



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27069/2014

THE IMMIGRATION ACTS

Heard at Field House
On 4th March 2015

Decision Promulgated
On 30th March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

**MR ADIL NAVEED ASIM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel

For the Respondent: Ms E Savage, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 4th February 1983 and is a national of Pakistan. He applied on 10th May 2014 for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the Points Based System (PBS). The respondent refused his application on 16th June 2014. He appealed against the respondent's decision at a hearing before First-tier Tribunal Judge Rose (the Judge) at Sheldon

Court, Birmingham, on 14th October 2014. The Judge dismissed the appeal on all grounds in a determination promulgated on 22nd October 2014.

2. The appellant was granted permission to appeal against the decision of the Judge by First-tier Tribunal Judge Adio on 2nd February 2015 for the following reasons:

The judge had dismissed the appeal on the basis that the applicant submitted the relevant information requested by the respondent after the date of decision. In the onward grounds of appeal the applicant notes there is proof of posting of a document from Pakistan and a letter requesting extension of time from the respondent. He also asserts that the letter from HMRC was received by the respondent before the date of decision. It is argued that the judge failed to consider whether the Rules are met.

I find that once the respondent decided to exercise discretion under paragraph 245AA of the Immigration Rules there was a bit of room for flexibility with regards to the receipt of documents. The judge recognised this at paragraph 18 of the determination. However bearing in mind one of the documents was coming from Pakistan and the applicant had written for the extension of time to submit documents which he found difficult in obtaining the judge should have considered whether the respondent exercised its discretion correctly particularly as the respondent's case notes reflected that the appellant had requested an extension. In view of the evidence from the applicant there should have been more consideration of the failure of the respondent to exercise discretion in favour of the applicant before concluding that there was no breach by the respondent to deal fairly with the applicant's application. All the grounds are arguable as there is an identifiable error of law as argued.

3. The matter accordingly came before me to determine whether the making of the Judge's decision involved the making of an error on a point of law. The respondent indicated opposition to the appeal in advance of the hearing under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The respondent contends that the Judge directed himself properly and without error; the computerised case notes make clear that the respondent did not have all the required evidence by the date requested or thereafter. The respondent asserts that there was no obligation having once extended time for documents to be submitted to continue to do so; the appellant should have provided all the required documentation at the date of application; there could have been no expectation that discretion once exercised would continue to flow.
4. The application was made on 10th May 2014 and the refusal was for the following reasons set out in the respondent's letter dated 16th June 2014. The appellant was found to have failed to meet the requirements of paragraph 245DD(b) and paragraph 41 of Appendix A of the Immigration Rules because specified documents had not been submitted as required. The respondent disallowed the 25 points claimed by the appellant under Appendix A for Access to Funds of £50,000 claimed by the appellant to be available to him from a third party. The appellant was noted to have provided a bank letter, a declaration from Mrs Ghazala w/o Muhammad Asim Khan and a legal representative letter from M Farhan Afzal.
5. The respondent found the legal representative letter from M Farhan Afzal to be unacceptable as it did not contain the number, place of issue and dates of issue and

expiry of Mr Farhan Afzal's identity documents. The specified evidence under paragraph 41-SD was accordingly absent and the respondent found a lack of proof of access to funds as claimed by the appellant. The application was further refused because the appellant claimed points for being self-employed but failed to show, in accordance with Appendix A, that he had been, on a date falling within 3 months prior to the date of application, registered with HMRC as self employed. The respondent contacted the appellant on 19th May 2014 to request submission of the necessary documents by 29th May 2014. In particular, the appellant was asked to submit the original welcome letter from HMRC containing his unique taxpayer reference number. Following the respondent's finding that the appellant failed to produce these documents the application was refused on 16th June 2014.

6. The Judge took account in paragraphs 5 - 10 of his determination of the appellant's written and oral evidence. In his written statement the appellant said that he had been waiting to receive a letter containing his unique taxpayer reference number from the HMRC; on 29th May 2014 he had sent his business contract to the Home Office and explained the HMRC position. He stated that his Pakistani legal representative had posted a letter to the Home Office with the necessary details on 28th May 2014. In his oral evidence the appellant told the Judge he did not receive the Home Office letter dated 19th May 2014 requesting documents until 27th May 2014. He said that he contacted his representative in Pakistan who posted a letter directly to the Home Office; he sent his business contract with a letter of explanation that his legal representative's letter was coming from abroad and might therefore take a few days to arrive.
7. At paragraph 10 of his determination the Judge records further evidence he heard during submissions from the appellant about his contact with HMRC that he had subsequently received from them which he had sent. He added: "I apologise I have missed the proof of posting, otherwise I would have sent that as well". In his findings the Judge noted that it was not disputed that the appellant had not sent the welcome letter with his application. In his witness statement the appellant said that he had supplied online confirmation that he was registered with HMRC, but the welcome letter may take 4 - 6 weeks to arrive. On 29th May 2014 he was told by HMRC that it would take 10 working days or more for the letter with his unique taxpayer reference number to arrive. On 29th May 2014 HMRC told him that they would issue the letter again and it would take "more than two weeks" to come.
8. Having considered the evidence before him the Judge reached the following findings in paragraph 18 and 19 of his determination:

18. The documents in the appellant's bundle included a letter from HMRC dated 29th May headed "Confirmation of UTR". I am not satisfied that this letter was submitted to the Home Office before the date of decision. The appellant's evidence was that he had received it in the first week of June and posted it as soon as he received it. He was then asked when he had sent the letter and said: "as soon as I received it, I think within the first 10 days of June." In my judgment, if as he claimed, the appellant had chased HMRC for the letter, knowing that it was required by the Home Office, had received it after the deadline specified by the Home Office for the submission of the further

documents, and had then sent it to the Home Office, it is improbable that he would have no more specific recollection or record of when he sent it.

19. There was a post office receipt dated 29th May. I infer that that related to the appellant's letter to the Home Office at page 21 of the appellant's bundle, in which he asked for a few more days in order to submit the documents requested. The Home Office case notes record receipt of a letter requesting further time. The appellant accepted in his evidence that he had no proof of posting in respect of the letter from HMRC which he claimed to have sent in early June. There was no explanation as to why he had not obtained proof of posting in respect of that letter.

9. The Judge did not consider the Home Office case notes to be determinative as to whether, or when, documents were received from the appellant. However, he found no indication in the Home Office printout that any documents were received from the appellant on or after 30th May, apart from the letter requesting further time to produce documents and a contract for work. The Judge found that no inference could be drawn from the wording of the notice of decision that documents had been received after 29th May 2014. In the light of all the matters before him the Judge endorsed, in paragraph 22 of his determination, his finding that he could not be satisfied that the welcome letter was submitted to the respondent before the date of decision. The Judge observed that he could not therefore have regard to the document now contained in the appellant's bundle in determining the appeal under the Immigration Rules.
10. Mr Richardson's submission to me in relation to the Judge's findings about the HMRC letter was that his reasoning is not sound. Mr Richardson contended that the Judge gave flimsy reasons for rejecting the evidence of the appellant because he had no proof of posting and could not remember the specific date of sending the letter. Mr Richardson submitted that there was evidence before the Judge of the letter dated 29th May 2014, but the appellant was frank in relation to the HMRC letter in stating that he could not remember, or provide proof of, the date of sending to the Home Office.
11. Mr Richardson submitted that the appellant's oral evidence of sending the letter to the Home Office in the first part of June should not have been disbelieved because there would have been no reason for the appellant not to have sent the letter as soon as possible. Mr Richardson submitted that the appellant had taken all steps to obtain the necessary documents and to keep the Home Office informed of his progress. The Judge should accordingly have found that the appellant sent the HMRC letter with his UTR as claimed, before the date of decision.
12. Mr Richardson further relied upon a document he obtained from the Upper Tribunal in advance of the hearing before me relating to this appeal. He said that a letter dated 11th June 2014 from the appellant to the respondent had been retrieved from the Tribunal file and he is instructed that this letter was before the Judge at the First-tier hearing but had been overlooked by the Judge. It is the covering letter sent by the appellant with the HMRC letter to the respondent. Mr Richardson submitted that it is strongly likely that this letter was sent as claimed and it serves to undermine the

findings of the Judge. The appellant would be bound to have sent the further evidence in the light of the extension of time by the respondent for doing so.

13. I reject the submission for the appellant that the Judge's finding about the HMRC letter is not sustainable. I find that he properly reached his conclusion on the evidence before him that the letter was not shown to have reached the respondent by the date of decision. I consider the submission that the appellant's letter dated 11th June 2014 must have been before the Judge to be speculative; the circumstances suggest otherwise. The letter found its way to the Tribunal or the Upper Tribunal at some stage but it was not included in the appellant's bundle before the Judge; it is not referenced in the appellant's statement dated 3rd October 2014 which was before the Judge. Other documents submitted, such as a Royal Mail receipt, the legal representative's letter and its courier service receipt, are specifically referred to in the appellant's statement.
14. The Judge set out the content of the written statement and gives a detailed account of the appellant's oral evidence. In the oral evidence recorded by the Judge the appellant makes no mention at all of the letter of 11th June 2014 but said firstly that the HMRC letter had, he thought, been received by him in the first week of June and posted immediately to the respondent, but then that he thought he had sent the letter within the first ten days of June. His evidence was found to be uncertain by the Judge and I find it unlikely that the appellant would fail to refer at all to the 11th June letter when questioned if it had been before the Judge as now claimed.
15. There was in any event a lack of any proof of posting of this letter, aside from the appellant's oral evidence which was not accepted. I find that the judge did not err by failing to find that the appellant would have, or must obviously have, sent the HMRC letter in time to the respondent simply because it was in his interests to do so or that he would have no reason not to do so. Such findings would have been speculative on the part of the Judge.
16. The appellant was represented at the First-tier hearing, albeit by different solicitors from those now instructed, and the Judge recorded the submissions made to him at the hearing. No reference by the appellant's representative to the 11th June 2014 letter is recorded by the Judge at paragraph 13 of his determination. He records the submission that the appellant's case is put on the basis of an inference from the notice of decision that documents had been received by the respondent, an inference specifically rejected by the Judge. It was submitted for the appellant before the Judge, without reference to the 11th June letter, that the documents had been received in time and that the respondent had acted unfairly.
17. This leads to the next submission before me for the appellant by Mr Richardson that the respondent acted unfairly and that the Judge erred in failing to make that finding and by failing to find that discretion should have been exercised differently by allowing greater flexibility to the appellant and under paragraph 245AA of the Immigration Rules. In this regard I accept the submissions for the respondent from Ms Savage that whilst the Secretary of State may exercise discretion in applying

flexibility to the evidence there is no obligation to do so. An extension of time was allowed to the appellant to submit documents but the extension did not have to be renewed.

18. I find that that the Judge gave proper and adequate consideration to this issue in paragraph 23 of his determination when he dealt with the paragraph 245AA ground of appeal before him. His previous findings set out in the determination and those made in paragraph 23 in my view support his conclusion that the appellant failed to establish that the respondent had acted in breach of any obligation to deal fairly with his application. The Judge took account of and gave due consideration to all the relevant facts and I find that he properly dismissed the appeal for the reasons given. I am therefore further satisfied that the Judge did not err in law by finding, in paragraph 25 of his determination, that it was unnecessary for him to consider the remaining issue of the letter from the legal representative. I therefore give no further consideration to the submissions before me about the legal representative's letter made by Mr Richardson. The appellant's appeal in the Upper Tribunal fails.

Notice of Decision

19. I find that making of the Judge's decision did not involve the making of an error on a point of law. It follows that decision of the First-tier Tribunal stands and this appeal in the Upper Tribunal is dismissed.

Anonymity

The position remains that the First-tier Tribunal made no anonymity order.

Signed: J Harries

Deputy Upper Tribunal Judge
Date: 28th March 2015

Fee Award

The position remains that there is no fee award.

Signed: J Harries

Deputy Upper Tribunal Judge
Date: 28th March 2015