Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/43067/2014**

THE IMMIGRATION ACTS

Heard at Field House

On 4 February 2016

Decision and Reasons Promulgated
On 17 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SYED HAMMAD ALI SHAH BUKHARI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Mustafa., of Britain, solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Griffith promulgated on 22 May 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 27 August 1987 and is a national of Pakistan.

4. On 17 October 2014 the Secretary of State refused the Appellant's application for further leave to remain as a Tier 1 (entrepreneur) Migrant.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Griffith ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 16 October 2015 Upper Tribunal Judge Reeds gave permission to appeal stating inter alia

> "2. It is further arguable that the Rules do not specify that the documents must be dated and that the findings at [23] do not provide reasons for rejecting the documents when viewed cumulatively.
>
> 3. There are a number of appeals concerning the requirements of paragraph 41-SD(e)(iii) and I consider the issue is one the Tribunal may wish to give guidance. Consequently I grant permission"

The Hearing

7. (a) Mr Mustafa, for the appellant, adopted the terms of the grounds of appeal and argued that at [23] the Judge was incorrect to exclude documentary evidence. He told me that the initial application was submitted on 28 August 2014, and that additional documents were submitted of 4 September 2014. The decision was taken at 17 October 2014, so that all documents were submitted before the application was decided by the respondent. He relied on Nasim & Others (Raju: reasons not to follow?: Pakistan) [2013] UKUT 610 (IAC) & Nwaigwe (adjournment:fairness) [2014] UKUT 00418 (IAC).

(b) Mr Mustafa told me that there is a further material error of law at [24] where the Judge, he argued, incorrectly applied paragraph 245AA of the immigration rules and failed to exercise discretion in favour of the appellant. He took me to the documents reproduced in the appellant's bundle before the First-tier, and argued that the documents between pages 18 and 25 of the appellant's bundle meet the requirements of paragraph 41 -SD (e)(iii) of the rules, so that the Judge was incorrect to find at [23] that they do not. He urged me to allow the appeal and said the decision aside.

8. Mr Tarlow, for the respondent, relied on the terms of the rule 24 note dated 3 November 2015, and told me that the decision does not contain errors of law, material or otherwise. He drew my attention to [22] where the Judge finds that the appellant gave incorrect information to the tribunal about the documents submitted with the application. He told me that at [23] the Judge was correct to find that the documents could not be considered, but that the Judge then went on to find that in any event those documents do not comply with the requirements of paragraph 41 SD. He told me that, in so far as there is any discretion contained in paragraph 245AA of the rules, it is a discretion which only the respondent can exercise. He urged me to dismiss the appeal and allow the decision to stand.

Analysis

9. In **R (on the application of Patel) v SSHD [2014] EWHC 1861** it was held that the purposes of paragraph 245 AA of the Immigration Rules that the word format in the phrase went "*in the wrong format*" did not extend to mean the information contained within the document. Format meant the way in which something was arranged or set out and the appropriate question was whether the balance certificate was simply in the wrong format but nevertheless confirmed that the availability of funds. Where the balance certificate did not include the information required by the rules, and prove that the necessary funds were held for a 28 day period, the certificate failed to meet the requirements as a matter of content not format.

10. In **R (on the application of Sabir & Others) [2015] EWHC 264** the advertising material submitted with a Tier 1 application in an attempt to show that that appellant was working, which was listed as a specified document within paragraph 41-SD of Appendix A to the Rules, did not include the nature of the business linked to the Claimants' names and a contractual document submitted did not comply with the language of paragraph 41-SD as it failed to provide a landline number of the other party involved in the contract. It was held that Rule 245AA applied where an applicant had submitted specified documentation but in the wrong format and the Respondent had discretion to allow the errors to be rectified. The problem with the Claimants' documents was not with their format, but rather that they did not contain information which, on the face of the rules, they were obliged to contain. The omission of specified details such as names, phone numbers etc. from documents were material defects which did not fall within the definition of 'the wrong format':

11. What is argued for the appellant (today) is that, because there are documents which do not contain all of the specified information, discretion should be exercised in the appellant's favour. That argument is hard to follow. The thrust of the grounds of appeal is that there is no defect in the documents produced to demonstrate advertising and marketing. The reasons for refusal letter focuses on one area. This application was refused because the respondent says "*the evidence that you have submitted in relation to advertising and marketing is not acceptable as it does not cover a continuous period commencing before 11 July 2014, up to no earlier than three months before the date of your application.*"

12. It is the appellant's position that he has produced the documents, so an argument about the application of paragraph 245 AA of the immigration rules is irrelevant. The real focus in this appeal is contained in grounds one and two. Permission to appeal was granted specifically with reference to the Judge's rejection of certain documents at [23], and the requirements of paragraph 41 SD(e)(iii).

13. In Nasim and others (Raju: reasons not to follow?) [2013] UKUT 610 (IAC) it was said (obiter) that, as held in Khatel and others (s85A; effect of continuing application) [2013] UKUT 44 (IAC), section 85A of the Nationality, Immigration and Asylum Act 2002 precludes a tribunal, in a points-based appeal, from considering evidence as to compliance with points-based rules, where that

evidence was not before the SSHD when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules. That followed a concession by the Respondent, but the implication is that that the date of application is not a fixed point in time.

14. In Ahmed and Another (PBS: admissible evidence) [2014] UKUT 365 (IAC) the Tribunal said that the purpose of section 85A Exception 2 "*is quite clear. It is that where a Points Based application is made and refused, the assessment by the Judge is to be of the material that was before the decision-maker rather than a new consideration of new material. In other words the appeal if it is successful is on the basis that the decision-maker with the material before him should have made a different decision, not on the basis that a different way of presenting the application would have produced a different decision*".

15. At [23] the Judge correctly takes guidance from the case of Ahmed and Another (PBS: admissible evidence), but in the following sentence wrongly applies that guidance saying "*I am therefore unable to consider the evidence submitted on 2 September 2014.*" The Judge's mistake, however, is rectified in the next two sentences when she specifies that it is not clear what documentation was considered by the respondent and then goes on to consider the documentary evidence produced by the respondent. In so far as the Judge's declaration that she is unable to consider some of the documentary evidence is an error, it is not a material error because she goes on to analyse all of the documentary evidence and reach conclusions which are well within the range of conclusions open to the Judge to reach. The Judge's belief that some documentary evidence could not be considered does not affect the outcome of this appeal because the Judge does not exclude that evidence. The Judge considered the evidence and found that it does not comply with paragraph 41 SD. The fulcrum of this appeal is the Judge's treatment of paragraph 41 SD.

16. The Judge correctly sets out the relevant part of paragraph 41-SD at [20]. The Judge concludes [21] by saying "*the documents were not dated*". It is not a requirement of paragraph 41-SD that advertising and marketing materials are dated, but the Judge correctly accepts at [23] that there is no requirement in the rules that the documents must be dated.

17. The documents produced by the appellant are (a) an invoice from a printing company dated 26 April 2014 for business cards, posters, letterheads and brochures (b) a business card (c) a brochure (d) a screenshot of the appellants 192.com page showing that he registered his business there on 20 May 2014 (e) a letter of reference dated 15 April 2015 from one of the appellant's customers

18. The screenshot of the appellant's 192.com page is evidence that the appellant's business was registered with an advertising website on 20 May 2014. It predates 11 July 2014. It is three months and two days earlier than the date of application. It is simply evidence that the appellant has an account 192.com. At [23] the Judge considers the documents produced by the appellant

and finds that none of those documents meet the requirements of paragraph 41-SD, when taken either separately or together. That is what the Judge was called on to decide; it was a decision which was open to the Judge to reach.

19. It was incumbent on the Judge to consider the documents produced. It is clear from the terms of the decision at [23] that the Judge considered those documents against the requirements of paragraph 41-SD(e), and having done so found that the appellant did not discharge the burden of proof because the documentary evidence did not establish that the advertising and marketing materials produced met the requirements of 41 SD(e)(iii).

20. At [24] the Judge correctly considered paragraph 245AA of the immigration rules and concluded that there was a discretion open to the Secretary of State, and that that discretion had been exercised correctly. The Judge correctly concluded that the documents submitted do not fall within the categories specified in paragraph 245AA(b). That was a conclusion which is well within the range a conclusion is available to the judge on the facts as she found them to be.

21. In reality the grounds of appeal amount to a statement of dissatisfaction with the conclusions reached by the Judge on the evidence presented, but no material error of law is identified. The Judge's fact-finding exercise cannot be faulted. The Judge correctly identified the applicable law and the tests which must be applied. The Judge correctly applied the burden and standard of proof.

22. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

23. The Judge carefully considered each strand of evidence placed before her. She carefully records the submissions that were made and then, after correctly directing herself in law, makes reasoned findings of fact before reaching conclusions which were manifestly open to the Judge to reach.

24. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning. The decision does not contain a material error of law.

CONCLUSION

25. No errors of law have been established. The Judge's decision stands.

DECISION

26. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Date 12 February 2016

Deputy Upper Tribunal Judge Doyle