Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23274/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
on 27th February 2014	**On 08th April 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NAGAPANDIAN KUMARAIYA
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mahmood instructed by Immigration Aid.
For the Respondent: Mr Richards – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of Designated First-tier Tribunal Judge Phillips promulgated on 24th October 2013 in which he dismissed the appeal against the refusal of the Secretary of State to vary the Appellants leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant. The date of refusal is the 3rd July 2013. The application was refused by reference to paragraph 245DD and Appendix A paragraphs 41-SD and 46-SD 322 (1) of the Immigration Rules.

Background

2. The Appellant was born on 25th May 1988 and is a citizen of India. There was no appearance before Judge Phillips by the Appellant or a representative. The day before the hearing, 16th October 2013, Judge Philips refused a written adjournment application made by SZ Solicitors. There was no written or oral renewal of the application and in light of the failure to attend the Presenting Officer agreed that Judge Phillips should determine the matter on the basis of the information available within the papers.

3. Judge Phillips sets out his findings between paragraphs 6 to 14 of the determination. It is noted that despite the filing of the notice of appeal in July 2013 the Appellant had not submitted evidence to the court either prior to the hearing or at the hearing and had failed to attend to give oral evidence [9]. It was found the matters raised by the Respondent in the refusal had foundation as despite three letters from the United Bank Limited of Karachi having been filed, two dated 9th May 2013 and one 10th May 2013, none mentioned the Appellant or his team partner, none showed that the bank is regulated by the appropriate authority, and none gave full contact details or confirmed that funds could be transferred to the United Kingdom [10]. The Judge also found a third-party declaration did not contain the signatures of the Appellant or his partner or confirm the amount of funds available and so the letter provided by his legal representative Sheikh Ali was held not to be valid. The letter from the legal representative did not validate the signatures on the declaration and the names of the two individuals whose signatures appear on the application [11]. The Judge found the company bank account submitted is not a bank account at all but rather a MasterCard debit card account statement in which the card setup fee is the only recorded transaction [12]. The contracts submitted with the application only show that the Appellant's company is to provide quarterly payroll processing and did not therefore demonstrate that the Appellant's job title of IT Manager is the nature of the services being provided to the businesses.

4. In paragraph 14 of his determination Judge Phillips concludes by stating "The only conclusion that it is possible to draw from the above is that the application did not meet the requirements of the Immigration Rules for the reasons stated by the Respondent. This appeal must therefore be dismissed."

5. The Grounds on which permission to appeal was sought confirms that the Appellant initially lodged his appeal and thereafter instructed solicitors who were the subject of an intervention by the SRA as a result of which he instructed SZ Solicitors to represent him in his case. They only agreed to represent him if he was able to obtain an adjournment. The Grounds acknowledge that an adjournment application was refused and claim they sent an application for a renewal of the request by fax to the Tribunal. It is therefore alleged that the Judge had erred in not taking into consideration the request and in proceeding with the hearing.

6. On behalf of the Appellant Mr Mahmood submitted that the material error of law being relied upon was the fact the Judge proceeded in absence which he stated was "inherently unjust" especially as there was evidence the Judge needed to consider.

7. It was submitted that had the Judge granted the adjournment request the Appellant could have appeared and documents that are to be found in a bundle that has now been provided could have been considered. Mr Mahmood also sought to rely upon an evidential flexibility policy which he submitted was to be found in the case of Rodriguez, and argued that paragraph 245AA of the Immigration Rules created a legally binding obligation upon the Secretary of State on the facts to seek further information from the Appellant to allow him to correct the errors in the papers that he submitted. It was submitted that all the relevant information had been provided albeit in the wrong format.

Error of law finding - Discussion

8. The papers within the Tribunal file show that an adjournment request was made and refused by Judge Phillips but there is no evidence this was renewed as alleged after the initial refusal. Notice of the hearing on the 17th October 2013 was sent by second class post to the Appellant on 18th September 2013. The Appellant had no representative and it was not until 16th October 2013 when the fax was sent to the Tribunal at Columbus House in Newport by SZ Solicitors, indicating they had been instructed to represent the Appellant, that anyone was aware that he was seeking legal advice. The application was refused as it was said there was nothing in the application and appeal, or the appeal itself, to suggest that the Appellant had ever been represented by Consillium Chambers, who it is alleged were his previous representatives.

9. The Appellant clearly had a considerable period of time in which to arrange for representation and it is correct to say that there is no record of him ever having been represented by Consillium Chambers. The fact SZ Solicitors may have accepted instructions the day before the hearing does not entitle the Appellant to secure the adjournment. The fact SZ Solicitors only appear to have agreed to act if an adjournment could be secured suggests it was a conditional acceptance of instructions and, as the adjournment was refused, they were not the Appellants representatives for the purposes of the appeal hearing. It is also correct to say that the refusal to adjourn did not prevent the Appellant attending in person to present his case and his failure to do so has not been explained.

10. In the adjournment request it was also claimed that the Appellant had not received the Respondent's bundle. When dealing with an adjournment request, in addition to considering the requirements of the Procedure Rules, it is necessary for a Judge to bear in mind the overriding principle of fairness. The refusal of the adjournment

request does not deal with the statement that no bundle had been received and it may be arguable that it was therefore an incomplete refusal and unfair to proceed on the basis on which the application was actually refused. Although, even if this is the case, it is necessary to consider whether any such error is material. I accept that in cases of this nature where an individual is entitled to have a hearing before the Tribunal and to present evidence that they wish the Tribunal to consider, it is only if it can be found that the Judge's decision is one that would have been arrived at in any event that such error would not be found to be material.

11. In proving the materiality Mr Mahmood relied upon the documents provided by SZ Solicitors in their letter dated 24th February 2014. These include a witness statement from the Appellant, the refusal letter from the Secretary of State, additional evidence in support of the Appellant's appeal, evidence where the Home Office has requested further information in relation to other applicants, and a copy of a determination promulgated on 15th November 2013 in relation to the Appellants Tier 1 (Entrepreneur) team member.

12. The witness statement, examples of where the Home Office has sought information in other cases, and the determination of the team member do not assist the Appellant. The additional documents provided in support of the appeal do not assist in proving that the Judge has made a material error as that information has clearly been prepared to correct faults in the application identified in the refusal and upheld by the Judge. It is noted for example that a lot of those documents postdate the date of application and decision.

13. I find no merit in the “evidential flexibility” argument. The policy for applications under the points based system was incorporated into the Rules at paragraph 245AA on 6th September 2012. A ‘specified’ document which is in the wrong format (e.g. a letter is not on headed notepaper, as specified), or is a copy rather than the original, or does not contain all the specified information, can trigger a request for the correct version of the document. A ‘missing’ document can only be requested if it is one of a sequence, e.g. one bank statement from a series has been omitted, but not if it is the sole “specified” document. One condition of that policy was an instruction to decision makers that before they seek further information from the applicant they must have established that the evidence exists or have sufficient reason to believe the information exists.

14. The case of Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC) was overturned by the Court of Appeal in SSHD v Rodriguez and Others [2014] EWCA Civ 2 in which it was held that the Secretary of State for the Home Department had not been under any obligation to afford applicants for leave to remain as Tier 4 (General) Student Migrants in the United Kingdom any opportunity to remedy defects in their applications in relation to maintenance funding requirements under her evidential flexibility policy. The evidential flexibility policy was not

designed to give an applicant the opportunity first to remedy any defect or inadequacy in an application or supporting documentation so as to save the application from refusal after consideration (my emphasis).

15. In R(on the application of Kaur) v SSHD [2013] EWHC 1538 it was held that where the procedure involved the submission by an appellant of documents for whose selection he or she was responsible, the respondent was not required to communicate doubts about a document to the appellant or give the appellant further opportunity to supply documentation or explanations.

16. In light of the above I find it not proved that there was any legally binding obligation upon the Secretary of State to refer to the Appellant to invite him to remedy defects in documents that he had submitted and that he has sought to rely upon. The common-law principle of fairness does not impose such an obligation and nor do the specific provisions of 245AA of the Immigration Rules. As a result it is arguable that the First-tier Tribunal Judge who allowed the appeal of the fellow team member on the basis it was 'not in accordance with the law' as a result of an evidential flexibility argument, has also legally erred.

17. At the date of the application or decision it has not been established that the Appellant was able to meet the requirements of the Immigration Rules and later documents prepared specifically for the purpose of correcting the errors that were made in the claim do not enable him to succeed. As a result I find this is one of those comparatively rare cases in which, notwithstanding any argument relating to the fairness or otherwise of the refusal to adjourn, and even if it was found Judge Phillips had erred in law, it would make no material difference to the outcome. On the basis of the admissible evidence there was only one outcome, which was that reached by Judge Phillips.

Decision

18. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

19. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 7th April 2014