



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

Appeal Number: IA/25813/2014

THE IMMIGRATION ACTS

**Heard at Glasgow
on 4 August 2015**

**Determination issued
on 18 August 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

CHIJOKE UGOCHUKWU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Shoaib, of Shoaib Associates

For the Respondent: Ms S Aitken, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria, born on 4 October 1978. On 10 April 2014 he applied for leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant under the points based system (PBS).
2. The respondent refused that application for reasons explained in a ten page letter dated 2 June 2014. The respondent found various deficiencies in the evidence submitted by the appellant and was not satisfied that he was a genuine entrepreneur.

3. In his grounds of appeal to the First-Tier Tribunal the appellant insisted that he is a genuine entrepreneur. He also said that discretion should be exercised in his favour and that the decision was incompatible with the ECHR, particularly Article 8, but neither of those grounds had any substantial content and they have not been further developed.
4. The appellant appealed to the First-Tier Tribunal. First-Tier Tribunal Judge Boyd heard his case on 15 September 2014. The appellant was represented by Mr Shoaib. He provided further evidence both documentary and oral. No objection was taken by the respondent's Presenting Officer, and the appellant was cross-examined. The Judge did not find his oral or documentary evidence persuasive and expressed "severe doubts as to the credibility of the appellant's business activities" (paragraph 19). The appeal was dismissed by determination dated 25 September 2014.
5. The appellant sought permission to appeal to the Upper Tribunal on two grounds.
6. Ground (a) is insufficiency of reasoning and irrationality - no reasons at paragraph 16 to support the rejection of the appellant's explanation about transfers to his bank account from friends, in light of exchange rate issues; inadequate reasoning for the conclusion at paragraphs 21 and 22 that the appellant does not have adequate business experience; and irrationality in the conclusion regarding the appellant's part-time work at paragraph 22, as it in no way undermines the appellant's case that he carried on part-time work to gain experience and contacts, yet this was held against him.
7. Ground (b) relies on section 85A of the 2002 Act, which restricts the evidence to be considered by the Tribunal in an appeal of this nature, and on **Ahmed & Another** (PBS: admissible evidence) [2014] UKUT 00365 - the Judge was "barred from admitting into evidence (including oral evidence) that was not submitted at the time of the application, yet he did so ... a fundamental error of approach which was material".
8. On 13 November 2014 a First-Tier Tribunal Judge refused permission to appeal, on the basis that ground (a) amounted to no more than disagreement with adverse findings which were adequately explained, and ground (b) was "somewhat bizarre", the appellant having chosen to exercise his right of appeal at an oral hearing, and he not having identified any part of his oral evidence taken into account by the Judge which amounted to post decision evidence rather than evidence about matters which were before the decision maker.
9. The appellant renewed his application, supplementing ground (a) by reference to **MK** (duty to give reasons) Pakistan [2013] UKUT00641 and acknowledging that although ground (b) and **Ahmed** might lead to a somewhat bizarre result, nevertheless **Ahmed** was binding on the First-Tier Tribunal.

10. On 17 February 2015 a Deputy Upper Tribunal Judge granted permission to appeal, on the view that ground (b) was arguable, and although the other grounds were less well founded in themselves, they were inextricably linked to the issue of what evidence the Judge was entitled to consider, so that all grounds might be argued.
11. In a Rule 24 response to the grant of permission the respondent says that in his appeal and by his oral evidence the appellant sought to address the respondent's concerns regarding availability and credibility of funds claimed. If the appellant was not allowed to rely on the further evidence he gave there was no means by which he could address the respondent's concerns and his appeal would fail. "Section 85A(4) is to be interpreted as relating to documentary evidence because if the definition were to go further and relate to oral evidence then if no oral evidence had previously been given none could be taken and even if oral evidence had been taken into account by the respondent the appellant could not expand on it. Therefore oral hearing would be nugatory."
12. Mr Shoaib submitted that the Judge gave inadequate reasons for not accepting the appellant's evidence. For example, at paragraph 15 he described affidavits from two witnesses as "self serving documents" which did not in themselves prove that funds were available genuinely to the appellant. The affidavits had been sworn before a notary public and signed in presence of the appellant's family members. The evidence the appellant gave at interview went to confirm the source of payments. The Judge did not give any sustainable reason for not accepting the evidence in the affidavits. At paragraph 16 the Judge doubted evidence relating to a Mr Menuba who had also previously been refused leave as a Tier 1 Entrepreneur Migrant. Mr Shoaib had also represented Mr Menuba. He had challenged his adverse decision by way of judicial review. The respondent withdrew the decision and granted him a visa. His case raised the same issue as the present case. The appellant had produced cogent evidence both oral and documentary to address all the respondent's concerns. The only point the respondents made was that the appellant had no employer's liability insurance certificate, but there was no legal requirement for him to have one while working prior to decision in accordance with permission and not acting as an entrepreneur.
13. On ground (b) Mr Shoaib submitted that the Judge should not have considered any further evidence either oral or documentary. I queried whether this was not trying to have matters both ways, asking the Judge to consider evidence and then reversing course when it turned out not to favour the appellant. Mr Shoaib responded that the appellant had been accepted by the respondent to have all the correct educational qualifications required, up to the level of a Masters Degree, and that if he was not able to show that he qualified under the points based system, "How could anyone prove that they are capable of doing anything?"
14. Finally, Mr Shoaib submitted that the determination should be set aside. I asked Mr Shoaib to submit on how the case should proceed from there, if

error were to be found. He said there were three options, but preferred to leave the matter to the Upper Tribunal.

15. Ms Aitken submitted that Section 85A was concerned to ensure that appeals were to be based only on the evidence before the respondent's decision maker, subject to certain exceptions. It was the appellant who sought to give oral evidence. That was designed to clarify material which had been before the decision maker, which was permitted by Section 85A (4). It was up to the appellant to make his case and not open to him to elect to have his evidence disregarded when it was not found to go in his favour. The Judge had agreed broadly with the respondent's assessment of the appellant's evidence. Even if there had been any error in taking account of oral evidence, the decision was not based only on that. The Judge found that the case failed even if restricted to the evidence which had been before the decision maker. Even if the Judge had considered further evidence in error, the outcome would have been the same. The criticisms of the Judge's conclusions were selective and overlooked the several good reasons given for rejecting the appellant's version of his affairs. The Judge gave very clear reasons for finding the evidence both oral and documentary to fall short of what was required.
16. Mr Shoib in response reiterated that the appellant had carried out work on a contract, had given evidence of the income derived from it, had shown that he had the required experience and qualifications, had worked only in accordance with the leave available to him and not as an entrepreneur, and that the Judge failed to give any proper reasons for disregarding the evidence presented.
17. I reserved my determination.
18. It was the responsibility of the appellant in the First-Tier Tribunal to direct the Judge's attention to the provisions of Sections 85 and 85A of the 2002 Act covering the matters and evidence which the Tribunal was to consider. There appears to have been an entire failure to make any submissions to the First-Tier Tribunal about that. Rather, the case was approached as if there were no restrictions on evidence.
19. The respondent's representative was also under a duty to refer the First-Tier Tribunal to the relevant provisions, and failed to do so. However, the primary responsibility was on the appellant as the party who had to make his case; and any waiver of objection by the respondent went in his favour at that stage, not against him.
20. It would be very late in the day now to try to analyse which parts of the evidence, oral and documentary, tendered by the appellant in the First-Tier Tribunal were admissible, and which parts were not. The appellant has not sought to explain the distinction or to apply it to his case.
21. I do not have to decide how far the evidence should have been restricted or try to disentangle it. The answer for present purposes is that the

appellant is personally barred from running any such argument. He placed the evidence before the First-tier Tribunal and asked for it to be considered. He has waived objection to its being considered, and cannot raise that once it is found to go against him.

22. An appellant cannot say to a judge, "Please consider this evidence if you think it helps me, but you are bound to disregard it if it goes against me".
23. That leaves the criticism of the judge's reasoning. In that respect the grounds are no more than a selective disagreement and an attempt to rerun the case on the facts. The determination must be read fairly and as a whole. The phrase "self serving" is seldom helpful when explaining why evidence is rejected, but the Judge said much more than that. He had the advantage of hearing directly from the appellant whom he did not find particularly credible or reliable. He did not accept that funds were genuinely available to the appellant as claimed, noting for example the large number of transactions and the account being mainly in overdraft despite the appellant claiming to have only one paying customer who was in Nigeria, and that fees paid into the account did not correspond with fees stated in the contract or by the appellant at interview. It did not appear to him credible that a firm based in Nigeria would appoint a business in the UK to carry out a fire and hazard risk assessment. It was not credible that there would not be similar businesses available at more beneficial rates in Nigeria. The Judge's reasons are to be found at paragraphs 15 and 20 in particular. The Judge did not make only negative findings, noting that the appellant did have the appropriate educational experience and that it was difficult to show business experience.
24. The Judge found that employers liability insurance was required but still had not been produced, although the point is in the respondent's decision. Mr Shoaib said vaguely that there is no such legal requirement - perhaps correctly, but no attempt was made to substantiate that either in the First-Tier Tribunal or in the Upper Tribunal.
25. Vague reference to a similar case where another party (Mr Menuba) by another route secured a successful result is also pointless. It does nothing to advance the contention of legal error by the First-tier Tribunal in the present case.
26. In short, ground (b) based on legal principle is one which the appellant is barred from making, and ground (a) is no more than reassertion of the case and disagreement with adverse findings which were open to the First-tier Tribunal, and for which a legally adequate explanation has been given.
27. The determination of the First-Tier Tribunal shall stand.
28. No anonymity order has been requested or made.

A handwritten signature in black ink that reads "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

6 August 2015
Upper Tribunal Judge Macleman