



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/39951/2014
IA/39921/2014

THE IMMIGRATION ACTS

**Heard at UT(IAC) Bennett House
On 5th October 2015**

**Decision & Reasons Promulgated
On 7th October 2015**

Before

UPPER TRIBUNAL JUDGE COKER

Between

**MANAZEER ASHAN MOHAMED NAWAZ
MOHAMMED THOWFEEK**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Kannangara, counsel

For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The First-tier Tribunal judge found, contrary to the respondent's decision, that the appellants had submitted financial documentation and advertising documentation that met the requirements of the Immigration Rules under the heading Attributes.

2. In paragraphs 26 to 30 the First-tier Tribunal judge sets out the evidence in the contracts regarding the services the appellants were to provide. In particular she refers to the heading in the contracts headed 'compensation' which

"... is clearly about what compensation the programmer would be entitled to for performing tasks and duties related to the scope of work. It then lists 7 types of work. There is in my view no reasonable way of interpreting this section that could lead to the conclusion that this is the section that sets out what services are to be provided by the business to that particular company.

28. A careful reading of the contract at section 3 – Programming services, shows that there should have been a document "Annex A" which sets out the services to be provided. When asked about this the appellants confirmed that they had not submitted Annex A with any of the contracts sent to the Home Office.They said that Annex A did exist, and was different for each customer but they accepted that they had not submitted it that it was not contained in the appellant's bundles either. They wished to rely on the compensation section at 4.1.

29. ... I am unable to find that the contract submitted did set out the services to be offered to the client as this would not be a reasonable interpretation of the contract. It is clear that these were to be set out in a document called Annex A which was not sent to the Home Office. This is not a matter that can be remedied as this document had to be submitted with the application and it was not.

3. In granting permission to appeal, UTJ Lindsley found that it was arguable that the First-tier Tribunal judge failed to consider whether the Evidential flexibility policy as incorporated into the Immigration Rules (paragraph 245AA) applied and if so find that the First-tier Tribunal judge should have found that the respondent's decision was not in accordance with the law and thus allowed the appeal and remitted it back to the respondent for a lawful decision to be taken.
4. The appellants also sought permission to appeal on the ground that Appendix A of the Immigration Rules did not provide for a contract to be in any particular form and that the contract provided by the appellants was the form in which they had chosen to comply with paragraph 41SD(e)(iv)(1)(b), such that they had shown the nature of the services provided within the contract submitted. UTJ Lindsley refused to grant permission on that ground. Mr Kannangara sought to persuade me to reconsider that ground on the basis that UTJ Lindsley had misunderstood the ground as pleaded. Mr Kannangara could not direct me to any provision which permitted this but even if I had re-considered that ground, I would have refused permission – the First-tier Tribunal judge considered the evidence before her and was plainly entitled to reach the conclusion that the contract as provided by the appellants to the respondent did not set out the services they intended to provide. The appellants did not meet the requirements of the Rules.
5. The document missing from the application that was submitted to the respondent was identified as "Attachment A" in paragraph 3.1 of the contract which states:

“Company hereby engages Programmer, and Programmer accepts such engagement, subject to the terms and conditions contained herein, to perform for Company the services described in Attachment A (the “Services”).”

6. Attachment A was not attached to any of the three contracts which the appellants had submitted with their application. The First-tier Tribunal accepted that the failure to submit Attachment A to any of the three contracts was an “honest oversight”. Mr Kannangara submitted that the missing Attachment A was a missing document as described by paragraph 245AA (b) namely it was the last page of the contract and came at the end of the contract and thus should be seen as a missing sequential document. He submitted that the First-tier Tribunal judge had considered Attachment A to be a separate document whereas it was not. He also submitted that it was a part of the contract and not separate from it.
7. Ms Johnstone submitted that the the issue of evidential flexibility had not been raised before the First-tier Tribunal judge and the judge could not have erred in law in failing to deal with something which had not been raised before her. Mr Kannanagara’s response to that was that the judge should have applied the law even if not raised directly by the appellants, who were not legally represented although they had a McKenzie friend who, if she were providing legal assistance on that basis could have been expected to ensure that the appellants raised that issue.
8. Ms Johnstone further submitted that Attachment A could not be considered to be a sequential document as provided for in 245AA; it was specifically referred to in the contracts that were submitted with the application; the appellants had, before the First-tier Tribunal, relied upon the contracts themselves as providing any necessary information as to the services provided; Mr Kannangara had provided no evidence that Attachment A had at any time been attached to the contracts either as the last page or as a separate document. She submitted that had the respondent requested that a copy of Attachment A it would have been akin to a ‘fishing expedition’ because there was nothing to indicate that it would provide the information required to enable the respondent to take a decision that the appellants met the requirements of the Rules.
9. Included in the documents before me (but it appears not before the First-tier Tribunal) was a copy of Attachment A which states that

“...works and/or services that has to be provided as per the agreement is the same as mentioned in paragraph 4.1 for which the compensation is entitled and detailed in the main contract document.”
10. This was not before the First-tier Tribunal and had not been submitted to the respondent. If as Mr Kannangara submits, this attachment was a part of the contract it is difficult to see how it could have been missed out of all the contracts that were submitted. If it is the last page of the contract, it does little to define the services to be provided other than in general terms – the work to be done by the appellants would appear, from a reading of the contract and the

Attachment together to be of such open-ended nature that the organisation with which the contract had been signed would not be able to identify how much or how little work they were agreeing to bind themselves to pay for.

11. Although it could be said in some circumstances that an annex or attachment to a contract was a sequential document that was missing – for example if the contract pages were numbered 1 of 10 or page 5 was missing but page 4 and 6 were present. In this case, although there is reference to an attachment, there is no indication that it was the last page or an integral part of the contract.
12. In any event, it is not possible to argue successfully that the missing attachment would have made a difference to the outcome – the attachment does no more than in essence repeat what is in the contract which, as I have said above, does not enable the parties to know to what they are committing themselves.
13. Even if the appellants had argued before the First-tier Tribunal that paragraph 245AA applied and even if the respondent had requested the missing Attachment, the Attachment itself did not provide any further information to the respondent such that it was likely that the application would have been granted. The First-tier Tribunal judge had concluded that the information in the contract did not suffice to meet the burden upon the appellants to show the services they were claiming to provide.
14. The decision of the First-tier Tribunal does not disclose an error of law such that the decision is set aside to be remade.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

The decision of the First-tier Tribunal stands.



Date 6th October 2015

Upper Tribunal Judge Coker