT 427 (IAC), and in the context of an explanation

provided in the applicant's Administrative Review request that did not rely on any new documents."

2. As a result of the exchange of pleadings, the issues have narrowed considerably. In essence, the challenge is now confined to the Administrative Review decision and whether the Respondent has engaged with the explanation given and/or whether her decision is unreasonable. Mr Pipe fairly conceded that he could not challenge the Respondent's first decision for reasons which follow and that if I am against him on the rationality/reasoning point he cannot succeed on a fairness challenge as the Respondent has confirmed that she considered the explanation put forward on Administrative Review but that she had rejected it because that explanation did not avail the Applicant.
3. The Respondent refused the application under paragraph 245DD of the Immigration Rules, applying paragraph 47 of Appendix A to the Rules ("Paragraph 47"), which reads as follows:

"For the purposes of Tables 4, 5 and 6 **'investment and business activity' does not include investment in any residential accommodation, property development or property management** and must not be in the form of a director's loan unless it is unsecured and subordinated in favour of the business. 'Property development or property management' in this context means any development of property owned by the applicant or his business to increase the value of the property with a view to earning a return either through rent or a future sale or both or **management of property, whether or not it is owned by the applicant or his business, for the purposes of renting it out** or resale. The principle is that **the business income must be generated from the supply of goods and/or services and not derived**

**from the increased value of property or any income generated from property, such as rent."**

[my emphasis]

Applying that paragraph, the Applicant was awarded zero points for "Attributes".

4. The reasoning in the Respondent's first decision was that the Applicant's bank statements which accompanied his application disclosed a number of entries referred to as "rent". I observe that others also refer to what are clearly property addresses. As such, the Respondent took the view that the Applicant was deriving his business income or at least some of it from the management of property and accordingly that he could not satisfy the Immigration Rules because such activity is precluded by Paragraph 47. It is conceded by Mr Pipe that, based on the documents before the Respondent, this was not an irrational approach in the first decision.
5. The way in which the Respondent explains the decision is this. On the clear and plain wording of Paragraph 47, the investment in the business cannot include investment in property management, that management of property is such whether or not the property is owned by the Applicant or his business and that the business income cannot include any income generated from property, such as rent. The prohibition does not mean that all the business income has to be generated from property and the income does not need to be rent as such. That is simply an example.
6. The Applicant says that his business does not derive income from property management but provides a concierge service. In support of his case, he relies on invoices which were issued to the students to whom he provides services. Those set out the services as a consultancy fee, and list the other services

performed. There is then a subtotal of the amount and an additional entry described as "transfer of rent". As I indicated to Mr Pipe in the course his submissions, that seems to me to be the strongest evidence in favour of the Applicant's case that all he is doing is paying over rent to the letting agency/landlord without deduction or charge.

7. However, as part of the Administrative Review the Applicant provided a fuller description of the nature of his business activities as follows:

"1. The Company's main activities are **to provide concierge-style services as a package** to international students in the UK. **The package includes**, but is not limited to, airport pickup upon the students' arrival in the UK, finding suitable accommodation for the students, **paying the rent and deposit on behalf of the students to landlords or letting agencies**, providing storage services and providing any service that the students may require during their time in the UK. The Company has built up an excellent reputation through word-of-mouth amongst the student and parent community since it was established and has gained the trust of its customers who now confidently allow the company to manage many aspects of the students' life in the UK, including **acting as the students' agent to liaise with letting agents or landlords**. The Company's customers feel greater security and confidence in **paying the rent to the Company as a go-between instead of paying the rent direct to the letting agent or landlord**. In addition, if any issues arise with the letting agent and/or the landlord, then the Company will deal with the issues on behalf of its customers. As noted in the Profit & Loss Account, **the Company charges a 'Management Service Fee in return for its concierge-style services**.

2. We understand that under the accounting rules, **if a company were to receive any rental income, then this income must be disclosed in the Profit & Loss Account. Please refer to the Company's Profit & Loss Account already provided, which does not show any receipt of any rental income as there was none.**

3. With reference to the Company's accounts already provided, they show that **the Company does not own any fixed assets, i.e., the Company does not own any properties and therefore it cannot generate rental income.**

4. Please refer to the company's tax return for the period 01/03/2016 to 28/02/2017 already supplied, in particular section 190 shows **"income from a property business" as fnil. This is because the Company does not receive any rental income or any other income from the property business.**

5. With reference to the Company's business bank statements ('the statements'), there are receipts of monies from its customers with the narrative 'rent' or the narrative of a property address which has created misunderstanding: **such monies are not rental income for the Company. Instead, the rental payments are for the Company to pass on to the various letting agents and landlords. Upon receipt of the rental payments, the Company transfers the rent portion to the relevant letting agent or landlord and retains the Management Service Fee portion for itself. Therefore, the Statement shows a lot of entries paying various letting agents and landlords. With regard to entries showing in the Statements relating to rental payments, only the Management Service Fee portion form part of the Company's revenue and not any part of the actual rent. The Company charges for services of acting as a**

**liaison with letting agents and/or landlords on behalf of the students."**

[my emphasis]

8. The difficulty for the Applicant is that whilst some parts of that explanation might point in the direction for which he contends, such as the reference to the "Management Service Fee portion" making up the Company's revenue and not any part of the actual rent, the explanation as there given is ambiguous. In particular, at paragraph [1], the Company's main activities are said to be to provide concierge-style services as a package, but that package as then described is said to include the payment of rent and deposits on behalf of the students. The final sentence confirms that the Company charges a "Management Service Fee" in return for provision of those services.
9. Whilst I accept that the profit and loss account does not include rental income, that does not assist the Applicant. As I understand the Respondent's case, the prohibited activity is the charging of a management service fee for collection and payment of rent and not the receipt of rental as such. Indeed, I did not understand Mr Pipe to dispute that if the Applicant was operating a business purely as a letting agency and levying a fee based on a percentage of the rent or even a flat fee per property, this would fall within the prohibition in Paragraph 47. The income does not have to be rent as such, that is just one example.
10. The Respondent relies heavily on paragraph [5] of the explanation given in the Administrative Review. As I have already noted, the reference there to "actual rent" might assist the Applicant but as the Respondent points out, the reference to the rent portion being passed on whilst the "Management Service Fee portion" is retained does not.

11. Further, the last sentence makes the point that the Company charges for acting as liaison with the letting agents and/or landlords, which, if anything, points in the direction of the Company deriving income from the rents paid whilst also transferring over the actual rent payable. Although I accept therefore that the invoices are capable of supporting an interpretation that no money is retained and the rent is transferred with no deduction, those invoices have to be read with the explanation given in the Administrative Review.
  
12. This is of course a judicial review and as such, it is not a matter of how I understand the explanation but how the Respondent understood it. I accept of course also that I am not here interpreting a statute either in terms of the wording of Paragraph 47, still less in relation to the wording of the explanation given in the Administrative Review. I therefore turn to the Respondent's administrative review decision which is under challenge to see how she approached the issue. Having referred to the original decision and Paragraph 47, the Respondent goes on to say this:

"...Under those Rules, you were required to demonstrate that you were not engaged with business activity related to residential accommodation.

You have challenged the decision to refuse your application for leave to remain as a Tier 1 Entrepreneur, which was refused on the basis that the original caseworker concluded your bank statements show a regular income from rent and not from the supply of goods or services as specified in Paragraph 47 of Appendix A of the Immigration Rules. You have claimed in your Admin Review that your business activities are a concierge service, which in turn offers a range of services. This includes you acting on behalf of the students as a 'go-between', transferring rent money



from the students to the landlords. You claim that your business accounts do not confirm ownership of any assets or properties from which rent is generated, nor is any rental income declared in those accounts. You have highlighted that your company's tax returns report no income from property business.

You claim that the bank statements which show income under the reference of 'rent' is a misunderstanding, because the rent is always passed on to the relevant landlords or letting agents while you retain a service fee.

Upon review of your application we are satisfied that the original caseworker was correct to refuse your application. Please be aware that the Admin Review process is limited to assessing the information which was available to the original caseworker at the time of your application, and whether or not the original caseworker was reasonable when deciding the outcome of your application with respect to the evidence available."

I pause to observe that it is that latter sentence which appears to be the basis on which permission was granted at least in part. However, it is now confirmed by the Respondent that the Applicant's explanation was in fact considered. The decision letter continues as follows:

"A review of your bank statements confirms that there are numerous instances where payment has been made into your business account under the reference of 'rent', 'house rent', 'rent payment' or similar wording. Furthermore, information about your company on the Companies House website, under the heading of 'Nature of Business' lists 'other accommodation'. Therefore we are satisfied that the original caseworker was reasonable to raise concerns over the substantial rental payments entering your business bank

account because such activity is not permitted under the Immigration Rules for Tier 1 Entrepreneurs. Unfortunately there is no clear indication on the other supporting documents submitted with your application which would have lead the original caseworker to assess such evidence/transactions within the context of a concierge service. A lack of declarations on your business accounts/tax returns related to property ownerships is not considered sufficient to dispel the original caseworker's concerns over the visible bank transactions."

13. As the Respondent accepts, there is no express rejection of the explanation given by the Applicant in the Administrative Review decision. However, the Respondent has clarified her position at [21] to [25] of her detailed grounds. As she there explains, the explanation given by the Applicant is consistent with the application of Paragraph 47. As is said at [21] of the detailed grounds by reference to [5] of the Administrative Review, the activity as there described "is precisely what is excluded under Paragraph 47".
14. The issue for me is whether the Respondent has engaged with the explanation given and whether her decision is irrational or fails to give reasons for rejecting it. As I have already indicated, the Respondent did not reject the explanation. Her case is that the business activity as she understood it and as set out in the Administrative Review is not permitted under Paragraph 47. I cannot say that her conclusion to that effect was irrational to the higher threshold which applies, particularly when the explanation is read as a whole and notwithstanding those parts which might support the Applicant's case (as I have already explained).
15. The outcome may have been different if the Applicant or his advisers had attempted to reconcile the bank statement entries

with the invoices and perhaps included some evidence of the actual rent charged to show that no part of the rent had been withheld. It might have been different if the Applicant had provided further detail of the consultancy fee and other services and not made any reference to the services provided as including liaison between student and landlord/letting agency or had stated in terms that there were no deductions from rent and that the management service fee has no link to the rent (if that is so). It might have been different if the Applicant had invoiced the students separately for rent, making clear that the rent as transferred was the exact amount payable under the tenancy agreement with no deductions and that no fee was charged for transferring that rent.

16. I am not here, however, to make the Applicant's case for him any more than was the Secretary of State. It was for the Applicant to make his case to the Secretary of State and to demonstrate that he was entitled to the relevant points. On this occasion, I am satisfied that he failed to do so and that the Secretary of State was entitled to reach the decisions she did. For those reasons, I refuse the application for judicial review.

17. I end by expressing some sympathy for the Applicant if indeed his business is simply transferring over rental income with no deduction or charge. If he were to make a further application (in the event that he is able to do so) he will, however, need to make plain how the Company's income is derived so that his explanation clearly shows that the business activity is not precluded by Paragraph 47.

18. For the foregoing reasons, I refuse the application for judicial review.

**Application for Permission to appeal to the Court of Appeal**

19. Mr Pipe does not make an application for permission to appeal. I am required to deal with that, however, in any event. I refuse permission to appeal for the reasons I have already given. There is no arguable error in my decision.

**Costs**

20. I make an order that the Applicant pay the Respondent's reasonable costs on the standard basis, to be assessed by a Costs Judge if not agreed.

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JR/7806/2018

**Upper Tribunal  
Immigration and Asylum Chamber  
Judicial Review Decision Notice**

The Queen on the application of  
Zi Ye

**Applicant**

v

Secretary of State for the Home Department

**Respondent**

**Before Upper Tribunal Judge Smith**

**Application for judicial review: substantive decision**

Having considered all documents lodged and having heard from Mr A Pipe of Counsel instructed by Lin & Co solicitors on behalf of the Applicant and Mr Z Malik of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on Monday 4 November 2019

**Decision: the application for judicial review is refused**

For the reasons contained in my decision given orally at the end of the hearing on 4 November, a transcript of which is attached hereto

**Permission to appeal to the Court of Appeal**

No application was made for permission to appeal. I refuse permission to appeal in any event. There is no arguable error of law in my decision.

**Costs**

The Applicant shall pay the Respondent's reasonable costs of this application on the standard basis, to be assessed by a Costs Judge if not agreed.

**Reasons**

The Applicant confirmed that he could not resist such an order. I did not have any schedule of costs from the Respondent in order to assess quantum.

Signed:



**Upper Tribunal Judge Smith**

Dated:      **6 November 2019**

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

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**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 appellant'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 given (Civil Procedure Rules Practice Direction 52D 3.3(2)).