
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/50854/2014
IA/50807/2014
IA/50853/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 11 May 2016** | **On 19 May 2016** |

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**VENKATESHAM ALLE**

**SRINIVAS AKKALA**

**PADMA PENDYALA**

Appellants

**and**

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

Respondent

**Representation:**

For the First and Second Appellants: Mr P. Richardson,
Counsel instructed by Morgan Mark Solicitors
For the Third Appellant: No appearance

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For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

## DECISION AND REASONS

## Background

1. On 17 April 2014 the first and second appellants ("the appellants") made an application for leave to remain as Tier 1 (Entrepreneur) Migrants. They stated that they were business partners ("an entrepreneurial team") and submitted a number of pieces of evidence in support of the application. The third appellant is the dependent wife of the first appellant.

2. The respondent interviewed the appellants prior to making a decision. No copies of the interview records appear to be included in the respondent's bundles. The date of the interview is unclear from the evidence currently before the tribunal.

3. The respondent refused the applications in decision letters dated 05 December 2014. The respondent considered the factors outlined in paragraph 245DD(i) of the immigration rules. The respondent was not satisfied that the appellants had demonstrated that they were genuine entrepreneurs. No points were awarded with reference to paragraph 245DD(k) of the immigration rules.

4. The appellants appealed against the decision. First-tier Tribunal Judge R.J.N.B. Morris ("the judge") dismissed the appeal in a decision promulgated on 29 September 2015. In summarising the applicable law the judge said:

> "8. In immigration appeals, the burden of proof is on the applicants and the standard of proof required is the balance of probabilities. I can consider evidence about any matter which I consider to be relevant to the substance of the Decision, including evidence which concerns a matter arising after the date of the Decision. The appropriate standard of proof is whether there are "substantial grounds for believing the evidence"."

5. When she went on to make her findings relating to the genuine nature of the application the judge stated:

> "15. Despite the Respondent's clear indication as to the matters of concern which undermined the Appellants' application, the Appellants have not adequately addressed these concerns nor adduced satisfactory oral or documentary evidence to address the matters set out in the Reasons for Refusal Letter. The greater part of the defects identified in the Reasons for Refusal Letters relate to matters specifically covered by paragraph 245DD, and in particular, paragraphs 245DD(h) and (i). However, there is scant reference to them (if at all) in the First and Second Appellants' Witness Statements and/or in the Skeleton Argument. Whilst the Appellants' oral Representative addressed a number of these points in his examination of the First and Second Appellants, to

> a large extent, their oral evidence further undermined their applications. Since the Reasons for Refusal letters are detailed documents, it would serve no purpose to repeat here all the matters set out in the Reasons for Refusal Letters. However, by way of example only of those serious defects which have not been address and therefore still seriously undermine the Appellants' applications, I noted the following…"

The judge went on to consider a number of points outlined in the reasons for refusal letters and made findings in light of the oral evidence given at the hearing.

6. The first and third appellants applied for permission to appeal against the First-tier Tribunal decision on the ground that the judge erred in taking into account the appellants' oral evidence contrary to the restrictions outlined in section 85A of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") in force at the time as interpreted by the Upper Tribunal in *Ahmed (PBS: Admissible Evidence*) [2014] UKUT 365.

7. First-tier Tribunal Judge Landes granted permission to appeal in a decision dated 22 March 2016. The judge took into account the fact that, by that stage, the second appellant was unrepresented but granted permission to all three appellants based on the grounds lodged by the first and third appellants.

8. The respondent's rule 24 response dated 31 March 2016 accepted that the judge was not entitled to consider subsequent evidence but any error was not material because she was correct to conclude that the respondent had identified a number of inconsistencies in the evidence, which led her to doubt the genuine nature of the application.

9. There was no appearance by or on behalf of the second appellant at the hearing on 11 May 2016. Given that first and second appellants say that they are business partners, and previously shared the same legal representative, it seemed unlikely that he was unaware of the hearing. No explanation was provided for his absence. In the circumstances I was satisfied that I could proceed to hear the appeal.

## Decision and reasons

10. The central issue to be determined in this appeal is whether the judge made a material error of law by taking into account oral evidence given by the appellants at the hearing as part of her assessment of paragraph 245DD(h) of the immigration rules i.e. the assessment of the genuine nature of the application.

11. Section 85A of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") as it applied at the date of the First-tier Tribunal hearing:

> "**Matters to be considered: new evidence: exceptions**
> (1) This section sets out the exceptions mentioned in section 85(5).

(2) Exception 1 is that in relation to an appeal under section 82(1) against an immigration decision of a kind specified in section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision.
(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 the "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"."

12. In *Ahmed and another (PBS: admissible evidence)* [2014] UKUT 00365 the Upper Tribunal concluded that the exception to evidence that may be considered in Points Based System appeals under section 85A(4)(d) only applied to non-points based provisions of the rules. Paragraph 245DD(k) linked the provisions relating to the assessment of the genuine nature of a Tier 1 (Entrepreneur) application to the acquisition of points and therefore came within the restrictions on evidence that could be considered by virtue of section 85A. In assessing the impact of section 85A the tribunal stated [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 the 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."

13. In *Olatunde v SSHD* [2015] EWCA Civ 670 the Court of Appeal considered the impact of section 85A and concluded [17]:

> "17. ….the clear policy underlying sections 85 and 85A 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 a Points Based system. This strongly supports the conclusion that section 85A(3)(a) is to be read as referring to that element of appeal proceedings which involves a challenge to a decision of a kind specified in section 82(2)(a) or (d), whether or not the appeal also involves a challenge to a decision which falls under another paragraph of section 82(2), in this case paragraph (ha)….

> 18. This analysis is support by the decision of the Upper Tribunal in *Mushtaq v SSHD* [2013] UKUT 00061 (IAC). It held that section 85A(3) can apply when an appeal is brought against an immigration decision falling within section 82(2)(a) or (d) regardless of whether an appeal is also brought against an immigration decision of another kind…"

14. The Court of Appeal went on to consider, on the particular facts of one case, the 'genuineness' provisions contained in paragraph 245DD(h):

> "26. Since sub-paragraph (h) is concerned with the applicant's intentions with regard to the establishment of a business and the investment of funds that are genuinely available to him, it is difficult to see in what circumstances an applicant who fails to satisfy the Secretary of State of those matters could hope to satisfy her that his application as a whole was genuine and thus avoid falling foul of sub-paragraph (k). However, it that were in issue, I am inclined to think that section 85A(3) would prevent the tribunal from taking into account new evidence that related to the genuineness of the application insofar as it was adduced to show that the requirements of sub-paragraphs (b), (c) and (d) were satisfied; and the failure to obtain the required number of points would inevitably lead to the refusal of the application."

15. It is common ground between the parties that the judge's self-direction in paragraph 8 of the decision was erroneous. Nowhere in the decision does she appreciate the impact of section 85A despite the fact that the appeal involves an application under the Points Based system.

16. The statutory provisions and case law outlined above shows that the clear intention of section 85A was to significantly restrict the evidence that could be considered by the First-tier Tribunal in an appeal against a decision made under the Points Based system. The wording of section 85A restricts a First-tier Tribunal Judge from considering "evidence" which was not submitted at the time of the making of the application. "Evidence" that could be considered might include specified documentary evidence or answers given at interview prior to refusal decision.

17. While section 85A does not specifically restrict a judge from hearing oral evidence as part of an appeal the effect of the provisions mean that only oral evidence relating to the limited number of exceptions can be considered. It would be open to a First-tier Tribunal Judge to consider the reliability of documentary evidence submitted with the application. It would also be open to a judge to consider the credibility of evidence given during an interview in the context of the other evidence submitted in support of the application. It is likely that a judge would also be able to consider any obvious points made by the appellant at a hearing to correct clear errors made by the respondent in the assessment of the evidence. For example, if the reasons for refusal letter contained a clear factual error or the conclusions were irrational on the evidence submitted with the application. A judge would also be able to consider further oral or documentary evidence to prove that a document is genuine or valid.

18. However, section 85A would restrict a judge from considering *ex post facto* evidence produced by the appellant, either by way of documentary or oral evidence, which sought to bolster inadequate evidence produced in support of the original application. If a document was inadequate or missing, further evidence produced on appeal to remedy the shortfalls could not be considered unless it came within one of the exceptions. If an answer in interview was inconsistent, implausible or sufficiently unclear, it would not be open to a judge to take into account further oral evidence from the appellant seeking to expand or elaborate on the issue at a hearing. Nor would it be appropriate to consider inconsistencies between evidence given at interview and at the hearing unless it came within the scope of the exceptions. What oral evidence might be relevant to the exceptions outlined in section 85A will require careful consideration by a judge on the facts of each particular case.

19. At first blush the restrictions contained in section 85A seem to limit the range of assessment by a judge to something more akin to review than an appeal. However, it is quite clear that the intention was to restrict Point Based system appeals in such a way (most likely as a precursor to the abolition of rights of appeal in Points Based system cases that followed). In the remaining appeals before the First-tier Tribunal the decision making process is an appeal. A judge is restricted in what evidence can be considered but can still assess the evidence submitted in support of the application and come to a different conclusion where appropriate.

20. In this appeal the judge erred in failing to have regard to the restrictions outlined in section 85A. Albeit that she was not impressed by the evidence given by the witnesses at the hearing and made negative findings it was not open to her to consider that further evidence.

21. The question that I must consider is whether the error was material to the outcome of the appeal in the circumstance of this particular case. The judge considered the reasons for refusal in some detail in paragraph 15. She considered a number of points raised with reference to evidence submitted in support of the application and given at interview albeit that she erroneously also went on to consider many of the points with reference to further evidence given at the hearing. She concluded that the appellants failed to address the concerns raised but even if she had not done so it seems clear from an overall reading of her findings that the judge considered the reasons for refusal cast sufficient doubt on the application to justify refusal under paragraph 245DD(h).

22. The appellants did not appear to take issue with the accuracy of the respondent’s summary of the answers they were said to have given in interview. The respondent was entitled to take into account the fact that there were a number of discrepancies on the face of the documents submitted in support of the application. For example, inconsistencies as to the source of the funds as well as in relation to the name of the company.

She was also entitled to take into account the fact that some of the appellants' answers in interview were rather confused and lacking in detail. While the appellants pointed out that the respondent was likely to be incorrect in stating that the business was registered on 07 March 2013 (the Current Appointments Report states it was incorporated on 07 March 2014) that single factual error was not likely to make any material difference to the overall credibility of the application in light of the other issues raised.

23. The judge took into account the evidence submitted with the application and the reasons for refusal letter and it seems clear from her findings that even if she hadn't considered the further oral evidence given by the appellants she was satisfied that there were sufficient grounds to cast doubt on the genuine nature of the application. For these reasons I conclude that, despite the fact that she erred in considering evidence restricted under section 85A, it was not material to the outcome of the appeal, which would have been dismissed even on the evidence submitted in support of the original application.

DECISION

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

The First-tier Tribunal decision shall stand

Signed  Date 16 May 2016

Upper Tribunal Judge Canavan