



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/00549/2015**

Appeal Number:

IA/00555/2015

IA/49161/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 5 February 2016**

**Decision & Reasons
Promulgated
On 22 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

**SHADAAB JAMIL
NISHAT MOHAMMADI
MOHAMMAD MAHFUZUR RAHMAN TUTUL
(NO ANONYMITY ORDER MADE)**

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Muquit (Londinium Solicitors)

For the Respondent: Ms A Everett (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Shadaab Jamil, and his wife Nishat Mohammadi, citizens of India, and his business partner Mohammad Mahfuzur Rahman Tutul, a citizen of Bangladesh, against the decision of the Respondent of 18 November 2014 to refuse their applications for leave to remain under

the Entrepreneur route and to set removal directions against them under section 47 of the Immigration Asylum and Nationality Act 2006. They now appeal to the Upper Tribunal with permission. The application was to run their company Future Shine Marketing Private Limited.

2. The application was refused because requirements of Appendix A regarding contracts and level of business activity were considered not to have been established, in particular:
 - (a) The contract put forward as evidence of business activity was thought to be between the two members of the Entrepreneur Team rather than between their company and a third party;
 - (b) The level of activities evidenced in the documents did not appear to be compatible with the claim to be providing services at the level of an information technology manager exceeding NVQ level 6 in expertise.
3. The decision has previously been the subject of an appeal in which the First-tier Tribunal found the immigration decision not to be in accordance with the law because of a failure to understand the nature of the business that underlaid the Entrepreneur application: this had led Judge Vaudin d'Imecourt to find that a material error of fact had been made regarding the contract which was not, on its face, between the team members, but rather between two independent companies, one based in this country and one in India, by which the former would collect payments for IT services rendered by the latter to third parties. This had been compounded by the fact that the decision maker appeared to have looked at the wrong website details for the UK based company. Accordingly the Secretary of State was required to redecide the application.
4. However, the subsequent refusal letters for the various Appellants do not acknowledge this disposition of the appeal following the hearing before Judge Vaudin d'Imecourt and are identical in the terms of their reasoning to those that he had found wanting.
5. The Appellants duly appealed to the First-tier Tribunal, and in a decision promulgated on 15 June 2015, it found that the Respondent's refusal reasons were justified, because the contract supplied was with Future Shine Marketing Pvt Ltd, based in Kolkata, India, signed by one Mohammad Taha, involving currency conversion services, rather than information technology ones: this appeared to represent a contract between the team members rather than being with an independent entity. Mr Tutul was identified as being able to be contacted at the sales office of the latter company and in these circumstances the two entities appeared to be so closely affiliated that any contracting between them could not realistically be seen as independent activity of trading.

6. Grounds of appeal took issue with this finding. Permission to appeal was granted by Judge Rintoul for the Upper Tribunal on 13 October 2015 because of apparent confusion as to the business framework.
7. Before me Mr Muquit explained the history of the appeal and contended that the First-tier Tribunal had materially erred in law in all the circumstances. In the light of her appreciation that the Respondent had substantially contributed to the confusion before the First-tier Tribunal by failing to reconsider its decision in line with a binding judicial decision to which it was party, and given the extensive reliance below on a document that was not in truth the contract and indeed was not admissible evidence, Ms Everett did not resist the thrust of the appeal.

Findings and reasons

8. The relevant Immigration Rules are these, within Appendix A:

“41-SD. The specified documents in Table 4 and paragraph 41, and associated definitions, are as follows:

 - (e) If the applicant is applying for leave to remain, and has, or was last granted, leave as a Tier 1 (General) Migrant or a Tier 1 (Post-Study Work) Migrant, he must also provide the following evidence that he meets the additional requirements set out in Table 4:
 - (ii) the Standard Occupational Classification (SOC) code of the occupation that the applicant has been working in since before 11 July 2014 or 6 April 2015 (as applicable), up to the date of his application, which must appear on the list of occupations skilled to National Qualifications Framework level 4 or above, as stated in the Codes of Practice in Appendix J ...
 - (iv) one or more of the following specified documents showing that the business was trading before 11 July 2014 or 6 April 2015 (as applicable) and traded continuously throughout the period leading up to the date of his application:
 - (1) one or more contracts for service. If a contract is not an original the applicant must sign each page. Each contract must show:
 - (a) the name of the business,
 - (b) the service provided by the applicant’s business;
 - (c) the name of the other party or parties involved in the contract and their contact details, including their full address, postal code, telephone contact number and any email address; and
 - (d) the duration of the contract or, if it is a rolling contract with no defined end date, confirmation of when this arrangement began and a letter from the customer or their representative confirming that the contract has not been terminated, dated no earlier than three months before the date of application;”
9. Accordingly there were two issues upon which the First-tier Tribunal should have concentrated. The first was whether the contract met the requirements of the Rules, the second was whether the level of business activities tallied with that claimed for the firm in the application. The second issue was left undetermined below. That might be an error of

- law, but would not be material if the finding on the first issue was a lawful one. I do not consider that it can be so treated.
10. The two critical items of evidence that received attention from the First-tier Tribunal were a letter of 27 April 2015 (that in fact post-dated the application and was thus inadmissible on appeal applying section 85A of the Nationality Immigration and Asylum Act 2002) provided as part of the Appellant's bundle, and the contract which had caused the Home Office concern. The April 2015 letter is written "To whom it may concern" and sets out that Mr Taha of the Indian based company and Mr Jamil of the entrepreneur team's company had agreed that the former would act for the latter in managing their affairs and in dealing with their clients abroad. The contract that worried the decision maker is between Shadaab Jamil for Future Shine Marketing Providing Ltd (United Kingdom) and Mohammad Taha for Future Shine Marketing Pvt Ltd (India) and provides for the former to receive money on behalf of the latter as its London agent in return for taking 15% of its professional fees.
 11. The First-tier Tribunal accordingly relied heavily on findings that were based not on the contract with which the Home Office had taken issue but which referenced the contents of a further document which appears to have been relied on as explanatory of the application. In fact it was patently not admissible (post-dating the application as it did) and appears to be another example of the overly common tendency in these appeals for those representing Entrepreneur Appellants to bombard the Tribunal with a mixture of material, some of which was part of the application and some of which was not, regardless of its admissibility. Nevertheless, the First-tier Tribunal fell into a significant error of fact.
 12. An error of fact is not necessarily an error of law, particularly when the disadvantaged party contributed towards the error, but in this case the Respondent was equally guilty of failing to adequately assist the Tribunal, by putting forward refusal reasons that had previously been found unlawful on appeal. It seems to me that in these circumstances Ms Everett was correct to accept the decision below is fundamentally flawed.
 13. Following the remittal of this appeal for re-hearing below the First-tier Tribunal will need to engage with the two issues identified above. On the face of it, and as already found on the earlier appeal, the contract does not appear to be between the two Appellants who form the relevant Entrepreneur Team: subsequent judicial findings will need to take the decision of Judge Vaudin d'Imecourt as their starting point. Whether or not it and other materials relied on truly exhibit activities at the relevant SOC code level will have to be judicially determined.

Decision:

The decision of the First-tier Tribunal contains a material error of law and the appeal is remitted for hearing to the First-tier Tribunal.

Signed:

A handwritten signature in black ink, appearing to read 'M.A. Symes', with a long, sweeping underline that extends to the left.

Deputy Upper Tribunal Judge Symes
February 2016

Date: 5