



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

Appeal Number: IA/26552/2014
IA/26543/2014
& IA/26549/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 13th November 2014**

**Determination
Promulgated
On 12th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

**MR IDOWU BABAJIDE ABOABA,
MR OLUNBENGA ADEOLU ABOABA
& MRS OMOWUNMI RASHED ABOABA
(NO ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sain, Counsel instructed by Shoaib Associates
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Nigeria. The first two appellants are applying to remain in the United Kingdom as Tier 1 (Entrepreneur) Migrants under the points-based system, specifically paragraph 245 DD and Appendix A of the Immigration Rules. The remaining appellant is applying as a

dependent and her status stands to be determined in line with that of the first two appellants.

2. I have considered whether it is appropriate to make an anonymity direction in respect of these proceedings. Having considered all the circumstances I do not consider such a direction necessary
3. This is an appeal by the appellants against the determination of First-tier Tribunal Judge W Grant promulgated on 24 September 2014, whereby the judge dismissed the appellants' appeals against the decisions of the respondent dated the 6 June 2014 to refuse the appellants further leave to remain in the United Kingdom and thereupon to make decisions to remove the appellants from the United Kingdom.
4. By decision made on 13th October 2014 permission to appeal to the Upper Tribunal was granted. The case appears before me to determine in the first instance whether or not there was a material error of law in the original determination.
5. According to the application forms submitted by the appellants, they were applying to remain as Tier 1 (Entrepreneur) Migrants at NQF level 6. In section 3A G Attributes the appellants claim that they were employed as directors or engaged in business activity in an occupation at degree level (group d). Thereafter in the application form the job title as set out at G.24 of the respective application forms were Purchasing Officer/Director or Marketing Officer /Director, both with a standard occupational classification (SOC) at G.25 of 1133.
6. The appellants have produced the Occupation Skills Codes for NQF level 6. SOC 1133 appears in Occupations skilled to NQF level 6. Level 6 occupation titles as set out in the codes of practice are Marketing Director or Sales Director and the practice describing details the functions to be performed by such individuals are also set out in the Occupation Skill Codes
7. The letters of refusal are dated on or about the 6 June 2014. In the letters of refusal it is noted that the appellants have to meet the requirements of paragraph 245DD and of Appendix A of the Immigration Rules.
8. The letter of refusal continues by raising the requirements under the provisions of paragraph 41 SD(c)(iii) and 41SD(e)(iv) of Appendix A. It is specifically alleged that the contract between the appellant's business and Floxx & Thrane Nigeria was not acceptable, as it was a photocopy and as each and every page had not been signed as required by the rules. Accordingly the requirements of paragraph 41-SD(c) and (d) of Appendix A had not been met.
9. The letter of refusal continues by setting out that the appellants had failed to submit evidence that their occupation skill was at NQF level 4 as required. As there was no evidence that the appellant's company was

selling products to other companies, they had failed to demonstrate that the occupation skill level was at the required skill level of NQF 4. Therefore the respondent had put in issue whether the appellants' business was carrying on economic activities, where the required occupation/skill level was at level NQF4. Clearly there was a mismatch between the application and the decision.

10. In the circumstances the appellants were not awarded any points under part A Attributes, whether that be under access to funds as required, funds held in a regulated financial institution or funds disposable in the United Kingdom. The appellants required 75 points under Attributes. The letter of refusal states that the appellants do not meet the requirements of paragraph 245DD (b) appellants. It was for the appellants to prove that they were entitled to the points by proving that they meet the criteria in the rules.
11. It certainly therefore appears that whilst the appellants were applying at NQF level 6 consideration was given to these applications by the respondent at the lower-level of NQF level 4. It is accepted that NQF level 6 encompasses occupations at a higher and more responsible level.
12. Documentation had been submitted by the appellants to the Tribunal relating to NQF level 6. In part the submissions relating to the appellants' case asserted that the respondent had applied the wrong standard and that fairness and evidential flexibility or paragraph 245AA required that the respondent should have written to the appellants for further documentation, specifically the original of the contract.
13. Whatever can be said, the respondent had put in issue whether the appellants' occupations satisfied the requirements under attributes.
14. In paragraph 14 of the determination the judge has clearly considered the business being carried on by the appellants' company and the actual functions undertaken by the appellants. The judge found that a single procurement contract with a company in Nigeria for a limited number of items and some advertisements were not sufficient to demonstrate that the appellants' business and the appellants themselves carried out occupations at the relevant level. The judge has therefore considered the evidence as to the functions of the appellants and determined that it had not been proved that the appellants were carrying out the job tasks set out within the relevant Codes at NQF level 6.
15. The copies of the Codes for NQF level 6 had been provided by the appellants in evidence. The judge not only considered the applications under NQF level 6 but also under level 4, but such is not to the detriment of the appellants but rather to their benefit. The letter of refusal had assessed that the appellants had failed to prove that there were carrying out activities at the lower level of NQF level 4. The judge considered both level 6 and level 4.

16. The appellants had sought to assert that they met the requirements of NQF level 6 and claimed to have produced evidence to substantiate that. The judge clearly found on the basis of the evidence that they did not meet the requirements of NQF level 6 as is evident from paragraph 14 of the determination. That was a finding the judge was entitled to make on the evidence.
17. However to the benefit of the appellants he considered whether or not in line with the letter of refusal they met the lower level of NQF level 4. The judge also found that the appellants on the basis of the evidence presented did not meet the requirements at the lower occupation level.
18. Whilst criticism is made of the appellants' failure to give evidence, the judge was satisfied on the evidence submitted that the appellants had failed to discharge that burden of proof that was upon them to show that they met the requirements of the rules in respect of the application made.
19. The appellants in the original submissions to the First-tier Tribunal had sought to argue that there were issues of fairness and that the respondent had failed to give effect to the policy of evidential flexibility applying paragraph 245AA. The judge has also dealt with that issue. In paragraph 15 the judge clearly refers to the fact that that policy or the provision of the rules would not have assisted the appellants as the occupation were not at the required skill level. Seeking to apply evidential flexibility and to ask the appellants for further documentary evidence would not have solved the problem that the business of the appellants and the appellants' employment did not satisfy the requirement of NQF level 6
20. The judge has considered the evidence presented to him and found that the appellants do not meet the requirements of the rules in respect of level NQF 6. Those were findings of fact which the judge was entitled to make on the evidence and the judge has given valid reasons for the conclusions reached.
21. The fact that the judge has also considered the application consistent with the letter of refusal on the lower basis of NQF level 4 would have only been to the benefit of the appellants as the appellants were being given a further opportunity to succeed under the rules. The fact that he has thereafter dismissed it on that basis also makes no difference to the substance of the decision that the appellants do not meet the requirements of the rules in respect of the application that they made.
22. With regard to the assertion is that the evidential flexibility policy or paragraph 245 AA should have applied and the immigration officers should have requested that the original contract be produced, the judge has clearly dealt with that in paragraph 15. The judge concludes that that would not have assisted the appellants as they have not proved in any event that their occupations were at the required skill level. Those were the findings of fact that he was entitled to make on the evidence presented.

23. Whilst the judge does make adverse comment about the fact that the appellants failed to give evidence that does not detract from the fact that the evidence submitted was not sufficient to satisfy the judge that the appellants met the requirements of the rules.
24. In dealing with the issues the judge had obtained copies of the Codes of Practice for Skilled Workers relating to NQF level 4. Challenge is made of the judge as it is alleged that the judge should not have obtained the Codes of Practice as such was a matter of evidence to be proved in the normal way. [see Durrani (Entrepreneurs: bank letters; evidential flexibility)(Rev1) [2014] UKUT 295 (IAC).
25. Whilst the practice of the judge making his own enquiries on the evidence is not to be encouraged, in the circumstances of the present case it would not have altered the fact that the appellants did not meet the requirements with regard to NQF level 6 and would therefore have made no difference to the outcome of the appeal. Thus if such constituted an error on the part of the judge it was not a material error of law.
26. There is no material error of law in the determination. I uphold the decision to dismiss these appeals on all grounds.

Signed

Date **11th December 2014**

Deputy Upper Tribunal Judge McClure