



IAC-BH-PMP-V1

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

Appeal Numbers: IA/49260/2014  
IA/49263/2014

**THE IMMIGRATION ACTS**

**Heard at Bennett House, Stoke  
On 28<sup>th</sup> September 2015**

**Decision & Reasons Promulgated  
On 30<sup>th</sup> October 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GARRATT**

**Between**

**DEEPIKA LOOMBA  
SUSHIL MADAAN  
(ANONYMITY DIRECTION NOT MADE)**

First Appellant  
Second Appellant

**and**

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

Respondent

**Representation:**

For the Appellants: Ms A Imamovic of Counsel instructed by Malik Law Chambers  
For the Respondent: Ms A Johnstone, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. In this appeal the Secretary of State becomes the appellant before the Upper Tribunal. However, for the sake of consistency and the avoidance of confusion, I shall continue to refer to the parties as they were before the First-tier Tribunal.

**Background**

2. On 25<sup>th</sup> June 2015 Judge of the First-tier Tribunal Lever gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal Somal in

which she allowed the appeal on immigration grounds against the decision of the respondent to refuse leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based system for the first appellant and as a dependant spouse for the second appellant.

3. Judge Lever granted permission noting that the respondent contended that the judge had not applied the date of application as the relevant date for consideration of the evidence and had allegedly failed to give adequate reasons for conclusions. Permission was granted because Judge Lever considered both grounds to be arguable pointing out that the judge had only briefly examined the evidence and it was not entirely clear what the judge had meant by saying that “the Presenting Officer accepted that all required points had been achieved”.

### **Error on a Point of Law**

4. At the hearing before me I heard submissions in relation to the issue of an error on a point of law which I now summarise.
5. Ms Johnstone confirmed that the respondent relied upon the grounds. These indicate that the judge gave the wrong self direction in paragraph 5 of the decision by saying that she could consider all the relevant circumstances at the date of hearing when, in points-based system cases, the relevant date was the date of application. Further, the grounds contend that no findings of fact had been made in relation to two of the points raised in the respondent’s refusal in relation to paragraph 245DD(h), namely: that the appellant genuinely intended to invest the money referred to in the business and that the money referred to was genuinely available and would remain available until spent by the business. Ms Johnstone reminded me that the relevant date for consideration of evidence was 24<sup>th</sup> June 2014 when the application was made. She drew attention to paragraphs 11 and 12 of the decision in which the judge refers to evidence which clearly post-dated the application, notably the production of advertising information and listings for the business. The judge had also failed to tackle the issue of the genuineness of the business.
6. Ms Johnstone also made reference to the skeleton argument submitted by Ms Imamovic at paragraph 15 in which the latter stated that the respondent had been afforded the benefit of the interview record of the appellant which post-dated the application. Ms Johnstone emphasised that the interview had taken place before the refusal decision. She then sought to distinguish between the issue of the genuineness of the business and the respondent’s apparent acceptance, on page 6 of the refusal letter, that the appellant had been awarded all necessary points in respect of the application. She believed that the case did not fall within the decision of the Upper Tribunal in *Ahmed (PBS: admissible evidence)* [2014] UKUT 365 (IAC) in which the Upper Tribunal had concluded that the non-points-scoring aspect and the requirements for points are inextricably linked. She expressed the view that it was possible to be satisfied with the point’s aspect but not the issue now raised namely, the genuineness of the business.
7. Ms Imamovic drew my attention to her comprehensive skeleton argument. She also indicated that she accepted that the judge had erred in the self direction given in paragraph 5 of the decision but she submitted that it was not material. In summary, her contentions are these. She argues that the appellant could benefit from the

exception to the limits on evidence set out in Section 85A(4)(d) of the 2002 Act as the genuineness issue was not related to the acquisition of points. In this respect she contends that the decision of the Tribunal in *Ahmed* is contrary to the “structure” of Section 85A. That is because the refusal letter in this appeal makes it clear that the appellant had been awarded all the points required and that consideration of the genuineness of the business was not constrained by the restrictions in Section 85A(4)(a). She also contends that *Ahmed* does not preclude the giving of subsequent oral evidence.

8. I expressed the view to Ms Imamovic that there appeared to be no scope to distinguish the present case from the conclusions of the Tribunal in *Ahmed*. However, I indicated that the judge may have been misled into thinking that the apparent confirmation in the respondent’s refusal letter that the appellant scored all the points required, meant that the issue concerning the genuineness of the business was open to her to consider separately and in the light of all the evidence produced including that which post-dated the application. Ms Imamovic agreed that the respondent’s decision appeared to be out of step with the point made in *Ahmed* that a non-points-scoring aspect of the refusal (i.e. issues such as the genuineness of the business) and the requirements for points are inextricably linked. In this respect Ms Imamovic also agreed that sub-paragraph (n) of paragraph 245DD of the Immigration Rules suggested that the respondent had overlooked that point. The sub-paragraph reads:

“(n) 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.”

As the respondent stated in the refusal that all the points required were awarded the decision would appear not to have been in accordance with the law because, if the genuineness of the business was in issue, the points could not have been awarded.

9. On that basis I also suggested that Ms Imamovic’s argument that the judge was entitled to consider evidence which post-dated the application by virtue of sub-paragraph (d) of Section 85A(4) also falls away.
10. At the end of submissions the representatives agreed that if I were to find a material error on a point of law it would be open to me to re-make the decision by allowing the appeal on the limited basis that the decision should be remitted back to the respondent to make a decision which was in accordance with the law as explained in *Ahmed*.

## **Conclusions**

11. I have little hesitation in reaching the conclusion that the decision shows a material error on a point of law. That is because the judge’s approach to the evidence adduced was wrong. The self direction given in paragraph 5 suggests that the judge was not aware of the evidential constraints imposed by Section 85A(4)(a) of the 2002 Act. The judge was also in error in applying evidence which clearly post-dated the date of application relating to the genuineness of the business. As *Ahmed* makes clear (paragraph 7) the assessment of the genuineness of an application is related to the acquisition of points under the points-based system and the two matters are inextricably linked. The judge’s decision was therefore materially flawed because

she was not entitled to consider the later evidence. Further, the judge did not apply her mind to the possibility that the respondent's indication in the refusal that the appellant had scored all necessary points was an error if the genuineness of the proposed business was being contested. As the errors are material the decision is set aside.

### **Re-Making the Decision**

12. Despite Counsel's submissions to the contrary, I am not satisfied that the decision of the Upper Tribunal in *Ahmed* can be regarded as, in any respect, unauthoritative. It is clearly the case that, in a points-based system application, the assessment of the genuineness of the application, particularly business proposals, must be seen together with the acquisition of points. That established proposition does suggest that, in the circumstances of this case, the respondent's refusal decision is not in accordance with the law. I refer to the matters which are raised under the heading "Non-Points-Scoring Reasons for Refusal" of the refusal decision of 13<sup>th</sup> November 2014. In that section the respondent expresses concerns about the appellant's intentions to actively run a business, the authenticity of the business contract, the genuineness of an advertising campaign, inadequate experience and, in consequence, the genuineness of the business. However, under the heading "Points-Scoring" the respondent has awarded all available points in respect of each relevant attribute when this is contrary to paragraph (n) of paragraph 245DD of the Rules which states that if the Secretary of State is not satisfied with the genuineness of the application in relation to a points-scoring requirement in Appendix A (attributes) those points will not be awarded.
13. From the above I have to conclude that the respondent's decision was not in accordance with the law. I am therefore obliged to allow the appeal but to the limited extent that the decision is remitted back to the respondent to reconsider the application.

### **Notice of Decision**

The decision of the First-tier Tribunal shows an error on a point of law. I set aside the decision and re-make it by allowing the appeal but only to the limited extent stated above in paragraph 13.

### **Anonymity**

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and I do not consider an anonymity direction is necessary before the Upper Tribunal nor was one requested.

Signed

Date

Deputy Upper Tribunal Judge Garratt