



IAC-BH-PMP-V1

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

Appeal Number: IA/24981/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 23 November 2015**

**Decision & Reasons Promulgated
On 2 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**SHAHID GHAFOR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim of Counsel under Public Access Scheme

For the Respondent: Ms S Sreeraman of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 5 November 1983. On 23 February 2010 he entered with leave as a Tier 4 (General) Student Migrant. That leave was extended and subsequently further leave was granted as a Tier 1 (Highly Skilled Post-Study) migrant. In time, the Appellant applied for further leave as a Tier 1 (Entrepreneur) migrant.

The Respondent's Decision

2. On 29 May 2014 the Respondent refused the Appellant further leave as a Tier 1 (Entrepreneur) migrant under paragraph 245DD(i) of the Immigration Rules on non-points scoring grounds. The Respondent did not consider the Appellant genuinely intended and was able to engage in his proposed business or would make the requisite investment or that the requisite funds for the investment were and would remain available to him.
3. On 12 June 2014 the Appellant lodged notice of appeal under Section 82 of the Nationality, Asylum and Immigration Act 2002 as amended (the 2002 Act). The grounds are formulaic and raise a claim based on Article 8 of the European Convention. Although Mr Nasim appears to be instructed under the Public Access Scheme, there is no explanation with what authority he was able to lodge the notice of appeal on behalf of the Appellant: see the Bar Standards Board Guidance for Lay Clients of March 2010.

The First-tier Tribunal's Decision

4. By a decision promulgated on 2 March 2015 Judge of the First-tier Tribunal J McIntosh dismissed the Appellant's appeal under both the Immigration Rules and Article 8 of the European Convention.
5. On 5 May 2015 Judge of the First-tier Tribunal Grimmett refused the Appellant permission to appeal. The Appellant renewed her application for permission to appeal to the Upper Tribunal on the same grounds. On 2 July 2015 Deputy Upper Tribunal Judge Mailer granted permission on all grounds on the basis that the Judge had arguably erred in failing to show that she had had in mind the effect of Section 85A of the 2002 Act and the jurisprudence in *Ahmed and Another (PBS: admissible evidence)* [2014] UKUT 00365 (IAC) and *Naved (Student - fairness - notice of points)* [2012] UKUT 14 (IAC).

The Upper Tribunal Hearing

Submissions for the Appellant

6. Mr Nasim submitted the Respondent had refused the Appellant further leave on the general grounds of paragraph 245DD(h). The Appellant had been interviewed by the Respondent subsequent to the application and the effect of Section 85A was to prevent the Appellant submitting post-application evidence to address matters arising out of the post-application interview. This was inherently unfair to the Appellant and he referred to the determination in *Naved*. In particular, he identified that:-
 - (1) The evidence relating to the jointly held account at Barclays Bank was relevant, if only because information about the account was relevant to the assessment of the Appellant's credibility. This was an application which had been refused on general non-points scoring grounds.

- (2) The record of the interview of the Appellant by the Respondent on 15 May 2014 before the Tribunal was incomplete. It appeared to me that only every other page had been copied and filed with the Tribunal.
 - (3) Section 85A of the 2002 Act appeared to make inadmissible the explanation why the Appellant had been able to save £20,000 given at paragraph 8 of his statement of 12 February 2015.
7. He drew my attention to page 9 of the Appellant's bundle filed for the First-tier Tribunal hearing showing that the Appellant held in excess of £50,000 in account number ***3232 in his sole name at Barclays Bank plc. This showed the funds were genuinely available and remained available to the Appellant.
 8. The application form submitted did not provide for any questions to be asked or for the Appellant to establish the genuineness of himself and the business to which the application related and so the Appellant had had no opportunity to respond to the Respondent's concerns about his genuineness. The consequence was the Respondent had unfairly and for inadequate reasons made adverse findings about the Appellant's credibility.
 9. At paragraph 28 of her decision the Judge had queried how the Appellant's hope to draw £1,600 monthly from his new business was consistent with the fact that in the previous 24 months his expenditure had totalled about £4,000. The reply to question 17A of 15 May interview record explained not only how he had been able to save £20,000 but why his expenditure had been as low as £4,000. This was before the Judge but was not referred to in her decision. Further, there was no inconsistency between the Appellant's past modest expenditure and his expressed hope for a substantially increased income once his new business was up and running.
 10. He had represented the Appellant at the First-tier Tribunal hearing and the case had never been put on the basis of the last sentence of paragraph 23 of the Judge's decision. Indeed I note the Judge's Record of Proceedings does not make reference to such an argument.

Submissions for the Respondent

11. Ms Sreeraman submitted that although the Judge had not expressly referred to Section 85A of the 2002 Act such an omission was not a material error. Paragraphs 7-12 of her decision showed she had taken into account the evidence in the Respondent's bundle and the oral evidence referred to at paragraph 7. The Judge had not asked any questions at the hearing. Her findings at paragraph 26 on the source of the funds available to the Appellant were based on the evidence before both the Respondent and the First-tier Tribunal. At paragraph 27 she had given adequate consideration to the viability of the Appellant's business plan and reasons for her finding that it was not viable.
12. The Appellant had failed to show there had been any unfairness in the process, particularly since the Judge had considered all the relevant evidence and given at

paragraphs 21-28 sustainable and adequate reasons for her conclusions. Mr Nasim had accepted that the issue of the correct Immigration Rules referred to in paragraph 23 of the decision and in ground 4 of the application for permission to appeal were not being pursued. Ms Sreeraman concluded there was no material error of law and the appeal should be dismissed.

13. In response Mr Nasim referred to paragraph 245DD(i) of the Immigration Rules which did not require the Appellant to show the provenance of the funding in order to prove he was genuine. Further, interview reply 5 explained the funds came from the sale of land in Pakistan and this was supported by the documents at pages 4-7 of the Appellant's bundle which had been before the Judge.

Findings and Consideration

14. The Judge failed to refer to Section 85A of the 2002 Act. The failure to refer in itself would not amount to a material error of law. However, in her decision, the Judge failed to take into account that the prohibition on the admissibility evidence in Section 85A(4) of the 2002 Act relates to new evidence. She did not clearly distinguish between new evidence and the Appellant's explanation of the evidence already submitted in support of his Tier 1 (Entrepreneur) application contained in 15 May 2014 interview. Further, her consideration of any explanation was vitiated by the fact that half the interview record was not before her. Her treatment of the issue of the funds in paragraph 26 and the finding against the Appellant that the relevant funds had to be in the United Kingdom was in error and also failed to take account that Table 4 of Appendix A does not require the funds actually be in the United Kingdom: paragraph (c) of Table 4 simply requires they be transferrable to the United Kingdom.
15. The Judge erred in her treatment of the Appellant's case at paragraph 28 of her decision for the reasons mentioned above at paragraph 9.
16. The Judge failed to make a finding on the Respondent's conclusion in the second paragraph of page 8 of the Notice of Decision about Almarjan Enterprises in the light of the details extracted from Companies Registry at page 8 of the Appellant's bundle which appears to contradict the Respondent's conclusion.
17. I conclude that the decision of the First-tier Tribunal contained material errors of law such that it should be set aside. In the course of the hearing I had indicated to Mr Nasim that the evidence submitted by way of explanation to support the Appellant's evidence submitted with his application was far from complete. Bearing this in mind together with Section 12(2) of the Tribunals Courts and Enforcement Act 2007, Practice Statement 7.2(b) and the nature and extent of the fact-finding required, the matter is remitted to the First-tier Tribunal for hearing afresh.

Anonymity

18. There was no request for an anonymity direction and having heard the matter I do not consider one is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal contains a material error of law and is set aside. The appeal is remitted to the First-tier Tribunal for hearing afresh.

Anonymity direction not made.

Signed/Official Crest

Date 26. xi. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal