



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

Appeal Number: IA/07626/2015

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 6 April 2016

On 28 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**SHAHZAD FAKHAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel, instructed through Direct
Access

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge M Davies (the judge), promulgated on 22 July 2015, in which he dismissed the Appellant's appeal. That appeal was against the Respondent's decision of 9 February 2015, refusing to vary the Appellant's leave to remain as a Tier 1 General Migrant and to remove him from the

United Kingdom under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant is a national of Pakistan. He originally arrived in the United Kingdom in 2010 as a student. On 18 October 2011 he was granted leave to remain as a Tier 1 General Migrant until 18 October 2013. He sought an in-time extension of leave in the same category. This application was refused and a subsequent appeal dismissed (IA/02991/2014). The Appellant then made a fresh application within twenty-eight days. It is this application which gave rise to the decision under appeal to the First-tier Tribunal.
3. The Respondent's refusal of the latest application was based on the conclusion that certain earnings from claimed self-employment relied upon were not genuine, with reference to paragraph 19(i) and (j) of Appendix A to the Immigration Rules (the Rules).

The judge's decision

4. The judge identifies the core issue in the appeal before him, namely whether earnings from self-employment were genuine or not (paragraph 18). Having listed the various factors set out in paragraph 19(j) of Appendix A, the judge concludes that he was not satisfied the earnings were genuine (paragraph 19). Thereafter, ten reasons are provided for this central conclusion (paragraphs 20-30). I do not propose to set these out here, as I will deal with them in due course.
5. As a direct result of the conclusion on earnings, the appeal was dismissed in respect of the Points-Based System claim. Article 8 was not pursued at the hearing, but the judge considers it briefly and finds against the Appellant (paragraph 33). There is a final observation about jurisdiction, but this is not in fact a live issue.

The grounds of appeal and grant of permission

6. The well-drafted grounds accept that some of the reasons provided by the judge were open to him on the evidence. The general thrust of the challenge is based upon the evidential restrictions imposed by section 85A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). It is said that the judge erred in finding against the Appellant on matters in relation to which he (the Appellant) was precluded from adducing new evidence because of section 85A.
7. Permission to appeal was refused by the First-tier Tribunal but granted on renewal by Upper Tribunal Judge Plimmer on 15 February 2016.

The hearing before me

8. Mr Richardson submitted that the Appellant had supplied all the documents specified under the Rules. Thus, he had been compliant with this essential step of the application process. In respect of the genuineness issue, the interview in 2015 had not expressly put concerns or objections to the Appellant. The Respondent's decision on the application was made only a couple of weeks later and the Appellant was not given the chance to provide any additional evidence or make representations prior to that decision. There was no opportunity for the Appellant to set out matters relating to genuineness of earnings in the application form. The judge described his reasons as "cumulative", and so even if two or three of these were sustainable, the errors on others undermined the entirety of the decision. The point taken in paragraph 27 of the decision was unforeseeable to the Appellant. The Appellant was not permitted to adduce further witness statements and so the judge was wrong to have held this failure against him. There was no detailed reasoning in paragraph 30.
9. Mr Kotas submitted that the decision of the Vice-President in Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC) is correct. It was open to the Appellant to adduce any evidence in addition to that specified under the Rules in support of his application. The Appellant has had experience of the Points-Based System and should have provided more evidence. It was accepted that the judge erred in paragraph 27 but this was said to be immaterial. In reality, submitted Mr Kotas, the Appellant was asserting a fairness challenge. However, this had not been argued before the judge or on appeal to the Upper Tribunal.
10. In reply, Mr Richardson referred to the application form. There was no space in which to address genuineness issues. The Appellant was not given a fair opportunity to address the Respondent's concerns prior to the decision on the application.

Section 85A of the 2002 Act

11. Sub-sections 85A(3) and (4) provide:

"(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) relates to the appeal in so far as it relies on grounds other than those specified in subsection (3)(c),
 - (c) is adduced to prove that a 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'."

Decision on error of law

12. I have concluded that there are no material errors of law in the judge's decision.
13. The first thing to say is that in my view Ahmed is correctly decided, and the prohibition of post-decision (if post-application) evidence is accurately stated in paragraph 5:

"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."

14. The application of section 85A may entail harsh results for some applicants, but that is the reality of the legislative and Rules-based framework for the Point-Based System.
15. Second, it is not contended by the Appellant that the judge failed to apply section 85A at all. Rather, it is said that when applying its restrictions the judge effectively took irrelevant matters into account.
16. Third, it is common ground that none of the 'exceptions to the exception' under section 85A(4)(b)-(d) apply in this case.
17. Fourth, as Mr Richardson quite properly acknowledged, four of the ten reasons provided by the judge have not been challenged on appeal (these being reasons one, two, three, and nine). It is clear that the findings within these paragraphs and the reasons in support were fully open to the judge. It is also clear that the points made are all materially damaging to the Appellant's overall credibility. The failure to mention previously the highly significant issue of his claimed self-employment when presented with an opportunity to do so was obviously very problematic. The inference drawn

by the judge in paragraph 22 casts further doubt about the essence of the Appellant's genuineness. For the avoidance of any doubt, the reasoning in paragraph 23 is not expressly challenged in the grounds and in any event I find that it is sound. Finally, referring back to the previous Tribunal decision from 2013, the judge was bound to take cognisance of the fact that the Appellant had been deemed untruthful then.

18. I must of course view the judge's decision holistically, and he did refer to his reasoning being cumulative. However, these four adverse matters immediately place a significant (although not insuperable) barrier to the success of this appeal because their effect is that there are several unchallenged (and in my view unchallengeable) credibility problems which would undoubtedly have coloured the rest of the Appellant's evidence.
19. Fifth, I turn to reasons four, five and six (paragraphs 24-26). These points are directly challenged in the grounds of appeal.
20. The reasoning in paragraph 24 relies on the finding that the Appellant had failed to adduce "sufficient evidence" that he had entered into agreements for the provision of services. Mr Richardson submits that the Appellant could not have adduced any post-decision evidence because of section 85A, and so the judge erred in holding this fact against the Appellant. With respect, I disagree with this analysis. On a proper reading of the passage, the judge was not expecting the Appellant to provide further evidence that he was unable to. The judge was simply stating his conclusion that the *admissible* evidence adduced by the Appellant with his application was insufficient to prove the particular issue in question. That was a conclusion to which he was entitled to arrive at. It has not been alleged that the conclusion was irrational in light of the pre-decision evidence.
21. A response to this from Mr Richardson runs along the line that the Appellant could not have known what matters raised concerns with the Respondent until the decision on his application was made: the judge's conclusion was therefore unfair.
22. However, putting aside for the moment the issue of the fairness of the Respondent's processes (to which I will return), Mr Richardson's point is met by a series of rather fundamental facts:
 - i. The requirements of the various categories within the Points-Based System are set out in the Rules;
 - ii. Although the Rules are complex in certain respects, the essential criteria for an application's success are accessible to applicants;
 - iii. Paragraph 19(i) of Appendix A to the Rules is stated in clear terms: "the Secretary of State must be satisfied that the earnings are from genuine employment...";
 - iv. A list of relevant factors to be considered are then listed in paragraph 19(j). This is not only a statement of how the

Respondent will consider an application, but clearly provides a guide as to what sort of information a prospective applicant could or should provide;

- v. It is down to an applicant to provide relevant and sufficient evidence in support of an application;
- vi. The prohibition on adducing post-decision evidence is clear from the terms of section 85A;
- vii. The Appellant has had legal representation throughout the application and appellate process;
- viii. The Appellant has gone through the Points-Based System before.

23. Taking these basic facts together, the Appellant in this case had every opportunity and precautionary indicator available to him to submit the evidence on the essential elements of his application. In all the circumstances of his case, in particular the outcome of his 2013 appeal, one might have thought that every effort would have been taken to provide a wealth of evidence on the earnings issue. A failure to put in sufficient evidence at the right time is not a matter to be laid at the door of the judge. The fact that the Appellant did not know in advance the specific points eventually relied on by the Respondent does not assist him in this case. In my view, the points made by the judge in paragraph 24 (and indeed in paragraphs 25 and 26) all concerned basic aspects of the Appellant's application, as it was put to the Respondent.
24. It might be said that on a strict application of section 85A appeals to the First-tier Tribunal no longer have any utility in Points-Based System cases. That is incorrect. The Tribunal can look at the admissible evidence and decide for itself whether the Respondent was right or wrong in refusing the application.
25. The judge's reasons at paragraphs 25 and 26 are similar in nature to those discussed already. He relies on a lack of evidence from the Appellant on material issues (contracts of service and the ability to undertake all of the work claimed). I would refer back to what I have said in my paragraphs 20-23, above. In essence, it was for the Appellant to have adduced evidence on matters that were clearly relevant to his application when he made that application, or at the latest soon thereafter and prior to the decision being made. As a Tier 1 applicant, it seems really rather obvious that he should have provided contracts for services and evidential explanations of how he was able to work as much as he claimed to. Again, the failure to provide this type of evidence was something to which the judge could quite properly have regard.
26. Sixth, Mr Kotas accepts that the judge erred in paragraph 27 when referring to the Appellant's failure to adduce "further evidence" on the issue in question. The Appellant was of course precluded from doing this by virtue of section 85A. Thus, the failure to adduce inadmissible evidence was not a relevant consideration.

27. In my view the error is not material. By itself, it cannot properly be said to be a particularly significant aspect of the judge's overall reasoning. Even in combination with what I say about paragraph 28 of the decision, below, the error simply does not raise the possibility of a different outcome to the appeal being anything other than a remote one.
28. Seventh, there is an error in paragraph 28 similar in nature to that contained in the previous paragraph. The Appellant was precluded from obtaining additional witness statements from claimed clients and so the judge should not have held that against him. However, once again, in my view this is not a material error, having regard to the decision as a whole. Alone or together with the error in paragraph 27, this matter does not provide a tipping point, beyond which the judge's reasoning as whole is rendered unsustainable.
29. Eighth, in paragraph 30 the judge refers to oral evidence from the Appellant. On a strict view of section 85A and Ahmed, such evidence should not have been admitted. Yet, as with the previous two errors, this reason (alone or in combination) can be stripped out of the decision and what remains is in my view fully sustainable.
30. Ninth, in paragraph 31 the judge makes it clear that he had taken account of the fact that the Appellant provided specified evidence. He was correct as a matter of law to conclude that notwithstanding this, the Appellant's appeal failed for the reasons stated previously in the decision.
31. Tenth, Mr Richardson arguments had a clear thread running through them: there is unfairness in the decision-making process for those applying under the Points-Based System because of the operation of section 85A. I have some sympathy for that view. It appears as though the Respondent does not contact Tier 1 applicants prior to a decision being made in order to raise concerns and allow for these to be addressed. It is arguable that the application form could be better presented in order to assist applicants with the presentation of their cases in the first instance.
32. Having said that, there was no discreet fairness point taken before the judge and none is raised on appeal to the Upper Tribunal. It is therefore not a live issue before me. It seems to me as though it could be a potentially fertile line of argument in appropriate cases (albeit probably only in the context of judicial review, given the limited scope of appeals under the new statutory regime).
33. For all the reasons set out above, the judge was entitled to conclude as he did and the Appellant's appeal must fail.

Anonymity

34. No direction was sought and none is appropriate.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

Signed

Date: 27 April 2016

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

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

Signed

Date: 27 April 2016

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal