



IAC-AH-VP-V1

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

Appeal Number: IA/08066/2014

**THE IMMIGRATION ACTS**

**Heard at Centre City Tower, Decision & Reasons Promulgated  
Birmingham  
On 6<sup>th</sup> October 2015**

**On 13<sup>th</sup> October 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**FAISAL NAZIR  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: No Representation

For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against a decision of Judge of the First-tier Tribunal Hawden-Beal (the judge) promulgated on 11<sup>th</sup> July 2014.
2. The Appellant is a citizen of Pakistan born 29<sup>th</sup> September 1985 who applied for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant.
3. The application was refused on 27<sup>th</sup> January 2014 with reference to paragraph 245DD(h) and (i) the Respondent not being satisfied that the

Appellant was a genuine entrepreneur and that he genuinely intended to invest the money referred to in Table 4 of Appendix A in his business, and the Respondent was not satisfied that the money referred to in Table 4 of Appendix A was genuinely available to him.

4. The Appellant appealed to the First-tier Tribunal (the FtT) and requested that his appeal be decided on the papers without an oral hearing.
5. The appeal was allocated to the judge on 26<sup>th</sup> June 2014 and dismissed in a decision promulgated on 11<sup>th</sup> July 2014. The judge noted that neither party to the appeal had complied with directions, in that neither had served bundles of documents.
6. The Appellant applied for permission to appeal to the Upper Tribunal contending that a bundle of documentary evidence had been served on the Tribunal and the Respondent on 13<sup>th</sup> June 2014 and the judge had erred in law in not considering this evidence.
7. Permission to appeal was granted by Judge of the First-tier Tribunal P J M Hollingworth on 11<sup>th</sup> September 2014.
8. The Respondent then lodged a response dated 26<sup>th</sup> September 2014 pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the judge had directed herself appropriately, although acknowledging that the Respondent did not know what documents were included in the bundle, and therefore whether the fact that the judge had not considered the documents was material to the outcome of the appeal.
9. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

### **The Upper Tribunal Hearing**

10. There was no attendance by or on behalf of the Appellant. I was made aware that his representatives had on 5<sup>th</sup> October 2015 faxed an adjournment application to the Tribunal. That application requested an adjournment on the basis that similar cases had been decided by the First-tier Tribunal in a decision promulgated on 15<sup>th</sup> June 2015 and the appeals had been dismissed. An application for permission to appeal to the Upper Tribunal had been made. The basis of the adjournment application was that this appeal should be adjourned until the Upper Tribunal had decided the test cases.
11. Mr Smart opposed the application on the basis that the Tribunal could deal with the error of law decision in this appeal, as it was conceded that the decision of the First-tier Tribunal should be set aside and thereafter the appeal could either be adjourned or remitted to the FtT.
12. I decided that it was not in the interests of justice to adjourn this appeal at this stage. It was appropriate to make a decision on the error of law and I therefore decided to proceed with the hearing.

13. Mr Smart confirmed that he did not rely upon the rule 24 response which indicated that the appeal was opposed. Mr Smart confirmed that a bundle of documents had been received from the Appellant's representatives on 16<sup>th</sup> June 2014. If a bundle had been received by the Tribunal, then it was an error of law for that bundle not to have been considered.
14. Mr Smart also made an application to cite an unreported decision, that being IA/08066/2014 and twelve other cases that were decided by the First-tier Tribunal and dismissed in a decision promulgated on 15<sup>th</sup> July 2015.

### **My Conclusions and Reasons**

15. I am satisfied that the decision of the FtT must be set aside because of a material error of law. This is not the fault of the judge.
16. I am satisfied that the Appellant's bundle of documents was posted to the Tribunal on 13<sup>th</sup> June 2014 as I have seen proof of postage. I am also satisfied that the documents were received by the Tribunal on 16<sup>th</sup> June 2014. It appears that they were not linked to the file, and therefore the documents were not before the judge when she prepared her decision.
17. In finding an error of law I have taken into account the principles in MM (unfairness; E & R) Sudan [2014] UKUT 00150 (IAC) and I set out below the first paragraph of the head note to that decision;
  - (1) Where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-tier Tribunal (the FtT) to be set aside.
18. There has been a procedural impropriety in that the bundle of documents received by the Tribunal from the Appellant's representatives, was not placed before the judge. This has resulted in unfairness to the Appellant, which means that the decision of the FtT is set aside with no findings preserved.
19. I allowed the application to cite the unreported decision of the FtT, that being IA/08066/2014 and twelve other linked decisions as I was satisfied that requirements of Practice Direction 11 were satisfied.
20. It was suggested by Mr Smart that it was appropriate to remit this appeal back to the FtT. In considering this issue I have taken into account the Senior President's Practice Statement 7.2 which states;
  - 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;
    - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
    - (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-

made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

21. In my view the requirements of paragraph 7.2 are met, in that the Appellant did not have a fair hearing before the First-tier Tribunal, as the bundle of documents submitted on his behalf was not considered.
22. The Appellant has requested that his appeal be decided on the papers, and therefore the appeal will be considered on the papers by a First-tier Tribunal Judge other than Judge Hawden-Beal. If the Appellant wishes to have an oral hearing or wishes to have his case stayed until the result of the proceedings in the Upper Tribunal are concluded, he must make an application to the First-tier Tribunal. The file will be sent to the Birmingham Hearing Centre. If the appeal is considered prior to the Upper Tribunal proceedings being concluded, it will be a matter for the First-tier Tribunal Judge as to what weight to attach to the unreported First-tier Tribunal decision which the Respondent has been given permission to cite.
23. I direct that the Respondent file a bundle of documents to be relied upon on the First-tier Tribunal and the Appellant, within 28 days of the date of this decision being sent out.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

### **Anonymity**

The First-tier Tribunal made no anonymity direction. There has been no request to the Upper Tribunal for anonymity, and I see no need to make an anonymity order.

Signed

Date 7<sup>th</sup> October 2015

Deputy Upper Tribunal Judge M A Hall

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

No fee award is made by the Upper Tribunal. This must be considered by the First-tier Tribunal.

Signed

Date 7<sup>th</sup> October 2015

Deputy Upper Tribunal Judge M A Hall