Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02505/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26th July 2013	**On 14th August 2013**
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Before

UPPER TRIBUNAL JUDGE RENTON

Between

EDMUND NNAMDI OKOYE
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss L Chinwuba of VLS Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant is a male citizen of Nigeria born on 6th April 1974. He first arrived in the UK on 21st February 2005 when he was given leave to enter as a student until

30th September 2006. He was then granted consecutive leaves to remain in that capacity until 31st May 2008 and thereafter as a Tier 1 (General) Migrant until 16th April 2012. On 17th March 2012 the Appellant applied for further leave to remain again as a Tier 1 (General) Migrant. That application was refused on 10th January 2013 for the reasons given in the Respondent's letter of that date. The Appellant appealed, and his appeal was heard by First-tier Tribunal Judge Beach (the Judge) sitting at Taylor House on 23rd April 2013. He decided to dismiss the appeal under the Immigration Rules for the reasons given in his Determination dated 17th May 2013. The Appellant sought leave to appeal that decision, and on 10th June 2013 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.

3. The application for leave to remain was refused because the Appellant failed to score sufficient points under Appendix A: Attributes for Age and Previous Earnings and therefore failed to meet the requirements of paragraph 245CA(c) of the Statement of Changes in the Immigration Rules HC 395 as amended. This was because although it was accepted that during the relevant period that the Appellant had earnings from employment amounting to £27,132.17, his earnings by way of net profit from a self-employment could not be taken into account as the evidence thereof fell partly outside the relevant period.

4. The Judge dismissed the appeal because he agreed with that assessment. The period under consideration was from 1st March 2011 until 29th February 2012 and the documents produced by the Appellant as to his self-employed earnings covered a longer period without a breakdown showing the Appellant's self-employed earnings for the applicable period.

5. At the hearing, Miss Chinwuba argued that the Judge had erred in this respect. In particular, the Appellant had made his application on 17th March 2012 and it therefore fell to be decided according to the provisions of Appendix A applicable at that time. However, the Judge had decided the appeal according to the version of Appendix A applicable at the date of the hearing. There was a material difference in paragraph 19 of the two versions of Appendix A as regards the documents which needed to be submitted in support of an application. If the Judge had applied the earlier version as he should have done so he would have been able to accept the evidence of the Appellant's self-employed earnings which had been submitted with the application, and therefore would have concluded that the Appellant had sufficient overall income to score sufficient points under Appendix A: Attributes to satisfy the Immigration Rule.

6. In response, Mr Tufan agreed that the Judge had decided the appeal by reference to the wrong version of Appendix A but argued that the difference between the two versions was not material. This was because even when applying the correct earlier version, the documents provided by the Appellant when submitting his application

would have been insufficient according to the Policy Guidance applicable at the time and the documentary requirements set out in the application form.

7. I find an error of law in the decision of the Judge so that it should be set aside. As argued by Miss Chinwuba the Judge decided the appeal by reference to a subsequent version of Appendix A as opposed to that in use when the application for leave to remain was made. This error was material because using the subsequent version of paragraph 19 of Appendix A the documents submitted with the application could not have been construed so as to establish the Appellant's self-employed earnings as found by the Judge. However, if the Judge had used the correct version of paragraph 19 of Appendix A those documents could have been so used. I do not agree with the submission of Mr Tufan. It was established in **Pankina v SSHD [2010] EWCA Civ 719** that the Policy Guidance was not part of the Immigration Rules and that being the case, Mr Tufan's submission that the difference between the two versions of Appendix A was of no consequence because of the application of the Policy Guidance has no merit.

Remade Decision

At the hearing, Mr Tufan was helpful enough to concede that had the correct version of the Immigration Rules been applied by the Judge, the Appellant had produced sufficient documentary evidence to show that he had sufficient earnings from his employment and his self-employment in order to score 75 points under Appendix A: Attributes and thereby meet the requirements of paragraph 245CA of HC 295. I so find.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remake the decision in the appeal by allowing it.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I find no reason to do so.

Signed Date

Upper Tribunal Judge Renton

TO THE RESPONDENT
FEE AWARD

In the light of my decision to remake the decision in the appeal by allowing it, I have considered whether to make a fee award under the provisions of Section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a reduced fee award of £70 as I have now allowed the appeal upon evidence which was not before the Respondent when the decision to refuse leave to remain was made.

Signed Date

Upper Tribunal Judge Renton