**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/33510/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 27 July 2015** | **On 13 August 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE G A BLACK**

**Between**

**MR MUHAMMAD SAJID**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms G McCall (Counsel instructed by Richmond Chambers LLP)
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

1. This matter comes before me for as an error of law hearing. The appellant whose date of birth is 3 February 1998 is a citizen of Pakistan. He appeals against a decision and reasons of the First-tier Tribunal (FtT) (Judge Fowell) promulgated on 25 March 2015 in which his appeal was dismissed on immigration grounds. The appellant applied for a visa as a Tier 1

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(Entrepreneur) Migrant under the points-based system (PBS) and in addition argued that his right to respect for private life was breached.

## FtT Decision

2. In a detailed and considered decision and reasons the FtT set out the detailed reasons for refusal together with the relevant statutory provisions and the submissions made by both representatives. The findings of fact were set out from [28-40] and the Article 8 issue was considered from [41-44].

3. At [29] the FtT found that the appellant failed to comply with the Rules in terms of a third party declaration as it did not confirm that the funds remained available to the appellant. Further it found that there was no declaration from a legal representative as specified in paragraph 41-SD(d) of Appendix A. At [32] the FtT found the appellant failed to provide the required evidence that he was registered with HMRC as self-employed.

4. At [32] the FtT found that the evidence failed to specify the duration of a trading contract as required by the Rules. At [36] the FtT found no evidence of business activity under the contract provided and was not satisfied that the appellant met the requirement under table 4, Appendix A, subparagraph (iv).

5. At [36] the FtT considered the issue of evidential flexibility and **Rodriguez** , and found that the letter from the bank did not come within this policy as it failed to provide the specified information.

6. At [42] the FtT considered private life under paragraph 276ADE and concluded that there the appellant failed to show there were very significant obstacles to his reintegration into Pakistan given his evidence of family ties with immediate family members.

7. The FtT went on to consider whether or not Article 8 ECHR outside of the Rules was applicable at [43] and with reference to **Aliyu and Another, R (on the application of) v SSHD [2014] EWHC 3919 (Admin)**. It found that there was no sufficiently good reason to consider Article 8 directly and no argument was placed before the Tribunal to suggest that there was anything about the appellant's circumstances not covered by the Rules.

## Grounds of Application

8. It was submitted that the First-tier Tribunal erred as follows.

   (1) The FtT applied the Rules in place after 11 July 2014 rather than those applicable on 10 July 2014.

   (2) The FtT failed to consider the factual basis of the appellant's application with reference to receipt of funds from third parties rather than individuals holding their own funds.

(3) The FtT placed evidential requirements on the appellant which were not contained in the Rules requiring (1) a declaration to accompany a letter from the bank and (2) the "fruits of work" to show trading.

(4) The FtT failed to consider relevant evidence insofar as it concluded that the appellant did not submit evidence of being self-employed with his application.

(5) The FtT failed to apply paragraph 245AA when considering evidential flexibility.

(6) The FtT failed to have regard to recent jurisprudence in relation to Article 8 and placed too high a burden on the appellant.

**Amended Grounds of Appeal**

9. The appellant submitted amended grounds of appeal dated 15 April 2015 in response to the section 120 One-Stop Warning referred to in the original refusal letter.

10. The appellant argued that he satisfied the requirements of paragraph 276 Immigration Rules (HC 395) (as amended) on the grounds of long residence – ten years' continuous lawful residence in the UK. Accordingly the decision to remove him contravened Section 6 of the Human Rights Act 1998.

11. Reliance was placed on **AS (Afghanistan) v SSHD [2009] EWCA Civ 1076** at [81] and **Lamichane v SSHD [2012] EWCA Civ 260** [26] and **AF (Afghanistan) in Patel and Others v SSHD [2013] UKSC 72**. It was submitted that the Upper Tribunal was required to determine the appellant's appeal in accordance with paragraph 276B notwithstanding this related to a different paragraph of the Immigration Rules from that in the respondent's decision.

**Permission to Appeal**

12. First-tier Tribunal Judge Pooler granted permission to appeal on 27 May 2015 finding all of the grounds in the original grounds of appeal to be arguable. Judge Pooler further commented "it is unlikely that the additional grounds found in the amended grounds of appeal disclose a material error of law because they raise matters not originally before the First-tier Tribunal; but since permission is to be granted on all grounds may be argued".

**Rule 24 Response**

13. The Secretary of State opposed the appeal submitting that the First-tier Tribunal directed itself appropriately. The FtT was entitled to conclude that the letter from the bank was not in the correct format and there was no obligation to apply the evidential flexibility Rule. The evidence was deficient. Further it was open to the FtT to conclude that the current

appointments report was not submitted with the application. It was open to the FtT to conclude that regardless of whether the appellant had a copy at appeal that it did not establish that it was submitted at the application. The mere existence of a document which the FtT was in any event barred from considering did not establish that it had been submitted.

14. As regards Article 8 this argument is misconceived.

**Error of Law Hearing**

Submissions

15. Ms McCall relied on the grounds of appeal. Her starting point was that having submitted additional grounds of appeal in response to the One-Stop Warning in the refusal letter, the Secretary of State was under a duty to respond to those grounds. She argued that the Tribunal was able to determine this matter and that it should remit the matter to the Secretary of State for a decision on the long residence issue.

16. As to the original grounds of appeal, Ms McCall submitted that the appellant had been resident in the UK 28 days short of ten years and had a private life capable of protection under Article 8 with which the Tribunal had not engaged at all and this amounted to a material error of law.

17. Mc McCall submitted that whilst the appellant was not actively pursuing the matters raised in the grounds of appeal, the Tribunal decision was littered with errors, the wrong law was quoted and the incorrect burden was used. She relied on the grounds set out in the permission to appeal only insofar as a material error of law was disclosed. Those issues were relied on only if it was not accepted that the Section 120 grounds could be raised at the error of law stage. Ms McCall produced a bundle of authorities including **AS (Afghanistan)**, **Patel** and the Upper Tribunal decision of **MU**.

18. Mr Whitwell requested sight of the Section 120 notice which was provided by Ms McCall and which confirmed that it was served on the Tribunal and respondent on 15 April 2015.

19. Mr Whitwell submitted that the Section 120 notice postdated the determination by the First-tier Tribunal and it could not be criticised for failing to deal with matters that did not exist at the date of the hearing or up to the promulgation date. The grounds relied on were not relevant to the issue of error of law. As and when an error of law was found such matters could only become relevant at the remaking stage. At the date of the appeal before the First-tier Tribunal the appellant did not have ten years' lawful residence.

20. Turning to Article 8 Mr Whitwell submitted that the Tribunal considered Article 8 with reference to the Immigration Rules under 276ADE. There were no factors relied on by the appellant to establish that his circumstances had not been covered sufficiently in the Rules.

21. Mr Whitwell further made reference to the skeleton argument produced by the appellant for the First-tier Tribunal hearing which in essence argued that the appellant was able to meet the Rules with additional documentary evidence. The appeal could not succeed.

22. As an aside Mr Whitwell raised concerns that the appellant appeared to be relying on his Tier 1 appeal which he hoped to discard in order to be able to pursue another form of leave, which indicated that the appeal had been pursued in order to give him the opportunity to establish ten years' residence.

23. Ms McCall relied on **SS (Congo)**. There were matters to be weighed up as the appellant had been in the UK for nearly ten years and was close to meeting the Immigration Rules which lessened the public interest in his removal from the UK. The Tribunal was required to give full consideration outside of the Rules under Article 8.

24. She responded to Mr Whitwell's suggestion that the appellant had abused the system by emphasising that Section 120 existed to enable the appellant to provide any further grounds.

25. At the end of the hearing I reserved my decision which I now give with my reasons.

## Discussion and decision
## Section 120 Notice

26. Clearly there can be no criticism of the appellant producing additional grounds in response to the service of the Section 120 notice. However, I am satisfied that the matter he raised (long residence) in the additional grounds of appeal was not a matter that was before the First-tier Tribunal and could not have been before the First-tier Tribunal as the appellant had not resided in the UK for a continuous period of ten years by that stage. In **AQ (Pakistan)** the Court of Appeal considered that the Section 120 notice procedure did not require consideration of events subsequent to the Secretary of State's decision. Furthermore, I find that no decision has been made by the Secretary of State on this entirely new matter. It is not a matter for this Tribunal to determine as primary decision maker in the course of an error of law hearing on an unrelated matter and the Upper Tribunal is under no obligation to consider this new application in the context of these proceedings and /or for the matter to be remitted to the Secretary of State. I am satisfied that the additional grounds have been submitted and served on the Secretary of State who will no doubt in due course make a decision.

## Error of Law Grounds

27. As I have rejected the appellant's primary submission I now consider the error of law grounds. I am satisfied that the appellant has not made out the grounds of appeal relied on. There was no issue raised with the First-

tier Tribunal as to the Immigration Rules applicable to the appellant's application made on 10 July 2014. The Secretary of State considered the Rules set out in the Reasons for Refusal Letter which were those in force after 11 July 2014 and the appeal proceeded on that basis. No such issue was taken in either the grounds of appeal or the skeleton argument before the First-tier Tribunal in which the point was argued that the appellant ought to have been given an opportunity to provide further evidence that was not submitted at the time of the application.

28. I find no material error of law in the Tribunal's consideration of the evidence submitted to meet the Rules. The correct relevant date for points-based matters was applied and evidence was adduced by the appellant which was inadmissible, for example the second bank letter. There was no evidence to show trading at the time of the application. I am satisfied that the First-tier Tribunal properly considered the requirements for specified evidence at paragraph 41-SD(e) of Appendix A and/or the arguments as to evidential flexibility.

29. Turning to Article 8, it was common ground that there is no longer any intermediary test prior to consideration of Article 8 ECHR. However, I am satisfied that the Tribunal's approach to this appeal was correct. The Tribunal first considered the application of private life under paragraph 276ADE(vi) and thereafter considered whether there was anything about the appellant's circumstances that was not covered by the Rules. It can be inferred that as long residence was a matter covered by the Rules, there was no argument for it to be considered under Article 8. There was no additional material for the Tribunal to consider in light of the fact that the appellant first came to the UK as a student in 2005 and was granted periods of leave under the points-based scheme until that expired on 10 July 2014. There was no additional evidence of any compelling nature before the Tribunal and none has been put to the Tribunal to support any substantive consideration of Article 8. If however the Tribunal did err in that respect I find that such error is not material, given that the appellant would not be able to argue that the interference was disproportionate following **Patel and Others**.

30. Accordingly any error of law in that regard is not material.

## Notice of Decision

31. There is no material error of law in the First-tier Tribunal's decision which shall stand.

No anonymity direction is made.

Signed Date 9.8.2015

Deputy Upper Tribunal Judge G A Black

**TO THE RESPONDENT**
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 9.8.2015

Deputy Upper Tribunal Judge G A Black

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