



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/10818/2015
IA/10821/2015
IA/10786/2015

THE IMMIGRATION ACTS

Heard at Field House
On 28 June 2016

Decision and Reasons Promulgated
On 4 July 2016

Before

Upper Tribunal Judge King
Deputy Upper Tribunal Judge Pickup

Between

Mohammad Sarwar
Kishwar Hasin Disha
Mohammad Sultan Ahmed Tapader
[No anonymity direction made]

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellants: Mr Z Malik of counsel, instructed by Kingdom Solicitors
For the respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the three appellants against the decision of First-tier Tribunal Judge Baldwin promulgated 29.10.15, dismissing their linked appeals against the decision of the Secretary of State, dated 4.3.15, to refuse their applications for leave to

remain in the UK as Tier 1 Entrepreneurs and dependent spouse (the second appellant). The Judge heard the appeal on 16.10.15.

2. First-tier Tribunal Judge Robertson refused permission to appeal on 21.4.16. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Goldstein granted permission to appeal.
3. Thus the matter came before us on 17.6.16 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons summarised below, we found an error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Baldwin to be set aside.
5. In granting permission to appeal, Judge Goldstein found it arguable that the First-tier Tribunal made adverse findings in relation to evidence that as a matter of law were excluded under section 85A of the Nationality, Immigration and Asylum Act 2002; failed, adequately or at all, to take into account the matters listed in paragraph 245DD(i) of the Immigration Rules; and raised issues of its own motion that did not form the basis upon which the respondent refused the appellants' applications and thus about which the appellants had no prior notice.
6. At the outset of the hearing both Mr Malik and Mr Duffy agreed that Ahmed and another (PBS: admissible evidence) [2014] UKUT 365 (IAC) is a decision applicable to this case. Section 85A(4) of the Nationality, Immigration and Asylum Act 2002 which prohibits, in PBS cases, the reliance on evidence not submitted with the application, also applies to evidence relating to the non-points-scoring aspect of the case where it is provided that points will not be awarded if the decision-maker is not satisfied as to the non-points-scoring aspect of the case, as the two are inextricably linked. The prohibition is in relation to evidence that goes to the scoring of points. In essence, the appeal before the First-tier Tribunal should have been decided only on the evidence available to the Secretary of State at the time of the decision.
7. However, it is clear from the decision of the First-tier Tribunal that Judge Baldwin heard oral evidence from the entrepreneur appellants and found that the concerns identified in the refusal decision, "far from being satisfactorily addressed by the appellants at the hearing, were magnified." The judge found aspects of the oral evidence implausible and not credible, stating at §20, "They did not come across as genuine Entrepreneurs and I could not imagine anyone having much confidence in them being able to organise important events for them." Relying on these findings about their oral evidence, later in the same paragraph the judge stated, "The business has not been proven to be genuine and likewise the intentions of the male Appellants have not been proved to be genuine in relation to it. It would also appear clearly that the appellants have used none of the money in the bank account for investment in the business. This, I find, strongly suggests they do not intend to do so and raises a real doubt as to the genuine availability of this money to them for investment in the business."

8. In the circumstances, we agree with the joint submissions of the representatives before us to the effect that the findings of the judge as to the issue of the genuine nature of the business, largely based on the oral evidence, were made in error of law. The error of law is significant, going to the crucial issues in the case, and it is not possible to rescue the decision by attempting to separate out those findings which did and did not relate to the inadmissible oral evidence. We cannot say that the outcome of the appeal would have been the same if the First-tier Tribunal had confined itself to the admissible evidence.
9. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
10. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, we do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellants of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, we find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

11. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

We set aside the decision.

We remit the decision in the appeal to be remade de novo in the First-tier Tribunal.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

4 July 2016

Consequential Directions

12. The appeal is to be relisted before the First-tier Tribunal sitting at Hatton Cross, at the earliest convenient date;
13. The decision in the appeal is to be remade afresh on the basis of the evidence that was with the Secretary of State at the date of the refusal decision, with no findings of fact preserved;
14. The appeal may be listed before any First-tier Tribunal Judge other than Judge Baldwin and Judge Robertson;
15. The estimate length of hearing is 2 hours;
16. An interpreter in Bengali will be required;
17. The First-tier Tribunal may give such further directions as may be necessary for the proper listing and conduct of the appeal.

Anonymity

We 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 order. Given the circumstances, we make no anonymity order.

Fee Award

Note: this is not part of the determination.

We make no fee award.

Reasons: The outcome of the appeal remains to be decided.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

4 July 2016