IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32779/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 March 2016	**On 6 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

MUKAILA OLATUNBOSUN MUSTAPHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. B. Ayanrinde, Babs and Co. Legal Practitioners
For the Respondent: Mr. I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge James, promulgated on 12 June 2015, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to grant indefinite leave to remain in the United Kingdom as a Tier 1 (General) Migrant.
2. Permission to appeal was granted as follows:

"The judge at paragraph 27 accepted that some of the dates within the refusal letter, noted by the Respondent, were not accurate, but had received no direct submissions in relation to this issue from the Respondent, save for a general reliance upon the refusal letter. Whilst he accepted he was granted entry clearance back in 2008 and was satisfied that Section 19 of the UK Borders Act 2007 applied to the Appeal, he did not introduce into evidence any documents which supported the application other than those referred to in the application, but he did not refer to the 3C leave that this Appellant had until 2 January 2011. This was central to his chronology and may have impacted negatively on the documentary evidence and in that respect the judge may have fallen into error."

3. At the outset of the hearing Mr. Jarvis accepted that there was an error of law in the decision relating to the calculation of time. He accepted therefore that the Appellant had not been an overstayer for a period in excess of 28 days. I was referred to the guidance document entitled "Applications from overstayers (non family routes)" valid from 20 October 2014, which states that where an application for leave to remain is rejected as invalid the period of overstaying for a further application for leave to remain must be calculated from the date the migrant is deemed to have received the notice of invalidity. Therefore, in relation to a 28 day period, the clock would start on the third day after the notice which stated that the application was invalid. Two applications made by the Appellant had been rejected as being invalid and on the third application he had been granted leave to remain. As a consequence of the application of the guidance, there was therefore no break during the application process from December 2010 to January 2011. For the purposes of paragraph 245CD(d)(ii) the five year period had been met.

4. Mr. Jarvis submitted that the judge had been wrong in finding that the Appellant had overstayed for a period in excess of 28 days. He had been wrong to conclude that the Appellant had not remained in the United Kingdom for five years continuously. On consideration of the immigration rules and the guidance, I found that this calculation was correct and that the decision involved an error of law in this respect.

5. There remained only the second ground of appeal in relation to the documents which had been considered by the judge. He had found that section 19 had applied to the evidence in the appeal and that therefore he had not been able to take into account the documents provided by the Appellant, as he found that they had not been provided to the Respondent with the application.

Submissions

6. Mr. Ayanrinde submitted that the Respondent had not applied the evidential flexibility policy because she had found that the Appellant did

not meet the five year requirement. The application had been refused in relation to two issues. First, the requirement for five years' residence was not met, and secondly two pieces of evidence had not been provided under Appendix A in relation to earnings and the English language requirements. He submitted that when the Respondent had found that the Appellant had failed on the five year point, she had then failed to apply her own evidential flexibility policy which she had been mandated by law to do. He therefore submitted that the evidential policy applied. He said that the refusal notice pointed to the fact that documents had been provided with the application.

7. I was referred to page 4 of the notice of decision where it is noted that the Appellant had provided bank statements from Natwest Bank for February 2013 to February 2014. However, there was only one bank statement in the bundle provided by the Respondent. He submitted that this was not right, but that twelve statements had been provided to the Respondent with the application. He submitted that even if the Respondent had refused the application, the documents had been submitted. He submitted that the reasons for refusal letter confirmed that twelve months' bank statements had been provided. Additionally evidence had been put before the judge of the weight of the parcel which the Appellant had sent with his application. It had weighed one kilogram and it was submitted that it therefore contained more documents than the Respondent had reproduced in her bundle.

8. It was submitted that the Appellant had submitted the documents required under Appendix A. Documents which had not been referred to in the reasons for refusal letter had nevertheless been submitted. He submitted that the Respondent could have required the outstanding documents to be provided but, as she had thought that the application failed by another route, she did not ask the Appellant to provide them.

9. He submitted that the judge had made an error of law in failing to find that the evidence had been before the Respondent but had not been considered, and had erred in failing to remit it to the Respondent for reconsideration.

10. Mr. Jarvis submitted that, if the judge had found that the Appellant had provided the documents with the application, the judge could have taken those into account by virtue of section 19. If he had found that all of the evidence required under Appendix FM was before the Respondent, he could have allowed the appeal outright. He would not have needed to remit it to the Respondent for reconsideration.

11. He submitted that the judge had rejected the argument made to him that the documents had all been provided to the Respondent with the application (paragraph [29]). He submitted that there was nothing unlawful about paragraph [29], and there was nothing wrong with the findings in this paragraph. The Appellant's representative had accepted

that that was the argument he had put forward, but the judge had found that the evidence in the Appellant's bundle was not admissible. He submitted that, if the Appellant was as organised as he claimed to be, it was odd that he was relying on the evidence of the weight of the parcel that he claimed to have sent to the Respondent.

12. He submitted that the Appellant had not filled in the application form with care. He provided me with a copy of Appendix A as had been in force at the relevant date. I was referred to paragraphs [20] and [21]. This states: "Applicants should indicate in the application form for which twelve month period their earnings should be assessed". It was submitted that the Appellant had not done that. Neither had he indicated whether he was self-employed or salaried, indicating that he had not filled the form in correctly. It was already evident from the form itself that the Appellant had not applied due care to his application. He submitted that there was no good or lawful challenge to the decision.

13. It was not right that the Respondent should have used her policy of evidential flexibility. In any event, there was no evidence that it had been argued before the First-tier Tribunal Judge that the evidential flexibility policy should have been applied by the Respondent. There could be no material error of law if the judge had failed to consider something which had not been put to him. He referred me to paragraph [23] of the decision which showed that the Appellant's case had not been put as one where the Respondent had not used her policy of evidential flexibility.

14. The case of Mandalia [2015] UKSC 59, which had been relied on by the Appellant, was not relevant. This referred to a policy instruction document, not to paragraph 245AA which was the applicable law at the time. He submitted that paragraph 245AA was more restrictive than the policy which had been in force prior to that. The Appellant could not argue that the documents which were missing would have obliged the Respondent to make enquiries under 245AA. A whole section of documents had been missing and paragraph 245AA was not applicable in this situation. Even if evidential flexibility had been argued, it could not have been argued with reference to the immigration rule as the Appellant was relying on Mandalia.

15. In response Mr. Ayanrinde submitted that the case of Mandalia did apply. I was referred to paragraph [36]. The policy under paragraph 245AA obliged the Respondent to invite the Appellant to repair any deficits in the evidence provided. Paragraph 245AA would have applied to the Appellant. The reason that it did not was because the Respondent had employed paragraph 245AA(c) which applies when the application fails for other reasons and the Respondent does not have to use her evidential flexibility policy. He submitted that the Appellant had not provided supplementary evidence to corroborate his earnings.

Error of Law

16. I have found above that the decision involves the making of an error of law in the calculation of the five year period. However, it will only be material if the appeal would have succeeded otherwise.

17. Paragraph [29] of the decision states as follows:

> "I am satisfied that section 19 of the UK Borders Act 2007 applies to this appeal and that there is a restriction on the presentation of new evidence in this appeal. The Appellant has not submitted that section 19 does not apply but has asserted that all the documents that the Appellant seeks to rely upon in the appeal were submitted with his application. The Appellant argues that because it was accepted by the Respondent that he had presented bank statements in relation to one bank account but that the application refers to one bank statement only it is clear that further documents were presented with the application. I disagree. The relevant page of the application refers to "bank statements" and the Appellant has indicated 1 in the relevant check box. I am satisfied that this shows that bank statements from one account have been submitted. I have noted that the Appellant has stated before the Tribunal that he considers himself to be very organised and experienced in preparing such applications. In those circumstances I do not accept that the Appellant submitted any documentation other than that indicated in the application."

18. I find that the judge has correctly considered that section 19 applies to the appeal. He correctly sets out the position at law, which is that there is a restriction on the presentation of new evidence in this appeal. Therefore the judge needed to decide whether the evidence which was relied on by the Appellant was submitted to the Respondent with the application in order that he could then consider it in the appeal.

19. The judge sets out his reasons in paragraph [29] for rejecting the Appellant's submission that he had provided all of the documents with the application. The Appellant submitted that he had provided the documents by reliance on the fact that the reasons for refusal letter indicates that he had provided bank statements covering a period of a year, but there was only one bank statement in the Respondent's bundle. However, in the application form he had put "1" in the relevant check box. The judge gives reasons for finding that this indicated that the Appellant had provided bank statements from one account. There is nothing irrational about this finding. He also notes that the Appellant told the Tribunal that he considered himself to be very organised, in which case it would be expected that he had sent the documents with the application. However he rejects this argument and finds that the only documents provided with the application were those indicated in the application form.

20. The judge noted that the Appellant said he was organised and was experienced in preparing applications. I have considered the application

form. As submitted by Mr. Jarvis, the Appellant did not state the relevant period for calculating the documents provided. This is noted by the Respondent in the reasons for refusal letter at the bottom of page 3:

"you have failed to give the start and end date of the period for which you are claiming previous earnings, you have failed to complete the table giving details of previous earnings being claimed and you have failed to provide your total earnings claimed".

21. I find that the judge was entitled to find in this situation that the Appellant submitted the documentation that he had indicated in the application and no more. Indeed, it was not submitted by Mr. Ayanrinde that there was any error of law in paragraph [29] but instead he sought to re-argue the Appellant's case. I find that there is no error of law in the judge's findings in paragraph [29] that the only documents provided with the application were those indicated in the application form. Had the judge found that the documents had been provided with the application he could have considered them and, it would have been open to him to allow the appeal outright had he found that they met the requirements of Appendix A, but he did not find that they had been so provided.

22. In relation to evidential flexibility, there is no indication that this argument was ever put to the judge. Therefore I find that there cannot be any material error of law in his failure to deal with this issue.

23. In any event, it was the evidential flexibility policy as set out in paragraph 245AA of the immigration rules which was relevant rather than the policy which preceded it. As submitted by Mr. Jarvis, the policy was wider than the immigration rule which restricted the kind of documents which could be provided and the circumstances in which those documents could be provided. There were many documents which were missing in the Appellant's case, and I find that the Respondent was not obliged to ask for them under paragraph 245AA. It was not just one document from a sequence which was missing, nor was a document in the wrong format or a copy, nor was there a document which did not contain all the specified information, as set out in paragraph 245AA(b). Therefore it is irrelevant that the Respondent did not request them with reference to paragraph 245AA(c), as the documents that are missing do not fit into the categories set out in paragraph 245AA.

24. I have found that this argument was not placed before the judge, so I find that there is no material error of law in his failure to consider it. In any event, I find that paragraph 245AA would not have applied to the Appellant's case given the extent of the documents which were missing.

25. I find that there is no error of law in the judge's rejection of the Appellant's claim that he had submitted all of the necessary documents with the application, paragraph [29]. The judge gave reasons for rejecting this

claim, and there is nothing irrational about this reasoning. I find that there is no material error of law.

26. Having found therefore that the judge would have dismissed the appeal in any event because the Appellant had failed to provide the necessary documents under Appendix A, I find that the error of law involved in the calculation of the time period is not material.

Notice of Decision

27. The appeal involves the making of an error of law but it is not material to the outcome of the appeal.

28. The decision of the First-tier Tribunal to dismiss the Appellant's appeal under the immigration rules stands.

No anonymity direction is made.

Signed Date 29 March 2016

Deputy Upper Tribunal Judge Chamberlain