Judgments

*Gu v Secretary of State for the Home Department

[2014] EWHC 1634 (Admin)

Queen's Bench Division, Administrative Court (Birmingham)

Mr Justice Foskett

20 May 2014

Immigration - Leave to remain - Maintenance requirements - Defendant Secretary of State refusing claimant Chinese national further leave to remain as Tier 4 (General) student for failure to provide all specified documents establishing maintenance requirements - Claimant seeking judicial review on basis should have been given opportunity to provide missing document as one from series being omitted - Whether one document from series being missing - Immigration Rules, para 245AA.

Judgment

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

MR JUSTICE FOSKETT:

1. This application for judicial review, permission to apply for which was granted by His Honour Judge Mark Rogers on 22 October 2013 following an oral renewal hearing, raises a short issue on the interpretation of paragraph 245AA of the Immigration Rules. The general background to the issues sought to be addressed by that paragraph is, of course, dealt with comprehensively in *SSHD v Rodriguez & Others* (reported as *Patel & Others v SSHD* [2014] EWCA Civ 2), which focused on the "Evidential Flexibility policy" described fully in paragraphs 45 *et seq* of the judgment of Davis LJ.

2. Paragraph 245AA was incorporated in the Immigration Rules on 6 September 2012 and it is not in dispute that it (or, more accurately, the then extant version of the paragraph) was in force at the time the decision challenged in these proceedings was taken. That paragraph was not directly the subject of the decision in *Rodriguez* although it was referred to by Davis LJ at paragraph 47 when he said that "what was contained in the Evidential Flexibility policy guidance has in effect been incorporated into the Immigration Rules themselves from 6 September 2012." I will return to the terms of the paragraph after setting out the immigration background of the Claimant.

3. He is a Chinese national studying for a BA (Hons) in Business Studies at Birmingham City University. On 29 July 2010 he was granted leave to enter the UK as a Tier 4 (General) Student valid until 10 August 2011. On 9 August 2011 he applied for and was granted further leave to remain on the same basis until 30 August 2012.

4. On 30 August 2012 he applied for further leave to remain, again on the same basis, because he needed to re-study one core module in order to complete his degree. However, the application was not accompanied by the requisite fee and, by

a letter dated 19 September 2012, the application was rejected as invalid. The letter told him that if he wished to make a further application then he should return a fully completed application form with the appropriate fee to the relevant address.

5. On 27 September 2012 (by which date the Claimant had no extant leave to remain in the UK) he submitted a further application for leave to remain as a Tier 4 (General) Student with the appropriate fee, but the evidence required under the Points Based System was lacking in a respect to which I will now turn.

6. The evidential requirement set out in paragraphs 1A and 1B(a)(i) of Appendix C of the Immigration Rules as it applied to the Claimant was that he should demonstrate by providing "the specified documents" that he had the required level of maintenance funds (£7200) for the consecutive 28-day period from 24 August 2012 to 20 September 2012. However, through the agent he instructed he submitted a one-page bank statement (and accompanying summary) dated 20 September 2012 which covered only the period from 28/29 August 2012 to 20 September 2012. The statement showed the transactions on the account between those dates (and certainly demonstrated the requisite level of funds during that period) and indeed demonstrated that the opening balance as at 28 August was just over £18,500. However, it did not show what the position was as from 24 August. Had the correct documents been submitted it is clear (and undisputed) from evidence sought to be submitted to the Defendant subsequently that he would have been able to demonstrate the requisite level of funding for the 28-day period, but, as I have indicated, that was not achieved by the documents submitted.

7. It is, perhaps, to be noted that the documents said to be "the specified documents" are "personal bank statements ... [which clearly show *inter alia*] any transactions during the specified period, and ... that the funds in the account have been at the required level throughout the specified period": see see Appendix C paragraph 1B.

8. On 5 December 2012 the Defendant refused the Claimant's application on the basis that it did not demonstrate the requisite level of funding for the requisite period. Since he had no extant leave to remain, there was no right of appeal and since there was no administrative review available he was told he had to leave the UK. He would then have to apply for re-entry to the UK.

9. He instructed solicitors who, in a letter dated 2 January 2013, invited the Defendant to reconsider the decision set out in the letter of 5 December 2012. The Defendant did review the case and took the view that the decision taken on 5 December was correct because the bank statements submitted with his application did not meet the relevant criteria. That was communicated by a letter dated 22 January 2013.

10. It should be noted that neither the letter of 5 December 2012 nor the letter of 22 January 2013 referred to paragraph 245AA of the Immigration Rules or to the "Evidential Flexibility policy".

11. It is right to observe that issues arising from these two matters were not raised in the pre-action letter from the Claimant's solicitors dated 24 January 2013 or in the initial grounds of claim drafted by them, but the "Evidential Flexibility policy" did emerge as an issue after the refusal of permission on the papers by His Honour Judge Plunkett in July 2013. It emerged in the "Grounds for seeking reconsideration" and drew on the *Rodriguez* case which at that time had been considered by the Upper Tribunal. Paragraph 245AA of the Immigration Rules was not referred to at that stage.

12. By the time the renewed application came before Judge Rogers, Mr Adam Pipe, who appeared for the Claimant

before me, had raised the issue of paragraph 245AA in addition to the issues arising from the *Rodriguez* case. Permission was granted, but the argument arising from *Rodriguez* and the application of the "Evidential Flexibility policy" is no longer pursued because Mr Pipe submits that paragraph 245AA is in broader terms and less restrictive than the Evidential Flexibility policy and, accordingly, avails the Claimant to a greater extent than that policy. Indeed, he acknowledged candidly that if this claim fell to be dealt with by reference to the Evidential Flexibility policy, it would fail.

13. Paragraph 245AA (in the form in which it falls to be considered in this case1) is entitled "Documents not submitted with applications" and the text is as follows:

> "(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the UK Border Agency will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where subparagraph (b) applies.
>
> (b) The subparagraph applies if the applicant has submitted:
>
> (i) A sequence of documents and some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);
>
> (ii) A document in the wrong format; or
>
> (iii) A document that is a copy and not an original document, the UK Border Agency will contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received by the UK Border Agency at the address specified in the request within 7 working days of the date of the request.
>
> (c) The UK Border Agency will not request documents where a specified document has not been submitted (for example an English language certificate is missing), or where the UK Border Agency 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."

14. It is plain from the history of events set out above that the provision that arguably comes into play in this case is paragraph 245AA(b)(i). Mr Pipe submits that it applies because one bank statement "from a series" was omitted. Anticipating the argument foreshadowed in the Detailed Grounds of Defence that the bank statement(s) covering the period 24 August 2012 to 27/28 August 2012 were not missing documents in a "sequence of documents" falling within paragraph 245AA(b)(i), Mr Pipe's Skeleton Argument contained the submission that the Claimant's case fits within the paragraph for the reason already given and he asserts that there is no requirement that the missing bank statement(s) should be in the middle of a series of such statements. That is the essential issue. The contention is that if he had been contacted and given the opportunity to provide the missing bank statement, the Claimant would have satisfied the rules because he had "more than adequate funds" for the specified period. As a matter of fact, that is not in issue.

15. Mr Shakil Najib, for the Defendant, repeats the argument foreshadowed in the Detailed Grounds of Defence and

contends that the missing bank statement(s) cannot be seen as a missing document or missing documents in a "sequence of documents". That, he contends, is the natural and ordinary meaning of the words in the relevant sub-paragraph, that it conforms to the views of the Court of Appeal in *Rodriguez* (albeit that that case did not deal directly with the wording of this paragraph) and with the obvious common-sense of the policy.

16. So far as *Rodriguez* is concerned, he draws attention to the conclusions that, he submits, should be drawn from the Court of Appeal's approach to Mr Mandalia's case. He came to the UK on 11 February 2008 on a student visa with leave to enter until 30 June 2009, leave which was extended from time to time until 9 February 2012. On 7 February 2012 he applied for further leave to remain as a student under the Tier 4 (General) requirements. He had to show possession of not less than £5,400 over the relevant continuous 28-day period. The bank statements he supplied with his application showed a credit balance in excess of £11,000 throughout, but they covered only the period from 29 December 2011 to 19 January 2012 (a 22-day period).

17. The Evidential Flexibility policy under which, potentially, Mr Mandalia's case fell to be considered was such that it enabled caseworkers "to query details or request further information, such as a missing wage slip or bank statement from a sequence". Step 3 of the detailed guidance given to caseworkers said this:

> "We will only go out for additional information in certain circumstances which would lead to the approval of the application.
>
> Before we go out to the applicant we must have established that evidence exists, or have sufficient reason to believe the information exists. Examples include (but are not limited to) bank statements missing from a series ..."

18. Against the background of the facts set out in paragraph 16 above, Davis LJ said this at paragraph 102:

> "... in his case the failure was to supply statements covering the necessary 28 day period: in respect of the period which the supplied statements did cover there was a sufficiency of funds. But in my view that makes no real difference. For, as [Counsel for the Secretary of State] pointed out, this was not a "missing sequence" case; and it would again have been complete speculation on the part of the Secretary of State as to whether bank statements - if available at all - for the preceding period or the succeeding period would have shown the availability of funds in the required amounts."

19. Mr Najib submits that Davis LJ took the expressions "missing ... bank statement from a sequence" and "bank statements missing from a series ..." to mean missing pages in the middle of the sequence - in other words, a "missing sequence" case was one in which, for example, the period 1 January to 31 January is covered by 6 bank statement pages and the third page was omitted from the sequence.

20. He submits that this is a common sense approach which is in keeping with the intention behind the Evidential Flexibility policy and indeed the new paragraph 245AA(b)(i), namely, to permit applicants who may inadvertently have omitted one document in a series to rectify the omission, but not simply to provide an opportunity for those who have failed to provide the required documentation to have a "second bite at the cherry". That philosophy found expression in the approach of Sullivan LJ in *Alam & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 960 with which Davis LJ expressly agreed in *Rodriguez*. Indeed Mr Najib also says that if the approach advocated by Mr Pipe

were correct, it would be immaterial whether an applicant had submitted bank statements showing the balance on any particular day within the 28-day period and that, accordingly, all missing banks statements to make up the required 28 days would fall within paragraph 245AA(b)(i) and the onus would be on the caseworker to "chase" up every such applicant to request missing bank statements. This would constitute an unwarranted burden on the Defendant with significant resource implications.

21. Whilst Mr Najib does not submit that it is authoritative as such, he draws attention to the decision of the Upper Tribunal in *Zahoor Ullah Khan v Secretary of State for the Home Department* (IA/24934/2012, 9 December 2013) in which Upper Tribunal Judge Pitt held that the appellant's case was not to be regarded as a 'missing sequence' case for the purposes of paragraph 245AA(b)(i) in circumstances where the appellant had submitted a one page bank statement showing the balance on a single day and thus did not cover the whole 28-day period. The approach, he submits, is consistent with the approach of Davis LJ in *Rodriguez*. Whilst Mr Pipe sought to suggest that providing evidence of a balance on one single day is rather different from the circumstances of this case (where the transactions and balances over all but a few days were shown), it does seem to me to operate as some confirmation of the general understanding of those with daily experience in the field of the meaning of paragraph 245AA.

22. Mr Pipe's more general response to Mr Najib's submissions is that paragraph 245AA should be seen as adopting a more liberal approach than the Evidential Flexibility policy and that there is nothing in *Rodriguez* to undermine that submission. Under the Evidential Flexibility policy he says that it can be seen that the Defendant will request further information only when its existence is reasonably believed to exist (see paragraph 17 above) and that there is no such requirement in paragraph 245AA. He also relies upon the proposition that the paragraph states that the Defendant "will" contact an applicant in the circumstances referred to and that the use of that word demonstrates a more generous approach to applicants than under the Evidential Flexibility policy.

23. Very attractively though the argument was presented, I am bound to say that it seems to me to be a very optimistic submission to suggest that that the purpose behind paragraph 245AA was to loosen the approach to these matters: the resource implications would be significant and, as Sullivan LJ observed in *Alam*, it would have the effect of slowing down the whole process of the Points Based System. The rigid application of the rules (which can themselves be difficult to understand) may have, in some cases, harsh results, but that cannot operate to undermine a procedure designed to deal with large numbers of applications in a relatively efficient way. Some leeway is provided in the exceptions specified in the rules, but, as it seems to me, those exceptions do have to be fairly narrowly interpreted otherwise the rules would have no meaning.

24. Giving paragraph 245AA its natural and ordinary meaning, and mindful of what was perceived by the Court of Appeal in *Rodriguez* to have been the intention behind it of giving effect to the existing policy (see paragraph 2 above), it does seem to me to be clear that something cannot be "missing" from a sequence until the sequence itself exists. To my mind that means that at least the start and end of the sequence must be in evidence for the sequence to exist. Something missing from it can only, therefore, be from within those two limits.

25. In this case, the statement constituting or evidencing the start of the sequence was missing. On that basis I do not consider that paragraph 245AA was engaged at all and I am unable to see why that should have obliged the Defendant's caseworker to pursue any further information even though the indication was that there was sufficient money in the account on 28/29 August. I would not, of course, say that it would necessarily have been wrong for the further information to be pursued by the caseworker, but any suggestion that the policy or the rule required that course to be adopted would, in my judgment, be wrong. It has to be accepted that the few days before 28/29 August were important to the validity of the application and it was incumbent on the Claimant to have put that information forward. If his agent failed to do so on his behalf, that is most unfortunate, but it can make no difference to the outcome.

26. For those reasons and despite Mr Pipe's attractively presented submissions, this application must be dismissed. I am grateful to him and to Mr Najib for their assistance.

27. I would merely add as a postscript that I was told by Mr Pipe that the Claimant has taken the one outstanding module that had generated the need to apply for the additional period of leave to remain, but that the university authorities would not release the results whilst this case was pending. I can well understand the concerns of an institution that has "Highly Trusted Status", as I understand this university does, but it would be unfortunate if it was felt that this claimant had been seeking to take advantage of the system as some do. It is clear that he did possess the relevant funds at the relevant time for the relevant period and that the agent acting for him did not make the second application in accordance with the requirements of the Points Based System. The Claimant has sought to challenge the decision to reject the application on grounds which persuaded Judge Rogers to grant him permission to proceed. The fact that I have rejected the substantive application should not be seen as any condemnation of the Claimant's personal position.

1 Mr Najib has helpfully indicated that paragraph 245AA was further amended by HC 760 on 13 November 2012 and again, most recently, by HC 628 on 1 October 2013. The guidance expressly provides that the amendment made by HC 760 on 13 November 2012 applies only to applications made on or after 13 December 2012. In other words, it would not apply to this case.