



IAC-HW-AM-V1

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

Appeal Numbers: IA/02822/2015  
IA/02830/2015  
IA/02833/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18<sup>th</sup> February 2016**

**Decision & Reasons Promulgated  
On 14<sup>th</sup> March 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

**A M (FIRST APPELLANT)  
Z A S (SECOND APPELLANT)  
F A (THIRD APPELLANT)  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr Muguit, Counsel for Farani Javid Taylor Solicitors, Ilford  
For the Respondent: Mr Avery, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants are citizens of Pakistan born on 3<sup>rd</sup> October 1985, 20<sup>th</sup> January 1982 and 20<sup>th</sup> March 2014 respectively. The Second and Third Appellants are dependent on the First Appellant. I shall call the First Appellant "the Appellant" throughout this decision. The Appellants

appealed against the Respondent's decisions of 6<sup>th</sup> January 2015, refusing the Appellant's application for further leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant and the Second and Third Appellants' applications for leave to remain in line with the Appellant. The appeals were heard by Judge of the First-tier Tribunal Cas O'Garro on 30<sup>th</sup> July 2015. She dismissed the appeals under the Immigration Rules and on human rights issues in a decision promulgated on 26<sup>th</sup> August 2015.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Kelly on 29<sup>th</sup> December 2015. He found that it was arguable that the Tribunal had failed to make its own assessment of the issues raised by the appellant's appeal but instead had confined itself to an assessment of whether the Respondent's decision was reasonably open to her upon the evidence. The method used by the judge was stated in the grounds to be that appropriate to the conduct of a judicial review. The permission states that it is also arguable that the Tribunal erred in law by treating the prohibition under Section 85 of the Nationality, Immigration and Asylum Act 2002, against admission of post-application documents in relation to "points scoring reasons" as if it were also applicable to a "non-points scoring reason". This was in spite of a clear distinction having been made by the Respondent between the two types of reasons in her reasons for refusal letter. The permission states that this is particularly applicable when related to the Respondent's reasons for refusing the application on the basis that it had not been proved that the Appellant's business was viable, (a non points-scoring reason) in respect of which further evidence had been adduced at the hearing of the appeal.
3. There is a Rule 24 response dated 5<sup>th</sup> January 2016. This states that the case of **Ahmed and Another (PBS admissible evidence) [2014] UKUT 365 (IAC)** applies in this case. The Rule 24 response quotes the headnote of this case:

"Where a provision of the Rules (such as that in paragraph 245DD(k)) 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 in 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."

The response states that the judge was constrained from consideration of the new evidence.

## **The Hearing**

4. Counsel for the Appellant submitted that he was not challenging the said case of **Ahmed** re admissibility and that that ground is not being pursued.
5. Counsel submitted that the judge used too narrow a focus when deliberating what was before her. He submitted that she made no specific findings evaluating the evidence herself but instead only considered the findings in the refusal letter. He submitted that because of this the decision is flawed. He submitted that paragraphs 4 to 13 deal with the refusal letter and what the Respondent found. He submitted that the judge lists the evidence given at the hearing at paragraphs 20 to 26 but instead of assessing this herself, under the heading "Consideration and Findings" she again returns to the Respondent's findings in the refusal letter.
6. The Presenting Officer submitted that the judge did not conduct her own view of the evidence. He submitted that she was entitled to review what was before the Respondent at the date of decision. He submitted that the judge was constrained by the evidence before her as some of this evidence was not submitted with the application and so could not be considered by her. He submitted that all the judge could do was look at the refusal letter to see if, based on what was submitted with the application, the Respondent's decision was reasonable and he submitted that she did this and she reached her conclusion based on this, which she was entitled to do.
7. The Presenting Officer referred me to the said case of **Ahmed** at paragraphs 7 and 8. He submitted that any finding on the genuineness of the application is linked to the acquisition of points so new evidence about this could not be considered by the judge.
8. He submitted therefore that all the judge could do was look at what was before the Secretary of State and decide if there was anything fundamental in the Secretary of State's findings which could have led the judge to reach a different decision. He submitted that the judge found that the Secretary of State's decision was fair and reasonable and there was very little scope for her to consider anything else.
9. Counsel submitted that the Presenting Officer is re-perpetrating the error of the First-tier Judge. He submitted that to say that the judge is obliged to accept the Respondent's conclusion unless it seems to be unreasonable is too narrow a take on how the judge should reach her decision. He submitted that the judge needs to decide for herself, based on what was submitted with the application, whether the refusal letter is perverse or unreasonable. He submitted that the judge misread the case of **Ahmed**. I was referred to paragraph 5 of that case. He submitted that this sets out the parameters to enable the judge to come to her decision. Paragraph 5 states:

"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”.

Counsel submitted that the judge was constrained regarding looking at new evidence but she does have to look at the evidence which was before the Secretary of State and come to her own conclusion based on this.

10. Counsel submitted that the judge is able to consider the genuineness of the scheme based on what was submitted with the application and it is possible that when this is considered, the judge might reach an alternative conclusion.
11. He submitted that the judge made an error of law in her decision as she did not evaluate the evidence herself.

### **Decision and Reasons**

12. Paragraphs 4 to 13 of the First-tier Judge’s decision set out the Respondent’s findings in the refusal letter. Although the judge at paragraphs 20 to 26 refers to the evidence before her, when she makes her decision she does not assess what was before the First-tier judge, she again refers to the Respondent’s findings in the refusal letter (paragraphs 32 to 35).
13. The judge was correct not to consider any postdecision evidence but if it was the case that the judge was constrained to such an extent that she could only consider what the Respondent’s findings were, then every case would fail. That is not the purpose of the Immigration Rules. The judge has to consider the evidence which was submitted with the application and was before the Respondent and decide if it was possible for the Respondent to have reached an alternative conclusion based on this. The judge did not do this.
14. Based on the evidence submitted with the application it is clear that a different decision might well have been reached by the judge had she assessed the evidence herself.

### **Notice of Decision**

15. There is a material error of law in the First-tier Tribunal's decision promulgated on 26<sup>th</sup> August 2015 and that decision must be set aside.
16. No findings of the First-tier Tribunal can stand. Under Section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal. Member(s) of the First-tier Tribunal chosen to reconsider a case are not to include Judge C A S O'Garro.
17. Anonymity has been directed.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge I A M Murray