Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09183/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28th July 2014	**On 11th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

RANJITH REDDY GUDIPATI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs A Vatish of Counsel instructed by Bright Star Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Wallace promulgated on 7th May 2014.

2. The Appellant is an Indian citizen born 2nd April 1986 who applied for leave to remain in the United Kingdom as a Tier 4 Student. The application was refused on 11th February 2014, the Respondent making a combined decision to refuse to vary leave to remain, and to remove the Appellant from the United Kingdom.

3. In refusing to vary leave to remain, the Respondent relied upon paragraph 245ZX(d) with reference to paragraph 13 of Appendix C of the Immigration Rules. The Respondent noted that the Appellant claimed to be financially sponsored by his father, but the Appellant had provided no evidence of his relationship to the Sponsor.

4. The Appellant appealed to the First-tier Tribunal, requesting that his appeal be determined on the papers. The appeal was considered by Judge Wallace (the judge) on the papers and dismissed.

5. The Appellant applied for permission to appeal to the Upper Tribunal. It was submitted that the judge had erred in paragraph 9 of his determination in finding the Appellant's passport did not show the name of the Appellant's father.

6. It appears to have been accepted that the Appellant did not provide his birth certificate with the application, but this was subsequently provided and it was contended that the judge had erred in paragraph 9 by finding material, the fact that different places of birth were given in the passport and in the birth certificate. It was contended that the passport and the birth certificate both showed the names of the Appellant's parents, and this was sufficient to prove the relationship, and the judge had erred in not accepting this.

7. Permission to appeal was granted by Judge of the First-tier Tribunal Davies and I set out below paragraphs 2-4 of the grant of permission;

> "2. The judge in an exceptionally brief determination makes no reference whatsoever to the burden and standard of proof which is a fundamental requirement of every determination made in this jurisdiction.
> 3. The judge did not apply the correct burden and standard of proof as he makes no reference to the burden and standard of proof whatsoever.
> 4. The grounds and the determination do disclose an arguable error of law."

8. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the judge had not erred and it was clear that the judge had correctly applied the burden of proof as being on the Appellant, and the judge was entitled to find that the Appellant had not discharged the burden of proof.

9. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The Upper Tribunal Hearing

Preliminary Issues

10. Mrs Vatish had not seen the rule 24 response and so was provided with a copy.

11. I asked the representatives whether it was agreed that the Appellant's birth certificate and the letter from his parents confirming the relationship, both of which were required to be submitted with the application by paragraph 13B of Appendix C, had not been submitted with the application.

12. Both representatives confirmed that this was agreed.

The Appellant's Submissions

13. Mrs Vatish said that while it was accepted that a letter from the Appellant's parents had not been submitted, there was a letter submitted with the application from United Bank of India, confirming that the Appellant's father had deposit accounts with that bank and that the funds could be used for the Appellant's education in the United Kingdom. The Appellant's passport had been submitted with the application for leave to remain, this showed the names of his parents. Mrs Vatish submitted that if the judge had applied the correct burden and standard of proof, he would have found that there was sufficient evidence of relationship between the Appellant and his Sponsor, who was his father.

14. In addition Mrs Vatish submitted that the Respondent should have applied the evidential flexibility policy. She clarified that she meant that the Respondent should have applied paragraph 245AA of the Immigration Rules and in particular 245AA(b)(i) on the basis that a document in a sequence had been omitted, and therefore the Respondent should have pointed this out to the Appellant and given him the opportunity to produce his birth certificate which was required to have been submitted with the application. The Appellant had received a letter from the Respondent acknowledging his application, indicating that he should not contact the Respondent again unless he heard further from the Respondent requesting any further information.

15. Mrs Vatish submitted that the judge had erred because he should have taken into account that the Respondent failed to properly apply paragraph 245AA, and therefore the judge should have found that the Respondent's decision was not in accordance with the law.

16. In relation to the other grounds referred to in the application for permission to appeal, Mrs Vatish accepted that there should have been no

reference in those grounds to the 1951 Refugee Convention, but reliance was placed upon Article 8 of the 1950 European Convention on Human Rights. I was asked to accept that this had been raised as a Ground of Appeal before the First-tier Tribunal and therefore should have been determined by the judge. Miss Vatish accepted that the only evidence before the First-tier Tribunal in relation to Article 8, was paragraph 2.9 of the Grounds of Appeal which is set out below;

> "2.9 The decision of the Respondent breached Article 8 of the Human Rights Act because of her (sic) private life in UK."

The Respondent's Submissions

17. Mr Walker accepted that the judge had made an error in finding that the Appellant's father's name was not in the passport but contended that overall there was no material error in dismissing the appeal under the Immigration Rules as the Appellant's birth certificate should have been submitted with the application. Mr Walker accepted that there was no reference in the application form to the requirement to submit a birth certificate.

The Appellant's Response

18. Mrs Vatish asked that I place weight upon the concession made by Mr Walker that there was no reference in the application form to a birth certificate being required, and that I take into account that the Appellant submitted his application without the assistance of legal representation.

My Conclusions and Reasons

19. I deal firstly with the burden and standard of proof which appears to have been raised by the judge granting permission, rather than the Appellant in his grounds of application, which were prepared by his previous representatives.

20. The judge does not set out in terms that the burden of proof is on the Appellant and the standard a balance of probabilities. However this is not, without more, an error of law. I find no indication, having read the determination, that the judge has erred in relation to the burden of proof. It is clear in my view that the judge found the burden of proof to be on the Appellant. I find no indication in the determination that the judge considered that the standard of proof was anything other than a balance of probabilities. I find no error on this issue.

21. The application was initially refused because the Appellant was relying upon financial sponsorship from his father, which is permitted, but he had provided no evidence of the relationship between himself and the Sponsor. The relevant paragraphs in Appendix C are 13 and 13B.

22. Paragraph 13 states that funds will be available only where the specified documents show or where permitted by the rules, the Appellant confirms that funds are held or provided by;

    (ii) the applicant's parent(s) or legal guardian(s), and the parent(s) or legal guardian(s) have provided written consent that their funds may be used by the applicant in order to study in the UK.

23. I set out below paragraph 13B;

    13B If the applicant is relying on the provisions in paragraph 13(ii) above, he must provide:
    (a) one of the following original (or notarised copy) documents:
        (i) his birth certificate showing names of his parent(s),
        (ii) his certificate of adoption showing the names of both parent(s) or legal guardian, or
        (iii) a Court document naming his legal guardian;
        and
    (b) a letter from his parent(s) or legal guardian, confirming:
        (i) the relationship between the applicant and his parent(s) or legal guardian, and
        (ii) that the parent(s) or legal guardian give their consent to the applicant using their funds to study in the UK.

24. Therefore in this case the Appellant should have submitted with his application his birth certificate showing the names of his parents, and a letter from his parents confirming their relationship, and that they give their consent to the Appellant using his funds to study in the UK. The requirement to provide these documents with the application is mandatory. If they are not provided then the Immigration Rules are not satisfied.

25. It is accepted on behalf of the Appellant that he has never provided a letter from his parents confirming the relationship and giving their consent to him using their funds to study in the United Kingdom. It is also accepted that the Appellant did not submit his birth certificate with his application, and his birth certificate was submitted on 8th April 2014, after the Respondent had refused the decision on 11th February 2014. The birth certificate was issued on 1st April 2014.

26. Therefore the Respondent was correct to find that the Appellant had not provided evidence of relationship to his Sponsor, and the judge was correct to find that the appeal must be dismissed under the Immigration Rules.

27. The most obvious reason for this, is that the letter from the Appellant's parents had never been submitted. Therefore even if the Respondent was wrong not to consider paragraph 245AA, and the judge was similarly wrong, in relation to the birth certificate, that would not have availed the Appellant because a mandatory document, that being the letter from his parents had never been submitted.

28. However I do not find that the Respondent was wrong not to apply paragraph 245AA(b)(i) which applies if;

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

29. This is not a case where a document in a sequence has been omitted. In this case the Appellant did not submit two specified documents with his application, those being his birth certificate, and a letter from his parents. The judge therefore did not err because he did not find the Respondent's decision to be not in accordance with the law.

30. Although the Appellant's birth certificate was submitted after the Respondent's decision, I find that it was not admissible in evidence by virtue of section 85A(4) of the Nationality, Immigration and Asylum Act 2002 which states that, subject to certain exceptions, if an appeal relates to an application under the points-based system, the Tribunal may only consider evidence adduced by the Appellant if that evidence was submitted in support of and at the time of making the application to which the Immigration Decision related. I do not find that any of the exceptions to this principle apply, and therefore the birth certificate was not admissible. Alternatively, even if it was admissible, the appeal could still not have succeeded because of the absence of the letter from the parents.

31. The judge erred in considering the birth certificate, and comparing the birth certificate to the Appellant's passport. This was not relevant. The judge should have found that specified documents that must have been submitted with the application had not been submitted, and for that reason the appeal had to be dismissed under the Immigration Rules. The judge has erred in referring to immaterial matters.

32. However the error is not material, because the appeal could not have succeeded under the Immigration Rules for the reasons given above.

33. Article 8 was raised as a Ground of Appeal. The judge did not consider it. This is an error of law because section 86(2)(a) of the Nationality, Immigration and Asylum Act 2002 states that the Tribunal must determine any matter raised as a Ground of Appeal.

34. However the error is not material. This is because the only reference to Article 8 that was before the First-tier Tribunal, was paragraph 2.9 of the Grounds of Appeal. There was no witness statement from the Appellant and no other evidence as to how it was contended that Article 8 was engaged, and how it was contended that Article 8 would be breached if the Appellant's application was refused. The judge could not have allowed the appeal under Article 8 in the absence of any satisfactory evidence.

35. I therefore conclude that the judge has erred in law in considering this appeal. I do not find the errors to be material because for the reasons given above, the appeal could not have succeeded under either the Immigration Rules or on human rights grounds. The Upper Tribunal has a

discretion under section 12(2)(a) of The Tribunals, Courts and Enforcement Act 2007, that states that if an error of law is found, the Upper Tribunal may, but need not, set aside the decision of the First-tier Tribunal. In this case I have decided not to set aside the decision because the errors are not material and the appeal could not have succeeded.

Decision

The decision of the First-tier Tribunal did not involve an error of law such that the decision must be set aside.

I do not set aside the decision. The appeal is dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date: 30th July 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date: 30th July 2014

Deputy Upper Tribunal Judge M A Hall