



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/18646/2014  
IA/18703/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 27<sup>th</sup> July 2015

Decision & Reasons Promulgated  
On 11<sup>th</sup> August 2015

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

GANESH GNAWALI  
TARA NATH PATHAK

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A Syed-Ali instructed by Immigration Aid

For the Respondent: Mr D Clarke, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants are citizens of Nepal born on 29<sup>th</sup> September 1984 and 14<sup>th</sup> March 1980. They appeal against the decision of First-tier Tribunal Judge Scobbie dismissing their appeals against the refusal of leave to remain as Tier 1 (Entrepreneur) Migrants under the Immigration Rules and on human rights grounds.
2. Permission to appeal was sought on the grounds that the Judge had misinterpreted paragraph 245DD of the Immigration Rules and the accumulation of points under

the points based system [PBS]; misapplied the evidential standard of proof; failed to consider the evidential flexibility policy under paragraph 245AA; and failed to consider the Appellants intentions in considering Article 8.

3. Permission to appeal was granted by Upper Tribunal Judge McGeachy on 4<sup>th</sup> June 2015 on the ground that having found that the financial requirements of the Rules were met at paragraph 29, there was a lack of clarity in the subsequent paragraphs in relation to whether the Appellants genuinely intended and were able to establish their business.

### Submissions

4. Mr Syed-Ali relied on his skeleton argument and submitted that Ahmed (PBS: admissible evidence) [2014] UKUT 00365 (IAC) was wrongly decided. The prohibition under section 85A(4) of the Nationality Immigration and Asylum Act 2002 [NIA] in relation to new evidence that goes to the scoring of points did not prohibit the Appellants from establishing the non-points scoring based facts.
5. The Appellants had been invited for interview after submitting their applications and therefore could not be expected to submit evidence in relation to whether their applications were genuine at the time of the application. To prevent the Appellants from submitting new evidence on appeal was unfair and therefore the Judge should have allowed the appeal on the basis that the Respondent's decision was not in accordance with the law.
6. The Judge placed too much weight on the Appellants' interviews. Had the judge accepted the Appellants' evidence he would have concluded that their applications were genuine and they were entitled to the points in relation to funds. The Judge erred in law in taking into account the Appellants' post decision evidence following Ahmed, which prevented the Judge from making a finding in the Appellants' favour. The decision was lacking in clarity and should be set aside and re-heard.
7. Mr Clarke submitted that Ahmed was good law, although it would appear from the decision that the Judge was not made aware of it. This was not material because the Appellants were not entitled to points if they failed the genuineness test. It was clear from paragraph 245DD(j) that the Respondent had discretion to consider further evidence. The Judge had taken into account the Appellants' interviews and their subsequent evidence. The Appellants had been given an opportunity to explain the discrepancies in interview. Their accounts were vague and they were unable to give specific details when asked. Although the Judge found that the funds were available, he was entitled to find that the Appellants did not genuinely intend to invest those funds on the evidence before him. The market research had been copied and there were concerns over the required skills. The Judge had not applied the wrong standard of proof.
8. Mr Clarke submitted that paragraph 245AA applied to specified documents and was not relevant in this case. The Appellants had no legitimate expectation under Article 8.

9. Mr Syed Ali submitted that he did not rely on Article 8 save to say that it added weight to the argument to admit the Appellants' evidence. In relation to paragraph 245AA, he submitted that it applied to specified documents and therefore its scope was limited. The discretion under paragraph 245DD(j) was wider and therefore should not be strictly applied. In this case the Respondent should have asked the Appellants, prior to interview, to submit evidence of their intentions and ability to establish their business in order to deal with the Respondent's concerns about whether the applications were genuine. The failure to do so made a non-points scoring aspect into a points scoring one.
10. In summary, following Ahmed, the Judge had erred in law in taking into account further evidence. The Judge should have found that the Respondent's decision was not in accordance with the law because unfairness had taken place. The decision should be set aside and re-heard on the basis that Ahmed was wrongly decided and evidence relating to non-points scoring aspects of the PBS was admissible on appeal.

### Relevant law

11. In Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC), the panel of the Upper Tribunal chaired by Mr Ockelton, the Vice President, held that:
  - “1. Where a provision of the Rules (such as that in para 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 s 85A(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”.
12. Section 85A of the NIA Act 2002 provides as follows:

“85A Matters to be considered: new evidence: exceptions

  - (1) This section sets out the exceptions mentioned in Section 85(5).
  - (2) Exception 1 is that in relation to an appeal under Section 82(1) against an immigration decision of a kind specified in Section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision.
  - (3) Exception 2 applies to an appeal under Section 82(1) if –
    - (a) the appeal is against an immigration decision of a kind specified in Section 82(2)(a) or (d),
    - (b) the immigration decision concerned an application of a kind identified in Immigration Rules as requiring to be considered under a “points-based system”, and
    - (c) the appeal relies wholly or partly on grounds specified in Section 84(1)(a), (e) or (f).
  - (4) Where Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it –

- (a) was submitted in support of, and at the time of making, the application to which the immigration decision related,
- (b) related to the appeal insofar as it relies on grounds other than those specified in sub-section 3(c),
- (c) is adduced to prove that the document is genuine or valid, or
- (d) is adduced in connection with the Secretary of State's reliance on a discretion under Immigration Rules, or compliance with a requirement of Immigration Rules, to refuse an application on grounds not related to the acquisition of "points" under the "points-based system".

### Discussion and conclusion

13. Mr Syed-Ali makes a very unusual submission. He seeks to rely on Ahmed to show that the Judge made an error of law and then having got the decision set aside on that basis he seeks to argue that Ahmed was wrongly decided. For the reasons given below I do not find that he succeeds on either of his submissions.
14. Applying Ahmed, the Appellants were not prevented from rebutting allegations made in the refusal letter. The Appellants can give evidence and make comments as to why the material produced to the Respondent with the application should not have led the Respondent to find that the business was not genuine without offending section 85A. They did so in witness statements dated 9<sup>th</sup> December 2014. The Appellants have been able to exercise their right of appeal, even though it only allowed consideration of the material before the decision-maker and did not allow new material to be considered. There was no unfairness as alleged in the grounds of appeal.
15. The Judge properly reviewed the Respondent's decision and concluded at paragraph 29 that the Appellants had produced their bank statements as required under the Immigration Rules which showed that they had the required funds of £50,000. The Respondent had not notified the Appellants of any concerns over the provenance of funds and therefore the Respondent could not rely on the matters relied on in the refusal letter in that respect.
16. The Judge then went on to consider whether the Appellants genuinely intended and were able to invest those funds in their business. He took into account the interviews and the Appellants comments on the matters raised in the refusal letter. He concluded that there were discrepancies in the interviews, which were not adequately explained, and the Appellants were unable to give specific details when asked. The Appellants were unable to name any of their potential clients whom they intended to target or to explain how they came to work out the specific figures in their business plan. The Judge concluded that the Respondent was justified in finding that the Appellants' applications were not genuine.
17. I accept that the decision could have been expressed with greater clarity, but this did not amount to an error of law. The Judge's decision was consistent with the principles set out in Ahmed, even though he has not specifically referred to the

decision. There was no error of law in the Judge's approach. The Judge's finding that the Appellants had not shown that they genuinely intended and were able to establish a business was open to him on the evidence before him. The Judge gave adequate reasons for this finding and applied the correct standard of proof.

18. Mr Syed-Ali's oral submission was contrary to his skeleton argument, at paragraph 27, in which he stated that the Judge had failed to consider the explanatory evidence of apparent discrepancies at the interview and therefore the Judge had erred in law in preventing the Appellants from establishing a non-points based fact which was not related to scoring points under the PBS (section 85A(4)(d)).
19. There was no merit in this ground of appeal, which may be the reason why Mr Syed-Ali did not rely on it in oral submissions, because the Judge clearly took the explanatory evidence into account at paragraphs 20 to 26 and referred to it in his findings at paragraphs 31 to 33.
20. I agree with Mr Clarke that paragraph 245AA did not apply. It was a matter for the Respondent whether she required additional information under paragraph 245DD(j). Mr Syed-Ali did not seek to rely on Article 8 outside the Immigration Rules.
21. The Appellants were interviewed and submitted comments in relation to those interviews on appeal. The Appellants had been given an opportunity to challenge the Respondent's decision, but had failed to show that their applications were genuine under the Immigration Rules.
22. The Judge had properly applied paragraph 245DD (k) which states: "If the Secretary of State is not satisfied with the genuineness of the application in relation to a points scoring requirement in Appendix A those points will not be awarded."
23. Therefore, I find that there was no error of law in the decision of the First-tier Tribunal dated 21<sup>st</sup> December 2014 and the appeal is dismissed.

### **Notice of Decision**

**Appeal dismissed.**

**No anonymity direction is made.**

Signed

Date 3<sup>rd</sup> August 2015

Upper Tribunal Judge Frances

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

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 3<sup>rd</sup> August 2015

Upper Tribunal Judge Frances