



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

Appeal Number: IA/14880/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 6 October 2015**

**Decision & Reasons Promulgated
On 9 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**ARNEX IMOEBE
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms D. Revill, Counsel instructed by Anthony Oguwfeibo & Co

For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 5 July 1984. He is appealing the decision of the First-tier Tribunal, promulgated on 27 April 2015, to dismiss his appeal against the respondent's decision to refuse him leave to remain as a Tier 1 Entrepreneur.
2. The appellant first entered the UK on 14 October 2009 as a Tier 4 General Migrant with leave until 24 January 2011. Thereafter leave to remain was granted until 2 November 2011 and, as a Post Study

migrant, until 29 November 2013. On 30 October 2013 he applied for further leave as a Tier 1 Entrepreneur. This was refused by the respondent on 12 March 2014 on the basis that the appellant did not satisfy the requirements in Paragraph 245DD(h) of the Immigration Rules when assessed in accordance with the factors listed in paragraph 245DD(i).

3. The appellant appealed and his appeal was heard by First-tier Tribunal Judge M. Eldridge (“the judge”). The judge concluded that he was not satisfied the appellant met the requirements of Paragraph 245DD. In so doing, he made the following findings:
 - a. He was not satisfied that the funds said to be available belonged to the appellant.
 - b. He did not find the appellant to be realistic or credible with respect to his business plan.
 - c. The judge considered the appellant’s research, both in respect of the market and potential customer base, to not be viable or meaningful.
4. At the hearing, additional evidence was handed to the judge but he declined to consider it on the basis that new evidence may not be adduced before the Tribunal in respect of non points scoring aspects as well as for the acquisition of points under section 85A of the Nationality, Immigration and Asylum Act (“the 2002 Act”). The judge referred to and relied on *Ahmed and Another (PBS: admissible evidence)* [2014] UKUT 00365 (IAC).
5. The grounds of appeal submit that:
 - a. The judge erred by not admitting new evidence produced at the Hearing, as under subsection 85A(4)(c) of the 2002 Act, the restriction on new evidence does not apply where the new evidence is adduced to show that a document is genuine or valid.
 - b. The judge erred by failing to have regard to material evidence in the form two invoices and a contract which were relevant to the genuineness of the business.
 - c. The judge conflated the question of the appellant’s intentions with that of whether the business would be successful.
6. I heard submissions from Ms Revill and Mr Tufan on the three grounds and I now consider each in turn.

Ground 1: applicability of subsection 85A(4)(c) of the 2002 Act

7. Section 85A of the 2002 Act provides as follows:
 - (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 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”

8. The new evidence adduced by the appellant, and which the judge declined to consider on the basis of Section 85A, comprised of a report from Companies House, advertising material and evidence pertaining to a business in Nigeria. Ms Revill argued that this new evidence fell within the exception at sub-paragraph 85A(4)(c) because it was adduced to prove that documents were valid or genuine. She submitted that the judge erred because he failed to recognise this.
9. Mr Tufan, in response, referred to the Court of Appeal judgement in *Olatunde* [2015] EWCA Civ 670. *Olatunde*, which, like the present case, concerned an application under Rule 245DD for leave to remain as a Tier 1 Entrepreneur, made clear that the Tribunal was not entitled to take into account documents which had not been submitted at the time the application was made. A similar point is made in *Ahmed and Another (PBS: admissible evidence)* [2014] UKUT 00365 (IAC). Mr Tufan argued that these cases are determinative of the issue. Ms Revill countered that *Olatunde* and *Ahmed* are not relevant as they do not address the exception in sub paragraph 4(c).
10. The judge stated that he could not consider post application evidence under 85A(4)(c) for the reasons given in *Ahmed*. I agree with Ms Revill that this is misconceived. *Ahmed* and *Olatunde* concerned the prohibition on admission of new evidence under 85A(4) but not the

applicability of subsection 4(c), which arises where new evidence is adduced for the specific purpose of proving a document is genuine or valid. The judge, therefore, has erred by failing to acknowledge that *if* the new evidence was adduced to prove that one or more of the documents submitted with the application were genuine, it should be admitted.

11. However, having considered the new evidence, I do not accept the contention that it was adduced to prove other documents were genuine. The new evidence stands alone as evidence in support of the appellant's case and only on the most artificial and stretched of interpretations can it be characterised otherwise. Accordingly, although the judge erred in failing to properly address the appellant's argument about sub-paragraph 4(c), the error was not material as the documents in question could not in any event be said to be fall within the exception under that sub-paragraph.

Ground 2: failure to have regard to material evidence in the form of a contract and invoices

12. Ms Revill argued that the judge omitted to give consideration to, and weigh in the balance when assessing the appellant's appeal, key evidence supportive of the appellant's case. She submitted that the judge's failure to even make a finding in respect to this evidence indicates that no regard was paid to it and the judge had failed to resolve a conflict in the evidence as required by *Budhathoki (reasons for decisions)* [2014] UKUT 00341 (IAC).
13. Mr Tufan submitted that the judge's findings were based on the evidence and, having given consideration to the relevant and material evidence before him, the judge reached a decision that was consistent with the evidence.
14. I do not accept Ms Revill's argument that material evidence has been overlooked. The relevant question for the judge was whether the appellant satisfied Rule 245DD(h), taking into account the factors listed in Rule 245DD(i). It is clear from the judge's decision that he has considered the evidence, as a whole, with the requirements of these provisions in mind. Although the judge did not refer specifically to certain evidence, specifically the contract and invoices, that does not mean they were overlooked. The judge stated at paragraph [9] that he had "taken full account" of the documents provided and I am satisfied, based on a consideration of the decision as a whole, that this is what he did.

Ground 3: conflating intentions with likelihood of success

15. Ms Revill submitted that the judge improperly considered evidence from the perspective of how the appellant will succeed in running a business rather than limiting himself to the question of whether the

appellant's intentions were genuine. Mr Tufan argued that intention and ability go hand in hand and the judge's findings were open to him. This issues was addressed in *Olatunde*, which states at paragraph [24]:

"Although paragraph 245DD(h) requires an applicant to satisfy the Secretary of State only that he genuinely intends and is able to establish the relevant business, the factors which the Secretary of State is entitled to take into account when deciding whether that requirement is met are set out in sub-paragraph (i). They include the viability of the applicant's business plans, presumably because it is thought that if the plans are not viable, it is less likely that the applicant really intends to put them into effect. In the light of this provision, it is clear that viability is one of a number of factors that may be relevant to the Secretary of State's decision."

16. The judge has addressed the issues required by Rule 245DD(h) and, as part of the consideration, formed a view on the viability of the appellant's business. That approach is in accordance with the requirements of the Immigration Rules and is consistent with *Olatunde*. This ground of appeal amounts to no more than a disagreement with the judge's findings and I am satisfied that it does not identify an error of law.

Notice of Decision

17. The appeal is dismissed.
18. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.
19. No anonymity order is made.

Signed



Date: 9 October 2015

Deputy Upper Tribunal Judge Sheridan