



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

Appeal Numbers: IA/14685/2014  
IA/14683/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 24<sup>th</sup> March 2015**

**Determination**

**Promulgated**

**On 19<sup>th</sup> May 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BAIRD**

**Between**

**JAE HYUK LEE (FIRST APPELLANT)  
HYE MI KANG (SECOND APPELLANT)  
(ANONYMITY DIRECTION NOT MADE**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr D Magne of Magne & Co Solicitors

For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Symes issued on 17<sup>th</sup> November 2014, allowing the appeals of the Appellants against the decision of the Respondent made on 10<sup>th</sup> March 2014 to refuse further leave to remain and to remove them from the United Kingdom under Section 47 of the Immigration,

Asylum and Nationality Act 2006. The First Appellant had sought leave to remain as a Tier 1 (Entrepreneur) Migrant and the appeal of the Second Appellant is entirely dependent on the First Appellant.

2. It is submitted in the grounds seeking permission that the Judge erred in concluding that the Appellant's business is a credible one, having taken into account post-decision evidence and finding that this evidence was admissible with reference to paragraph 245DD(h)-(i) of the Immigration Rules. Reliance is placed by the Secretary of State for the Home Department on the decision **SSHD v Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365**.
3. On 23<sup>rd</sup> January 2015 First-tier Tribunal Judge Nicholson granted permission to appeal. He said at paragraphs 4 and 5:
  - "4. In **Ahmed and Another** it was held that where a provision of the Rules provides that points will not be awarded if the decision maker is not satisfied as to another (non-points-scoring) aspect of the Rule, the non-points-scoring aspect and the requirement for points are inextricably linked; as a result the prohibition on new evidence and Section 85A(4) of the Nationality, Immigration and Asylum Act 2002 applies to the non-points-scoring aspect of the Rule: the prohibition is in relation to new evidence that goes to the scoring of points.
  5. At paragraph 7 of **Ahmed** it was said 'paragraph 245DD(k) of the Statement of Changes in the Immigration Rules, HC 395 (as amended) is the following:

'If the Secretary of State is not satisfied with the genuineness of the application in relation to a points scoring requirement in Appendix A those points will not be awarded.'

That clearly links the assessment of the genuineness of the scheme to the acquisition of points and rules out, in a ground not related to the acquisition of points under the Points Based System. On the contrary, the wording of the Rule links the two matters inextricably'."
4. In his response to the grant of permission to appeal Mr Magne said that the ratio of Ahmed cannot be applied to Paragraph 245DD(h) because that would be to subvert the intention of Parliament when introducing Section 85A of the 2002 Act. Because the Points-based system had not been implemented at the time of the introduction of s.85A the scope of it has to be derived from assurances given by Ministers at the time of the passage of the Bill introducing it. He relied on the decision in *Alvi v SSHD* [2012] UKSC33. He submitted that that in an application for leave to remain as an entrepreneur the question of whether a business is genuine or viable is a discretionary one that goes beyond the requirement in the Immigration Rules to provide specified documents. He said that refusal to consider the post-decision documents flies in the face of the intention of s. 85A.
5. Mr Magne relied on a large and comprehensive bundle of documents which includes the following:-

- i. Extracts from the UK Borders Bill – Hansard 2007
  - ii Extract from Immigration, Asylum and Nationality Bill Standing Committee E - Hansard – October 2005
  - iii Ahmed & anr (PBS: admissible evidence) [2014] UKUT 000365
  - iv Alvi v SSHD [2012] UKSC33
  - iv Extracts from Bennion on Statutory Interpretation
  - v. A, R [2001] UKHL 25
6. Mr Magne also provided a skeleton argument in which, relying on **Alvi**, it is submitted that the Secretary of State having implemented the Rules in accordance with the assurances given at the time of the passage of the statute has now sought to backtrack on these assurances through the incorporation of subjective assessments into the award of points and this would be contrary to the dicta of Executive estoppel set out in **A,R** .
  7. Mr Kandola simply relied at the hearing before me on the decision in **Ahmed** pointing out that in **Ahmed** the Tribunal noted that the decision before them was of the sort specified in Section 82(2)(d) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).
  8. The issue before me is whether there is a material error of law in the decision of First-tier Tribunal. Judge Symes set out the facts of the case and the requirements of paragraph 245DD of the Immigration Rules. He noted that the Presenting Officer had agreed that the only issue was the credibility of the Appellant’s business, and that the relevant provisions at 245DD(h) and (i) set out the requirements regarding the business and what the Secretary of State is allowed to take into account, including “the evidence the applicant has submitted”.
  9. At paragraph 22 he found that he could rely on the documents relative to the Appellant’s business that had been lodged post-decision because s. 85(A)4 admits exceptions to the general post-application bar on fresh evidence where it is ‘adduced in connection with the Secretary of State’s reliance on a discretion under the Immigration Rules, or a compliance with a requirement of points under the points-based system. He said that Rule 245DD(h) – (i) ‘does not involve the acquisition of points’ but rather a global assessment of the credibility of a business and thus s.85(A) 4 is in play.
  10. Judge Symes made no reference to **Ahmed**. Clearly he failed to take account of it. As a Judge of the First-tier Tribunal he was bound by that decision unless he could distinguish it. Since he failed to mention it at all it cannot be said that he distinguished it and gave sound reasons for doing so. There is therefore a material error of law in his decision and I set it aside.
  11. As I have said Mr Magne made comprehensive submissions as to why the decision made by Judge Symes was correct. He urged me to overturn the

decision in **Ahmed**. I have given very careful consideration to all the submissions made and to the very helpful documentation provided.

12. In **Ahmed** the Tribunal said,

“The Secretary of State applied for and obtained permission to appeal on the basis that the Judge had behaved in a way that was not by statute open to her. The decision in the present case is of the sort specified in s 82(2)(d). The relevant law is contained in s 85A(3) and (4), expressed as an exception to a general rule that all relevant evidence may be considered:

- “(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 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,
  - (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’.””

- and at paragraph 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.”

13. The Tribunal continued,

“As is apparent from her judgement, the judge took into account material other than that which was before the decision-maker. In a spirited defence of her procedure Mr Asme has submitted that the way in which the letter was divided into Non-Points Based and Points Based matters demonstrates that in assessing whether the business plans were genuine the decision-maker was refusing the application on grounds which were not related to the acquisition of points under the Points Based System. If that is right, Mr Asme submits, then the judge was at liberty to look at further evidence. We

are satisfied however that that is a submission which cannot succeed. There are two connected reasons for that.

The first is that in paragraph 245DD(k) of the Statement of Changes in the Immigration Rules, HC 395 (as amended) is the following:

“If the Secretary of State is not satisfied with the genuineness of the application in relation to a points scoring requirement in Appendix A those points will not be awarded.”

That clearly links the assessment of the genuineness of the scheme to the acquisition of points and rules out, in our judgement, the submission that the assessment of the genuineness of the scheme was a ground not related to the acquisition of points under the Points Based System. On the contrary, the wording of the Rule links the two matters inextricably.

Secondly, as we pointed out to Mr Asme in the course of his submissions, if he were able to show that the judge was entitled to look at the genuineness of the scheme for the purposes of the appeal before her, she would nevertheless not be able to reach a decision that because of her view about the genuineness of the scheme, points should have been awarded. That is because that would itself link the genuineness of the scheme to the acquisition of points, and she is prohibited from hearing evidence which does go to the acquisition of points.”

14. Mr Magne put it to me that s 85A(4)(d) is ambiguous and I agree that it arguably is but it seems to me that the decision in **Ahmed** dispels any ambiguity and is correct for the reasons given by the Upper Tribunal. I place particular weight on the point in the above paragraph beginning ‘Secondly’. I would add to that my own observations. Mr Symes at paragraph 22 of his decision asserts that Rule 245DD (h) – (i) ‘does not involve the acquisition of points’ but S. 85a 4)(d) refers to ‘reliance on a discretion under the immigration rules or compliance with a requirement of the immigration rules to refuse an application on grounds *not related to the acquisition of points* in the Points-based system. That is a different thing. It is the relationship to the acquisition of points that is relevant not the bare fact of the non points-scoring element. Further, paragraph 245DD (h) of the Rules is said to apply where an applicant ‘is being assessed under Table 5 of Appendix A’ and it is Appendix A that sets out how points are earned. Again this supports the finding in **Ahmed** that the non-points-scoring aspect and the requirements for the acquisition of points are inextricably linked.

15. I therefore dismiss the submissions made on behalf of the Appellant.

## **DECISION**

The Appellants’ appeals against the decision of the Secretary of State of 10<sup>th</sup> March 2014 to refuse further leave to remain are dismissed.

No anonymity direction is made.

Signed

Date: 8<sup>th</sup> May 2015

N A Baird  
Deputy Judge of the Upper Tribunal