



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/09795/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6 July 2016

Decision & Reasons Promulgated  
On 18 July 2016

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

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

Appellant

**and**

**MR MUHAMMAD FAZIL  
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

**Representation:**

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer  
For the Respondent/Claimant: Mr P Richardson, Counsel instructed by Kingsley Napley Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision of the Secretary of

State to refuse to grant him leave to remain as a Tier 1 (Entrepreneur) Migrant and against the Secretary of State's concomitant decision to remove him from the UK. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

### **The Reasons for the Grant of Permission to Appeal**

2. On 26 May 2016 Upper Tribunal Judge Blum granted permission to appeal for the following reasons:
  - "2. The grounds contend that the judge erred in law by taking account of evidence provided after the making of the Appellant's application, contrary to section 85A of the Nationality, Immigration and Asylum Act 2002 and the cases of *Ahmed (PBS: admissible evidence)* [2014] UKUT 00365 (IAC) and *Olatunde* [2015] EWCA Civ 670. It is clear that the judge allowed the Appellant to give oral evidence at the hearing [9] and took account of that evidence in her assessment [18].
  3. It is arguable that by hearing and taking account of oral evidence at the hearing the judge misdirected herself in law as to the restrictions contained in section 85A".

### **Relevant Background**

3. The claimant had previously been granted leave to remain in the United Kingdom until 25 July 2013 as a Tier 1 (General) Migrant. He applied for leave to remain to set up a business called FS & Co Auto Sales, for which he provided a business plan. The plan said that there was a need in the Slough for a large selection of quality used cars, and FS & Co would sell these top quality used vehicles at a competitive price. The owner and sales manager had years of combined experience in new and used auto sales in the UK and Pakistan. They would continue to develop their excellent working relationship with local dealers and auctions to bring savings to the customer.
4. The claimant's completed Tier 1 (Entrepreneur) application form was received on 24 July 2013 and the claimant was interviewed about his application on 16 January 2015. The interview record was not included in the Home Office bundle for the hearing in the First-tier Tribunal. But the claimant's solicitors obtained a copy of the interview in advance of the hearing, and it is to be found at page 166 onwards of the first appeal bundle.
5. The claimant was interviewed in accordance with a standard temporary migration credibility interview template (Tier 1). He was asked questions about his experience, his team member, business development, market research, contract and pricing, funding and business performance.
6. At the end of the interview, the interviewing officer was required to complete a short questionnaire. Question C was whether there were any points in the interview where the applicant appeared to lack credibility? He answered yes and went on to give a brief explanation:

[A]pplicant is running two business (sic) as well as a part-time job. They have already had one used car business which he is not running anymore.

7. On 17 February 2015 the Secretary of State gave her reasons for refusing the application.
8. All the reasons related to the answers which the claimant had given in the interview. On the topic of funding, he had confirmed that no money had been invested into the business by the third party funder. There was no guarantee that the money would be transferred if a visa was issued, and as he had made no attempt to transfer the money into a UK account, this raised concern over the genuineness of the funds. He also said that he had spent £26,000 to £27,000 yearly on advertising, but this was not credible as advertising on Gumtree was usually free of charge. There was also no evidence that he had spent this amount of money on any advertising nor had he provided any evidence of advertising.
9. On the topic of business development, he stated in interview that he had registered with Companies House, but following a check with Companies House it was found that the business was not registered. He also stated he did not have any business insurance. It was not credible that somebody setting up in business would not register their company as per UK law and also would not take out any insurance. He stated that his business had not started yet, but when questioned about turnover he stated that he had started six months back so in the last quarter his turnover was £38,000 to £40,000. This was contradictory, and there was also no evidence that it was true. On the topic of market research, they were not satisfied he had undertaken any viable market research. When asked what market research he had carried out, he had stated actually there was no need for research for this business.
10. Based on the above considerations, the Secretary of State was therefore refusing his application because he had not satisfactorily demonstrated that he was a genuine entrepreneur.

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

11. For the purposes of the appeal hearing, the claimant's solicitors took a lengthy witness statement from the appellant in which he said that he had worked for twelve years for the Pakistani subsidiary of the Suzuki motor corporation in Pakistan and thus learnt about car manufacturing, maintenance and the engine assembly process from a number of different perspectives. While in the UK as a Tier 1 (General) Migrant, he had established a used car sales business under the name of Cars Comfort Limited of which he was the sole director. This business was relatively successful. He had operated with an annual turnover of about £100,000 with a good profit margin. In the summer 2013, around the time he made his application for leave to remain as a Tier 1 (Entrepreneur) Migrant, he applied for "strike down" in relation to Cars Comfort. The business was still solvent and was still making money, but he decided he wanted to start a new business.

12. He also ran another business called UENS UK Limited established by a friend of his in 2011. He joined the company in October 2013 and became a sole director of the company on 1 November 2013. He took on this business because his Tier 1 (Entrepreneur) application was outstanding, and it provided him with an additional income stream. UENS was an export business, dealing in spare parts for cars, which worked directly with contacts in Pakistan. In the last six months, UENS's turnover was more than £50,000. It was still functioning, although his focus had shifted to running his new business FS & Co Auto Sales. In August 2012 he took work with a security firm Vision Security Group (VSG) which was part of the Compass Group. He was employed through their Northampton branch but he was sent all over the UK to work. He worked most frequently at a packing warehouse of a duty free shop in Slough.
13. He went on to comment on the interview. The interviewing officer seemed to be very rigid during the interview. He was not sure whether this was because the interview was being conducted over Skype, or whether he had to stick to his set of questions. During the interview the interviewing officer became confused about the different businesses he was involved in. When he asked him whether he had registered the business, as UENS was a company he had just been speaking about, he assumed he was talking about UENS.
14. After a few questions, he began to get concerned the interviewing officer was not asking about FS & Co which was the business that he was making his application in relation to.
15. He had read through the interview transcript and it did not reflect the interview he had. It did not provide the responses written down in the order that they were recorded. There was no record of him informing the interviewing officer that he should be asking him questions about FS & Co.
16. At the outset of the hearing, the Presenting Officer objected to the claimant giving oral evidence in relation to the interview record on the basis that it would be postdecision evidence and therefore disallowed in terms of **Ahmed**. The judge decided it was not in the interests of justice to refuse to allow him to give oral evidence. He observed that the interview itself was not postdecision. He ruled that the claimant should be allowed to comment on the interview, particularly when it formed the basis of the respondent's refusal. It went to the root of what was being appealed.
17. The claimant proceeded to give oral evidence, and he was cross-examined by the Presenting Officer. In his closing submissions on behalf of the Secretary of State, the Presenting Officer submitted the interview transcript showed that a clear interview was conducted, and he invited the judge to reject the claimant's evidence that the interview had not been conducted correctly and there had been a mix up in the way his answers had been recorded. In reply, the claimant's Counsel submitted there was very little or no substance in the reasons for refusal. They were based on inconsistencies and mistakes arising from the manner of the interview. The refusal

was fundamentally undermined as it was based almost entirely on the interview transcript. Based on the evidence submitted by the claimant contained at tab F of the claimant's bundle there was sufficient evidence before the Secretary of State to grant the application. Her primary position was for the Tribunal to allow the appeal on the basis that the Secretary of State had not properly considered or taken account of all the evidence and the decision was not therefore in accordance with the law.

18. In his subsequent decision, the judge's reasons for finding in the claimant's favour were set out at paragraphs [18] to [21], which I reproduce verbatim below:

"18. I have considered all the evidence on file, the subjective and objective evidence (some of which may not be specifically referred to herein), the oral evidence given at the hearing and the submissions of both parties. I have taken into account all the evidence presented to me which I am permitted to consider in light of *Ahmed* and *Olatunde* and paragraph 245AA of the Immigration Rules. The Appellant's representative asked me to find that *Ahmed* had been decided wrongly in relation to the linking of evidence on points based matters and evidence on the genuineness of the application. In *Olatunde* Lord Justice Moore-Bick held that section 85A restricts the evidence that the tribunal can consider on appeal against a decision based on sub-paragraph (h) alone. I was asked to find that both of these decisions had been wrongly decided. Upper Tribunal decisions are binding on First Tier Tribunals and I am unable to accede to the Appellant's representative's submission on this point. I do however find that I see nothing wrong in the Appellant giving evidence (albeit post-decision) to clarify matters raised by the Respondent in the notice of refusal. This includes the interview transcript. The Appellant's representative argued that the interview was fatally flawed as a result of the confusion surrounding the Appellant's answers in relation to the two businesses he has. The confusion is not assisted by the fact that the interview was carried out via Skype. The Appellant, when asked at the end of the interview, felt that he had given a good account of his businesses. He would have been unaware of what the interviewer had recorded until he received a typed transcript. When he did receive the transcript he went over it with his solicitor and prepared a witness statement pointing out the errors and confusion. Contrary to what the Respondent's representative submitted I do not see that there was any onus on the Appellant at such a late stage (six weeks pre-hearing) to make a formal complaint to the Home Office regarding the interview. The appeal was on-going and a hearing had been fixed. It was within the Appellant's remit to produce his response in oral evidence at the hearing so as to clarify the misunderstandings in the interview record.

19. There was some discussion over the significance of his business partner Sohail and his unsuccessful application for entry clearance from Pakistan to join the Appellant in FS and Co. I took the view that this was a side issue which had no direct bearing on the legal issues before me in relation to this appeal. I did not find that the position of Sohail altered the Appellant's position in relation to this appeal and it did not affect his credibility.

20. I considered the evidence provided by the Appellant with his application as listed in the notice of refusal and contained (with other inadmissible documents

not before the decision-maker) in the Appellant's bundle. I also considered the interview transcript in light of the notice of refusal and the Appellant's explanations. The Appellant has been involved in the car business all his life. He has extensive knowledge of what is necessary to conduct such business. He has done so successfully with previous businesses. He is aware of the requirement for insurance. He has the business contacts, local knowledge and understanding of how to operate and price his goods in a competitive market. He has financial backing. I accept his explanation of the confusion arising in the Skype interview where he is talking about two businesses. His answers and explanation were plausible. I note that the notice of refusal is based entirely on the question of genuineness and it is clear that the Respondent has formed the view that the Appellant is not genuine based on his answers to a confusing interview. In my opinion it is open to come to a different conclusion on the permissible evidence regarding the question of genuineness. I find the Appellant's evidence to be straightforward and credible in relation to the genuineness of his application.

21. I find that the Respondent has made a decision which is not in accordance with the law to the extent that she finds the Appellant's application to be lacking in genuineness. For the reasons given above I have come to a different view. The appeal is therefore allowed to this extent."

### **The Hearing in the Upper Tribunal**

19. At the hearing before me to determine whether an error of law was made out, Mr Avery developed the argument advanced in the application for permission to appeal. It was abundantly clear from the case law of **Ahmed** and **Olatunde** that a refusal on the basis of an appellant's failure to demonstrate the genuineness of the business was interwoven with the acquisition of points. As a result of that link, the prohibition on adducing new evidence set out in Section 85A(3) of the 2002 Act would apply to any new evidence to support an appellant's claim that the business was genuine. As such, the new evidence relied upon by the judge to allow this claimant's appeal was prohibited as it went towards the acquisition of points and it did not fall within the exception under Section 85A(4)(d) of the 2002 Act.
20. No distinction could be drawn between oral and documentary evidence. The prohibition applied to both forms of evidence.
21. On behalf of the claimant, Mr Richardson developed the arguments advanced in his Rule 24 response. **Ahmed** did not have the effect of preventing an appellant from giving explanatory evidence in connection with documents submitted in support of the application and answers in interview, which themselves predated the date of decision. To suggest otherwise would produce absurd results, which would offend the principle of common law fairness.
22. His second submission was that **Ahmed** was wrongly decided. It was clear from the format of the decision letter and from the way in which the Rules were drafted that a distinction existed between refusals because adequate documents were not submitted, and refusals after an interview has occurred on the grounds of genuineness. Since the latter necessarily involved an assessment of credibility, it was

an affront to commonsense to suggest that this could be done by a judge without hearing from the appellant.

23. Giving the leading judgment of the court in Olatunde, Moore-Bick said at paragraph [26] that in the instant case it was not necessary to decide whether, if an applicant could in practice fail to meet the requirements of subparagraph (h) without falling within subparagraph (k), Section 85A restricted the evidence that the Tribunal could consider on appeal against a decision based on subparagraph (h) alone.
24. His third submission was that, if an error of law was identified, the appeal should be allowed on the alternative ground that the Secretary of State's decision was unlawful on account of it being made in contravention of the principles of common law fairness. He cited a passage in the speech of Lord Mustill in R v Home Secretary Ex Doody [1994] 1AC 531 at 560 where the judge said that what fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects:
  - “(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result: or after it is taken, with a view to procuring its modification; or both.”
25. In paragraph 24 of his Rule 24 response Mr Richardson gave examples of matters that formed the basis of the adverse decision, which were never put to the claimant in his interview and about which he was never permitted to give an explanation:
  - (a) In relation to the investment funds not being transferred to the UK, which was unsurprising given that the application had not yet been determined, the claimant was never asked why this had not been done. He was thus unfairly deprived of the opportunity to provide an explanation.
  - (b) The claimant was criticised for failing to provide any evidence of advertising expenditure or any advertising material, but was never asked, or provided with an opportunity, to do so.
  - (c) The claimant was never asked about his experience in the motor industry or requested to provide evidence of the same. Had he been asked, he was plainly in a position to provide an abundance of such evidence.
  - (d) It was never put to the claimant that his company was not registered at Companies House. This had the consequence that he was unable to clarify the company to which he referred as being registered was UENS Limited and, most importantly, to clarify that FSC was not registered because it was not a limited company.
  - (e) The alleged contradiction about whether or not the business was trading was never put to the claimant. He was thereby deprived of the opportunity to clarify that the business which was trading was UENS Limited and not FSC.

- (f) The letter inviting the claimant for interview unequivocally stated that further documents would not be accepted at the interview. There was then, subsequently at the interview, no further opportunity of further documentary evidence to be submitted by the claimant. The criticisms about his failure to provide further evidence in the refusal letter were therefore particularly pernicious.

## Discussion

26. There is considerable force in the Secretary of State's error of law challenge. By being permitted to adopt his witness statement as part of his evidence-in-chief, and then being questioned extensively about its contents, the claimant was clearly providing additional information about his application beyond that which was available to the decision-maker when making a decision to refuse his application.
27. What is envisaged by the Rules is that an applicant should be judged inter alia on his performance in interview, not on his performance when giving oral evidence by way of appeal. So prima facie the receipt of oral evidence from the claimant breached the prohibition on postdecision evidence directed at establishing that the Secretary of State had been wrong to conclude the application was not genuine by reference to one or more of the factors listed in subparagraph (h) of paragraph 245DD of the Rules. I do not consider that the point left open by Moore-Bick LJ in Olatunde is of any assistance to the claimant on the facts of this case.
28. However, I consider that the claimant's evidence about the interview was admissible for the purpose of seeking to establish that the claimant had been a victim of common law unfairness in respect of the way in which the interview had been conducted and/or recorded. It was open to the judge to accept the central thrust of the submission made by Counsel for the claimant that the interview was fatally flawed as a result of the confusion surrounding the claimant's answers in relation to the two businesses which he had.
29. Following the interview, the Home Office conducted further enquiries, and established that FSC had not been registered. The Home Office had not sought an explanation from the claimant as to the apparent contradiction between this discovery and his claim in the interview that the business had been registered at Companies House. It would be contrary to the requirements of procedural fairness to exclude evidence from the claimant that the enquiry undertaken by the Home Office had been directed to the wrong business, and that the representation which he had made in the interview related to UENS Limited not FSC. Similarly, it would be contrary to the requirements of procedural fairness to have excluded the claimant from clarifying that there was no contradiction in respect of his answers on the topic of whether the business was trading, as one answer that he gave related to UENS Limited and the other answer related to FSC.
30. Accordingly, I consider that it was open to the judge to allow the appeal on the primary position taken by Counsel at the hearing, which was that the decision was not in accordance with the law as it was entirely based on the interview which was



fatally flawed as a result of the confusion surrounding the claimant's answers in relation to the two businesses which he had.

31. The judge however erred in allowing the appeal under the Rules. For the claimant's evidence was only admissible for the purposes of establishing that the decision was not in accordance with the law. It was not admissible for the purpose of enabling the judge to come to a different view on the question of whether the application was genuine.

**Notice of Decision**

The decision of the First-tier Tribunal allowing the appeal under the Rules contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The claimant's appeal is allowed on the ground that the decision appealed against was not in accordance with the law as the interview forming the basis of decision was fatally flawed, and a lawful decision on the claimant's application for leave to remain as a Tier 1 (Entrepreneur) Migrant remains outstanding.

No anonymity direction is made.

Signed

Date **18 July 2016**

Deputy Upper Tribunal Judge Monson