



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35391/2014
IA/35392/2014

THE IMMIGRATION ACTS

Heard at Field House
On 10th March 2016

Decision & Reasons Promulgated
On 22nd March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR. JINAL PIYUSHKUMAR SHAH (1)
MRS. ARPITABEN JINAL SHAH (2)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Ms. I Broklesby-Weller, Home Office Presenting Officer
For the Respondent: Mr. D Balroop of Counsel instructed by Maalik & Co

DECISION AND REASONS

1. This is an appeal against a decision by First-tier Tribunal Judge Symes promulgated on 18th September 2015, in which he allowed the appeal against the decision of the Secretary of State for the Home Department of 2nd September 2014,

to refuse the application made by Mr Jinal Shah for leave to remain in the UK as Tier 1 (General) Migrant under the Points Based System. The Judge also allowed the appeal of Mrs Arpitaben Shah who is the wife of Mr Jinal Shah. It is uncontroversial that the two appeals stand and fall together.

2. Although First-tier Tribunal Judge Symes allowed the appeals because the decisions of the respondent were not in accordance with the law, the applications were effectively remitted back to the Secretary of State so that she could consider the discretion vested in her under paragraph 322(5) to refuse the application because of the conduct of Mr Jinal Shah. The Judge considered that Mr Shah had provided raw data to his Accountant and was under a duty to ensure that the subsequent figures prepared by the Accountant, are accurate when they are signed off, particularly when the figures were going to form the basis for tax liability, and applications for leave to remain. The Judge considered that permitting figures to be held out by his former Accountants as representing the true level of his earnings, was conduct that falls to be considered by reference to paragraph 322(5) of the Immigration Rules, and the respondent may have overlooked the discretion that is relevant to such a case.
3. The appellant before me, is the Secretary of State for the Home Department. However for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to Mr and Mrs Shah as the appellants, and the Secretary of State as the respondent.
4. Permission to appeal was granted by First-tier Tribunal Judge Nicholson on 22nd February 2016. In doing so, he noted that in the grounds of appeal, the respondent somewhat surprisingly contends that the judge erred in relying on paragraph 322(5) because the respondent never raised it. He noted that if the respondent is right, then the effect of the application as drafted, is that these appeals should be allowed outright, in line with the judge's decision at paragraph [8].
5. The matter comes before me to consider whether or not the determination by First-tier Tribunal Judge Symes involved the making of a material error of law, and if so, to remake the decision.

Background

6. The appellants are both citizens of India. The first appellant's immigration history is set out at paragraph [2] of the decision of the First-tier Tribunal Judge. He was granted leave to enter the UK as a student from 15th January 2007 until 31st March 2009. His leave was extended as a Tier 1 (Post study) Migrant until 26th January 2012 and as a Tier 1 (General) Migrant until 5th March 2014.

7. On 27th February 2014, the first appellant made an application for leave to remain in the United Kingdom as a Tier 1 (General) Migrant in accordance with the Points-Based System of the Immigration Rules. The application was refused for the reasons set out in a decision letter dated 2nd September 2014. The first appellant was not awarded any points for 'Previous Earnings' under paragraph 245CA(c) and Appendix A of the rules. In broad terms the respondent applied the 'Genuine Earnings Test' outlined in paragraph 19(i) of Appendix A, but on the balance of probabilities she was not satisfied that the earnings that the appellant had claimed from self employment, were from genuine employment. The respondent set out her reasons for that conclusion in her decision, and I do not repeat them in this decision.

The appeal before the First-tier Tribunal

8. On 1st September 2015, First-tier Tribunal Judge Symes heard the appeals and allowed the appeals for the reasons set out in a decision promulgated on 18th September 2015. Paragraph [2] of his decision sets out the background and paragraph [3] sets out the reasons provided in the respondent's decision of 2nd September 2014. At paragraphs [4] and [5], the Judge records the evidence before him. He states:

"4. In his witness statement the Appellant set out that he was in business dealing with properties in Gujarat, India, his customer base comprising expatriate Gujaratis in this country whom he helped to invest in property. His business grew by word of mouth. A

downtown in the property market for the years 2012/2013 had diminished his earnings though this did not mean the business was not genuine. Having seen the Home Office criticism of his earnings he had now investigated previous years' tax returns which he now appreciated had been completed on an inaccurate basis but his former accountants, JP Consultants, had not been contactable and he had reported them to the ACCA. He worked very long hours overall and it was wrong to presume he could not run his property business as well as working for 47 hours each week as an employee.

5. *Supporting documents included numerous invoices from March 2013 to February 2014 from the Appellant to various customers; a letter from Shah Consultancy, Accountants, of March 2015 saying that tax returns had been submitted for previous years and one would be provided for the year ending 5 April 2015 soon: he had told them that his previous accountants had made errors in the submission of his documents; letters from JP Consultants to UKBA of April 2011 recording a net profit of £30,661; a complaint to ACGA of March 2015 from the Appellant in relation to JP Consultants; a letter from Shree Hari Infrastructure of Anand, India, wrote that the Appellant referred them customers for property investments but none of the deals were finalised in the years 2011-2013; and numerous plans of properties.*

9. At paragraph [7] of his decision, the Judge makes reference to the matters set out in paragraph 19(i) of Appendix A of the rules and the factors that the respondent will take account of, that are identified at paragraphs 19(j)(i) to (ix) of Appendix A. The essential findings and reasons of First-tier Tribunal Judge Symes are to be found at paragraph [8] of his decision:

"8. I accept, having reviewed the evidence in the documents and the witness statements, that the Appellant has consistently been working in the United Kingdom including on a self-employed basis running his own business. He has provided detailed evidence and numerous documents associated with the existence of an underlying business, including copy invoices. His new accountants have now certified those corrected figures for past earnings as genuine. The question posed by 19(1) is whether the earnings are from genuine employment which may include earnings from businesses operated by an applicant. I do not see that I can find that he does not have "genuine" earnings upon which to rely given my primary finding that he runs business. The fact he

may have under-declared his earnings does not mean that this is not a genuine business enterprise."

10. The decision of the First-tier Tribunal Judge does not make express reference to the documents that were before him and contained in the respondent's bundle. The respondent had provided the Tribunal with a copy of the first appellant's Tier 1 application and the supporting documents. They were; The first appellant's Indian passport, Biometric Residence Permit card, payslips from EAT Ltd, payslips from Matalan Ltd, payslips from Vimas LLP, letter from Mac & Co Accountants, and HSBC bank statements. Also included in the respondent's bundle were HMRC documents and the transcript of an interview completed on 7th April 2014. The documents from HMRC are in fact a witness statement signed by HMRC Officer John Richards on 18th August 2014 providing information held on HMRC systems concerning the first appellant's tax affairs. Plainly, that statement and the transcript of interview do not form part of the documents submitted by the first appellant at the time of, and in support of his application, but arise from further enquiries made by the respondent, when assessing the application.

The Grounds of appeal

11. The respondent initially appealed on the sole ground that First-tier Tribunal Judge Symes had erred in allowing the appeal and remitting the matter back to the respondent because of the respondent's failure to consider the exercise of discretion under paragraph 322(5) of the rules. The respondent contended that the Tribunal had materially misdirected itself because paragraph 322(5) was not referred to in the respondent's decision and it formed no part of her decision.
12. At the outset of the hearing before me, Ms Broklesby-Weller made an application to amend the grounds of appeal to raise another ground that is inextricably linked to the ground already advanced. The respondent avers that the First-tier Tribunal Judge reached his decision to allow the appeal and to remit the matter back to the

respondent for her to consider whether she should exercise her discretion under paragraph 322(5), by reference to amended profit figures provided by Shah Consultancy Accountants in March 2015. The respondent avers that s85A of the Nationality, Immigration and Asylum Act 2002 operates such that the Tribunal should only have considered the evidence produced by the first appellant that was submitted in support of, and at the time of making the application to which the immigration decision related. She submits that s85A of the 2002 operates such that documents that were not sent with, or in support of the application, cannot be relied upon in an appeal against a decision from an application considered under the 'Points Based System' save as set out in the Act. The respondent avers that the amended profit figures provided by Shah Consultancy Accountants in March 2015 were not adduced to prove that a document is genuine or valid under s85A(4)(c) of the 2002 Act, but was were adduced as evidence of the first appellant's earnings.

13. Mr Balroop objected to the amendment to the grounds of appeal and submitted that in any event, the documents relied upon by the appellant were documents that were used to prove that a document is genuine or valid and it was therefore open to the Judge to have regard to the letter from Shah Consultancy Accountants, in reaching his decision. The hearing was adjourned for a short time to allow the parties and me, to reflect upon the provisions of s85A of the 2002 Act, and to ensure that we each had a copy of the relevant provisions before us. When we returned, I drew the parties attention to the decision of the Upper Tribunal in **Ahmed & Subedi -v- SSHD [2014] UKUT 00365 (IAC)**, that I considered may be of some relevance.
14. I remind myself that once permission to appeal to the Upper Tribunal has been granted, the grounds upon which such permission has been granted may be amended with the permission of the Upper Tribunal (rule 5(3)(c) of the Upper Tribunal Rules). Mr Balroop had an opportunity of considering the provisions of s85A and was able to deal with the additional matter raised by the respondent.

Having regard to the over-riding objective set out in rule 2, and in particular the need to deal with cases fairly and justly, and avoiding unnecessary formality and seeking flexibility, I granted the respondent permission to amend the grounds.

The hearing before me

15. Ms Broklesby-Weller adopted the matters are set out in the respondents application to amend the ground of appeal. She submits that the judge reached his decision by reference to new material that was not relied upon by the first appellant at the time of his application. The respondent had set out in her decision that the evidence relied upon by the first appellant as to his earnings, was not credible. She submits that the assessment by the judge should have been confined to the evidence that was before the respondent. The respondent did not contend in her decision that the letter from Mac & Co Accountants was not genuine. The respondent refused the application because enquiries made by the respondent revealed that the earning figures previously relied upon by the first appellant were inconsistent with records held by HMRC, and so no weight could be attached to the earnings set out in the letter from Mac & Co Accountants. She submits that the Judge based his decision upon an Accountants letter that plainly post-dates the application, and which seeks to correct matters. She submits that that is not evidence that was adduced to prove that a document is genuine or valid.
16. In reply, Mr Balroop submits that the evidence that was produced by the appellants at the hearing before the First-tier Tribunal was simply evidence to establish that the letter from Mac & Co Accountants was genuine or valid. He submits that the appellant had established before the First-tier Tribunal that the first appellant's earnings are from genuine employment taking into account the factors identified in Paragraph 19(j)(i) - (ix) of Appendix A. He submits that in any event, under paragraph 19(k) of Appendix A, it was open to the respondent to request additional information to explain any discrepancy, but the respondent had failed to give the appellants any opportunity to provide an explanation.

DISCUSSION

17. Section 85(4) Nationality, Immigration and Asylum Act 2002 provides that on an appeal, the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision, but that is subject to the exceptions set out in section 85A. Of these, only Exception 2 is relevant for present purposes. It is contained in subsections (3) and (4), which provide as follows:

“(3) Exception 2 applies to an appeal under section 82(1) if-

(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,

....

(c) is adduced to prove that a document is genuine or valid, or

...

18. The first appellant made his application for leave to remain in the UK as Tier 1 (General) Migrant under the ‘Points Based System’ on 27th February 2014. The Judge notes in his decision, at paragraphs [4] and [5], the evidence that was before him. Importantly in my judgment, the Judge records at paragraph [4]:

“...Having seen the Home Office criticism of his earnings he had now investigated previous years’ tax returns which he now appreciated had been completed on an inaccurate basis but his former accountants...”

The Judge goes on to record at paragraph [5]:

“Supporting documents included numerous invoices from March 2013 to February 2014 from the Appellant to various customers; a letter from Shah Consultancy, Accountants, of March 2015 saying that tax returns had been submitted for previous years and one would be provided for the year ending 5 April 2015 soon: he had told them that his previous accountants had made errors in the submission of his documents; letters from JP Consultants to UKBA of April 2011 recording a net profit of £30,661; a complaint to ACGA of March 2015 from the Appellant in relation to JP Consultants; a letter from Shree Hari Infrastructure of Anand, India, wrote that the Appellant referred them customers for property investments but none of the deals were finalised in the years 2011-2013; and numerous plans of properties.

19. I have set out at paragraph [10] of this decision, the evidence that was provided by the first appellant at the time of, and in support of his application. The evidence that is referred to by the Judge in paragraph [5] of his decision, is evidence that the appellants’ had adduced at the hearing of the appeal. It was not evidence that the appellants had provided at the time of, and in support of their applications to the respondent. That applies not only to the letter from Shah Consultancy Accountants, but also to the other evidence such as the invoices from March 2013 to February 2014 from the first appellant to various customers and the letter from Shree Hari Infrastructure, Anand, India.
20. The narrow issue in the appeal now before me is whether the First-tier Tribunal Judge was entitled to have regard to that new material that was adduced before the First-tier Tribunal, but had not been provided by the appellants at the time of their application, or any time before the decision of the respondent.
21. In my judgment, the clear policy underlying sections 85 and 85A of the 2002 Act is that the Tribunal should be able to consider a broad range of evidence in relation

to appeals generally, but a more limited range of evidence in relation to appeals against decisions which have to be considered under the Points Based system.

22. In **Ahmed & Subedi -v- SSHD [2014] UKUT 00365 (IAC)**, the Upper Tribunal considered s85A(3) and (4) of the 2002 Act and held;

“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.”

23. The appellants’ bundle before the First-tier Tribunal contained a number of material documents. Those documents were not before the respondent at the time of her decision. The letter from Shah Consultancy Accountant’s clearly post-dates the application and was obtained by the first appellant after he had seen the criticisms made by the respondent in her decision. I reject the submission that the letter from the Shah Consultancy Accountants was adduced to prove that a document is genuine or valid. There was no question before the First-tier Tribunal that the letter from Mac & Co Accountants previously relied upon by the first appellant, was genuine or valid. The issue was the weight that could be attached to its content, given the outcome of enquiries made by the respondent with HMRC. Having been alerted by the respondent in her decision that the information previously provided by the first appellant was inconsistent with the records held by HMRC, the first appellant appears to have accepted that the previous years tax returns, had been completed on an inaccurate basis. The correction of the first appellant’s tax affairs is a matter that has occurred since the decision of the respondent. The appellant’s tax affairs aside, the Judge also had regard to supporting documents including numerous invoices from March 2013 to February 2014 from the first appellant to various customers, and a letter from

Shree Hari Infrastructure of Anand, India, that again, were not before the respondent at the time of her decision.

24. In my judgment, it is clear from the decision of the First-tier Tribunal Judge that in reaching his decision that the first appellant has consistently been working in the UK, including on a self-employed basis running his own business, and that the earnings of the appellant from self-employment were from genuine employment, the Judge took into account material other than that which was submitted in support of the application and was before the decision maker. In short, the Judge reached his decision based upon a different presentation of the application. That presentation being based upon material that was not before the respondent at the time of her decision, and had not been adduced to prove that a document was genuine or valid.
25. I reject the submission made on behalf of the first appellant that the respondent had failed to give the appellant's any opportunity to provide an explanation for the inconsistencies in the information about the first appellant's earnings from self-employment. Paragraph 19(i) of Appendix A makes it plain that the Secretary of State must be satisfied that the earnings are from genuine employment. Under the provisions of paragraph 19(k), to support the assessment, the respondent may request additional information and evidence. The onus of satisfying the respondent that the requirements under the points based system are met rests upon an applicant. There is no mandatory requirement to request additional information and in my judgment, having obtained evidence from HMRC that established that the first appellant had in previous years earned significantly less than he had previously claimed to, it was open to the respondent to make a decision upon the application.
26. It follows that in my judgment, the decision of the First-tier Tribunal discloses a material error of law and the decision of the First-tier Tribunal is set aside.

The decision Remade

27. Given the approach that is mapped above, there can only be one decision. Absent the new material that was relied upon by the appellants before the First-tier Tribunal, the decisions of the respondent of 2nd September 2014 are unassailable. The decisions are therefore remade by dismissing the appeals.

Notice of Decision

28. The decision of the First-tier Tribunal is set aside.
29. The decision is remade and the appeals of the first and second appellants are dismissed.
30. No anonymity direction is applied for and none is made.

Signed

Date

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

The First-tier Tribunal made no fee award. As I have set set aside the decision of the First-tier Tribunal and dismissed the appeals, I make no fee award.

Signed

Date

Deputy Upper Tribunal Judge Mandalia