IAC-FH-AR-V2

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/17851/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 23 June 2015**
**Prepared 23 June 2015**

**Decision & Reasons Promulgated**
**On 9 July 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**BABATUNDE OLAWALE ARINOLA**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr T Wilding, Senior Presenting Officer
For the Respondent: Mr C Ezike, Solicitor, Prime Solicitors

**DECISION AND REASONS**

1. In this decision the Appellant is referred to as the Secretary of State and the respondent is referred to as the claimant.

2. The Claimant made an application on 21 February 2014 for leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based system. The Secretary of State

refused that application and made removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. An appeal against that decision came before First-tier Tribunal Judge Blandy who, on 28 November 2014, allowed the appeal under paragraph 245DD of the Immigration Rules on the basis that the Claimant had not met relevant requirements. The issue was clearly identified for the Secretary of State's stance had been that the Claimant had not submitted sufficient evidence to show the nature of his employment and that the documentation provided did not show the necessary contact details, as set out in paragraph 2 of the decision [D] and in addition the agreement was not a contract of the kind expected and properly coded under the provisions of the Rules.

4. Nevertheless the judge went on to decide that the reasons for refusing leave to remain had not been sufficiently addressed. The Judge found, even if the specified documents had not been provided, in substance sufficient information had been provided to enable the application to be resolved. In addition to that the judge went on to remake the decision and to exercise a discretion which the Secretary of State had not exercised to conclude that the Appellant had met the relevant requirements of paragraph 245DD of the Rules.

5. Mr Wilding, for the Secretary of State, argued that what the judge should have done, having considered the relevant factual elements of it which went to show that there was not the specified information, was remitted the matter to the Secretary of State to consider the exercise of a discretion under paragraph 245AA in relation to the assessment of the other documents notwithstanding the requirements of the Rules.

6. The judge according to Mr Ezike, was entitled to reach a decision on those matters and that in doing so it does not disclose any material error of law.

7. The fact of the matter is that the Reasons for Refusal Letter, dated 1 April 2014, specifically asserted (P3/7) that a discretion was not being exercised and gave the reasons why. I do not consider the merits of that matter but suffice to say it is clear beyond doubt that a discretion was not being exercised by the Secretary of State which plainly under the provisions of 245AA is the responsibility of the Secretary of State to consider and apply.

8. In the circumstances, whilst I wholly understand why the judge decided it was appropriate to get on and deal with the matter, given the conclusion he had reached on the overall merits of the Claimant's application, nevertheless should not have done so. I find the case of Ukus (Discretion: when reviewable) [2012] UKUT 307 shows that the Secretary of State retains the primary responsibility to decide whether or not to exercise a discretion and it is only when the discretion has been exercised, that is of course lawfully exercised, then it is reviewable. Ukus makes plain, the discretion is primarily vested in the Secretary of State, the Immigration Officer or the Entry Clearance Officer. The appropriate course is to require the decision maker to complete his task by reaching a lawful decision on the outstanding application.

9. I find that Ihremedu [2011] UKUT 340 also reflects the continuing responsibility that the Secretary of State has to act in accordance with the law and assess the public interest.

10. For these reasons, therefore, whilst understanding why the Claimant will be disappointed with this outcome, it seemed to me in the light of the positive findings and in any further representations made by the Claimant in respect of issues that had been raised, that the opportunity must be given to the Secretary of State to decide whether to exercise that discretion in the light of the judge's decision, the findings made and any further representations made on behalf of the claimant.

11. The Original Tribunal's decision is set aside.

12 The following decision is substituted. The appeal of the Secretary of State is allowed to the extent that it is for the Secretary of State to consider the exercise of discretion under paragraph 245AA of the Immigration Rules HC 395 as amended, with particular reference to the adequacy of the evidence provided in relation to the requirements of paragraph 41-SD(e)(iv) of Appendix A of the Immigration Rules.

13. No anonymity direction was requested, none is being made and none is appropriate.

Signed Date7 July 2015

Deputy Upper Tribunal Judge Davey