



IAC-FH-NL-V1

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

Appeal Number: IA/43041/2014

THE IMMIGRATION ACTS

**Heard at Field House
Oral determination given following hearing
On 17 December 2015**

**Decision and Reasons Promulgated
On 21 March 2016**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

**MR ADNAN RAZI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner instructed by Farani-Javid Taylor Solicitors LLP
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant in this case who was born on 20 January 1980 is a national of Pakistan. He has been in this country with valid leave to remain as a student and prior to the expiry of his last leave he applied for leave to remain as a Tier 1 (Entrepreneur)

Migrant under the points-based system. In order to satisfy the requirements of the Rules it is necessary save in circumstances to which I will refer below to send all the information required under the Rules with the application. It is common ground in this case that with regard to two matters that information was not supplied with the application. It is also common ground that this was a genuine application in that other than with regard to these two matters to which I will refer, all the requirements under the Rules were satisfied. The respondent does not dispute either that the requisite funds were in fact available or that the applicant was carrying out a genuine business.

2. The two matters where it is said the requirements were not satisfied and indeed they were not, were first that the letter showing that the appellant had the requisite funds of £50,000 did not spell out in terms that those funds were for his own use and were not for the use of anybody else.
3. The second matter was that the appellant did not supply the specific information confirming the domain website which he needed to show. There are however circumstances in which the strict requirements of the Rules can be waived by the respondent. These were at the relevant time set out at paragraph 245AA of the Immigration Rules and under these provisions the Entry Clearance Officer or Immigration Officer or Secretary of State has a discretion to contact the applicant or his representative, in writing, in order to request the correct documents. This discretion is set out at subparagraph (b)(iv) of paragraph 245AA. It is stated within the Rules that "the requested documents must be received at the address specified in the request within seven working days of the date of the request".
4. In accordance with this provision the respondent wrote to the appellant on 2 October 2014 pointing out that the information supplied from the bank did not state, as it needed to, that "the third party has informed the institution of the amount they intend to make available and that the institution is not aware of the third party having promised to make the money available to another person". The appellant was accordingly given seven days in which to provide this information in accordance with the provisions within the Rules. This letter was posted to the appellant because the respondent was unable to contact the application by email and following receipt of the letter the appellant notified the respondent that although he would attempt to get the information within the time given he may be in difficulty doing so because he had to obtain the information from the bank which was in Pakistan and seven days was simply not a sufficient period of time in which this information could be obtained. Thereafter, the appellant obtained the information which had been requested from the bank which he sent to the respondent on 16 October 2014. Unfortunately for him on the same day as he posted this information on to the respondent, the respondent made a decision refusing his application, the reasons given being first that the necessary information from the bank had not been supplied but also that the appellant had failed to submit evidence of the domain ownership for his website.

5. The appellant appealed against this decision and his appeal was heard at Taylor House before First-tier Tribunal Callow on 20 May 2015. At that hearing the respondent was not represented and I have heard evidence of what is said to have occurred at that hearing to which I will make reference below.
6. Subsequently, in a Decision and Reasons promulgated on 9 July 2015, Judge Callow dismissed the appellant's appeal. He does not in his decision deal with whether or not the appellant could or should have been given further time to provide the requisite documents but merely states that the Rules are mandatory and include the requirement that the consideration of evidence under the points-based system is limited to consideration of the evidence submitted with an application and as required information had not been supplied, his application had to be rejected. As he says at paragraph 11, "the requirements of the Rules addressing an application for leave to remain as a Tier 1 (Entrepreneur) are expressed in mandatory terms; they preclude the exercise of a discretion" and in this regard he relies on the reported decision of this Tribunal in *NA and Others (Tier 1 post-study work - funds)* [2009] UKAIT 00025. As he correctly states, "there is no near-miss principle". Accordingly, as the judge found at paragraph 12:

"As the appellant did not submit the bank letter, meeting the requirements of the Rules, in time and has failed to furnish any evidence of domain ownership for the website in question it has not been demonstrated, on a balance of probabilities, that the appellant meets the requirements of the Rules to be awarded points under provision (d) in the first row of Table 4 of Appendix A".

7. The appellant now appeals against this decision with leave having been granted by First-tier Tribunal J M Holmes on 2 November 2015. One of the grounds of appeal is that the judge had indicated at the hearing that he intended to allow the appeal and that the judge changing his mind was a procedural error which in the words of Judge Holmes when setting out his reasons for granting permission to appeal arguably "identify a significant procedural error that raises an arguable ground of fairness".
8. I can dispose of this ground relatively speedily. The evidence in the statement provided by Mr Al Arayn is very brief and merely states at paragraph 3 that, "towards the end of the hearing, the FTT judge indicated that he is minded to allow the appeal after reviewing the papers". The judge was not asked to comment upon what he says happened at the hearing but in any event I asked for Mr Arayn to attend which he did and in the course of his evidence before this Tribunal he very fairly admitted that although the judge had said that he was minded to allow the appeal he had also indicated that he needed to go over the documents and in Mr Al Arayn's words "there was a 'but'." The Court of Appeal in *SK (Sri Lanka)* [2008] EWCA Civ 495 has indicated when considering a similar submission that a judgment is not made until such time as it is promulgated and there is nothing intrinsically unfair about a judge who having taken further time to make up his mind, then alters his provisional view. In this case I would not go so far as to say that where a judge expresses in very strong terms that an appeal will be allowed and then changes his or her mind without giving the parties an opportunity of making further submissions

that can never amount to a procedural error but I am satisfied in this case that that is not what happened. The judge may have expressed a provisional view of what he was likely to do but it is clear from the evidence I have heard that that was not a definitive view and that the decision would be given finally following further consideration of the papers.

9. The other matters that are argued relate though to the fairness of a decision once discretion was exercised to limit it in a way which prevented compliance with what the appellant was required to do. The difficulty with this argument is of course the provision within the Rules at paragraph 245AA(b)(iv) that the requested documents “must be received at the address specified in the request within 7 working days of the date of the request”. What is stated in the letter is as follows:

“You have 7 days from the date of this letter to provide the below, no further extensions will be provided.

Documents required:

- (1) The bank letter you have provided from United bank does not state that the bank is unaware of the funds being available to anyone else.”

10. The first observation that must be made about this request is that this letter is not in accordance with the law. The requirement within the Rules is that the requested document “must be received... within 7 working days of the date of the request”. The request is for the document to be given within 7 days, which would include weekends and of course it is right that the appellant in fact did not provide the documents even within 7 working days but in a case where strict reliance upon the Rules is said to be mandatory it is perhaps arguable that at the very least the respondent should be punctilious in ensuring that the Rules are correctly stated. Otherwise what is being exercised is not just a discretion under the Rules but a rather more general discretion which the respondent would have in particular circumstances where they are required. I will deal with this aspect of the appeal below.
11. Although the refusal letter relies on the failure to provide evidence of the domain ownership for the website used in the course of the appellant’s business the point is made on behalf of the appellant that this information was available openly to anyone who searched for it which in fact is not disputed. Ms Isherwood with her customary fairness has made the Tribunal aware of the fact that there was evidence on the respondent’s file that as at 16 October 2015 the respondent had, it appears, carried out a search of this website because a document within her file establishes that. It is also right to say that the respondent does not seek to challenge the assertion that as a matter of fact that information has subsequently been supplied and would or could have been available at that time. Although no specific admission is made that this is the case, in the absence of a challenge, I so find on the balance of probabilities.
12. With regard to whether or not the First-tier Tribunal Judge should have found that that information had in fact been made known to the respondent before the date of

decision, I have in mind what is set out at paragraph 245AA of the Immigration Rules which were in force at the relevant time as they are now with regard to “documents not submitted with applications” and in particular to what is set out at paragraph 245AA(c) which is as follows:

“(c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.”

13. It is remarkable in this case if indeed the respondent had not before writing the letter of 2 October 2014 been satisfied that there was sufficient evidence of domain ownership for the appellant’s website that she did not either in that letter request the appellant to provide that document or alternatively simply dismiss the application on the basis that that evidence had not been provided. What seems incompatible with the Rule in question is for the respondent to write requesting the information from the bank in circumstances where if the second objection is sustainable the request for further evidence from the bank could not have led to a grant because the application would have to be refused in any event because of the lack of evidence regarding domain ownership for the website. In these circumstances I am satisfied on the balance of probabilities that the respondent must have appreciated at the date the letter was sent to the respondent and certainly as at the date of the decision that this objection was not sustainable. In these circumstances I consider that the failure of Judge Callow to consider whether this was so was in the circumstances of the case an error of law and for reasons which follow a material one.
14. That leaves the question of whether or not the letter which ultimately was provided from the appellant’s bank in Pakistan should have been taken into consideration. It should be pointed out that again the respondent does not challenge the genuineness of this letter or that as a matter of fact had the letter been provided either with the application or before the decision was made, it is more likely than not that this ground of rejection would not have been maintained.
15. The appeal was brought under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 as it was in force at the date of appeal. This Act has now been amended but as at the relevant time Section 82(1) provided that “where an immigration decision is made in respect of a person he may appeal to the Tribunal” and Section 84 sets out the grounds on which such an appeal must be brought. These grounds include under Section 84(1)(f) “that the person taking the decision should have exercised differently a discretion conferred by Immigration Rules” and it is on this basis that the decision has to be considered.
16. If one looks at what is stated within the Immigration Rules it does provide that the requested documents must be received within 7 working days of the date of the request. In this case of course the documents were not provided within 7 working

days of the date of request and it is a finely balanced decision as to whether or not in these circumstances a Tribunal is limited simply to finding that as the technical requirements of the Rules have not been met the appeal has to be refused. In the particular circumstances of this case which will not be repeated because the Rules have been changed and are, I would expect, very unusual I do not consider that the Rules can be read in such a narrow manner. In the first place as I have already stated the Rules do not provide for receipt within 7 days but 7 working days; also we cannot say with any certainty when the request was actually received and, thirdly, having decided to exercise her discretion, it is in my judgment on the facts of this case not reasonable to expect this appellant to be able to write to Pakistan, get the information requested and then post it to the respondent so that it is received in the relevant department within 7 days of the date the request is actually sent out. That is so unreasonable as to be unlawful in the circumstances of this case; the respondent having decided to exercise her discretion was obliged to allow the appellant a reasonable time in which to provide the information required, and the judge made a material error of law by failing to consider this aspect of the case such that his decision must be set aside and re-made.

17. I had before me all the evidence relevant to this appeal and so the only question which remains is whether I am limited to finding that the decision was not in accordance with the law, the consequence of which would be that the respondent would have to reconsider the application or whether I am able to say that the respondent should have exercised differently a discretion conferred by Immigration Rules in which case I can re-make the decision.
18. Having heard further submissions from the parties I consider that this is one of those very rare cases where the Tribunal is able to re-make the decision on the basis that on the evidence available there is only one way in which the discretion can be exercised. Although no formal concession has been made with regard to the evidence from the bank (I have already decided that the evidence regarding the domain name was on the balance of probabilities before the respondent) no suggestion has been made that the letter is not genuine and as I have already decided that the respondent was obliged to allow the appellant a reasonable time in which to provide the information which had been requested and as that information shows that other than with regard to when the information was supplied the mandatory requirements under the Rules were satisfied, it follows that had the respondent considered this information properly as she should she would have been bound to grant leave as sought.

Decision

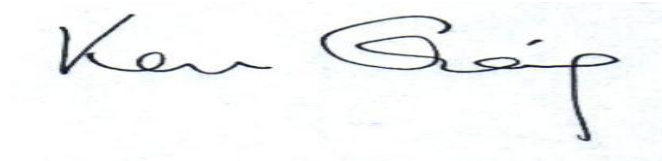
The decision of First-tier Tribunal Judge Callow is set aside as containing a material error of law.

The following decision is substituted:

The appellant's appeal is allowed.

No anonymity direction is made.

Signed:

A handwritten signature in black ink on a light blue background. The signature reads "Ken Craig" in a cursive, slightly slanted script. The first name "Ken" is written in a simple, rounded cursive, and the last name "Craig" is more elaborate, with a long, sweeping tail on the 'g'.

Upper Tribunal Judge Craig

Date: 10 February 2016