



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

Appeal Number: IA/15583/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 4th November 2014**

**Decision & Reasons Promulgated
On 11th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

**MR ABIODUN ADEKUNLE ISMAILA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Aghayere (Solicitor)

For the Respondent: Mr N Bramble (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant's appeal against decisions to refuse to vary his leave and to remove him from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 was allowed by a First-tier Tribunal Judge in a determination promulgated on 22nd January 2014. The Secretary of State applied for permission to appeal and, in due course, in a determination promulgated on 8th October 2014, the Upper

Tribunal found that the decision of the First-tier Tribunal contained a material error of law. That decision was set aside and directions given to enable it to be re-made before me, in the Upper Tribunal.

2. In setting aside the decision of the First-tier Tribunal, I found that favourable findings of fact made by the judge, regarding submission of a service contract with the appellant's application for leave in the Tier 1 (Entrepreneur) category and the genuineness of the business arrangements he had with Mona Agencies, were to be preserved. In issue was the second ground of refusal, regarding the appellant's claimed membership of Institute for Small Business and Entrepreneurship ("ISBE").
3. In refusing the appellant's application and making the adverse immigration decisions, the Secretary of State found, in this context, that he had provided no evidence of business activity. As an alternative to the submission of business advertisements, it was open to the appellant to provide evidence of membership of a trade body or association. The judge found that bank statements accompanied the application, which was made on 28th January 2013 and that a membership fee for ISBE was debited from the appellant's account the following day, on 29th January 2013. She found that the appellant would have been in a position to submit evidence of membership, if it had been requested by the Secretary of State.
4. Mr Aghayere provided a skeleton argument in support of the appellant's case and several documents, including what was described as "a further letter dated 27th October 2014 from ISBE confirming (the appellant's) membership with them since 28th January 2013" and two invoices, regarding membership subscriptions, dated 28th January 2013 and 2nd March 2014. Mr Bramble handed up a copy of the version of paragraph 245AA of the Immigration Rules in force as at the date of decision on 21st April 2013.
5. Mr Aghayere said that there was ample evidence to show that the appellant was a member of ISBE, as at the date of decision on 21st April 2013. Page 4 of the supplementary bundle, a letter from ISBE dated 27th October 2014, confirmed that he became a member on 28th January 2013 and was still a member. At pages 5 and 6 there were supporting documents, consisting of invoices sent to him. Pages 7 to 10 of the supplementary bundle showed e-mail correspondence from ISBE, again confirming the appellant's membership in 2013 and 2014. The documents showed membership at the date of application and at the date of decision. The appellant sought to rely on paragraph 245AA of the rules and evidential flexibility. It was clear that the Secretary of State had a discretion to contact an applicant for leave, in order to request correct documents. This appeared at paragraph 245AA(b) of the rules.

6. In addition, the appellant relied upon Article 8 of the Human Rights Convention. He arrived in the United Kingdom in September 2009 with leave as a student. He then became a Tier 1 (Post-Study Work) Migrant. In his five years here, he had established a strong private life, through his studies and work or business activities. To refuse him further leave due to “minor issues of documentation” would be harsh and unreasonable and breach the appellant’s Article 8 rights. Reliance was placed upon UE (Nigeria) [2010] EWCA Civ 975 and section 117B of the 2002 Act, introduced by section 19 of the Immigration Act 2014. That statutory provision fell to be applied in the re-making of the decision. The appellant’s value to the community was a factor telling in his favour and made him suitable for a grant of leave.
7. Mr Bramble said that the Secretary of State did not dispute that the appellant was a member of ISBE but the important question was whether his application for leave was accompanied by any evidence or information showing this. Appendix A of the rules, at paragraph 41-SD(c)(iii)(4) showed that personal registration with a trade body linked to an applicant’s occupation was required in relation to the provisions contained in (d) in Table 4. The rules required evidence of this to accompany the application.
8. Turning to the version of paragraph 245AA in effect at the date of the adverse decisions, in order to come within scope the appellant would have to show that his documents fell within sub-paragraph (b). In other words, where the rules required documents to have been submitted with the application, the Secretary of State would only consider documents submitted afterwards if firstly, in a sequence of documents, some in the sequence were omitted (an example being a missing bank statement from a series), secondly, a document was in the wrong format or thirdly, a document was a copy and not an original item. In those circumstances the Secretary of State might contact the applicant and request the correct documents. Paragraph 245AA made it clear, in sub-paragraph (c), that the Secretary of State would not request documents where a specified document was not submitted or where it was not anticipated that addressing the omission or error would lead to the grant of leave. The appellant’s difficulty was that none of the evidence he provided with the application suggested that he had become a member of the trade body. The missing documents, in other words documents showing membership of ISBE, were not in scope. The Secretary of State’s obligations were clear and she had not fallen foul of her own policy.
9. The appellant relied on Thakur and common law fairness but that principle had no application here. The appellant could not show that he was disadvantaged by any failure on the part of the Secretary of State to deal with his application in a different way, perhaps by contacting him after receiving it. There was no evidence submitted with the application that the appellant was a member of ISBE or putting the Secretary of State on notice.

The application was properly refused under paragraph 245DD of the rules and under 41-SD(7)(iii)(c)(4) of Appendix A.

10. So far as Article 8 was concerned, the appellant arrived in 2009 as a student. He could not meet the requirements of paragraph 276ADE. There was nothing to suggest any family life established here and so Appendix FM was of no application. So far as section 117B of the 2002 Act was concerned, the appellant had clearly been present here with limited leave and the Secretary of State did not suggest that he had been a drain on resources. However, Article 8 was not a general dispensing power, as the Supreme Court made clear in Patel [2013] UKSC 72. The appellant had spent time here with limited leave but there was nothing to show any particularly weighty ties, even though he might well have engaged in community activities. There was nothing to show sufficient interference with his private life, outweighing the public interest in removal. He could not succeed under Article 8, either under the rules or outside them. Guidance given by the Upper Tribunal in Nasim was also of application.
11. Mr Aghayere said, in response, that the appellant's case was that although he did not provide evidence of membership with his application, he did provide a bank statement which showed a debit entry recording payment of a subscription for ISBE. As at the date of application, the Secretary of State was informed of his membership, albeit not directly, through the bank statement. The subscription came out of his account on the day his application was submitted or the day afterwards. In all probability, he would not have been able to provide a letter confirming membership at that time. Nonetheless, the Secretary of State was put on notice of his membership and all she had to do was request further documents to confirm the position.
12. It might also be argued that sending in the bank statement, showing the debit entry, amounted to the submission of a document in the wrong format, so that the Secretary of State ought then to have approached the appellant for evidence of membership in the correct format. It was clear that paragraph 245AA was of application by means of sub-paragraph (d). If a document were submitted in the wrong format or in copy form, that paragraph provided that the application might be granted exceptionally, providing the UK Border Agency was satisfied that the specified documents were genuine and the applicant met all other requirements. The appellant's bank statements had not been questioned and the other requirements were met.
13. In the Article 8 context, reliance was indeed placed on Thakur. The principle of fairness should not be applied in any rigid way. In this case, it must have appeared to the Secretary of State that the appellant might have been a member of ISBE, on the basis of his bank statement. Common sense would have required the Secretary of State to seek other evidence. The five

years spent in the United Kingdom by the appellant, his Master's degree, his hard work and his community activities ought not to be ignored. In his applications to the Secretary of State, his private life ties and immigration history would have been known to the respondent. Although he did not rely on family life, he had built up links and ties through his education, work and his residence here. It would infringe his right to respect for his private life to refuse his application by reason of a minor failure to produce the documents. UE (Nigeria) showed that benefit to the community might weigh in the balance. The appellant also relied on section 117B of the 2002 Act. The appellant applied on 28th January 2013 and his ISBE membership pack came through on 11th February 2013. That was when he received it. At page 8 of the supplementary bundle was an e-mail, bearing that date, confirming his membership. The more recent letter from ISBE confirmed that his membership began on 28th January 2013.

Findings and Conclusions

14. In this appeal, the burden lies with the appellant to prove the facts and matters he relies upon and the standard of proof is that of a balance of probabilities. The appellant has the benefit of preserved findings of fact, as noted at the beginning of this determination and in the determination promulgated on 8th October 2014, in which the decision of the First-tier Tribunal was set aside. So far as the Immigration Rules are concerned, the remaining issue concerns the requirement that the appellant provide evidence of membership of a trade association with his application, as an alternative to providing business advertisements.
15. In this context, the appellant relies on the bank statements he submitted, which record a debit in the sum of £65 on 29th January 2013, the transaction appearing as "Institute for Smal CD7430". His case is that the application of paragraph 245AA of the rules and considerations of general fairness, as considered by the Upper Tribunal in Thakur, combine to show firstly, that the Secretary of State was on notice of his membership of the trade association and, secondly, that her policy and fairness required her to approach the appellant to seek further evidence.
16. The chronology is far from clear. The Secretary of State's reasons letter referred to the application as having been made on 28th January 2013 and the First-tier Tribunal Judge recorded that same date, at paragraph 3 of her determination. The copy application form in the evidence shows that it was completed on 26th January and the date of posting on the first page is illegible. At first sight, an application made on 28th January 2013 would be most unlikely to include bank statements recording a transaction at a later date, even a transaction apparently made only one day later than receipt by the Secretary of State. Be that as it may, evidence contained in the appellant's supplementary bundle shows that ISBE recorded his membership as beginning on 28th January 2013.

17. However, I am unable to accept Mr Aghayere's submission that the bank statement was sufficient to put the Secretary of State on notice of the appellant's membership or that it amounted, indirectly, to evidence of his membership. There is absolutely nothing in the bank statement, or in the description of the particular transaction, to suggest that the debit related to payment of a membership fee. The description of the entry is, in itself, perfectly consistent with a different type of transaction entirely, perhaps the purchase of material or settlement of an invoice. By the time the appellant received his membership pack, on 11th February 2013, the ISBE was in a position to welcome him as a new member but the bank statement does not suggest membership at all and the passage of time between 29th January and 11th February, when his membership was confirmed, strongly suggests that an administrative process of some sort was in play between those dates, albeit one that, when completed, led to confirmation of membership from 28th January 2013.
18. Turning to paragraph 245AA, the bank statements were simply that and manifestly not a sequence of documents where one has been omitted. Nor was the particular statement containing the debit entry a document in the wrong format and, although it may have been a copy rather than an original, submission of the original would have made no difference. What was missing was evidence of membership of ISBE, which falls within paragraph 245AA(c) of the rules. Evidence of membership, had it existed, would have been a specified document which was not submitted. It was not submitted because it was not available on 28th January 2013, or the day afterwards, when the debit entry appeared. The Secretary of State was under no obligation, in terms of her policy, to approach the appellant or to request it. The requirements of the rules, in paragraph 41-SD(7)(iii)(c)(4) were not met.
19. I accept Mr Bramble's submission that Thakur is of no assistance here. There is nothing to suggest that the Secretary of State acted in a procedurally unfair way in declining to approach the appellant for evidence of membership as the bank statement was not, in itself, evidence of such membership and fell short of putting her on notice that she ought to make further enquiries. There was no scope for the application of any evidential flexibility policy. Although the duty to act fairly applies in general terms to the Secretary of State's functions, the points-based system puts a premium on predictability and there is no unfairness in requiring an applicant to submit with his application all of the evidence necessary to demonstrate compliance with the rules: Alam [2012] EWCA Civ 960. The Secretary of State was obliged to do no more and no less than decide the appellant's application for leave in the Tier 1 (Entrepreneur) category fairly and in accordance with the rules and the general law and she did precisely that, giving reasons in April 2013 for the decisions to refuse to vary leave and to remove the appellant.

20. So far as Article 8 is concerned, there is no need to doubt that the appellant may well have made friendships and associations, and established a private life, since he arrived here in September 2009 as a student. The witness statement he made in December 2013 contains no detail of any particular ties. The Secretary of State found that the requirements of paragraph 276ADE of the rules were not met, not least because of the appellant's relatively recent arrival and it has not been suggested by him at any stage that he has established a family life here. The failure to comply with the rules is not properly described as a "near miss", but even if it were, this does not add weight to his Article 8 case: Patel [2013] UKSC 72. The proper focus, as explained in Nasim [2014] UKUT 00025, is on the real substance of ties established here and there is a paucity of evidence in this regard in this particular case. The appellant's ties have been established during periods of limited leave and, as in Nasim, Article 8 has limited utility in this case, as the appellant's circumstances are closer to the "fuzzy penumbra" of Article 8, rather than its core area of operation. There is no reason to doubt Mr Aghayer's submission that the appellant has been involved in community activities and that his presence has been beneficial in this context but the judgment in UE is of only very limited assistance, taking into account the failure to meet the requirements of the rules, the appellant's relatively recent arrival and the fact that any ties have been established during periods of limited leave. I have taken into account section 117B of the 2002 Act, but find that it adds little to the appellant's case. Mr Bramble correctly did not seek to suggest that the appellant has been a drain on public finances. The appellant is able to speak English and the evidence suggests that he is financially independent. I have had regard to the public interest considerations which appear in that section.
21. Overall, the appellant has relatively little of real substance to put in the balance against the Secretary of State's case that there is a strong public interest in the maintenance of immigration controls, in the interests of the economic well-being of the United Kingdom. The failure to meet the requirements of the rules adds weight to that public interest. The appellant has not shown that the factors falling in his favour outweigh it. He cannot succeed under Article 8 as encapsulated in the rules and he cannot succeed under Article 8 outside the rules, where the proportionality issue is "more at large", as the points-based system rules do not amount to a complete code: MM [2014] EWCA Civ 985.
22. In summary, the appellant cannot show that the requirements of the rules have been met or that the Secretary of State was obliged to allow him an opportunity, in accordance with the rules or her policy, to provide further evidence in support of his application. He cannot succeed under Article 8 of the Human Rights Convention. At the end of the hearing, however, the Tribunal returned to the date on which the two immigration decisions were made, 21st April 2013. This was a little over two weeks before Section 52 of the Crime and Courts Act 2013 came into force and so the Secretary of State

was unable, lawfully, to make the Section 47 removal decision on the same occasion as the decision to refuse to vary the appellant's leave. The First-tier Tribunal Judge made no mention of the Section 47 removal decision in her determination. In re-making the decision, and noting that neither representative disagreed with this course, I conclude that the appeal should be allowed in relation to that decision, as it was not in accordance with the law. The appellant succeeds to that limited extent and it follows that, so far, the Secretary of State has not made a lawful removal decision against him.

Decision

The appeal against the decision to refuse to vary leave is dismissed.

The appeal against the Section 47 removal decision is allowed.

Anonymity

There has been no application for anonymity at any stage in these proceedings and I make no order on this occasion.

Signed

Date **4th November 2014**

Deputy Upper Tribunal Judge R C Campbell

TO THE RESPONDENT **FEE AWARD**

I have dismissed the appeal on all the grounds advanced and, notwithstanding success in relation to the Section 47 removal decision, I make no fee award.

Signed

Date **4th November 2014**

Deputy Upper Tribunal Judge R C Campbell