Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/10648/2014
IA/10649/2014
IA/10650/2014
IA/10651/2014

THE IMMIGRATION ACTS

Heard at Field House
On 20 April 2015

Decision & Reasons Promulgated
On 05 May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR SARDAR ALI SHAH (FIRST APPELLANT)
MRS LAILA ILAHI (SECOND APPELLANT)
MISS ANMOL SHAH (THIRD APPELLANT)
MR MUHAMMAD KHALIL (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P Richardson, Counsel instructed by Morgan Mark Solicitors
For the Respondent: Mr N Bramble, Specialist Appeals Team

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal dismissing the appeals of the first and fourth appellants against the decision

© CROWN COPYRIGHT 2015

by the Secretary of State to refuse to grant them leave to remain as Tier 1 (Entrepreneur) Migrants on the grounds that they had not shown they were genuine entrepreneurs. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. The second and third appellants are related to the first appellant, Mr Shah, as wife and daughter respectively. They joined in the appeal of Mr Shah as his dependants.

3. Mr Shah and Mr Khalil are both nationals of Pakistan. They applied for Tier 1 entrepreneur status as fellow directors of SM Global Financial Limited, a company which had been set up to provide bookkeeping services. In support of their respective applications, they relied on a Barclays Bank account statement showing a balance in excess of £50,000 as of 10 July 2013; and a supply of services agreement between SM Global Financial Limited and Afro Hair and Beauty (Halston) Limited dated 15 August 2013.

4. The appellants made their application on 15 July 2013, and they were interviewed about their application on 16 October 2013. They were asked questions about the source of the funds which they said they were going to invest in the business, and about their business plan.

5. In February 2014 the Secretary of State gave her reasons for refusing the applications. The reasons were contained in separate refusal letters, but the grounds of refusal were to the same or similar effect. The Secretary of State was not satisfied that the appellants genuinely intended and were able to take over or become a director of one or more businesses within the next six months; or that they genuinely intended to invest the money referred to in Table 4 of Appendix A in the Immigration Rules in their business or businesses; or that the money referred to in Table 4 of Appendix A of the Immigration Rules was genuinely available to them and would remain available to them until such time as it was spent by their business or businesses.

6. In the refusal letter, the respondent referred to paragraph 245DD(i) of the Rule which stated that, in making the assessment in subparagraph (h) of paragraph 245DD, the Home Office might take into account the following factors:

(i) the evidence the applicant has submitted;

(ii) the viability and credibility of the source of the money referred to in Table 4 of Appendix A;

(iii) the viability and credibility of the applicant's business plans and market research into their chosen business sector;

(iv) the applicant's previous educational and business experience (or lack thereof);

...

(vii) any other relevant information.

7. On the topic of the viability and credibility of the source of the money referred to in Table 4 of Appendix A, the respondent referred to the conflicting answers which the appellants had given in their respective interviews. When asked in interview how he had obtained the funding of £50,000, Mr Khalil said the money was from his own savings, and it came from Pakistan. But after checking through his current bank account statements, there was no evidence that he had received any money from Pakistan as claimed. According to Mr Khalil's bank statements, he received a modest monthly salary from his job with Manpower. So the respondent did not find it credible that he would be able to save £25,000 as his half stake in his proposed business whilst living and maintaining himself in the UK. Also, looking at his bank statements he had a total of £20,000 that had been deposited in his Barclays Bank account from Mobile – Channel FT. When asked in interview where these funds had come from, he replied he did not know, it could be his cousin's account. The respondent did not find it credible that neither he nor Mr Shah would know where a deposit of £20,000 into the joint bank account originated from.

8. Under the heading of the viability and credibility of the applicants' business plans and market research in their chosen business sector, the respondent said that the business plan was heavily based on the business plans found on various online websites, including a business plan for MIK Enterprise Limited and then KNOJ Limited, copies of which had been copied and included with the refusal notice. This undermined the credibility of their business plan, which they claimed to lay out their business strategy for the operation of their proposed business. After checking Yell.com, the respondent found at least 40 other bookkeeping services within a two mile radius of their current trading address. Mr Khalil had stated in interview that he had one contract for £1,500 from Afro Hair and Beauty in Halston, and had received a payment of £500 already. But there was no deposit or payment from the above named business into the company bank account. He also stated he had breached the contract, as he was unable to fulfil the contract while he was awaiting a visa. Looking at the contract, the wording on the contract had the same wording as that used in the advertisement which he had placed in the Daily Jang. The respondent therefore did not find the contract supplied with the application to be credible. The chances of the business being successful when faced with so many competitors in the existing area seemed unlikely at best. The respondent did not see what his proposed business would offer which would result in customers of other bookkeeping businesses being attracted into becoming customers of the appellants' business. It seemed that they had no clear idea of how their business would operate. Their answers at interview relating to their proposed business and the market research were generally poor and lacking in detail. The respondent was not satisfied that the appellants had a viable and credible business plan.

The Hearing Before, and the Decision of, the First-tier Tribunal

9. The appeal eventually came before Judge J D L Edwards sitting in the First-tier Tribunal at Richmond Magistrates' Court on 24 November 2014. The judge was invited to take into account a bundle of documents compiled by the appellants' solicitors running to 142 pages. The judge also received oral evidence from both Mr Shah and Mr Khalil, whose evidence in rebuttal of the concerns raised in the refusal letters is summarised in paragraphs [20] to [22] of the judge's subsequent decision.

10. In the course of the hearing, Mr Richardson referred the judge to the case of **Ahmed (PBS: admissible evidence) [2014] UKUT 365**. The head note of this decision reads as follows:

> 1. Where a provision of the Rules (such as that in paragraph 245DD(k)) provides that points will not be awarded if the decision maker is not satisfied as to another (non-points scoring) aspect of the Rule, the non-points scoring aspect and the requirement for points are inextricably linked.
>
> 2. As a result, the prohibition on new evidence in s85A(4) of the Nationality, Immigration and Asylum Act 2002 applies to the non-points scoring aspect of the Rule: the prohibition is in relation to new evidence that goes to the scoring of points.

11. In his subsequent decision, the judge referred to **Ahmed** at paragraph [7]. He summarised the effect of the decision as being that where a PBS application is made and refused, the assessment of the judge is to be made on the material that was before the decision maker, rather than a new consideration of new material. It must not be on the basis that a different way of presenting the application would have produced a different result. He recorded Mr Richardson as protesting that this was unfair and unappealable, but that he was constrained to follow **Ahmed**.

12. The judge's findings were set out from paragraph [25] onwards. He did not find Mr Khalil and Shah to be the most impressive witnesses, being prone to long rambling answers that were not responsive to questions asked of them.

13. At paragraph [26] he did not accept Mr Richardson's proposition that the respondent was precluded from asking questions about the source of funds in a bank statement relied on by the applicants:

> In this case Mr Khalil and Mr Shah have both given unsatisfactory answers touching their income and, particularly expenditure over the years so as to allow them to build up the level of savings they claim. It would appear that for substantial periods both have been remarkably parsimonious on the amounts they have spent on themselves.

14. At paragraph [27], the judge said he was troubled by one of the pay slips at page 88 of the appellants' bundle. At paragraph [28] he said there was a further problem with the profit and loss account allegedly prepared by the appellants' accountants. He noted that it had been altered in manuscript, and he did not accept that a

competent accountant would act in this way. At paragraph [29], he said he was further troubled by the contradictory answers given by Mr Shah and Mr Khalil in interview as to how they knew each other. One said they were cousins, but the other made no mention of the family relationship. At paragraph [30], he said that, looking at the business plan in the round, Mr Shah and Mr Khalil had some academic training that might transfer to their sphere of work. But there was little before him to confirm what the extent of the market for their services might be, other than one small contract. He did not accept that local accountants would be prepared to subcontract work to them, in effect acting against their own best interests. He did not accept that a rebate of 50p an hour over a trained accountant's fee would act as an incentive to transfer custom; and in any event £10 an hour seemed a remarkably cheap rate for an accountant anyway.

15. He concluded at paragraph [31] that the appellants had not placed before him sufficient evidence to establish on a balance of probabilities that they met all the requirements of the Rules.

16. The judge went on to dismiss the appeal under the Rules, and also under Article 8 ECHR.

The Application for Permission to Appeal

17. Mr Richardson settled an application for permission to appeal to the Upper Tribunal on behalf of the appellants. Ground 1 was that the judge had failed to approach the evidence that was before him in a consistent way, and had failed to make it clear upon what evidence he was basing his conclusions. On the assumption that **Ahmed** was correctly decided, which was not accepted by Mr Richardson, it followed that the judge could only have regard to the evidence that was before the decision maker when determining the appeal. Accordingly, the judge could not have any regard to the new evidence in the 142 page bundle to which he referred in paragraph [7] of his decision. It was also submitted that, if **Ahmed** was correct, the judge could not have regard to the oral evidence of the appellants about the genuineness of their intentions and the availability of funds. Accordingly, the reasoning in paragraphs [25] and [26] of the decision was materially flawed. The Tribunal could not have its cake and eat it. If new evidence is prohibited, a judge could not cherry pick those parts of such new evidence that he felt harmed an appellant's case, and ignore those parts which assisted the appellant's case.

18. Ground 2 was that the judge had failed to address a point of law that Mr Richardson had raised at the hearing. If **Ahmed** was correct, it followed that the appellants were the victims of common law unfairness, applying **Naveed (Student – fairness – notice of points) [2012] UKUT 14**, as the effect of **Ahmed** was to deprive the appellants of the opportunity to provide further evidence of the genuineness of their business or of the provenance of the funds that they intended to invest in their business. If it is right that they could not produce such evidence on appeal, the decision of the

Secretary of State was "common law unfair", and the First-tier Tribunal Judge should have so ruled.

19. Ground 3 was that the reasoning of the judge in paragraphs [27], [29] and [31] was flawed. It was particularly unfair for the judge to criticise the appellants in paragraph [31] for not putting enough evidence before him. Firstly, the judge would not have been permitted to look at the same (applying **Ahmed**) and secondly, the judge had ignored nearly all the new evidence that had been placed before him.

The Grant of Permission to Appeal

20. On 27 January 2015 Designated Judge Garratt granted permission to appeal on grounds 1 and 2 for the following reasons:

> Whilst the third ground appears to be no more than a disagreement with the reasoned findings of the judge the first two grounds have arguable merit. That is because the decision does not make it clear how the judge approached evidence submitted by the appellant which post-dated the application, such as the pay slip and profit and loss account referred to in paragraphs 27 and 28 of the decision. Further, although the judge appears to have considered the appeal on the basis of the genuineness of the proposed business, it is not explained why the specific aspects of paragraph 245D of the Immigration Rules, to which the judge refers in paragraph 4, had not been met by the appellants.

The Rule 24 Response

21. John Parkinson of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. He observed that it was somewhat ironic that the appellants were relying on s85A to disqualify the judge from considering evidence that they had submitted. Any error of law was not material:

> Given the appellants' clear inability to demonstrate to the respondent on the evidence that they met the rules the appeal would have fallen to be dismissed.

The Hearing in the Upper Tribunal

22. At the hearing before me, Mr Bramble agreed with Mr Richardson that the effect of **Ahmed** was to render inadmissible some of the evidence relied on by the judge as undermining the appellants' case. But Mr Bramble submitted that the judge's reasoning in paragraph [26] was sufficient to sustain the conclusion that the appellants had not discharged the burden of proving that the Secretary of State had been wrong to refuse their application by reference to subparagraph (h) of paragraph 245DD.

23. Mr Richardson accepted that the judge's reasoning in paragraph [26] related to what the appellants had said in interview, and was therefore admissible evidence. But he submitted that the judge had not given adequate reasons at paragraph [26], as he had

not listed the unsatisfactory answers by Mr Khalil and Mr Shah to which he was referring.

24. He submitted that the judge had not adequately addressed the specific points advanced against the appellants in the refusal decisions, and that the appellants had thereby been deprived of a fair hearing in the First-tier Tribunal. Consequentially, he submitted that the decision should be set aside in its entirety, and remitted to the First-tier Tribunal for a de novo hearing. In addition, Mr Shah had now accrued ten years' lawful residence in the United Kingdom, and he invited me to direct the respondent to decide whether Mr Shah qualified for leave to remain on the grounds of long residence.

25. Mr Richardson agreed that, in the light of the stance which he was taking by way of appeal to the UT, the rehearing of the Tier 1 appeals in the FTT would be a submissions only hearing. He would not be calling the appellants as witnesses, and he would not be relying on any documentary evidence that was not before the Secretary of State at the time of decision. In the circumstances, Mr Bramble submitted that it would be appropriate for the Upper Tribunal to remake the decision, if an error of law was found.

26. I reserved my decision on whether there was a material error of law such that the decision should be set aside; and, if there was a material error of law, the forum in which the decision should be remade.

Discussion

Grounds 1 and 3

27. It is agreed by the parties that most of the reasons given by the judge for dismissing the appeal do not stand up to scrutiny. This is either because the reasons relate to new evidence tendered by way of appeal, which is inadmissible following **Ahmed**, or, in the case of paragraph [29], because the criticism does not stand up to scrutiny. Although the refusal letters accused Mr Shah and Mr Khalil of giving contradictory answers on the question of how they knew each other, Mr Bramble accepts that on a fair reading of the interview transcripts this particular allegation is without merit.

28. However, one of the two main reasons given by the respondent for disputing that the appellants are genuine entrepreneurs was the credibility of the source of their investment funds. Although the judge does not detail "the unsatisfactory answers" given by Mr Shah and Mr Khalil in their respective interviews, they are clearly set out in the refusal decisions. The discrepancies highlighted in the refusal letters are unanswerable and will remain so, as Mr Richardson's position is that the appellants cannot and will not adduce any evidence which addresses them. Of particular note is that neither Mr Khalil nor Mr Shah was able to explain the deposit of £20,000 from Mobile – Channel FT. This sum represented 40% of the funds said to be available for investment, and the inability of either entrepreneurial team member to explain the

origin of these funds reasonably led to the conclusion that they had not shown that £50,000 of investment funds was genuinely available to them.

29. It may be the case that the appellants did not receive a fair hearing on the new evidence relied on at the hearing, but that is now accepted to be irrelevant. So I have not reviewed the new evidence to see to what extent it retrospectively bolsters the appellants' credibility.

30. I have however reviewed the interview record on which the respondent based her adverse decision. I have not been shown, nor am I persuaded, that the appellants did not receive a fair hearing in the First-tier Tribunal on the crucial question of whether the Secretary of State was right to refuse the application on credibility grounds, based *inter alia* on the appellants' performance in interview.

31. The other main ground for disputing that the appellants were genuine entrepreneurs was the viability and credibility of their business plan. Although the business plan was not apparently put before the judge, it was not disputed that the plan was plagiarised from business plans published on the internet, including the business plan for MIK Enterprise Limited. In argument before me, Mr Richardson accepted that the role of the judicial decision maker in an appeal such as this is more than simply discharging a reviewing function, as would be the case in an application for judicial review. Accordingly, it was open to Judge Edwards to endorse any concerns expressed by the respondent regarding the viability and credibility of the appellants' business plan and market research into their chosen business sector, which he does in paragraph [31].

32. I do not consider that **Ahmed** prevents the judicial decision maker from taking into account evidence which is adduced, or elicited in cross-examination, on the topic of a business plan whose credibility and viability has been discussed and challenged in the refusal decision.

33. In conclusion, although much of the reasoning of the judge must be disregarded, there is a sufficient body of sustainable reasoning going to the two main concerns ventilated in the refusal decision such as to constitute adequate reasons for dismissing the appeals of Mr Shah and Mr Khalil.

Ground 2

34. In **Ahmed**, the First-tier Tribunal Judge allowed the appeal of the Tier 1 entrepreneurs because the new evidence which they had provided persuaded her that they were genuine entrepreneurs. After the Upper Tribunal set aside her decision as being erroneous in law, the representative for the entrepreneurs informed the UT that they would like to withdraw their appeal, rather than have it remade, on the basis that they were instead going to make a new application supported by the new evidence which had become available to them, "no doubt during the course of the business which they have been seeking to run ever since they set it up at the end of 2012".

35. It is open to the appellants to make a new application, relying on new evidence which addresses the concerns raised by the respondent in the refusal letters.

36. This is a partial answer to Ground 2. The UT in **Ahmed** saw nothing unfair in the applicants being refused on credibility grounds by reference to the pre-decision evidence, and not being able to succeed in their appeal by reference to post-decision evidence, even though it retrospectively established that they had been genuine entrepreneurs all along.

37. These cases are distinguishable from the paradigm case of **Naveed** because the grounds of refusal cannot reasonably be categorised as grounds "of which he did not know and could not have known". The rules specify the specific matters which are taken into account by the SSHD in assessing whether a Tier 1 entrepreneur application is genuine, and the fact that the appellants were invited to an interview carried with it the implied threat that they might be subsequently refused on credibility grounds if their performance in interview was deemed to be unsatisfactory.

38. So the decisions appealed against were in accordance with the law, and the appellants were not victims of common law unfairness.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. These appeals against the refusal of leave to remain, and against concomitant removal decisions under Section 47 of the 2006 Act, are dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson