Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00582/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 6 August 2014	**On 22 August 2014**
Prepared on 7 August 2014	

Before

UPPER TRIBUNAL JUDGE DEANS
DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

OLUDOTUN BABATUNDE OLAREWAJU

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Echendu of the Minority Advice Bureau Leeds
For the Respondent: Mr Dewison, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Nigeria, born on 26 July 1977.
2. The Appellant was issued with entry clearance to the United Kingdom as a student on 10 September 2009. A grant of leave to remain was then made to him as a Tier 1 (Post Study Work) Migrant until 31 March 2013. On 8 March 2013 the Appellant

applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. That application was initially refused on 13 May 2013, but the decision was subsequently withdrawn and remade, so that it was refused again on 4 December 2013, and at the same time a decision was taken under s47 of the 2006 Act to remove the Appellant from the United Kingdom.

3. The Appellant appealed against those immigration decisions, and his appeal was heard by First Tier Tribunal Judge Cope on 5 March 2013, whereupon it was dismissed under the Immigration Rules, and on Article 8 grounds in a Determination promulgated on20 March 2014.

4. The Appellant sought permission from the First Tier Tribunal to appeal that decision. Permission was refused by First Tier Tribunal Judge Page on 29 April 2014. The application was renewed to the Upper Tribunal, whereupon permission was granted by Upper Tribunal Judge Taylor on 27 May 2014. She considered that Judge Cope had arguably failed to make findings on the issues placed in dispute by the Respondent but had instead embarked upon a broad ranging consideration of the meaning of "entrepreneur" and "business", so that the question of whether the Appellant's commercial arrangements met the requirements of the Immigration Rules required further consideration. Permission was however refused in relation to the challenge to the Judge's disposal of the Article 8 appeal.

5. The Respondent served a Rule 24 response to the grounds of appeal dated 3 July 2014 which simply asserted that the Judge was entitled to reach the conclusions that he did. Neither party has applied for permission to rely upon further evidence.

6. Thus the matter comes before us.

<u>The Appellant's relationship with Epicanthus</u>

7. The Appellant studied for and was awarded a degree in medicine at the University of Ibadan in Nigeria. He studied for a Masters degree in Public Health at the University of Northumbria, which was awarded to him on 24 November 2010. He was registered by the GMC with a licence to practise medicine in the UK from 14 June 2012.

8. On 20 June 2012 the limited liability company Julifem Services Ltd was incorporated ["Julifem"]. The Appellant is and was at all material times the sole shareholder and sole director of Julifem.

9. On 28 December 2012 the limited liability company Epicanthus Services Ltd was incorporated ["Epicanthus"]. The Appellant is and was at all material times the sole shareholder and sole director of Epicanthus (he assumed those roles on 4 January 2013). In addition, at the date of the application, the Appellant has accepted that he was the sole employee of Epicanthus.

10. A Companies House report on Epicanthus dated 7 March 2013 showed that no accounts for the company had yet been filed. Unaudited accounts for Epicanthus for the period 28 December 2012 to 31 December 2013 prepared upon the Appellant's instructions, and the records he had kept for Epicanthus, recorded a turnover of £66,846, administrative expenses of £31,824, and thus a profit before tax of £35,022. The post tax profit was largely distributed to the Appellant as the sole shareholder by way of dividends of £25,000, with the balance held as retained profit. The notes to the profit and loss account disclose the Appellant's salary as £7,500, and reveal the administrative expenses to include not only the use of the Appellant's home as an office, but all those expenses that an employed man would meet from his post tax income.
11. The Appellant was interviewed in relation to his application for LTR on 13 November 2013. At that interview he accepted that his shareholding and directorship of Julifem did not meet the requirements of the Immigration Rules, because it had not been acquired or incorporated within 3 months of the date of his application. Thus he stated that he intended to "close it down". He provided no information about the trading activities or accounts of Julifem, no information to suggest that it was actively trading at the date of the application, and no information to show how he intended that its affairs should be wound up.
12. In relation to Epicanthus the Appellant accepted at that interview that he had prepared no business plan. He accepted (and provided some sample contracts to confirm) that from time to time Epicanthus entered into contracts with ID Medical Group Ltd ["IDMG"] whereby Epicanthus agreed to provide the services of the Appellant to IDMG at a rate of £40 per hour. In turn IDMG agreed from time to time with NHS Hospital Trusts in the North East to provide the Appellant's services as a qualified doctor, which in practice meant that he was performing locum work on the night shift in the Accident and Emergency Departments of those hospitals. The Appellant accepted at interview that Epicanthus had only ever entered into such contracts with IDMG.
13. Accordingly at the date of the application the only business undertaken by Epicanthus was to provide to IDMG at the hourly rate of £40/hour the services of the Appellant as a hospital locum, at the locations, and for the hours, required by IDMG. The Appellant has never asserted, and the evidence provided by him did not suggest, that the NHS Hospital Trusts that sought to engage his services insisted upon these commercial arrangements.
14. Thus the Respondent took the point when refusing the application that the evidence showed that the Appellant was simply operating Epicanthus as a vehicle to provide the services of himself as an

employee of that company, to an agency full time, who would in turn from time to time provide his services as a doctor to a hospital. As a consequence the Respondent was not satisfied that the Appellant had any genuine intention to invest in Epicanthus, because there was simply no necessity for Epicanthus to advertise, to recruit staff, or to take on office premises. Moreover the Respondent was not satisfied that the Appellant had any genuine intention to grow or expand the business of Epicanthus.

15. Moreover the Respondent was satisfied that the commercial arrangement between Epicanthus and IDMG meant that one was simply supplying a member of staff to another; the Appellant was not providing medical services to IDMG, but only to a third party customer of IDMG. Thus the Respondent concluded that given the Appellant's evidence about Julifem, he had only ever incorporated Epicanthus in order to seek to meet the requirements of the PBS for LTR as a Tier 1 (Entrepreneur) Migrant.

<u>The availability of £50,000 to the Appellant, and his intention to invest in Epicanthus</u>

16. In support of his application the Appellant sought to demonstrate that he met the requirements of paragraph (d) of Table 4 to Appendix A of the Immigration Rules by providing evidence that he had available to him the sum of £50,000. The evidence provided to do so consisted of bank statements for a Lloyds TSB bank account that he had caused Epicanthus to open on 5 February 2013. These statements covered the period 5 February 2013 – 1 May 2013. They recorded a credit to the account of £50,000 on 12 February 2013, and the withdrawal of that same sum from the account ten days later on 22 February 2013.

17. It has never been suggested that Epicanthus had the benefit of these funds on any other occasion, and the Appellant has never suggested that the advance of these funds to Epicanthus was by way of share capital. To the extent that it should be inferred that this movement of funds constituted a short term loan to Epicanthus (and the Appellant has never suggested that this was the case) then the terms of the loan were never reduced to writing.

18. In support of his application the Appellant had also provided a bank statement for a Lloyds TSB Easy Saver bank account that he held in his own name and which covered the period 10 September 2012 - 5 March 2013. This bank statement recorded a credit to the account of £23,000 on 9 January 2013, of £5,000 on 4 February 2013, of £17,000 on 5 February 2013, and of £5,000 on 8 February 2013. (Each of those credits to the account is recorded as being by way of a transfer from another account held by the Appellant with the same branch of the same Bank. No details of that source bank account have however ever been disclosed, and there is no obvious

reason for the Appellant to have arranged his financial affairs in this way.) The statement for the Easy Saver account records the withdrawal of £50,000 on 12 February 2013, and the deposit of that same sum ten days later on 22 February 2013; it is plain that this is the same sum of money that was transferred to the Epicanthus bank account for that same ten day period.

19. The Appellant was questioned about the funds available to him at interview. He said that the £50,000 was in part his own savings, and as to about £37,000 funds provided to him by members of his family. Whilst he asserted that this money could be regarded as his inheritance, he also accepted that he would repay it if asked to do so by the family members who had provided these funds to him.

20. The Respondent took the point when refusing the application that the evidence submitted in support of the application did not disclose the ultimate source of the funds that constituted the £50,000, and that although an explanation had been given at interview (which was not corroborated by any documentation) the Appellant had appeared to accept that he might be required by his family to repay to them some £37,000 of those funds. Thus the Respondent was not satisfied that all of this money was genuinely available to him to invest in Epicanthus.

21. In addition the Respondent took the point that she was not satisfied that the Appellant genuinely intended at the date of the application to invest the £50,000, or any part of it, in Epicanthus. The Appellant had accepted at interview that he had invested none of that sum in the business, and although he asserted that he would use it to "get my own place, employ staff", the nature of Epicanthus' business (which was simply to provide a tax efficient vehicle for the supply of his services to a locum agency) was such that the Respondent did not believe that such investment was needed, or that the Appellant had a genuine intention to make it.

Error of Law?

22. We approach this appeal on the basis that HMRC have not raised any issue over the Appellant's tax affairs, and that the decision to provide his services through the medium of Epicanthus, so that expenses can be set against tax in a way that is not open to an employee, and so that fees paid in relation to the work he has performed can be received by him in large part by way of dividends, rather than being subject to PAYE and NIC, is not one that HMRC have sought to challenge.

23. We regret to have to record that we experienced very serious difficulties in understanding Mr Echendu's somewhat incoherent submissions, and in persuading him to address the relevant requirements of the Immigration Rules, and the issues raised by this appeal. Mr Echendu's approach to the presentation of this appeal

was not assisted by his refusal to address the requirements of paragraph 245DD(h), (i), and (k), his failure to use the version of the Immigration Rules in force at the date of the application in preparing for the appeal, or his misguided insistence that the changes to the Immigration Rules that were introduced by HC943 were not made before the Appellant had submitted his application for LTR on 8 March 2013.

24. We are however satisfied that the changes made to the Immigration Rules by HC943 took effect on 31 January 2013. Thus the application made by the Appellant on 8 March 2013 was quite properly considered by the Respondent by reference to sub-paragraphs 245DD (h), (i), and (k), which (inter alia) were introduced to the Immigration Rules by paragraph 2 of the statement of changes effective on 31 January 2013.

25. As we understand it, the challenge that the Appellant seeks to advance to Judge Cope's decision is that he failed to make adequate findings of fact, and that the conclusions that he reached were not open to him. Put simply we are not satisfied that these challenges are made out. It is quite plain from a fair reading of the Determination as a whole that the Judge made no mistake of fact in his analysis of the nature of the relationships between the Appellant and Epicanthus, or in his analysis of the commercial arrangements the Appellant had caused Epicanthus to enter into with IDMG. The Judge noted that Epicanthus did not retain anyone, save for the Appellant at the date of the application, and thus it had not placed anyone other than the Appellant with any third party, and when it had done so, it had only ever done so with the one locum agency IDMG. Moreover the Judge correctly identified that Epicanthus had never made any effort to do anything else. He concluded that the Appellant was not pursuing a genuine business enterprise through Epicanthus, but was simply using Epicanthus to avoid the restrictions that prevented him taking direct employment as a doctor, because he had not sought or obtained LTR as a Tier 2 Migrant. In our judgement that conclusion was one that was well open to him on the evidence, and there was no lack of adequate reasoning for it. Thus there was no error of law in his decision to dismiss the appeal.

26. To the extent that it can properly be argued that the Judge should have gone further, and that he should have dealt individually with each the issues placed in dispute by the Respondent, we are satisfied that the Appellant can derive no assistance from the argument, because it was inevitable that those issues would be resolved adversely to him.

27. In our judgement the commercial reality of the arrangements that have been made by the Appellant are quite clear, and his actions entirely fail to offer any support for the proposition that he held at

any material time a genuine intention to invest £50,000 in Epicanthus [paragraph 245DD (h)(ii)], even if it was possible that a Judge would conclude on the evidence that such a sum was genuinely available to him. The Appellant never prepared, or disclosed, any business plan to demonstrate when, or how, he would make such an investment in Epicanthus, or what it would be used for, or what commercial benefit he anticipated Epicanthus would gain from it. It is perfectly plain that Epicanthus traded profitably at the date of the application without the benefit of any such investment, and that to continue the business of providing the Appellant's services to IDMG, no investment was required.

28. Mr Echendu's argument that the payment of tax by either the Appellant or Epicanthus constitutes "investment" in Epicanthus has no proper foundation, and is quite simply wrong.

29. Although at interview the Appellant had asserted that Epicanthus would take on commercial premises there was patently no commercial need for it to do so. Moreover the Appellant as its sole shareholder had derived a significant commercial advantage from Epicanthus choosing not to do so, because he had set against the taxable profits of the company its use of part of his home, thereby maximising the post tax profit of the company, and thus the sum that could properly be declared as dividends, to his benefit as the sole shareholder.

30. Again, although the Appellant had asserted at interview an intention that Epicanthus should grow in the future by retaining other doctors who were willing to undertake locum work, he had taken no steps to recruit them, or to explore how Epicanthus could do so profitably. In our judgement it is extremely difficult to see how such an intention could ever have been genuinely held by him. The Appellant failed to offer any evidence to show that any suitably qualified doctor would be prepared to work for Epicanthus for less than they could earn by contracting either with IDMG, or another locum agency directly, or by setting up their own company through which to supply their services to a locum agency. Unless the Appellant could demonstrate that Epicanthus could achieve a profit on the hourly rate paid by IDMG for such a doctor, then there would be no commercial purpose in Epicanthus retaining such a doctor.

31. The grounds of appeal to the Appellant's IAFT-1 asserted baldly that the decisions under appeal breached his "Convention rights". To the extent that this was properly to be read as a reliance upon the Appellant's Article 8 rights, as the Judge did, then there was no grant of permission to appeal in relation to his dismissal of that aspect of the appeal. In any event we are satisfied that there was no error of law in the dismissal of that aspect of the appeal; it is not suggested that any material evidence was overlooked by the Judge,

or that he failed to apply the relevant jurisprudence. In our judgement the arguments advanced in the application for permission to appeal are no more than a disagreement with his assessment of the proportionality of the decisions under appeal dressed up as assertions of errors of law.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 30 March 2014 did not involve the making of an error of law in the decision to dismiss the appeal that requires that decision to be set aside and remade. The decision to dismiss the appeal is accordingly confirmed.

Deputy Upper Tribunal Judge JM Holmes
Dated 7 August 2014