



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19502/2014
IA/19506/2014

THE IMMIGRATION ACTS

Heard at Field House
On 22 October 2015

Decision & Reasons Promulgated
On 2 November 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Ruchi Ruchi
Anand Singh

[No anonymity direction made]

Claimants

Representation:

For the claimants: Mr R Sharma, instructed by Charles Simmons Solicitors
For the appellant: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Ruchi Ruchi, date of birth 11.2.89, and Anand Singh, date of birth 25.5.82, are citizens of India.
2. The Secretary of State appealed against the decision of First-tier Tribunal Judge Manuell promulgated 23.2.15, allowing the claimants' linked appeals against the decisions of the Secretary of State, dated 10.4.14, to refuse their applications for leave to remain (LTR) in the United Kingdom as a Tier 1 entrepreneur and dependant. The Judge heard the appeal on 28.1.15.

3. First-tier Tribunal Judge Hollingworth granted permission to appeal on 23.4.15.
4. Thus the matter came before me on 15.9.15 as an appeal in the Upper Tribunal. I found that there were such errors of law in the making of the decision of the First-tier Tribunal that the decision of Judge Manuell should be set aside, to be remade in the Upper Tribunal, reserved to myself.
5. In summary, although the refusal was for 'non-points scoring reasons,' pursuant to section 85A(4) of the 2002 Act, and following Ahmed and another (PBS: admissible evidence) [2014] UKUT 00365 (IAC), I found that it was an error of law for the First-tier Tribunal Judge to take into account evidence other than that which was submitted with the application, or at least before the Secretary of State at the time the decision was made on 10.4.14. In this case, before making her decision, the Secretary of State invited the claimants for interview. I also found that there was nothing procedurally unfair about that process, particularly since paragraph 245DD(h) makes it clear that an applicant has to satisfy the Secretary of State on the balance of probabilities that the application is genuine and credible.
6. As the First-tier Tribunal judge referred to at §4 of the decision, under section 85(4) of the 2002 Act, the ability of the Tribunal to consider the circumstances prevailing at the date of the appeal hearing is circumscribed by section 85A(4). In a points based system (PBS) appeal, the Tribunal may consider evidence adduced by an appellant only if it was submitted in support of, and at the time of making, the application to which the immigration decision related. Despite that prohibition, at §12 Judge Manuell considered that "Since the respondent had chosen to challenge the substance of the business on general grounds the appellant was free to produce additional documentary evidence to rebut the respondent's allegations." This may thought to be justified by a reading of section 85A(4)(d), which states that evidence may be considered if it 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 "point" under the "Points Based System."
7. However, this very issue arose, in a case almost on all fours with the present appeal in Ahmed and another (PBS: admissible evidence) [2014] UKUT 00365 (IAC), where a panel including the Vice President held that "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. 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."
8. At §5 of Ahmed, the Tribunal explained, "the purpose of that provision is quite clear. It is that where a Points Based application is made and refused, the assessment by the judge is to be of the material that was before the decision-maker rather than a new consideration of new material. In other words the appeal if it is successful is on the basis that the decision-maker with the material before him should have made a

different decision, not on the basis that a different way of presenting the application would have produced a different decision.”

9. Ahmed related to exactly the same reason for refusal as in the present case, reliance on paragraph 245DD(k) for not awarding PBS points. The decision states that, “For the reasons stated earlier in this letter, under the heading “Non-Points Scoring Reasons for Refusal”, the Secretary of State is not satisfied as to the genuineness of your application and, in accordance with paragraph 245DD(k) of the Immigration Rules, no points have been awarded in this area.”
10. In Ahmed the First-tier Tribunal Judge took into “material other than that which was before the decision-maker.” Mr Sharma skilfully sought to distinguish Ahmed by suggesting that it prohibits only documentary evidence and not oral evidence, and that in the present appeal the judge was relying on the oral evidence of the claimant(s) in order to make a credibility finding that differed from that of the Secretary of State. I can see no basis in fact, law or logic for making any such distinction. I do not accept that Ahmed can be rationalised in that way, even though it was not entirely clear what additional evidence had considered. I pointed Mr Sharma to §8 of Ahmed, where the Tribunal held that the judge “is prohibited from hearing evidence which does go to the acquisition of points. On the basis of the principle set out at §5 of Ahmed, there is no purpose in considering any oral evidence at all in relation to a non-points-scoring issue that is relied on not to award points.
11. Neither did I accept the submission of Mr Sharma that, based on Naved (Student – fairness –notice of points) [2012] UKUT 14 (IAC), that it the decision is unfair. Naved held that fairness requires the Secretary of State to give an applicant an opportunity to address grounds for refusal, of which he did not know and could not have known, failing which the resulting decision may be set aside on appeal as contrary to law (without contravening the provisions of s85A of the Nationality Asylum and Immigration Act 2002).” However, the Secretary of State did give the claimants the opportunity to address the concerns, by inviting them for interview. There was nothing procedurally unfair about the process of inviting for interview before making a decision based on a non-points-scoring issue, especially since 245DD(h) sets out for all applicants that the Secretary of State has to be satisfied on the balance of probabilities that the application is genuine, and the criteria by which that assessment is to be made.
12. I can see no basis at all for distinguishing Ahmed from the present case. It follows that the decision must be set aside to be remade. I would have proceeded to remaking the decision at the same hearing of 15.9.15, given that it necessarily followed from Ahmed that there was no purpose in further oral evidence. At §5 of Ahmed, the Tribunal explained that, “...where a Points Based application is made and refused, the assessment by the judge is to be of the material that was before the decision-maker rather than a new consideration of new material. In other words the appeal if it is successful is on the basis that the decision-maker with the material before him should have made a different decision, not on the basis that a different way of presenting the application would have produced a different decision.”

13. However, as explained in §16 of my error of law decision, it was not entirely clear what material had been submitted with the application and that which had been submitted post decision. The refusal decision sets out those documents which had been considered by the Secretary of State, but Mr Sharma submitted that such a list may not be entirely reliable. I therefore agreed, somewhat reluctantly, to adjourn the remaking of the decision, issuing directions for each party to lodge and serve on each other a comprehensive list of the documents alleged to have been submitted with the application made by the second claimant. It was not necessary to reserve the appeal bundles and I directed that reference to the pagination of the documents contained within the First-tier Tribunal appeal bundles would suffice.
14. There was no compliance with the direction by the Secretary of State, and the late-served letter from the claimants' representatives, dated 20.10.15, purporting to "clarify what exactly the appellant provided with the initial application," proved to be woefully inaccurate and not at all helpful to the purpose of issuing the directions, combining as it did in the list some documents that were, as Mr Sharma accepted, clearly produced post application, with those that were submitted with the application. It took some time at the hearing to ascertain that many of the documents listed in the letter could not have been submitted with the application, as they were only created or dated after the application was submitted on 9.9.13. In fact, the list contained within the refusal decision proved to be more accurate.
15. For example, the representative's letter purports that the marketing material at A286-291 of the claimants' appeal bundle was submitted with the application, when it comprises an invoice for printing "marketing material" dated only 8.7.14, allegedly paid in cash. In any event, I doubt the reliability of this invoice, as it does not state how many documents were printed. It is followed in the bundle by what appears to be a copy of a leaflet printed for what Mr Sharma described as the unfortunately named ASS Consultants Ltd. Mr Sharma was unable to agree that this was the leaflet produced as a result of that invoice, but the evidence rather suggests that it is, and in the absence of any evidence to the contrary, I so find. It follows that this evidence including the leaflet could not have been before the Secretary of State when the decision was made in April 2014, but has been produced since the refusal and should be excluded from consideration as to whether the claimants met the requirements of the Rules.
16. In passing, I observe that the very production of this post decision leaflet evidence begs the further and significant question as to why it was produced after refusal and before appeal. The claimants submitted no evidence of any other leaflet which would support the claim made in interview that 50,000 leaflets had been distributed prior to the making of the application. It is curious that even though the claimants' appeal bundle contained many documents produced long after the application and even after the decision of the Secretary of State, the claimants did not trouble to include in the First-tier Tribunal appeal bundle evidence addressing many of the reasons for refusal, such as evidence of the leaflet distributed, even though, as I have ruled in the error of law decision, such evidence cannot be taken into account.
17. Paragraph 245DD(h) provides that the Secretary of State must be satisfied that the applicant genuinely intends and is able to establish, take over or become a director of

one or more businesses in the UK within 6 months, or has done so and continues to operate that business or those businesses. Under 245DD(i), in making that assessment the Secretary of State will assess the balance of probabilities. Such an assessment involves more than merely production of specified documents. In making the assessment the Secretary of State may take into account the factors set out under 245DD(i).

18. It is worth noting that under 245DD(j) the Secretary of State reserves the right to request additional information and evidence to support the assessment in (h). 245DD(m) also provides that the applicant must, unless he provides a reasonable explanation, comply with any request made by the Secretary of State to attend for interview. The interview is thus part of the process envisaged by the Rules. Paragraph 245DD(k) provides that 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. The obvious consequence of that will be the refusal of the application.
19. It does not appear that the Secretary of State requested any further evidence in this case, but did invite the second claimant for interview, which took place on 19.3.14. In remaking the decision in the appeal I thus have to decide whether, on the basis of the documents submitted with the application and the second claimant's responses to questions in interview, the Secretary of State should have made a different decision when assessing on the balance of probabilities whether the second claimant is a genuine entrepreneur, and did so by taking into account certain of the factors set out under paragraph 245DD(i), including the viability and credibility of the business plans and market research, as explained in the refusal decision.
20. For the reasons set out herein, I am satisfied that the claimants failed to demonstrate on evidence submitted with the application and on the content of the interview and on the balance of probabilities that the application is genuine and that the business plan is viable or credible.
21. In respect of the viability and credibility of the business plans and market research, the claimants asserted that 50,000 leaflets had been distributed and that Mr Singh had interviewed 30 people. As stated above, on the limited evidence there is no evidence that any such leaflets existed, or were printed, or distributed; the assertion rests on the claim alone. As the refusal decision set out, Mr Singh did not state where the leaflets were distributed and produced no evidence to enable the Secretary of State to be satisfied that any market research or the acquisition of primary data had taken place, making it impossible to assess the viability or credibility of the market research. I accept that he was not asked in interview where the leaflets were distributed, but it is the absence of evidence as a whole as to market research which is relied on in the refusal decision, not simply the location of distribution of leaflets.
22. Whilst there is no prohibition on Mr Singh using the Internet and his own dissertation as source of secondary data, the point made in the refusal decision is that he has done nothing other than copy Internet passages and his own dissertation into the business plan. It is for the claimant to demonstrate the viability and credibility of

market research. I find that his actions, taken as a whole in the context of the evidence in the round, do not demonstrate any viable or credible market research.

23. The refusal decision relies on the fact that the business has not been set up. Mr Sharma submitted that it was an entirely sensible course of action to await the grant of leave before taking substantive steps to set up the business. However, the claimants' case is that they have taken substantial steps. Although the business has not been formally set up, they have been advertising and even entered into a contract. He had published one Gumtree advert and claims to have advertised on Facebook.
24. I have grave concerns as to the reliability of the evidence and in particular as to the claimed contract, purported to be dated 9.9.13, shortly before the application was made.
25. The services offered set out are those lifted word for word from the generic Home Office SOC code website for Code 2436 for construction project managers and related professionals, rather than anything specifically adapted to the claimants' particular proposed business. In my view this is no more than a poor attempt to try and meet the requirements of the Rules and not demonstrative of a genuine business.
26. There is no credible evidence that the claimants have any relevant qualification to operate a business as a building contract manager. Mr Singh has a degree in personal management HR, and a masters in Business Administration. He claims to have worked as a labour supervisor and as a site access controller at a railway station, maintaining records of those coming and going and maintaining the fire alarms. Mr Singh has not demonstrated how this apparently unskilled work qualifies him by experience for managing large construction projects. I find that he has little relevant experience at all and none which relates to management of contracts, and there was no evidence of any of this so-called work experience submitted with the application.
27. The company has been registered at Companies House, but it is clear the purported business is not in a position to operate professionally as claimed. I have grave concerns that the claimants claim to have embarked on providing professional services when they do not hold any public liability insurance for doing so, having only allegedly taken a few quotes. Neither do the claimants have any health and safety training, experience or qualifications. Neither is there any evidence that the business is registered with any supervisory or professional body for the industry in which it intends to operate. Neither do they have any business premises, but claim to be working from home. Whilst working from home is not proscribed, taking the evidence taken as a whole, strongly suggests little effort has been put into establishing a genuine, credible and viable business. Mr Sharma sought to rely on the work experience evidence at A287, but it appears that this is also post-application evidence.
28. The refusal decision also points out a number of concerns about the submitted contract. Mr Singh has not provided any credible explanation in interview as to how this contact came about. His answers are vague and lacking in detail. The contract refers to being paid 7%, but the contact does not set out any detail of the fee to be

charged. I found the claimant's answer at Q15 as being 7% of the service fee "apart from the payment" as entirely vague and lacking in clarity. Neither did I accept Mr Sharma's explanation that paragraph 2.2 of the contract (at A235) provides any meaningful answer. The suggestion that the other party reimburses the costs disbursed by the company plus 7% makes little sense in the light of Mr Singh's answer in interview. I am not satisfied that Mr Singh in fact understood it in the same way Mr Sharma submitted it should be interpreted.

29. The interview provided Mr Singh with the opportunity to elaborate on his application. There was nothing unfair about the open-ended questions asked. I reject the submission that he should have been provided information in advance as to the questions asked or that it is unfair to rely on the absence of information not asked of him in interview. It is clear from the Rules that it was for him to demonstrate on the balance of probabilities that the business is credible. It is obvious that what is required is an overall assessment of the application and business proposal, taking the evidence in context and as a whole. To that extent whilst individual elements of the refusal decision might be picked apart or criticised, it is important not to lose sight of the fact that the purpose of the viability and credibility requirements are to enable an overall assessment of the application. In any event, I make the observation that Mr Singh he did not seek to provide any further evidence after his interview and before the decision was made. Further, even though it is not admissible, the post-decision evidence he has attempted to rely on does not in fact provide satisfactory answers to the issues raised, all of which rather suggests that advance notice of the questions or issues would have changed little in the outcome of the application.
30. As Mr Tarlow pointed out, Mr Singh made application for leave to remain as an entrepreneur, a person expected to not only have the financial means but the business acumen to operate a business in the UK, the burden of which falls on him to demonstrate on the balance of probabilities, assessed by the viability and credibility of the business plan and the application. However, having considered the application as a whole, I am fully satisfied that this is not a genuine application at all. It is, in my view, no more than a poor attempt to meet the criteria of the Rules by vague, generalised and what can only be described as very weak evidence. I thus find the Secretary of State's concerns about the viability and credibility of Mr Singh's proposal entirely well-founded. Taken as a whole, I find, for the reasons set out, including those relied by the Secretary of State, that the application as made, together with the interview, excluding the post-decision evidence, is neither viable nor credible. Thus the decision of the Secretary of State was entirely correct and in accordance with the law.

Conclusion & Decision:

The making of the decision of the First-tier Tribunal involved such error on a point of law that it had to be set aside, to be remade. In remaking the decision in the linked appeals I find that the claimants have failed to demonstrate on the balance of probabilities that the application is genuine or that the business plan is viable or credible. Ms Ruchi's appeal fails in consequence of the failure of Mr Singh's appeal.

The appeal of each claimant is dismissed.



Signed

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an anonymity order. Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been dismissed.



Signed

Deputy Upper Tribunal Judge Pickup