



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/41566/2013

THE IMMIGRATION ACTS

**Heard at Birmingham
On 17 November 2014**

**Promulgated
On 18 November 2014**

Before

UPPER TRIBUNAL JUDGE PITT

Between

David Nwachukwu Ilukwe

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Manning, instructed by Samuel Louis Solicitors

For the Respondent: Mr Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the decision promulgated on 16 June 2014 of First-tier Tribunal Judge Shanahan which refused the appeal against the Secretary of State's decision dated 1 October 2013 refusing leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant.
2. In order to address the appellant's error of law challenge it is expedient to set out the history of this matter.
3. The appellant applied for leave to remain as Tier 1 (Entrepreneur) Migrant on 29 November 2011.

4. That application was refused on 2 November 2012. That refusal was on the basis that the documentary requirements for his financial documents had not been met.
5. The appeal against refusal of 2 November 2012 was dismissed by First-tier Tribunal Osborne in a determination promulgated on 25 January 2013.
6. The appellant was granted permission to appeal that decision and the matter came before Deputy Upper Tribunal Judge Hall on 13 May 2013.
7. Judge Hall found that First-tier Tribunal Judge Osborne had made an error on a point of law and set the decision aside. He found that to be so as it was not correct that the appellant's Nigerian bank had to be shown to be regulated by the UK Financial Services Authority. This was an error conceded for the respondent as at [17] of Judge Hall's decision.
8. Judge Hall also found at [19] that there was a further error in Judge Osborne's decision as the absence of a conversion of the appellant's Nigerian funds into sterling should have been dealt with under the appellant's evidential flexibility policy.
9. Finally, Judge Hall concluded at [20] that any other omissions or shortcomings in the appellant's documents were capable of being remedied under the respondent's evidential flexibility policy. As that policy had not been applied here, Judge Hall proceeded to remake the appeal by allowing it as not in accordance with the law.
10. The respondent then requested further documents from the appellant which he provided on 11 June 2013.
11. The respondent's new decision dated 1 October 2013 sets out the documentary requirements at length and states that they were not met, the appellant being awarded no points against the Appendix A criteria. The letter does not specify in what way the appellant had failed to meet the documentary requirements however.
12. Notwithstanding the fact that he did not know why his application had again been refused, the appellant again appealed to the First-tier Tribunal. His appeal was dismissed in the determination of Judge Shanahan. Her reason for refusing the appeal was that, as put forward for the respondent at the hearing before her, the appellant had still failed to provide a conversion of his Nigerian funds into sterling; see [7] and [10].
13. The appeal against Judge Shanahan's decision thus came before me. The first ground was that there has never been a requirement in the Immigration Rules to provide a conversion of the Nigerian funds into sterling. The respondent's position is that she will conduct her own conversion if none is provided. Mr Smart conceded that to be so before me. There has never been any dispute here that the appellant had enough funds at all times whatever currency conversion rate was applied. I was

entirely content that Judge Shanahan had erred in requiring the appellant to have provided a conversion of his Nigerian funds.

14. The difficulty before me was that Mr Smart maintained that this was not material as the appellant had never remedied the defects of the first application as set out in the first refusal letter of 2 November 2012. As I understood the argument for the respondent, the matters from the 2 November 2012 refusal remained at large before me as Judge Hall's decision was defective as evidential flexibility could not assist the appellant to the extent set out in his decision.
15. After allowing the parties time to consider this jurisdictional issue and address me on it, my conclusion was that the issues before me related to the refusal letter of 1 October 2013 and not the earlier refusal letter. If the respondent had wanted to continue rely on the matters set out in the earlier refusal, she could have said so in the refusal letter of 1 October 2013. She could have said something to this effect before Judge Shanahan. She could have said so in a Rule 24 response to the grant of permission to appeal to the Upper Tribunal. She could have attempted to do so in a cross-appeal against Judge Shanahan's decision. She did not. I was not prepared to accept that she could take that position before me now, additionally so on no notice.
16. As should be clear from [6], it is my view that Judge Shanahan erred in finding that the appellant had failed to provide a currency conversion of his Nigerian funds. That is not a requirement of the Immigration Rules and I set aside her determination for that reason.
17. In re-making the decision I return to the point made in paragraph 4 above that there is nothing of substance in the refusal letter of 1 October 2013 indicating why the appellant had failed to meet the Immigration Rules. Nothing other than the absence of a conversion of the Nigerian funds was relied on before Judge Shanahan and nothing was before me as to why the appellant does not meet the Immigration Rules, having provided on 11 June 2013 the evidence requested by the respondent. Where those matters are so, I find on the balance of probabilities that the appellant meets the requirements of the Immigration Rules as a Tier 1 (Entrepreneur) Migrant.

Decision

18. I find that the decision of the First-tier Tribunal discloses an error on a point of law and set it aside. I re-make the appeal as allowed under the Immigration Rules.

Signed: 
November 2014
UPPER TRIBUNAL JUDGE PITT

Date: 17

