Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49518/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 July 2014	**On 05 August 2014**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS VIRTUE ANURI NWOKORO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Presenting Officer
For the Respondent: Mr M K Hasan

DETERMINATION AND REASONS

1. The parties are hereafter referred to as they were before the First-tier Tribunal so that Miss Nwokoro is the appellant and the Secretary of State for the Home Department is the respondent.

2. The appellant is a Nigerian national who was born on 25 November 1982. She appealed the decision of the respondent made on 19 November 2013 refusing to vary her leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant. Removal directions were also issued against her.

3. The appellant appealed that decision to the First-tier Tribunal and the appeal was heard by Tribunal Judge Fox. In a determination promulgated on 16 May 2014 the judge allowed the appeal "insofar as the matter is returned to the respondent to reconsider her decision in accordance with the evidential flexibility policy".

4. The respondent took objection to that decision and applied for permission to appeal and the application was granted.

The Rule 24 Response and Cross - Appeal

5. In response the appellant filed a Rule 24 reply and cross-appeal to the effect that there was an e-mail from the respondent to the appellant seeking further information. This showed that the process under the evidential flexibility policy had already been engaged in and on that premise the First-tier Tribunal was of the view that enquiries ought to be fully completed. It was argued that the judge was correct therefore to remit to the Secretary of State as the policy is not the only power or source through which evidence or information could be requested. There are also the provisions of paragraph 245AA of the Rules. In any event the respondent would not be prejudiced by the appeal being remitted as she is not obliged to grant the appellant leave following the determination. Any error of law by the judge is not material and the respondent "if they are adamant that their decision was correct in the first place simply needs to remake the same decision causing very little, if any administrative burden."

6. The appellant also challenges the findings of the judge at paragraphs 27 to 33 of the determination. In essence the argument is that the appellant sought the services of lawyers and therefore clearly had not considered the SOC codes herself. Therefore, for the Tribunal to penalise her or find against her in that respect is arguably erroneous and against the evidence. The judge also failed to make adequate credibility findings with proper reasoning, failed to appreciate that the respondent ought to have noticed and raised enquiries following the fact that the SOC code and the description given in the contracts were different. There is the further assertion that the appellant's actual role is much higher than the role given through the SOC code in the application.

7. Another matter of complaint is that no findings were made in respect of Article 8, but if the respondent's grounds were found to be sustainable and the determination set aside there needed to be a comprehensive reconsideration of the appeal and the matter should be remitted to the First-tier for a de novo hearing on all issues with no findings or evidence preserved.

My Deliberations

8. The grounds seeking permission submit that the respondent refused the original application, inter alia, because the appellant had failed to provide evidence of working in an occupation which appears on the list of occupations skilled to National Qualifications Framework Level 4 as stated in the Codes of Practice detailed under Appendix J of the Immigration Rules. The judge's findings, which are set out at paragraphs 27 to 34 of the determination, include in paragraph 31 that "upon the available evidence I am not satisfied that the appellant is engaged in business activities as claimed".

9. It is readily apparent therefore that the judge found that the appellant could not meet the requirements of the Rules to enable her to succeed in her application under the points-based system. At that point one would have expected the appeal to have been dismissed under the Immigration Rules and an assessment made of the appellant's Article 8 claim. As to that the judge said merely that as the matter remains outstanding before the Secretary of State he made no finding in relation to Article 8 ECHR.

10. It appears that the reason for saying this is that in the previous paragraph he found it reasonable to conclude that the respondent intended to conduct further investigations in accordance with her evidential flexibility policy when she issued an e-mail and, as a result, he directed that the matter be returned to the respondent to reinstate her request for further information "and the respondent is free to make enquiries in accordance with my findings should she chose to do so". The e-mail is referred to at page 3 of the decision letter of 19 November 2013.

11. As part of the reason for the refusal of the appellant's application the respondent was not satisfied that on a date falling within three months prior to the date of the application the appellant registered a new business in which she is a director. The reason for coming to that conclusion is because the document provided is only the application to register with Companies House and not the current report naming the appellant as the director with a business address and as such does not meet the requirements specified under Appendix A.

12. The appellant denied ever receiving that e-mail. It is not clear from the judge's findings what he made of that aspect, but whether it was received or not he found that on the balance of probabilities the appellant registered as a director with Companies House within three months of her application as an entrepreneur. To that extent therefore it appears he was saying that she met that part of the Rule. However, she still needed to show that she was working in an occupation which appears on the list of occupations skilled to National Qualifications Framework Level 4 and he found that she did not do so.

13. The importance of the e-mail referred to appears to be because of what was recorded as the submission made in paragraph 24 of the determination. Mr Hasan submitted that the respondent should have sought clarification from the appellant about whether the SOC code 1135 was the appropriate code. He submitted that the evidential flexibility policy applied and that the e-mail demonstrates that the respondent intended to actively apply the evidential flexibility policy.

14. At paragraph 34 of the determination the judge states that it is reasonable to conclude that the respondent intended to conduct further investigations in accordance with her evidential flexibility policy when she issued "the e-mail". It was for that reason that the matter was returned to the respondent to reinstate her request for further information.

15. What is entirely unclear is how or why the respondent was required to make such investigations, particularly in light of paragraph 245AA of the Rules. The request for the supply of the current Companies House report naming the appellant as a director of the business to support her application was a request made for a specific document as envisaged by Rule 245AA. The Secretary of State is only required to consider documents that have been submitted with an application and will only consider documents submitted after the application where they are submitted in accordance with sub-paragraph (b) of 245AA which states as follows:-

> "(b) If the applicant has submitted specified documents in which:
>
> (i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
>
> (ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
>
> (iii) A document is a copy and not an original document; or
>
> (iv) A document does not contain all of the specified information;
>
> ..."

16. The relevant Rule goes on to state that documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the ... Secretary of State did 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. The Rule also sets out that if the applicant has submitted a specified document in the wrong format or is a copy or does not maintain all of the specified information etc., the application may be granted exceptionally as long as the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all of the other requirements.

17. In the light of paragraph 245AA of the Immigration Rules absent further reasoning by the judge it is not reasonable to conclude that the respondent intended or was required to conduct further investigations, the e-mail demonstrating only that the information sought by it should be provided. It never was provided and there is a dispute as to whether the e-mail was ever received, but in the event the refusal, as the judge found, was because the appellant was engaged in business activity below the required skill level.

18. It is entirely unclear to me therefore what was expected of the respondent under the "evidential flexibility policy", or indeed Rule 245AA, if that was what was meant, because it is readily apparent that the application itself was bound to fail given the basis upon which it was made and the code given which was provided by the appellant or those acting on her behalf. Although the appellant asserted that the reason the application was made using the wrong code was the fault of her former representatives the judge found that the appellant's evidence taken at its highest demonstrates that she did not need to defer to another professional on this matter because she holds herself out as an expert in the field of employment issues (para 33 of the determination).

My Conclusions

19. My conclusions therefore are that the judge made findings on the evidence before him that he was entitled to make. The judge had the benefit of hearing from the appellant who was cross-examined about the evidence that she gave. There has been an attempt to show that the judge was not entitled to come to those conclusions but for the reasons given I found that he was.

20. Where the judge fell into error was in deciding that "the evidential flexibility policy" required that the respondent embark upon further inquiry, which on the facts found would still be bound to have led to a refusal of the application as it was originally made. The judge should therefore have dismissed the appeal.

Decision

21. **The Upper Tribunal sets aside the decision of the First-tier judge and in substitution for allowing the appeal to a limited extent substitutes a decision that the appeal is dismissed under the Immigration Rules**, and this is for the reasons set out above.

22. This leaves outstanding the Article 8 aspect of the appeal. The appellant relied on Article 8 in her grounds of appeal and the judge declined to deal with that part of the appeal for the reasons stated. I find that he should have done so and announced my decision at the hearing. I sought the views of the representatives. As a result **I have decided that the matter is to be remitted to the First-tier Tribunal for a hearing**

before the same judge, who is judge VMD Fox, and that hearing will be limited to the Article 8 human rights issue only.

23. I was not addressed on the matter of anonymity. However, the facts do not appear to warrant that an anonymity direction be made and accordingly I do not make one.

Signed Date
Upper Tribunal Judge Pinkerton