



IAC-AH-PC-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/13801/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 20 April 2015**

**Decision & Reasons Promulgated
On 1 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR EZEKIEL IBEABUCHI ISICHEI
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

Representation:

For the Secretary of State: Mr N Bramble, Specialist Appeals Team

For the Respondent/Claimant: Mr Ikeh, Solicitor, Moorhouse Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision to refuse him leave to remain as a Tier 1 (Entrepreneur) Migrant on the ground that the Secretary of State's refusal decision was not in accordance with the law, and a lawful decision in compliance with her policy on evidential flexibility was outstanding. The First-tier

Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. The claimant applied for leave to remain as a Tier 1 Entrepreneur, on the basis that he had set up a business trading as "IEEE Global Engineers", which was a specialist firm dealing with the design, installations, maintenance, commissioning, repairs, inspection and testing of electrical installations, sales and security systems. The services advertised in the promotional literature for IEEE Global Engineers were: CCTV installations testing; CCTV IP networking; biometric access control; video monitoring system design, installation, maintenance, commissioning, repair, inspection and testing of electrical installations; and intruder alarm sales and security.
3. He enclosed with his application two invoices tendered by him to Optimum Security Supplies Limited on 7 and 21 December 2012 respectively. The first invoice was for the installation of CCTV cameras, DBR, commissioning and testing and access control installation in the amount of £350.49. The second invoice was for the installation of a biometric access control system, CCTV cameras, a computer station for control and closed circuit television CCTV at Morgan Sindall construction sites, for an amount of £235; and the installation of CCTV cameras and DBR, commissioning and testing at Willmott Dixon Construction for the sum of £310. There were also two further items which were charged at £25.30. The second invoice was also rendered to Optimum Security Supplies Limited.
4. The claimant did not however provide a contract between him/his firm and Optimum Security Supplies Limited relating to the services covered by the two invoices.

The Reasons for Refusal

5. The claimant made his application on 28 December 2012, and the application was refused on 26 February 2014. He was awarded 0 points for attributes under Appendix A, because he had not provided sufficient evidence to show that he met the requirements contained in subparagraph (iv), namely that he was:

"... engaged in business activity ... in an occupation which appears on the list of occupations skilled to National Qualifications Framework level 4 or above, as stated in the Codes of Practice in Appendix J, and provides the specified evidence in paragraph 41-SD"

6. Although he had provided a job title that was listed in Appendix J, the only evidence he had submitted to demonstrate that he was active in that occupation as part of his business, IEEE Global Engineers, was some advertising leaflets and posters. But that advertisement did not contain his name and therefore it did not meet the requirements listed at paragraph 41-SD(c)(iii) of Appendix A of the Rules. Furthermore, he had provided no contracts to confirm that he was engaged in business activity as claimed. He had submitted an invoice but this was not a contract and it did not demonstrate his business activity or meet the required criteria required

of a contract according to the Rules. As a result of the above, he had not demonstrated that he had met the requirements of the Rules to be awarded points under provision (d) of Table 4 of Appendix A.

The Grounds of Appeal to the FTT

7. The claimant's representatives settled detailed grounds of appeal on his behalf. In addition to the documents listed in part B of the application form, the claimant had also submitted a few extra documents which he had not listed there as there were no more boxes for those to be listed. This might explain why the Home Office might have misplaced some documents from his file which he had submitted to the Home Office with his application. He had duly submitted "the original contract" as per the requirements, which might have been misplaced by the Home Office.
8. If there had been missing evidence or further clarification was necessary, under the terms of the evidential flexibility policy, the Home Office ought to have contacted the claimant.

The Hearing Before, and the Decision of, the First-tier Tribunal

9. The claimant's appeal came before Judge Morgan sitting at Taylor House in the First-tier Tribunal on 11 December 2014. Both parties were legally represented. The claimant's representatives prepared a bundle of documents which contained an agreement for engineering services made on 19 December 2012 by Clyn Technologies International UK Limited on the one part, and IIEE Global Engineers on the other part. The agreement was signed by the appellant as a director of IIEE Global Engineers.
10. The bundle also contained an unsigned letter from the appellant dated 28 December 2012 headed "Additional information to be considered as part of my application". The letter said that he was working as an engineer through his company IIEE Global Engineers Limited, and he was also maintaining a professional working relationship with Optimum Security Supplies Limited, as could be seen in the invoice attached with the application. He went on to list various documents which he said had been included as part of his submission. The list included:
 - Invoices showing descriptions of jobs/contract already done.
 - A contract document for a new job to commence March 2015.
 - Company fliers and copies of the company website pages.
11. He went on to say that he had provided a payment invoice as proof of contracts carried out under his new company IIEE Global Engineers Limited. He had also provided "a private short agreement contract note for incoming job in 2013".
12. In a signed witness statement dated 9 October 2014, he said that he had provided a copy of his contract with Clyn Technologies Limited as evidence to demonstrate

business activity. The SSHD was wrong in concluding that he did not include these documents and information. By way of appeal, he had also provided other supporting documents showing more contracts which were signed in the last year, and further invoices issued as evidence of his trading activities. The recent contracts in the bundle comprised (a) an agreement made on 1 October 2013 between Optimum Securities Limited and IIEE Global Engineers Limited headed "Engineering service subcontractor agreement", and (b) another engineering service subcontractor agreement entered into with Optimum Security Supplies Limited on 1 October 2014. Both contracts were for a period of one year.

13. In his subsequent decision, the judge said the refusal identified one matter in issue. In particular, the Secretary of State was not satisfied that the claimant was entitled to the points claimed under attributes because, although all of the required documents had been provided, they were not all in the requisite format. In the light of the documents before him, and in particular those contained within the claimant's bundle, he was satisfied the claimant could have provided the Secretary of State with evidence in the requisite format prior to the making of the decision. Rule 245AA gave the Home Office discretion to contact an applicant where a document was provided in the wrong format. He found that this discretion had not been exercised, and accordingly in the light of **Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC)**, the decision was not in accordance with the law and should be sent back to the Secretary of State to enable the decision maker to reach a lawful decision.

The Application for Permission to Appeal

14. A member of the Specialist Appeals Team applied on behalf of the Secretary of State for permission to appeal to the Upper Tribunal. The only evidence submitted by the claimant to demonstrate he was active in a relevant occupation was some advertising leaflets and posters. The advertisements did not contain his name, and therefore did not meet the requirements as listed at paragraph 41-SD(c)(iii) of Appendix A of the Rules. It was submitted that evidential flexibility did not apply to this case.

The Grant of Permission to Appeal

15. On 9 February 2015 Designated Judge McClure granted permission to appeal for the following reasons:

"This was not a case where the documentation was lacking or where one in a series of documents appeared to have been omitted, rather that the documents submitted did not comply with the Rules. In the circumstances where the advertisements did not meet the requirements of the Rules it is arguable that the judge in allowing the appeal has made an error of law."

The Hearing in the Upper Tribunal

16. At the hearing before me, Mr Bramble relied on **Akhter & Another (paragraph 245AA: wrong format) [2014] UKUT 297 (IAC)** in support of the submission that the judge erred in law in finding that the claimant could invoke paragraph 245AA in support of the contention that he should have been given an opportunity to rectify

the deficiencies in his advertising material. The advertisement did not constitute a document that was in the wrong format.

17. On the other hand, he accepted that the judge could have treated the advertising material as coming within 245AA(b)(iv) as it was a specified document that did not contain all of the specified information.
18. But he submitted there was an unresolved question as to whether 245AA(c) applied. 245AA(c) provides as follows:

“Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the ... Secretary of State 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.”
19. After hearing from Mr Ikeh, who did not appear below, I ruled in the Secretary of State’s favour. I found that an error of law had been made out, and I gave my reasons for so finding in short form. My extended reasons for finding an error of law are set out below.
20. I then proceeded to receive evidence and submissions for the purposes of remaking the decision. The claimant, who was in attendance, confirmed that he had provided the contract dated 19 December 2012 with the application. Mr Bramble pointed out that the contract was not included in the documents listed in the application form itself, and queried whether it had in fact been provided. But he did not cross-examine the claimant on this issue.
21. Even if I was satisfied that the contract had been provided with the application, Mr Bramble submitted that it did not in fact show that the claimant was active in his stated occupation as part of his business. This was because the contract related to work to be done in the future.
22. In reply, Mr Ikeh submitted that the contract did the job required of it. Even if it was a contract relating to future activities, there were invoices provided with the application which showed that the claimant was trading.

Reasons for Finding an Error of Law

23. The reasoning of the judge with regard to the Secretary of State’s alleged breach of evidential flexibility principles was flawed. Firstly, the judge primarily based his decision on a policy document issued in May 2011. But this had been superseded by the introduction of Immigration Rule 245AA. As noted by the Upper Tribunal in paragraph [14] of *Akhter*, paragraph 245AA was introduced with effect from 6 September 2012. So it was this paragraph which applied to the application, not the earlier policy guidance cited by the judge. Secondly, although the judge moved on to a consideration of paragraph 245AA, he was simply wrong to characterise the advertising material as a document “in the wrong format”.

24. The judge's error in this regard would not have been material if the only stated deficiency in the application had been the provision of one specified document which did not contain all the specified information. But this is not the case. The refusal was also based on the proposition that the claimant had not provided a specified document at all, namely a contract showing trading.
25. Mr Ikeh said his instructions were that the parties had agreed at the hearing that the claimant had in fact provided the contract of 19 December 2012 with the application. This did not accord with Mr Bramble's instructions, and such a concession is not clearly recorded by the judge in his decision. Moreover, the judge has not made a finding on whether the contract of 19 December 2012 "does the job", as Mr Ikeh puts it. Such a finding was reasonably required in circumstances where the claimant expressly put forward the contract as not relating to work which he was about to undertake, It was expressly put forward on the basis that it related to a future job in March 2013, which was three months after the agreement was signed.
26. For the above reasons, the decision of the First-tier Tribunal is vitiated by a material error of law such that it should be set aside and remade.

The Remaking of the Decision

27. How the decision should be remade hinges on two questions. The first is whether the contract of 19 December 2012 was provided with the application; and, if so, whether it is a contract "showing trading".
28. I find on the balance of probabilities that the contract of 19 December 2012 was provided with the application under cover of the letter dated 28 December 2012. However, it does not confirm that the claimant was engaged in business activity as claimed. It does now show that the claimant was trading.
29. Firstly, as previously noted, the contract was put forward as a future contract relating to work that was not going to be embarked on until March 2013. Secondly, on analysis the contract is no more than an agreement to negotiate. It is far too vague to constitute a valid and legally binding contract. It lacks legal certainty, and would not be enforceable as a contract. This is typified by two aspects of it. Under the heading of "Scope of services" it is stated that the owner (Clyn Technologies) *may* require various engineering and maintenance services to assist in planning, design and operation of "his company". The significance of the word "may" is that the owner is not committing himself to using the claimant's services. In effect, he is saying no more than he might wish to use the claimant's services at some indeterminate point in the future.
30. Secondly, under the heading of compensation, the following is stated: "Compensation for each project assigned to the engineer shall be negotiated individually on a lump sum or hourly basis, as determined by the defined scope of work." As the remuneration for each project is something that is going to have to be negotiated individually in the future, the document does not create any legal relations between the parties to it.

31. As remuneration for the services to be provided has not been agreed, the document cannot reasonably be characterised as a contract. It is no more than a discussion document, albeit that there is provisional agreement about some terms which might feature in an eventual binding contract, such as what will be covered by “additional reimbursable expenses”.
32. Accordingly, since the claimant did not provide a contract showing that his business was trading at the date of application, there was no breach of paragraph 245AA(b) in the Secretary of State not giving the claimant the opportunity to provide advertising material which contained his name. The case worker was not obliged to afford the claimant this opportunity, as the application fell to be refused in any event because the claimant had not provided a contract showing trading.
33. It is open to the claimant to make a fresh application relying on new evidence of trading. But his appeal against the refusal decision must fail. He has not discharged the burden of proving that the refusal decision was wrong, or that the Secretary of State breached evidential flexibility principles in not giving him an opportunity to rectify the omissions in his application before making a decision on it.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant’s appeal against the refusal of leave to remain as a Tier 1 Entrepreneur Migrant is dismissed.

No anonymity direction is made.

Signed

Date **1 May 2015**

Deputy Upper Tribunal Judge Monson