Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/41761/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 26 November 2015

Decision & Reasons Promulgated
On 21 December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

USMAN ALI WARIS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sowerby (counsel) instructed by Farani Javid Taylors, solicitors
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Grant promulgated on 25 May 2015, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 08 January 1986 and is a national of Pakistan.

4. The appellant entered the UK as a student in December 2006. The respondent granted leave to remain as a student until 11 August 2012, when the appellant was granted leave to remain until 11 August 2014 as a Tier 1 (Post study work) migrant. On 3 October 2014 the respondent refused the appellant's application for leave to remain in the UK as a Tier 1 (Entrepreneur) migrant.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge E B Grant ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 7 August 2015 Judge Simpson gave permission to appeal stating

> "It is clear from the RfRL that the issue was whether A was active in the occupation described by the job title provided i.e. Business Development Manager (3545) and it was open to the Judge to find that A was not working in that capacity. However, given the judge's finding at [6] that A does provide accountancy services, it is arguable that A meets that requirement as he would still have an occupation which was a NQF level 4 or above. The Judge's comments at [7] are confusing but in any event, I am satisfied that NQF level 6 is a higher qualification than NQF level 4! Whilst A did not meet the requirements of para.41-SD(e)(v) as he had not submitted a Companies House Current Appointment report, it is arguable that the Judge ought to have considered whether Paragraph 245AA could apply, given that that was the only outstanding issue and addressing that issue might well lead to a grant."

The hearing

7. (a) Mr Sowerby, for the appellant moved the grounds of appeal. He told me that there are three bases for the respondent's reasons for refusal. The first is a failure of the appellant to submit a Companies House current appointment report. The second is that the respondent believes that the services provided by the inconsistent with the services of a business development manager (SOC Code 3545). The third is that the respondent argues that the contract produced by the appellant did not specify the duration. Mr Sowerby took me to the productions in the appellant's bundle. At page 184 there is a copy the appellant's business card which designs the appellant as a financial and management consultant. He referred to the business plan at page 45 of the bundle which sets out the activities of the appellant's business. He told me that there was inadequate documentary evidence to establish that the appellant provides services consistent with code 3545.

(b) He argued that the Judge had failed to take account of documentary evidence produced and referred to the contracts produced, referring specifically to the clause setting out the duration of each contract. He

argued that the Judge should have been satisfied on the documentary evidence produced, but that in any event the Judge failed to make findings in fact relating to the evidence placed before her. Instead at [5] and [6] the Judge rests on bald assertions.

(c) Mr Sowerby concedes that the appellant did not produce a Companies House current appointment report, but argued that there was a wealth of evidence to indicate that the appellant is a company director, so the provisions of paragraph 245AA were engaged. He argued that it would have been a simple matter for an immigration officer to either ask the appellant for a Companies House current appointment report, or to make an online enquiry at the Companies House website. He argued that the decision contains a number of material errors in law and urged me to allow the appeal and set the decision aside.

8. For the respondent, Ms Holmes argued that the decision does not contain any material errors of law, and that the Judge's consideration was restricted to the standard occupation code selected by the appellant; it is not for the Judge to shoehorn the appellant into the category that the appellant did not choose himself. She told me that there was in any event inadequate evidence to establish that the appellant fell into any other category. Ms Holmes conceded that the contract produced by the appellant did have duration specified, but argued that there was nothing wrong with the refusal in relation to the category codes so that there is more to this case than an argument about evidential flexibility in terms of paragraph 245AA. She told me that the decision does not contain material errors of law and should be allowed to stand

Analysis

9. In R (on the application of Nwaiwu) [2014] EWHC 3694 the Claimant's entrepreneur application was refused when he failed to provide a specified document, stating that funds held in the First Bank of Nigeria, an institution not regulated by the Financial Services Authority ("FSA"), were transferable to the UK. The Claimant submitted on Judicial Review that the question of whether the funds were transferable was a minor detail, and thus the SSHD ought to have taken steps to correct the omission pursuant to paragraph 245AA of the Immigration Rules and her evidential flexibility policy. It was held that the responsibility was at all times upon the Claimant to ensure that he provided the relevant information pursuant to the requirements of the Immigration Rules upon which his application was based. He could not reasonably expect the Secretary of State to accept an application, which was lacking in a material respect (*paras 34 and 39*). The failure to confirm that the funds in question were transferable to the UK was not a minor omission. Pursuant to the true construction of the Immigration Rules, and the proper application of the evidential flexibility process, the Secretary of State was not obliged to make good the omission in the Claimant's application. It had not been shown that there was injustice or unfairness to the Claimant at any stage.

10. It is not disputed that the appellant made an application referring to the codes of practice for skilled workers and alighting on the definition of his job

description as SOC 3545. The Judge correctly notes that SOC 3545 is recognised by the respondent as an occupation skilled to NQF level 6. At first instance, counsel argued that the appellant provides accountancy services which fits within code 2421 ([7] of the decision), an occupation skilled to NQF level 6. In the appellant's witness statement, the appellant insists that he provides services falling within the job description set out SOC code 3545.

11. It is argued that the difference in the job descriptions of the two occupations is academic because if the appellant occupation falls within the definition of either of the SOC codes then he is working in an occupation skilled to NQF level 6 or above and so fulfils the requirements of the immigration rules (Appendix A table 4). The fundamental flaw with that argument is that the respondent's decision is based on the information provided by the appellant to support his application. The appellant submitted his application on the basis that his occupation fell within code 3545. It is for the respondent to consider the application as it is made and make a decision on the basis of the evidence that supports the application.

12. It is not for the respondent to unilaterally amend an applicant's application. It is not for the respondent to receive a bundle of documents forming an application and then try to guess what the application is for. If the appellant had identified code to 2421 in the course of his application, then the respondent's decision might have been different; but he had not. The respondent was asked to consider an application made by reference to code 3545. The respondent did that.

13. At [7] the Judge correctly identifies code 3545 as an occupation skilled to NQF level 6. The Judge then goes on to say "*I find as a matter of fact the appellant has not demonstrated that he could meet the requirements of the occupation code he placed on his application SOC 3545.….*" That is a finding of fact which was manifestly open to the Judge; it is clearly a finding of fact with a firm foundation in the evidence presented to the Judge. It is a clear and unambiguous finding which does not contain an error of law, material or otherwise.

14. The appellant's argument that the respondent should have applied paragraph 245 AA of the immigration rules cannot succeed because it is entirely dependent on the only flaw in his application being the absence of a current appointment report from Companies House. The appellant concedes that he did not produce a current appointment report. It is argued that the respondent should have carried out her own investigations to obtain the relevant report, because it is argued that it is obvious that the appellant was a director of a limited company.

15. In many ways this appeal is an attempt to re-litigate the matters which were before the Judge at first instance. The grounds of appeal and submissions from counsel take issue with the logic employed by the respondent in the decision appealed against, and seek to use the re-litigation of those arguments as an argument that the Judges' decision contains a material error of law.

16. The Judge has adopted an unusual style in writing her decision, importing the appellant's witness statement into the decision and importing parts of the respondent's decision into the Judge's decision, but the Judge clearly sets out findings between [5] & [8] which were open to the Judge and which lead the Judge to the conclusion that the appellant could not benefit of paragraph 245AA of the immigration rules. The Judge's findings may be brief, but they lead the Judge to an unassailable conclusion that the appellant's application did not fulfil the requirements of the immigration rules.

17. It is not an arguable error of law for a Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for a Judge to fail to deal with every factual issue under argument. Disagreement with a Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible.

18. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

19. A fair reading of the Judge's decision indicates that there is no misdirection of law and that the fact-finding process cannot be criticised. As I have already indicated, the Judge's conclusions are conclusions which were reasonably open to her to reach.

20. I find that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

21. No errors of law have been established. The Judge's decision stands.

DECISION

22. The appeal is dismissed.

Signed Date: 3 December 2015

Deputy Upper Tribunal Judge Doyle