



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

Appeal Number: IA/22481/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 September 2015**

**Decision & Reasons Promulgated  
On 16 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR AZHARUDDIN AYUB HAFEJI ISMAIL PATEL  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer  
For the Respondent: Mr R Parkin, Solicitor Advocate, instructed by UK Law Associates

**DECISION AND REASONS**

**Introduction**

1. For ease of reference, I shall refer to the parties as they were before the First-tier Tribunal. The Secretary of State is therefore the Respondent and Mr Patel is the Appellant.
2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Eames (Judge Eames), promulgated on 16 February 2015, in which he allowed the Appellant's appeal. That appeal was against the Respondent's decision of 14 May 2014, refusing to vary the Appellant's

leave to remain and to remove him from the United Kingdom under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The Appellant is an Indian national, born on 30 January 1986. He arrived in this country on 18 September 2007 and remained here with leave as a Tier 4 student until 27 April 2012 whereupon he was granted leave as a Tier 1 Post-Study Migrant, this leave running until 27 April 2014. On 17 April 2014 the Appellant sought further leave to remain as a Tier 1 Entrepreneur. The Respondent refused the application on the basis that he had failed to provide a letter from a legal representative as required under Paragraph 41-SD(d)(ii) of Appendix A to the Immigration Rules (although the specific provision is inaccurately recorded). As a result of this, the Appellant was not awarded points and the application failed under Paragraph 245DD(b) of the Rules. The discretion available to the Respondent under Paragraph 245AA of the Rules was not exercised in the Appellant's favour.

### **The decision of Judge Eames**

4. The two principal issues considered by Judge Eames were those of the legal representative's letter required under Paragraph 41-SD(d)(ii) and the bank letter apparently required by Paragraph 41-SD(c)(i). As regards the legal representative's letter, he concluded that all the required information had been provided, but it was not in the correct format and to that extent was non-compliant with the Rules (paragraphs 28 and 30). He went on to conclude that the discretion under Paragraph 245AA(b)(ii) of the Rules was "available", and that the required information and declarations had been provided by a later letter from the legal representative, dated 12 August 2014. It was found that the Respondent had been under a duty of fairness to request this appropriately formatted information (paragraph 31). He then admitted the new letter in as evidence in compliance, as he saw it, with section 85A of the Nationality, Immigration and Asylum Act 2002 (paragraph 32).
5. As to the bank letter, Judge Eames agreed with the submission from the Appellant's representative that the Explanatory Memorandum which accompanied the Statement of Changes to the Rules, HC1138, in effect relaxed the requirements of Paragraph 41-SD to the extent that the absence of such a letter was not fatal to the appeal's success (paragraph 33).
6. Following on from this, Judge Eames concluded that the Appellant met all the requirements of the Rules and, as I read the decision, then exercised his own discretion in substitution to that of the Respondent and allowed the appeal outright under the Rules themselves.

### **The Respondent's grounds of appeal**

7. In essence, the grounds assert that Judge Eames erred in several respects: he admitted evidence that was inadmissible; he disregarded the requirement for a bank letter; he misapplied the provisions under Paragraph 245AA of the Rules.

8. Permission to appeal was granted by First-tier Tribunal Judge Lambert on 20 April 2015. Although only grounds 1 and 2 are specifically referred to, both representatives before me were agreed that the grant was not limited in its scope.

### **The hearing before me**

9. Mr Whitwell relied on the grounds of appeal. In addition, he made the point that Paragraph 41-SD(c)(ii) would not have assisted the Appellant in any event because the third party's bank statements related to a company account, not a personal one, as required.
10. Mr Parkin submitted that viewing pages 18-23 of the Appellant's bundle in the round, the information provided by the legal representative (a solicitor, Ms Fatema Sattar) was compliant with the requirements of Paragraph 41-SD. It was only the format which was incorrect. Once Judge Eames had found this to be the case, submitted Mr Parkin, the issue of discretion under Paragraph 245AA(b)(ii) of the Rules was engaged. Having regard to the decision letter of 14 May 2014, it was apparent that the Respondent had in fact exercised her discretion, but not in the Appellant's favour. Therefore, Judge Eames was entitled to substitute his own discretion for that of the Respondent, as he duly did in paragraphs 31, 32, and 34. Seen in this way, Mr Parkin asserted that there was no material error.
11. In terms of the admission of the legal representative's letter of 12 August 2014 into evidence, it was submitted that this was permissible so as to show that if the Respondent had requested correctly formatted evidence prior to making her decision, the Appellant could have produced it.
12. Finally, in respect of the bank letter, it was said that Judge Eames had been entitled to rely on the Explanatory Memorandum to Statement of Changes HC1138 as being an official document from the Respondent which was itself an indication of policy guidance. It was tantamount to a statement of policy that the Rules were being relaxed as regards this particular issue. Policy guidance can operate outwith the Rules. It did not matter that the formal policy guidance on Tier 1 did not contain the effects of what was said in the Memorandum. It was accepted that the Appellant had not provided any bank letter, but this was not fatal. Mr Parkin acknowledged that he needed to succeed on this argument as well as that relating to the legal representative's letter in order for the decision of Judge Eames to survive.
13. In reply, Mr Whitwell submitted that the bank letter remained a mandatory requirement of the Rules. The wording of the Memorandum did not in fact assist the Appellant. The document at page 18 of the Appellant's bundle did not in fact contain all the required information. Finally, the letter of 12 August 2014 was inadmissible under section 85A(4) of the 2002 Act. Even if it was admissible, the Appellant's case failed on at least one alternative basis.

**Decision on error of law**

14. I find that Judge Eames did materially error in law when allowing the Appellant's appeal.
15. The first and most obvious error was to effectively disregard the requirement for a bank letter under Paragraph 41-SD(c)(i) of Appendix A to the Rules. It is accepted that there was in fact no such letter submitted with the application or at any material time thereafter. It is clear that Judge Eames concluded that this omission was immaterial to the success of the application and in turn the appeal (see paragraph 33 of his decision). It is also clear that in reaching this significant conclusion he relied solely upon the Appellant's contention that the Explanatory Memorandum accompanying Statement of Changes HC1138 applied what he described as a "more relaxed regime as regard bank evidence in cases where the application was made on or after 6 April 2014" (paragraphs 16-17 and 33 of his decision).
16. This approach is flawed for several reasons. First, there is the wording of the Memorandum itself. At paragraph 7.6 (page 32 of the Appellant's bundle), the third bullet point states that, "minor updates are being made to evidential requirements." In the same paragraph it states that the changes would affect the contents of third party funding declarations from banks in order to better reflect banking practice." What it clearly does not say is that such declarations/letters were to be disposed of as mandatory requirements of the Rules. Indeed, the following bullet point leaves no room for doubt: the change in wording of the Rules was in order to "emphasise more explicitly that applicants must provide all the relevant specified evidence..." In short, the wording of the Memorandum itself simply does not support the conclusion of Judge Eames that an existing requirement of the Rules was being "relaxed" to the extent that the Appellant need not have provided evidence from the bank.
17. Second, and following on from the first point, the actual changes set out in HC1138 do not themselves have the dramatic effect of obviating the need to produce evidence from a bank. Following the coming into force of HC1138 on 5 May 2014 the requirements of Paragraph 41-SD(c) clearly retained the need to provide a bank letter or personal bank statements. The purpose of an Explanatory Memorandum is, by its nature, to explain why the relevant changes are being made. Thus, the explanation provided necessarily relates to what the amendments to the Rules in fact say: what they say is unambiguous.
18. Third, Mr Parkin's suggestion that the Explanatory Memorandum acted as a separate policy document beyond the remit of the Rules is misconceived. In addition to what I have said already about the wording and nature of the Memorandum, there is nothing in the Respondent's formal Tier 1 guidance to indicate that the requirements of Paragraph 41-SD(c) can be avoided by an applicant. It is highly unlikely, to say the least, that in the time since the introduction of HC1138 no substantive change to

the guidance would have occurred if the Memorandum had the effect contended for by Mr Parkins and applied by Judge Eames.

19. The error by Judge Eames is material. I raised the possibility at the hearing that the provision of personal bank statements by the third party could have satisfied Paragraph 41-SD(c)(ii), which is an alternative to (c)(i). Mr Whitwell was right to point out that the bank statements at page 17 of the Appellant's bundle were in the name of a company secretary, not the third party himself. Having reflected on the alternative requirements, I note that bank statements cannot in fact come from a third party in any event and so the statements in the Appellant's bundle did not comply with Paragraph 41-SD(c)(ii)(4). Mr Parkin did not seek to argue otherwise.
20. The second material error of law relates to the legal representative's evidence. Whilst Judge Eames found that the evidence as a whole contained all mandatory information, this simply was not the case. Indeed, at paragraph 18 of his decision the Appellant's acceptance of a deficiency in the information provided is recorded.
21. Paragraph 41-SD(d)(ii) requires there to be "a letter" from the legal representative. There was no such letter submitted with the application in this case. There was not even a series of letters containing elements of the required information in each. Therefore, a mandatory item of evidence was missing from the application. Judge Eames was wrong to have concluded that the issue was one of incorrect format only.
22. The third error lies in Judge Eames' decision to admit and take account of the legal representative's letter of 12 August 2014. This letter did indeed contain all the information required by Paragraph 41-SD(d)(ii). However, it was clearly inadmissible under section 85A(4) of the 2002 Act, as the evidence related to the acquisition of points under the Points-Based System. This error was material.
23. The final error flows from the others. On the admissible evidence before him there was no lawful basis upon which Judge Eames could have allowed the appeal under the Immigration Rules, as he purported to do.
24. I set aside the decision of Judge Eames.

### **Re-make decision**

25. In the event that I found errors of law, both representatives were content for me to go on and re-make the decision on the basis of the evidence before me. This I now do.
26. It is accepted by the Appellant that he did not provide a bank letter at the time the application was made or at any stage prior to the Respondent's decision. Having regards to my conclusions on the first error of law identified in the decision of Judge Eames, above, an item of evidence specified under Paragraph 41-SD(c)(i) was omitted. In turn, the Appellant was not entitled to the points required to meet the Rules. On this basis alone, the appeal must fail under the Rules.

27. As regards the legal representative's evidence, insofar as it is admissible, there is no letter or combination of letters from them containing all the information required under Paragraph 41-SD(d)(ii), as I have discussed in relation to the second error of law by Judge Eames, above. It is not a question of wrong format, but of a missing document or documents. Again, the Appellant was not entitled to points and the appeal must fail under the Rules on this ground too.
28. As regards Paragraph 245AA, the issue of discretion simply does not arise in this case. There was no requirement for the Respondent to have exercised discretion because there were two separate items of required evidence which were not provided at all with the application, namely the bank letter and the legal representative's letter(s). In these circumstances, the Appellant's situation did not fall within any of the categories under Paragraph 245AA.
29. There is no evidence before me of any policy which existed at the time of the decision and should have been applied to the Appellant (bearing in mind what I have said about the Explanatory Memorandum, above).
30. Article 8 has not been argued before me in any way. I note that it was not raised in the grounds of appeal to the First-tier Tribunal. Even if it had, there is no possibility of a claim succeeding on the evidence.

### **Anonymity**

31. No direction has been made previously and none has been sought from me. I see no need for one. I make no such direction.

### **Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**I set aside the decision of the First-tier Tribunal.**

**I re-make the decision by dismissing the appeal on under the Immigration Rules.**

Signed

Date: 14 September 2015

H B Norton-Taylor  
Deputy Judge of the Upper Tribunal

### **TO THE RESPONDENT** **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date: 14 September 2015

Judge H B Norton-Taylor  
Deputy Judge of the Upper Tribunal