Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/16486/2013
IA/16488/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13th June 2014	**On 11th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

OLADAPO AFOLABI LAWAL (FIRST APPELLANT)
AYODELE OLUWATOYIN LAWAL (SECOND APPELLANT)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr I Khan of Ikon Law Solicitors and Advocates
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellants appeal against a determination of Judge of the First-tier Tribunal Devittie (the judge) promulgated on 16th April 2014.

2. The Appellants are Nigerian citizens born 7th August 1973 and 11th June 1973 respectively. The first Appellant is the husband of the second Appellant.

3. On 14th March 2013 the first Appellant applied for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the Points Based System (PBS) and the second Appellant applied as his dependant.

4. The applications were refused on 29th April 2013. In relation to the first Appellant the Respondent accepted that he was entitled to be awarded the 10 points claimed for English language under Appendix B, and the 10 points claimed for maintenance under Appendix C. However the Respondent did not accept that the Appellant was entitled to the 75 points claimed for Attributes under Appendix A of the Immigration Rules, and no points were awarded. The application was therefore refused with reference to paragraph 245DD(b) of the Immigration Rules.

5. In giving reasons for refusal the Respondent contended that the first Appellant, who was relying upon third party financial support, had not provided the specified evidence to prove that the third party funds were available and therefore that the business was financially viable.

6. The Respondent contended that the letters from Ecobank and FirstBank did not contain the required specified information, and also contended that letters from legal representatives did not confirm the validity of signatures on third party declarations, as they had not been signed by the first Appellant. A third reason for refusal was that the first Appellant had submitted a printout regarding his company information, but this was not a Current Appointment Report from Companies House as required by paragraph 110 of the published guidance.

7. Because the first Appellant's application had been refused, the second Appellant's application, as his dependant, was also refused. In both cases the Respondent made combined decisions to refuse to vary leave to remain, and to remove the Appellants from the United Kingdom.

8. The Appellants appealed to the First-tier Tribunal and their appeals were heard by the judge on 18th March 2014. The appeals were dismissed under the Immigration Rules and with reference to Article 8 of the 1950 European Convention on Human Rights.

9. The Appellants applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had erred in law by not finding that the Respondent's decision to remove was unlawful as the decision had been made at the same time as the decision to refuse to vary leave to remain.

10. It was also argued that the judge had made material factual errors in his determination, and had failed to make findings as to why the bank letters and third party declarations did not meet the requirements of the rules. It was contended that at paragraph 10 of the determination the judge misinterpreted the requirements of paragraph 41-SD.

11. It was further argued that the judge should have found that the Respondent should have considered the evidential flexibility policy as it

was accepted that there was some information missing from some of the specified documents submitted by the Appellants.

12. Permission to appeal was granted by Judge of the First-tier Tribunal Hemingway in the following terms;

> "1. The Appellants have applied, in time, for permission to appeal against a decision of the First-tier Tribunal (Judge Devittie) promulgated on 16th April 2014, dismissing each appeal against decisions of the Respondent, of 29th April 2013 refusing to vary leave to remain as a Tier 1 Migrant and dependant and deciding to remove each of them from the UK.
> 2. The grounds of appeal assert the judge erred in failing to consider the lawfulness of the removal aspect bearing in mind the decisions were taken prior to the coming into force of relevant provisions of the Crime and Courts Act 2013, erred in failing to apply the doctrine of evidential flexibility, erred in misreading certain bank letters and erred in applying a requirement not contained in the rules.
> 3. The judge arguably erred in failing to consider the lawfulness of the removal parts of each decision. Since I am granting permission I shall not shut out argument so the other grounds may be argued too.
> 4. Permission is granted."

13. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. In relation to the decision to remove taken pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006, the Respondent accepted that this was unlawful and withdrew that aspect of the decision.

14. In relation to evidential flexibility the Respondent pointed out that the case was decided post September 2012 by which time the applicable evidential flexibility policy had been incorporated into paragraph 245AA of the Immigration Rules. Given the extent of the non-compliance with the specified documents in this case, it was contended that the provisions of paragraph 245AA did not assist the Appellants, and consequently any failure to consider them was not a material error of law.

15. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to establish whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Appellants' Submissions

16. Mr Khan relied upon the grounds contained within the application for permission to appeal, together with his skeleton argument dated 22nd May 2014.

17. In brief summary Mr Khan accepted that the Respondent was entitled to withdraw the removal decision. He submitted that it was not correct that the Respondent's evidential flexibility policy which was published on 17th June 2011 had been incorporated into paragraph 245AA of the Immigration Rules and pointed out that the Respondent had published a new evidential flexibility policy valid from 28th March 2014. Mr Khan believed that the

policy published on 17th June 2011 was valid until 6th October 2013. I was not provided with any evidence to confirm that.

18. With reference to the Respondent's contention that the Appellant had not submitted with his application the Current Appointment Report from Companies House, Mr Khan's first submission was that this document was in fact submitted with the application, but if it was found not to have been submitted, he relied upon Shebl (Entrepreneur: proof of contracts) [2014] UKUT 00216 (IAC) in support of the contention that the majority of the information contained in the Companies House report was in fact in a printout that was submitted with the application.

19. In relation to the letters from the legal representatives, Mr Khan submitted that these letters contained at H1 and H5 of the Respondent's bundle appeared to comply with the requirements of the Immigration Rules and there was no requirement that they be signed by the applicant.

20. Mr Khan accepted that the bank letters from Ecobank and FirstBank did not contain the specified information required. He accepted that they did not satisfy the requirements in paragraph 41-SD(a)(i)(5), (6), (9), (10), and (11). However Mr Khan's submission was that the Respondent should have applied either the evidential flexibility policy or paragraph 245AA, and given the Appellants the opportunity to submit the missing information, and the judge had materially erred in law, by failing to find the Respondent's decision unlawful, because of the failure to apply either paragraph 245AA or the evidential flexibility policy.

The Respondent's Submissions

21. Miss Everett confirmed that the section 47 removal decision was withdrawn and relied upon the rule 24 response.

22. Miss Everett submitted that Shebl could be distinguished from this case, as Shebl involved contracts which were not in issue in this case.

23. In relation to the letters from the legal representatives, Miss Everett accepted that they appeared to comply with the rules. The bank letters however had numerous omissions. Miss Everett submitted that the judge had been correct to dismiss the appeal, based on those omissions in the bank letters.

24. Miss Everett commented that the Respondent's evidential flexibility only dealt with minor omissions.

The Appellants' Response

25. Mr Khan pointed out that in the evidential flexibility policy document dated 17th June 2011, there was no mention of this applying only to minor omissions. I was asked to set aside the determination of the First-tier Tribunal.

26. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

27. Dealing firstly with the fact that the Respondent made a combined decision to refuse to vary leave, and to remove the Appellants from the United Kingdom, and the fact that this decision was made before 8th May 2013 when section 51 of the Crime and Courts Act 2013 made it lawful to take two decisions at the same time, I conclude that the judge erred in not recording that the removal decision was unlawful.

28. The Respondent has indicated that this decision is withdrawn, and Mr Khan consented to that. If a decision is to be withdrawn before the Upper Tribunal, the consent of the Tribunal is required pursuant to rule 17 of The Tribunal Procedure (Upper Tribunal) Rules 2008, and consent was granted to the Respondent's decision to remove the Appellants being withdrawn. There is therefore no removal decision.

29. I turn next to the refusal based upon specified evidence not being supplied with bank letters, those letters having been supplied by Ecobank and FirstBank. The judge made his findings in paragraph 10 of his determination which I set out below;

> "10. On the evidence presented in this case I am satisfied that even on a liberal interpretation of the rules the Appellant has failed to provide the evidence specified and, separately, to establish that the required level of funds are genuinely available to him to invest in a business in the United Kingdom. These are my reasons:
> (i) The bank letters in respect of each of the third parties do not, as required under paragraph 41-SD, confirm that the third party has informed the institution of the amount of money it intends to make available, and that the institution is not aware of the third party having promised to make that money available to any other person.
> (ii) The letters from the bank raise serious doubts about whether the funds are freely transferrable because they say that transferability of funds is subject to approval by the exchange control authority. There is no evidence to show that such authority has been granted."

30. I conclude that the judge should have given more comprehensive reasons for finding that the specified evidence had not been submitted but this is not a material error, as it is clear, and accepted on behalf of the appellants, that the specified evidence required in the bank letters was not included.

31. The specified evidence required was, at the date of refusal, set out in paragraph 41-SD(a)(i) of Appendix A which states that there must be a letter from each financial institution holding the funds, to confirm the amount of money available to the applicant, and there is then set out eleven specific requirements which the letter must contain.

32. The letters in question are a letter from Ecobank dated 8th March 2013, and FirstBank of the same date. The following specified information is

missing from both letters, which is set out below using the numbering in paragraph 41(a)(i);

> (5) confirm that the institution is regulated by the appropriate body
> (6) state the applicant's name, and his team partner's name if the applicant is applying under the provisions of paragraph 52 of this Appendix,
> (9) confirm the amount of money provided to the applicant from any third party (if applicable) that is held in that institution,
> (10) confirm the name of each third party and their contact details, including their full address including postal code, landline phone number and any email address,
> (11) confirm that if the money is not in an institution regulated by the FSA the money can be transferred into the UK.

33. The judge found that the specified information was not included in the letters, although he did not set out correctly the specified information that was missing. As it is not disputed that the specified information was missing, the issue is whether the judge erred in not concluding that the Respondent should have applied either the evidential flexibility policy or paragraph 245AA of the Immigration Rules. I do not find that the judge materially erred on this issue.

34. I have had the benefit of considering the recent Upper Tribunal decisions, Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295 (IAC), Akhter and another (Paragraph 245AA: wrong format) [2014] UKUT 00297 (IAC), and Fayyaz (Entrepreneurs: paragraph 41-SD(a)(i) – "provided to") [2014] UKUT 00296 (IAC). I set out below paragraph 245AA which was in force at the date of refusal on 29 April 2013;

> 245AA Documents not submitted with the applications
> (a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the UK Border Agency will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with sub-paragraph (b)
> (b) If the applicant has submitted:
> (i) A sequence of documents and some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);
> (ii) A document in the wrong format; or
> (iii) A document that is a copy and not an original document,
> the UK Border Agency may contact the applicant or his representative in writing, and request the correct document. The requested documents must be received by the UK Border Agency at the address specified in the request within 7 working days of the date of the request.
> (c) The UK Border Agency will not request documents where a specified document has not been submitted (for example an English language certificate is missing), or where the UK Border Agency does not anticipate that addressing the omission or error referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.
> (d) If the applicant has submitted a specified document:

(i) in the wrong format, or
(ii) that is a copy and not an original document,
the application may be granted exceptionally, providing the UK Border Agency is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The UK Border Agency reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b).

35. In my view paragraph 245AA would not have assisted the Appellant. This was not a case where a document was missing from a sequence, or a document was in the wrong format, or a copy had been submitted instead of an original document.

36. The Tribunal in Akhter decided that a bank letter, which does not specify the postal address, landline telephone number and email address of the account holders is not thereby 'in the wrong format' for the purposes of paragraph 245AA of the Immigration Rules.

37. The Upper Tribunal in both Akhter and Durrani, found that there was no evidence that some policy on evidential flexibility, independent and freestanding of paragraph 245AA, survived the introduction of that paragraph in the Immigration Rules. The Tribunal recorded in paragraph 15 of Akhter;

> "15. We consider that the judge erred in law in assuming that this 'policy' remained in existence following the introduction of paragraph 245AA and, hence, applied to the Appellants' application. The question of whether a policy exists, in any given context, is a question of fact. There was no concession to this effect. Absent a concession, an evidential foundation for this finding was necessary. There was none. The contrary was not argued before this Tribunal. Furthermore, the additional evidence brought to the attention of the Court of Appeal in the Rodriguez case suggests that the documents in question had no enduring force or effect when paragraph 245AA of the Rules was introduced: see Secretary of State for the Home Department v Rodriguez and Others [2014] EWCA Civ 2, [47] and [65]. The information contained in these passages, though not formally admitted in evidence by the Court of Appeal, was not challenged by the Appellants before this Tribunal. Finally, and in any event, the Court of Appeal reversed the Upper Tribunal's finding that the documents under scrutiny constituted a new policy: see [87]."

38. I therefore reject Mr Khan's submission that the Respondent's evidential flexibility policy published on 17th June 2011 exists independently from paragraph 245AA of the Immigration Rules. There was therefore no obligation on the Respondent to consider this policy, and no error made by the judge in not finding that the Respondent's decision was unlawful because the policy had not been considered. The Respondent does in fact have Tier 1 (Entrepreneur) Policy guidance, and version 08/2012 was in effect when the Appellants applied for leave to remain. This has a section dealing with documentary evidence and paragraph 26 sets out the policy in relation to submission of documents, which is set out below;

26. If you do not provide the specified documents, we will contact you to ask for them only when you have submitted:
    - A sequence of documents, and some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);
    - A document in the wrong format;
    - A document that is a copy and not an original document.

    In these circumstances we will contact you or your representative in writing, and the evidence must be received by the UK Border Agency processing centres within 7 working days. If not, we may refuse your application. We will not ask for further information when none of the information has been submitted (for example an English language certificate is missing); or where a correction of minor errors or omissions will not lead to an approval because the application will fail for other reasons.

39. It can be seen that the above mirrors the provisions of paragraph 245AA which was in force at the relevant time. Therefore this policy would not have assisted the Appellants.

40. The judge did not make findings upon the aspects of the refusal which referred to letters from legal representatives nor the alleged absence of the Current Appointment Report from Companies House, and findings on these points should have been made. However the omission is not material, as the judge found that the appeals could not succeed because of the absence of the specified information required in the letters from Ecobank and FirstBank.

41. The judge considered Article 8 of the 1950 European Convention on Human Rights, and the appeal was rejected on that basis, and there has been no challenge to those findings.

42. I therefore conclude that although there are some errors in the determination of the First-tier Tribunal, those errors are not material. Therefore the decision of the First-tier Tribunal stands, although as previously stated, if the Appellants are to be removed from the United Kingdom there must be a further removal decision as the removal decision dated 29th April 2013 was unlawful and has been withdrawn by the Respondent.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision must be set aside. I do not set aside the decision. The appeal is dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity direction.

Signed Date 30th June 2014

Deputy Upper Tribunal Judge M A Hall
Fee Award

The appeal is dismissed. There is no fee award.

Signed Date 30th June 2014

Deputy Upper Tribunal Judge M A Hall