



IAC-FH-NL-V1

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

Appeal Number: IA/39253/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 13 January 2016**

**Decision & Reasons Promulgated
On 15 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**MR. FARHAN AFZAL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. T. Khan of Counsel, St. Paul's Chambers

For the Respondent: Mr. D. Mills, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Ford promulgated on 22 December 2014 in which she dismissed the Appellant's appeal against the Secretary of State's decision to refuse to grant leave to remain as a Tier 1 (Entrepreneur) Migrant.
2. Permission to appeal was granted as the judge had found that the "flexibility rules" applied only to Companies House documents, which was arguably wrong. Further, the judge found that she was not satisfied that the discretion afforded to the Respondent "should have been exercised differently". However no finding was made as to how the Respondent had

exercised her discretion under paragraph 245AA, or whether the Respondent had even engaged with the existence of the discretion.

3. Prior to the hearing, Mr. Khan provided a copy of a decision of the Upper Tribunal in the case of the Appellant's Tier 1 Entrepreneur Partner, Mudahhar Shafique. The application of the Appellant was made jointly with that of Mr. Shafique, and the same documents were submitted in support. The reasons for the appeal going to the Upper Tribunal were not exactly the same, but the outstanding issue in the Appellant's case was the same as that before the Upper Tribunal. Upper Tribunal Judge Monson found as follows:

"If the judge had upheld the case worker's other objections to the specified documents provided with the application, this would have been the end of the road for the claimant. But as the judge found that these other objections were ill-founded, the claimant was in retrospect deprived of the benefit of the case worker giving consideration as to whether to exercise discretion under sub-paragraph (d) of paragraph 245AA. As Mr. Kandola accepted, the case worker does not appear to have considered whether the missing specified information from the third party declaration was verifiable from other documents; and, if so, whether discretion should exceptionally be exercised in the applicant's favour. Accordingly I allow the appeal on this ground."

4. The Appellant's representative also provided a copy of a letter dated 22 October 2015 from the Respondent to Mr. Shafique, approving his application for leave to remain as a Tier 1 Entrepreneur.
5. In the light of this decision and the subsequent grant of leave to Mr. Shafique, Mr. Mills submitted that it would be hard to argue that the decision in respect of the Appellant should be made any other way than to follow that made in respect of Mr. Shafique.
6. At the hearing I set aside the decision and remade it, allowing the appeal to the extent that the application be sent back to the Respondent for the making of a lawful decision. I set out my reasons below.

Error of law

7. The judge resolved two of the three issues before her in favour of the Appellant, so there was only one remaining reason why the Respondent had refused the Appellant's application. This concerned the third party declaration and the legal representative's letter. "Both were deficient in this case because the third party declaration did not contain the names of the entrepreneurs or their signatures and the legal representative could not therefore confirm the validity of the signatures" [11].
8. Paragraph [12] of the decision states:

"I do not accept that the flexibility rules could assist because the Rules specify that it is only where Companies House documents have not been provided under paragraph 41SD(b) that the ECO or IO reserves the right to request the specified original documents in the correct format. Even if I am

wrong on this and there is a discretion to call for substitute documents rather than missing documents, I am not satisfied that this is a case where the discretion should have been exercised differently.”

9. In relation to the finding that the flexibility rules only apply to Companies House documents, this is not the case. There is no such restriction imposed by the rules.
10. In relation to the discretion under the rules, paragraph 245AA(d)(iii)(1) provides that where an applicant has submitted a specified document “which does not contain all of the specified information, but the missing information is verifiable from other documents submitted with the application” the application may be granted exceptionally, providing that the Respondent is satisfied that the specified documents are genuine, and the other requirements are all met.
11. The third party declaration did not contain the signatures of the Appellant and his team member, but their signatures were verifiable from other documents submitted with the application, as there was a separate document accompanying the application in which the signatures were verified by a solicitor. The judge decided that the Respondent was wrong to have dismissed the application on the other two issues. Therefore, this was a case where, had the Respondent not refused the application for these other reasons, which she was not entitled to do, she should have considered the exercise of her discretionary power under 245AA(d).
12. Paragraph [12] refers to the discretion under paragraph 245AA, and indicates that the judge is satisfied that discretion should not have been exercised differently. However it is not clear from the Respondent’s decision that she considered the exercise of discretion at all, given that she was refusing the application for other additional reasons, which the judge found that she was not entitled to do. I find that the appeal should therefore have been allowed as not being in accordance with the law, and the application sent back to the Respondent for her to make a lawful decision.

Remaking

13. The only reason outstanding for the refusal of the application was that the third party declaration did not contain the signatures of the Appellant and his team member. I find that this information was verifiable from other documents submitted with the application. I therefore find that the Appellant’s application falls within paragraph 245AA(d)(iii), and that the Respondent should exercise her discretion under this paragraph, which she has not done.

Notice of decision

The decision of the First-tier Tribunal involves the making of an error on a point of law. The decision is set aside.

I remake the decision allowing the Appellant's appeal as the Respondent's decision was not in accordance with the law. The application is sent back to the Respondent for a lawful decision to be made.

Signed

Date 14 January 2016

Deputy Upper Tribunal Judge Chamberlain