Asylum and Immigration Tribunal

IK (Immigration Rules – construction – purpose) Pakistan [2010] UKAIT 00002

THE IMMIGRATION ACTS

Heard at Field House (AIT Procession House)
On 4 November 2009

Before

SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE P R LANE

Between

IK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Solomon, Counsel, instructed by Greater London Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

The finding in AM (Ethiopia),[2008] EWCA Civ 1082, that the Immigration Rules have no over-arching purpose and must be construed sensibly according to the natural meaning of the language employed, is an approach approved by the Supreme Court in Ahmed Mahad and others [2009] UKSC 16. The existence of paragraph 245V, which describes the purpose of the Tier 1 (post-study work) "route", does not entitle decision makers to re-write specific requirements of the Rules, which are on their face sufficiently plain, whether or not a judicial fact-finder thinks the provision in question might have been differently phrased, compatibly with the purpose articulated in paragraph 245V.

DETERMINATION AND REASONS

1. The appellant, a citizen of Pakistan born on 16 March 1980, arrived in the United Kingdom on 12 September 2004 as a student. He was subsequently granted variations of leave to remain in that capacity until 10 December 2007, when he was granted a variation of leave to remain as a participant of the International Graduate Scheme until 10 December 2008. On 14 November 2008 the appellant applied for a variation of leave, to remain in the United Kingdom as a Tier 1 (post-study work) migrant. On 3 February 2009 the respondent refused the appellant's application.

2. The appellant appealed against that decision to the Tribunal, which heard his appeal at Hatton Cross on 2 April 2009. The Immigration Judge allowed the appellant's appeal under the Immigration Rules. On 3 July 2009 reconsideration of the Immigration Judge's decision was ordered under section 103A of the Nationality, Immigration and Asylum Act 2002, on the application of the respondent, who contended that the Immigration Judge had erred in law by having regard to the appellant's overdraft facility in the sum of £2,000, notwithstanding that the appellant did not have what was said by the respondent to be the requisite £800 of savings available to him at the material times prior to the making of the application.

3. The letter of decision of 3 February 2009 sent by the respondent to the appellant stated that the appellant had claimed 10 points for funds under Appendix C of the Immigration Rules but that the documents provided by the appellant "do not demonstrate that you have been in possession of £800 for the period specified in the guidance. The Secretary of State is therefore not satisfied that you have achieved 10 points under Appendix C of the Immigration Rules." The letter went on to say that the appellant accordingly did not satisfy the requirements of the Immigration Rules and it had been decided to refuse his application under paragraph 245Z as he did not meet the requirement of paragraph 245Z(e).

4. The relevant part of paragraph 245Z reads (or at the relevant date read) as follows:-

> "**245Z. Requirements for leave to remain**
>
> To qualify for leave to remain as a Tier 1 (post-study work) migrant, an applicant must meet the requirements listed below. Subject to paragraph 245ZA(i), 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:

...

(e) The applicant must have a minimum of 10 points under Appendix C."

5. Appendix C to the Rules deals with maintenance (funds). The relevant provisions read as follows:-

"1. An applicant applying for entry clearance or leave to remain as a Tier 1 Migrant (other than as a Tier 1 (Investor) Migrant) must score 10 points for funds.

2. 10 points will only be awarded if an applicant:

...

(b) applying for leave to remain, has the level of funds shown in the table below and provides the specified documents.

Level of funds	**Points**
£800	10

3. The applicant must have the funds specified in paragraph 2 above at the date of the application and must also have had those funds for a period of time set out in the guidance specifying the specified documents for the purposes of paragraph 2 above."

6. Paragraph 91 of the relevant guidance stated that, in order to qualify for leave to remain,

"applicants must show that they have enough money to support themselves. The funds requirements are detailed below.

...

- applicants in the United Kingdom seeking Further leave to remain must have at least £800 of personal savings."

7. Under the heading "**Documents we require**", the guidance required that the relevant evidence "must be in the form of cash funds. Other accounts or financial instruments such as shares, bonds, pension funds etc, regardless of notice period are not acceptable." Referring to Appendix C as stating that "only specified documents will be accepted as evidence of this requirement, the guidance then set out the specified documents as being:-

"1. Personal bank or building society statements covering the three-month period immediately before the application: the personal bank or building society statements should clearly show:

- the applicant's name;
- the account number;
- the account of the statement;
- the financial institution's name and logo;
- transactions covering the three-month period;
- that there are sufficient funds present in the account (the balance must always be at least £2,800 or £800, as appropriate)."

8. At paragraph 30 of his determination, the Immigration Judge wrote:-

> "13. The Appellant has 2 accounts at Barclays Bank, the first a current account which has an overdraft limit of £1,500 and a reserve limit of £500. The appellant also has a nest-egg savings account with Barclays Bank. The appellant had in that savings account on the 15 August £13,000 and £12,000 was withdrawn by him and paid in to his current account which he subsequently withdrew in cash in order to make a loan to his uncle and the loan in cash was made to his uncle in September 2008 and there is an affidavit from the appellant's uncle, being document 35 in the appellant's bundle, confirming that loan was made to [the uncle]."

9. At paragraph 14, the Immigration Judge referred to judicial comments taken from a case he referred to as "Obed and Others" (generally known as GOO and others [2008] EWCA Civ 747), in which it was said to be relevant to recall that the admission of foreign nationals to study helped to maintain English as the world's principal language of commerce, law and science and furnished a source of revenue, which was of importance to the United Kingdom's universities and colleges as well as to many independent schools. At paragraph 15, the Immigration Judge considered that although that statement had been made in relation to a student appeal "it could be argued that the whole purpose of this Immigration Rule is to allow the skills and knowledge acquired by an applicant to be used for employment and such skills would aid the economy".

10. After those observations, the Immigration Judge turned at paragraph 16 to the analysis of the appellant's actual case. The Immigration Judge noted that in the application form the question at N1 was "Does the applicant have **access** to £800 available funds to support themselves?" (Immigration Judge's emphasis). The Immigration Judge then referred to the policy guidance and in particular the statement at paragraph 91 that "Applicants in the United Kingdom seeking further leave to remain **must have at least £800 of personal savings**" (Immigration Judge's emphasis).

11. It is common ground that, in the remainder of the determination, the Immigration Judge wrongly described the Policy Guidance as an

Immigration Directorate Instructions (IDI). At paragraph 17, the Immigration Judge said that the IDIs "are silent as to what the meaning of 'personal savings' (sic) and equally the IDIs are silent about the existence of overdraft facilities available on specific accounts". The Immigration Judge continued in paragraph 18 by noting that the case of ZH (Bangladesh) [2009] EWCA Civ 8 had been cited to him in argument. Compressing what Sedley LJ said in paragraph 32 of the judgments in that case, the Immigration Judge purported to note that "an IDI does not have and cannot be treated as [if] it possessed the force of law… The IDI must have a legitimate bearing in the sense that it would be wrong for the Immigration Judge to adjudicate in ignorance of it."

12. After referring to AM (Ethiopia) [2008] EWCA Civ 1082 and Ahmed Iram Ishtiaq [2007] EWCA Civ 386 [2007] EWCA Civ 386, the Immigration Judge found as follows:-

> "21. Applying the above cases, together with the IDIs in respect of this particular Immigration Rule, whilst it is clear that the Appellant did not have a credit of £800 for the whole period of the 3 months immediately preceding his application, i.e. in October, September and August, nevertheless he did have the benefit of an overdraft facility which amounted in total to £2,000.
>
> 22. If one construed literally the wording of the IDI guidance that the Appellant had to have £800 of "personal savings" meaning a credit then it would have been open to the Appellant to have utilised that overdraft facility, withdrawn money and put it in a savings account. As it was, he did not need to utilise that facility although he had the benefit of the facility and therefore it can be urged that he had at least £800 or more available to him throughout the period.
>
> 13. Furthermore, for the period in which the Appellant did not have more than £800 in his bank account was [sic] a period that coincided with him loaning to his uncle £13,000 and there is a clear financial trail of how that money was loaned to his uncle. He did this at the time he was in expectation of receiving a bonus from his employers and which has been confirmed by his employers and was expecting and would normally have received that bonus at the time when his account was less than £800. As it was, he did not receive that bonus until February 2009.
>
> 14. I have concluded that if one uses a common sense approach to these issues and look at the reason for the Immigration Rule and how the IDIs should be interpreted in relation to a person such as the Appellant with the financial facilities that were available to the Appellant, namely an overdraft notwithstanding the fact that he did not actually use that, coupled with the fact that there is evidence of the Appellant being a person with financial means, namely that he has the ability to loan an uncle £13,000 and he has a property in Pakistan which is currently valued at over £55,000 and has been adequately supported by his father and his uncle when he was a student in the United Kingdom, that he does satisfy 245Z(e) of the Immigration Rules.

15. I therefore find that the Decision of the Respondent appealed against is not in accordance with the applicable Immigration Rules."

16. In his submissions in support of the Immigration Judge's determination, Mr Solomon, who had also appeared before that judge, relied upon his reply, served pursuant to rule 30, in which he made reference to the case law mentioned by the Immigration Judge. According to Mr Solomon, Appendix C to the Immigration Rules, properly construed, "contains a discretion allowing the respondent to consider the appellant's overall financial position". The policy guidance in question was "guidance only". The approach adopted by the Immigration Judge was in accordance with paragraph 245V of the Immigration Rules, which states that the purpose of the Tier 1 (post-study work) migrant route is "to encourage international graduates who have studied in the UK to stay on and do skilled or highly-skilled work". Alternatively, the wording of paragraph 245Z(e), Appendix C and the policy guidance "does not exclude loans or overdrafts and therefore it was reasonably open to the judge to take account of these in assessing the maintenance requirement".

17. The quotation cited by the Immigration Judge in paragraph 19 of his determination, as coming from AM (Ethiopia), in fact originates in the approach to the interpretation of the Immigration Rules commended by Lord Roskill in Alexander [1982] 1 WLR 1076 at p1080G:-

> "[The Rules] must be construed sensibly according to the natural meaning of the language which is employed. [They] give guidance to the various officers concerned and contain statements of general policy regarding the operation of the relevant immigration legislation."

18. That was the approach employed by the Court of Appeal in AM (Ethiopia), as is apparent from paragraph 55 of the judgments (Laws LJ); an approach now approved by the Supreme Court (Ahmed Mahad and others [2009] UKSC 16; paragraph 10 (Lord Brown)). What is said in paragraph 55 about the Immigration Rules having no "over-arching policy", whilst remaining true of the Immigration Rules as a whole, is subject to the qualification that, as regards the type of case – Tier 1 (post-study work) migrant – with which we are concerned, paragraph 245V does, as we have seen, set out the purpose of "this route", which plainly includes paragraph 245Z and the relevant appendices.

19. Nevertheless, the existence of paragraph 245V can in no way be regarded as entitling decision makers, including this Tribunal, to rewrite specific requirements of the Rules, which are on their face sufficiently plain. That is so, whether or not a judicial fact-finder thinks that the provision in question might have been differently phrased, compatibly with the purpose articulated in paragraph 245V.

20. The Immigration Judge's reliance upon Ishtiaq was misconceived, as is the appellant's submission that Appendix C, properly construed, contains a discretion allowing the respondent to consider an appellant's overall

financial position. Ishtiaq concerned the quite different question of whether an IDI had the effect of circumscribing the discretion of a caseworker under paragraph 289A(v) of the Immigration Rules in deciding what evidence to require an applicant to produce in a case involving alleged domestic violence. That case cannot be used as an interpretive tool in relation to Appendix C. As can be seen, paragraph 2 of Appendix C contains no element of discretion. 10 points will only be awarded if an applicant has the level of funds shown in the table and provides the specified documents. The "level of funds" is "£800". Paragraph 3 provides that the applicant must have those funds for a period of time set out in the guidance. Notwithstanding Mr Solomon's submission to the contrary, there is nothing remotely discretionary in any of this. Furthermore, these requirements are in the Immigration Rules themselves (albeit an Appendix), rather than in the policy guidance. The Concise Oxford Dictionary defines a fund as a "permanent stock of something ready to be drawn upon; or a stock of money, especially one set apart for a purpose". Thus, even before one comes to the relevant policy guidance, it is by no means plain, as a matter of construction, that an overdraft facility, which concerns the bank's stock of money rather than the applicant's, can be said to represent the funds of the applicant.

21. We do not find that ZH (Bangladesh) assists the appellant. That case concerned the interpretation at paragraph 276B of the Immigration Rules (requirements for indefinite leave to remain on the ground of long residence in the United Kingdom). Paragraph 276B contains a requirement for the decision maker to have regard to a variety of matters, including the personal circumstances and background of the applicant, in reaching a decision as to whether it would be undesirable for that person to be given indefinite leave to remain on the ground of long residence. The Court of Appeal dealt with the IDI of May 2007, which sought to guide the respondent's caseworkers in how to approach their task in this regard. The IDI in that case was held not to be an aid to the construction of the Rule. The policy guidance in the present case, however, is not relied on by the respondent as an aid to the construction of the relevant Rules, including Appendix C. Instead, the policy guidance is the means by which the requirement in paragraph 3 of Appendix C, to have the relevant funds for a particular period of time, is given effect. It is also the means by which the respondent gives expression to the requirement in Appendix C to produce "the specified documents".

22. This was made plain by the Tribunal in paragraph 46 of NA & Others (Tier 1 - post-study work – funds) [2009] UKAIT 00025, where the Tribunal found that:-

> "There are two respects in which the rules treat the guidance as determinative: as to the period of time for which an applicant must show he has had the requisite £800 in maintenance (funds) and as to the type of documents he must produce to evidence that. Unlike some items of Home Office policy, the policy guidance does not seek or purport to set out, and is not to be confused with a document setting out, matters of Home Office

policy that exist as concessions outside the Rules. Unlike UKBA Immigration Directorate Instructions (IDIs) which albeit in the public realm are written for UKBA staff, the policy guidance is clearly written for potential applicants. As such it is something on which applicants are entitled to rely as accurate and reliable information about what is expected of them if they wish to qualify under the Immigration Rules. The policy guidance appears, therefore, to be a hybrid of a new kind, being guidance expressly for applicants and containing some provisions that are integral to the understanding and operation of the relevant Immigration Rules."

23. In the present case, the appellant was, and is, unable to produce the specified documents, since his bank statements fail to show that, for the relevant period, there were "sufficient funds present in the account (the balance must always be at least £2,800 or £800, as appropriate)". Those requirements admitted of no purposive construction, such as the Immigration Judge mentioned in paragraphs 22 to 24 of his determination. The overdraft facility was not the equivalent of funds in the appellant's account. The fact that the appellant had loaned his uncle £13,000 was, likewise, not evidence that the appellant had those funds at the relevant times; nor was the fact that the appellant appeared to have received his employee's bonus later than he was anticipating.

24. Finally, Mr Solomon sought to rely upon paragraph 95 of the policy guidance issued in respect of applications made on or after 31 March 2009. This reads:-

> "95. The evidence of maintenance must be cash funds in the bank (this includes savings accounts and current accounts even when notice must be given), loan or official financial or government sponsorship available to the applicant. Other accounts or financial instruments such as shares, bonds, pension funds, etc, regardless of notice period, are not acceptable."

25. If the reference in paragraph 95 of the new guidance to a "loan" represents a substantive change, compared with the guidance with which we are concerned, the appellant's case, far from being strengthened, faces the difficulty that the previous wording did not cover loans of any kind. If, on the other hand, Mr Solomon's intention is to use paragraph 95 as an aid to the construction of Appendix C, this runs counter to the judgments of the Court of Appeal in relation to IDI's in ZH (Bangladesh), besides being based on a misunderstanding of the substantive role played by the guidance in the points based scheme. Finally, the new policy guidance continues to require specified documents, the nature of which do not assist the appellant. In particular, the personal bank etc. statements are required to show:-

> "• that there are enough funds present in the account (the balance must always be at least £2,800 or £800 as appropriate)."

26. As the Tribunal recently said in PO (Points based scheme: maintenance: loans) Nigeria [2009] UKAIT 00047, this "is a simple and readily intelligible requirement. Documents which fail to show a balance at the required level simply are not evidence of the requirements of the points based scheme" (paragraph 5).

Decision

27. The Immigration Judge made a material error of law and we accordingly substitute for it a decision dismissing the appellant's appeal under the Immigration Rules.

Signed

Senior Immigration Judge P R Lane