Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29252/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 3 April 2014	**On 29th April 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

ARINZE ANDERSON NJEMANZE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nadeem, Counsel, instructed by Immigration Advice Service , Birmingham
For the Respondent: Mr Mills, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant applied for leave to remain in the United Kingdom as a Tier 1 (General) Migrant. His application was refused on 4 July 2013. He sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Thomas on 3 December 2013.

2. In order to obtain the requisite number of points it was for the appellant to show that his earnings for the previous twelve month period had reached £50,000. In the event upon the documentation which was presented upon application that figure was £41,765.04.

3. In respect of the other matters the appropriate number of points was awarded.

4. The appellant gave evidence at the hearing which is set out in some detail at paragraphs 4 and 5 of the determination. The income that was declared in his application was based upon an interim account by his accountant and he had by mistake not provided all the documents to his accountants.

5. At the hearing the appellant produced a bundle of documents being his bank statement and a revised letter from the accountant and revised financial accounts for the period 1 April 2012 to 31 March 2013.

6. Had those documents been submitted to his accountants at the relevant time then they would have shown figures above £50,000.

7. Unfortunately the appellant had not produced those documents with the application and indeed had only discovered the omission upon refusal. Therefore it was not possible for the Judge to accept the new documentation under Section 19 of the UK Borders Act 2007. Thus the appellant failed in establishing any successful claim upon the Immigration Rules, although as the Judge noted specifically at paragraph 7, there was nothing which prevented the appellant from making a further application.

8. The grounds of appeal which were lodged in relation to that matter contend that the respondent was in breach of her own evidential flexibility policy. It is not entirely clear in what way that could be said. The grounds set out in some detail the nature of the policy but it is difficult to understand what more could have been done by the respondent upon receipt of the financial documents. They did not show that which they should have shown, and that was an omission by the appellant and not by the respondent.

9. Grounds of appeal, however, were submitted on another matter, namely that no findings were made as to Article 8 of the ECHR. It was upon that basis that leave to appeal was granted and brings the appeal before me.

10. I raised with Mr Nadeem, who represents the appellant the issue of the flexibility policy and what it was that the respondent ought to have done having received the paper work from the appellant. There was nothing missing from the paperwork. There were no sequential difficulties but merely the fact that the evidence produced did not achieve the result intended. Mr Nadeem most fairly indicated that he was in difficulties in articulating what it was that the respondent should have done.

11. I bear in mind also that insofar as the evidential flexibility policy is concerned, the original decision in **Rodriguez** was revisited by the Court of Appeal in **Secretary of**

State for the Home Department v Rodriguez [2014] EWCA Civ 2. The policy was found to be more restrictive in its operation than had previously been considered. The court held at paragraph 110 of the Judgement that the evidential flexibility policy did not require the Secretary of State in every case where there was a failure to meet the requirements of the Immigration Rules to make furtherer enquiries. In that case it was held that the Upper Tribunal Judge was right to conclude that the Secretary of State was under no obligation to enquire as to the presence of further funds.

12. I see little merit in the grounds of appeal in relation to the immigration decision made by the judge, namely to dismiss the appeal in that respect.

13. The issue of Article 8, however, is of greater concern because it is undoubtedly clear that in the decision of 4 July 2013, the decision is made to remove the appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

14. Notwithstanding that clear statement, there appears in paragraph 7 of the determination the statement "there are no removal directions and no issue of human rights raised. There is nothing that prevents the appellant from making a further application".

15. It is far from clear as to how that statement came to be made and it was certainly incorrect to say that there were no removal directions.

16. Mr Nadeem was not the representative on the occasion but he recalls speaking to the representative who was, who recalls the issue of there being no removal directions being raised and hence no argument as to human rights.

17. Mr Mills has a slightly different perspective to take on the matter and produces to me the note from the Home Office Presenting Officer at the hearing, from which it is noted that the Judge accepted that the grounds had not raised Article 8 and thus no submissions relating to Article 8 was required from the Home Office Presenting Officer.

18. My attention was drawn by Mr Mills to the original grounds of appeal against the decision, and it is certainly correct that there is no overt ground of appeal relating to human rights.

19. Nevertheless it is a matter of concern that what appears to be an incorrect statement of fact appears in the determination. I consider the notes of procedures which are not entirely easy to read. I note the observation:-

> "No human rights raised. No removal directions."

20. Thereafter appears a phrase which seems to read that there are no removal directions and nothing to prevent the appellant from raising that further under 3C leave. That leave applies to him and so no human rights to consider.

21. Mr Mills asked me to consider that there was no error of law in the approach taken by the Judge. No human rights issues were raised in the grounds of appeal. There is no statement or skeleton argument in which they were raised at the hearing. I asked Mr Nadeem whether in all the bundle of documents there were any statements from the appellant as to his personal situation and circumstances and I was told that there were none at present.

22. I find from the Record of Proceedings that clearly the issue of there being no removal directions was raised at some point in the hearing. Clearly, to so record was an error.

23. An essential issue in this appeal, however, is whether that error is material to the outcome of the appeal. In the absence of any evidence presented as to the private and family life of the appellant it is difficult, without more, to conclude that there was any safe basis for the conclusion that human rights were engaged.

24. The appellant had finished his studies and so the **CDS** point of interruption of studies did not arise. He was now seeking to operate a business in the United Kingdom but had not satisfied the respondent that he met the requirements to do so. That would seem to be very much a different matter from a break in a lengthy period of studies.

25. Since he failed to meet the Immigration Rules the jurisprudence as set out in the recent decisions of **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)** and **Shahzad (Article 8: .... of name) [2014] UKUT 0085 (IAC)** would come into play, namely that there would have to be something compelling in the applicant's circumstances in order to call in the question of Article 8 of the ECHR. Nothing had been advanced and nothing particularly is obvious.

26. Clearly were it not for the Section 19 barrier the appellant would have been able to satisfy the Rules upon the production of his new accounts. Again as has been made clear by the Supreme Court in **Nazeem and Others (Article 8) [2014] UKUT 25 (IAC)** Article 8 is not to be used to circumvent technical difficulties under the Rules.

27. As Mr Mills submitted, even were the matter to get to the issue of proportionality, the argument would be bound to fail in this particular case by reason of the paucity of evidence as to private or family life.

28. He set out what is his understanding of the current situation on applications which fail because new evidence was prevented by the operation of Section 19.

29. He submitted that in case, as indeed had been highlighted by the Judge in the determination, the course open to the appellant was a relatively straightforward one: that was to make a new application.

30. It was accepted by the Secretary of State that in the light of the fairly draconian effects which Section 19 had upon the ability of individuals to present evidence, even evidence seeking to clarify that which was presented before, Section 3C leave

operates and indeed a period of 28 days thereafter is allowed for an appellant to present a new application in-country.

31. The point of Section 19 was to stop the proliferation of documents being presented except on time. That did not prevent however the making of a fresh application upon proper documentation.

32. He submitted that that is what the appellant could reasonably do in this case. It was not a situation in reality that he would be removed from the jurisdiction, rather that he had the opportunity should he take it to make a fresh application. If he chooses not to do so it is difficult therefore to argue that his human rights are infringed as he has the choice to make that application or not, as the case may be. Mr Nadeem seemingly accepted the logic of the position as outlined by Mr Mills and indicated that that too was his understanding of the situation.

33. It seems to me, therefore, somewhat unfortunate that this new application could not have been made many months ago when the error was first noted. That would have saved the time and expense of two hearings. The appellant cannot be heard to argue that it is disproportionate to remove him if he does nothing to take what would seem an obvious step to take in the process. It is accepted that that may involve the payment of another fee but it was his mistake in the first place that went to the difficulty.

34. Looking at the matter overall therefore in relation to the ground of appeal as to human rights, although I find there was an error in stating that it was not part of the decision, had it been considered it is inevitable that the claim would have been dismissed. The remedy of the appellant is a simple and straightforward one, namely to make a new application with the correct documents covering the correct financial period.

35. In all the circumstances, therefore, this appeal of the appellant to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal Judge shall therefore stand, namely that the appeal is dismissed under the Immigration Rules and dismissed under Article 8 of the ECHR.

Signed Date

Upper Tribunal Judge King TD