



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: IA/47369/2014**

Appeal

THE IMMIGRATION ACTS

**Heard at Field House
On 25 February 2016**

**Decision & Reasons
Promulgated
On 4 March 2016**

Before

**The Hon Lord BURNS (Sitting as a Judge of the Upper Tribunal)
Deputy Upper Tribunal Judge MANUELL**

Between

The Secretary Of State For The Home Department
Appellant

And

**Miss Olufunmilayo Omorinsola OLUGOGA
(No Anonymity Direction)**
Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mr R Layne, Counsel (instructed by Lannex
Immigration)

DETERMINATION AND REASONS

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Brunnen on 16 December 2015 against the determination of First-tier

Tribunal Judge Sweet who had allowed the Respondent's appeal against the Secretary of State's decision dated 3 November 2014 in a determination promulgated on 18 August 2015. The Appellant is a national of Nigeria, who had applied for further leave to remain in Tier 1 as an Entrepreneur Migrant. This was refused and removal directions were made under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Judge Sweet found that that the Respondent had demonstrated that she met the requirements of paragraph 245DD of the Immigration Rules, in that she had shown that she was registered as self employed with HMRC prior to 11 July 2014, and had also shown that she was actively trading prior to 11 July 2014. Subject to the Secretary of State's being satisfied as to the genuineness of the business under paragraph 245DD(h), the appeal was allowed.
3. Judge Brunnen considered it arguable that Judge Sweet had erred by taking into account evidence that should have been excluded, pursuant to section 85A(4) of the Nationality, Immigration and Asylum Act 2002. Had such evidence not been admitted, the appeal would have been dismissed.
4. Mr Wilding for the Appellant submitted that Judge Sweet had manifestly fallen into legal error, as the grant of permission to appeal indicated. The judge had not referred to section 85A(4) of the Nationality, Immigration and Asylum Act 2002 nor Ahmed and Another (Points Based System: admissible evidence) [2014] UKUT 00365 (IAC). The specified documents had not been submitted with the application. Nor had the judge addressed the issue raised in the reasons for refusal letter as to the date of the advertising material produced, although he had noted that it was in issue at [7] of his decision and reasons. The judge's findings at [12] and [13] were based on post application material, as the judge's use of the word "now" signalled. The original appeal could never have succeeded and the decision and reasons should be set aside and a determination dismissing the original appeal substituted.
5. Mr Layne for the Respondent submitted that the relevant rules were very complex and it was easy to go wrong. The Respondent had done her best and should not be penalised. The evidence identified by the judge showed

that the HMRC self employment registration was in place prior to the Respondent's application.

6. The tribunal invited Mr Layne to take it to any documents which supported that proposition. The only document identified (at page 30 of the Respondent's bundle) post-dated the application as it was dated 10 April 2015. The accountant's letter (page 26 of the Respondent's bundle) stated "We however await the receipt of the welcome letter from the HMRC confirming the registration." The tribunal pointed out that Mr Layne's submission was thus unsustainable. Mr Layne was given the opportunity of conferring with his client. He added noting thereafter.
7. Mr Wilding wished to add nothing by way of reply.
8. The tribunal indicated that the Appellant's appeal succeeded, and reserved its determination which now follows. The tribunal finds that the judge had fallen into material errors of law. The Tier 1 (Entrepreneur) Migrant rules are complex but Ahmed and Another (above) emphasises the restrictions which apply to the evidence which is admissible in Points Based System appeals. As Mr Wilding correctly submitted, the judge's key findings were based on inadmissible evidence. Nor did the judge reach any clear finding on the advertising material issue which he had earlier identified; see paragraph 41-SD(e)(iii)(1) of the Immigration Rules. The Respondent's own documents show that she made her application prematurely, before all of the specified documents were available. The reason why the documents must be produced with the application is to enable them to be verified by the Home Office. Simple errors by applicants are protected by paragraph 245AA of the Immigration Rules, but that provision had no relevance to the present case and there was no submission to the contrary.
9. It follows that the decision and reasons cannot stand and is hereby set aside. It was plain from the argument heard by the tribunal that the original appeal could only be re-made on one basis, namely that the specified documents had not been provided with the original application and that there had been no application to vary the original application before the decision to refuse it had been made by the Secretary of State. The tribunal finds that the original Appellant has failed to meet the mandatory requirements

of paragraph 41-SD, as stated in the reasons for refusal letter. The original appeal is accordingly dismissed.

DECISION

The making of the previous decision involved the making of material errors on points of law. The Secretary of State's appeal is allowed. The original decision is set aside.

The following decision is substituted:

The Appellant's appeal is dismissed

Signed

Dated

The Hon. Lord Burns

**TO THE RESPONDENT
FEE AWARD**

The appeal was dismissed so there can be no fee award

Signed

Dated

The Hon. Lord Burns