IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09121/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 June 2015	**On 22 June 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

PRONOY BARUA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Miss A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh whose date of birth is 1 January 1985. He appealed against the respondent's decision to refuse to vary his leave to remain to that of a Tier 1 Entrepreneur. The respondent's decision was dated 31 January 2014. He appeals to the Upper Tribunal against the decision of First-tier Tribunal Judge Clarke who dismissed his appeal in a decision promulgated on 24 September 2014.

2. The appellant entered the UK on 6 February 2010 with entry clearance as a Tier 4 (General) Student that was valid until 30 November 2011. On 29

December 2011 he was granted an extension of leave to remain as a Tier 1 (Post-Study Work) Migrant until 29 December 2013. On 28 December 2013 he applied to vary his leave to remain to that of a Tier 1 (Entrepreneur) Migrant. He proposed to enter into an entrepreneurial team with Mr MD Emran Hossain to run an IT services company called BETech solutions Limited.

3. The application was refused by the Secretary of State on 31 January 2014. The Secretary of State noted that the appellant had failed to provide a number of documents that were relied by paragraph 41SD of the Immigration Rules. These included a recent bank or building society statement. He had also failed to provide relevant documentation relating to third party funding. He had failed to provide contracts of evidence of trading of the company. He had also failed to provide a current appointments report as evidence to show that he was a director of the company.

4. The Secretary of State also pointed out that other pieces of evidence were not in the correct format and did not contain the correct information. This included the letter from the Halifax dated 27 December 2013 but did not show the appellant's account number as required, and also included a letter relating to Mr Md Emran Husain, also dated 27 December 2013 which the Secretary of State rejected because it did not state as required by the Rules that the appellant had access to the funds held in the account.

5. The appellant appealed against the decision of the First-tier Tribunal Judge on the grounds that the judge erred in failing to have consideration to the evidential flexibility policy outlined in paragraph 245AA of the Immigration Rules. The grounds also argued that the judge failed to give adequate consideration to Article 8 in light of the fact that it was asserted that the appellant had established a private life in the UK and had also established a business in the UK.

6. On 9 March 2015 Deputy Upper Tribunal Judge Sheridan granted permission to appeal because it was at least arguable that the judge had failed to give consideration to paragraph 245AA although the judge said “It is far from clear that the appellant's failings would have been saved by paragraph 245AA”. In response the respondent submitted that the number of failures in the evidence means that the provisions of paragraph 245AA would not in any event avail the appellant and that there is no error of law in the judge’s decision.

7. The matter comes before the Tribunal today to decide whether there is any error of law in the First-tier Tribunal decision. The appellant did not appear at the hearing and was unrepresented. The Tribunal was satisfied that a notice of hearing was sent to the appellant giving notice of the hearing date on 17 June 2015. Although the top of the notice erroneously states that it was issued on 28 June 2015, that clearly could not be correct. After having made enquiries I was satisfied that the Tribunal records

showed that the notice was in fact sent to the appellant on 28 May 2015 and that the date at the top of the notice on file was obviously a typographical error. As such I was satisfied that the appellant had given no explanation for his non-attendance and that the Tribunal could go on to decide the appeal. I am satisfied that the decision of First-tier Tribunal Judge Clarke does not disclose any material errors of law. Although the judge, as was pointed out, did not deal explicitly with paragraph 245AA as argued by the appellant, and that this could amount to an error of law, I find that it is not a material error for the following reasons.

8. Paragraph 245AA states the following:

"(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 they are submitted in accordance with subparagraph (b).

(b) 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 may 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 requested 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.

(d) If the applicant has submitted a specified document:

(i) in the wrong format; or

(ii) that is a copy and not an original document;

the application may be granted exceptionally, provided the UK Border Agency is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The UK Border Agency reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b)."

9. Although the judge did not specifically refer to paragraph 245AA, it was quite clear that the judge had taken into account the fact that the appellant had failed to provide a number of the documents required by the Immigration Rules. It was accepted at the hearing that the appellant had failed to provide some of the documents but it was said that this was merely an oversight or that some of the documents were merely in the wrong format. The judge was correct to say that she could only consider documents that were submitted with the application and was unable to consider the further evidence that was produced at the hearing by virtue of Section 85A of the Nationality, Immigration and Asylum Act 2002 as it was at the relevant date.

10. The appellant's grounds of appeal sought to argue that his failure to provide the contract was merely part of a series of documents because he had supplied two invoices relating to the trading contact with the companies. The grounds also sought to argue that the omissions of the company current appointment report was merely minor document which was omitted by the appellant with the application. However it is quite clear to me that the provisions of 245AA would not have assisted the appellant in any material way even if the judge had considered the paragraph specifically in her decision.

11. Paragraph 245AA(c) states quite clearly that the UK Border Agency will not request further documents where it is not anticipated that the omission or error would lead to a grant because the application would be refused for other reasons.

12. In this case, although there were arguably some documents where the wrong format had been provided, for example, the letters from the Halifax, there were other documents that were just clearly missing including the recent bank statement, contacts as evidence of trading and the current appointments report to show that the appellant was a director of the company. In such circumstances, paragraph 245AA would simply not be engaged because the appellant had failed to provide so many fundamental pieces of evidence that were required for the application that it would not lead to a grant and there was no onus on the Secretary of State to contact the appellant when he had simply failed to produce sufficient evidence to support the application.

13. Whilst it is of course the case that there may on occasion be errors made by applicants for leave to remain when a large number of documents are now required for such applications, the onus is still on the applicant to ensure that they have checked the requirements of the Immigration Rules and have provided the evidence required.

14. For these reasons I conclude that whilst the judge did not specifically refer to paragraph 245AA of the Immigration Rules, this was not a material error of law because it would not have made any difference to the outcome of the appeal because that paragraph did not apply.

15. I find that the grounds relating to Article 8 are unarguable and disclose no error of law. Nothing more than a bare assertion relating to the appellant's private life in the UK has been made, the witness statement that the appellant prepared before the First-tier Tribunal did not contain any detail about the ties that he has to the UK. He has only been resident for a period of some five years and very little evidence was produced relating to the running of the business in the UK. The appellant has produced wholly insufficient evidence to show that such removal in consequence of the decision would have even engaged the operation of Article 8 and for these reasons I find that the First-tier Tribunal Judge's findings could not be found to disclose any error of law in relation to Article 8.

Notice of Decision

16. I conclude for the reasons given above that there are no material errors of law in the First-tier Tribunal decision and that the decision shall stand.

No anonymity direction is made.

Signed Date

Judge Canavan
Judge of the First-tier Tribunal