



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

Appeal Numbers:
IA/04582/2015
IA/04606/2015
IA/04613/2015

THE IMMIGRATION ACTS

**Heard at: Field House
On: 31st March 2016**

**Determination Promulgated
On: 11th July 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**Mohammad Rakibul Hasan
Khandaker Salma Tanjin
[M A]
(no anonymity direction made)**

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellants:
For the Respondent:

Mr W. Rees, Counsel instructed by VMD Solicitors
Ms A. Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are all nationals of Bangladesh. They are respectively a husband, wife and their son. They appeal with permission the decision of the First-tier Tribunal (Judge Oxlade) to dismiss their linked appeals against a decision to refuse to vary their leave as Points Based System Migrants and to remove them from the United Kingdom.

2. The principle applicant was in the United Kingdom with leave as a Tier 1 (Post Study Work) Migrant when he made an in-time application to vary that leave as a Tier 1 (Entrepreneur). His wife and child applied at the same time for leave as dependents.
3. The applications were refused on the 23rd January 2015. The Respondent did not accept that the applicants met the requirements of the Rules. In particular, they had not met the requirements of paragraph 245DD(h) for a failure to demonstrate that:
 - that the applicant had genuinely established/taken over/become Director of one or more businesses in the UK and continues to operate that business
 - there had been a genuine investment or there was a genuine intention to invest
 - the money relied upon was genuinely available for investment and would remain available until such time as it had been used by the business
 - the applicant did not otherwise intend to take employment

These were the matters in issue before the Tribunal.

4. The First-tier Tribunal heard oral evidence from the first Appellant. It was referred to the written evidence including an interview that had been conducted with the the Appellant prior to the refusal. The Tribunal's attention was drawn to the list of documents that had been submitted with the application. The determination lists the 8 issues raised by the refusal letter, and the Appellant's responses to them. The Tribunal directed itself that the evidence had to be approached in a "holistic" way. The Tribunal was not satisfied that the First Appellant had shown his business or investment to be genuine. The Appellant told the Judge that his preparatory work had started 2 years ago but there was no evidence of anything committed to paper. He had not supported his application with any evidence of market research; although this was not obligatory it was pointed out on the form that it would be of assistance to the decision maker. Bearing in mind the claim that the Appellant and his business partner were purporting to be investing £50,000 this was surprising:

"There is criticism made that the Appellants tried to submit it later at interview, but the Respondent refused to accept it; however they were advised by Solicitors at the time of their application, and it was well-known by then that there were strict rules about the date of submission with PBS applicants. I find that the absence of submission at that stage was because none had been conducted; it was telling that nowhere did the First Appellant set out the facts and figures on which they based their assessment"

As to the evidence that the Appellant and his partner intended to start in the Bangladeshi community and then grow from there to reach a “global market” within 24 months, the Tribunal noted a “mismatch between published aspiration and the reality” and dismissed the appeals.

The Challenge

5. The grounds (which are longer and more detailed than the determination itself) are not easy to read and do not clearly identify what the alleged errors of law are. Insofar as I have been able to summarise them it is alleged that the First-tier Tribunal erred in the following material respects:

- a) *Failing to take material evidence into account/ misunderstanding evidence that was given.*

The Appellant had said that his ability to work on the business had been hampered by his lack of security about his immigration status. The Judge had accepted this but had then questioned why, if the Appellant was concerned about that insecurity, had taken a three-year lease on a premises. The Judge failed to take into account the fact that there was a break clause in the lease which meant that the premises could be given up on two months notice at any point.

The Tribunal gave weight to the fact that there were differences in the figures and information given by the Appellant and his partner when they were interviewed. The Tribunal failed to give adequate weight to the fact that they had been interviewed at different times so the information would obviously be different because the business was at a different stage.

The Tribunal had placed weight on an apparent discrepancy between the Appellant’s evidence that he provided additional services for some clients upon oral agreement, and the face of the contracts which stated that any variation in agreement would need to be set down in writing. The Tribunal failed to give adequate weight to the Appellant’s explanation that these were not variations in contract but separate services.

The Appellant had given evidence that one of the services he was offering to clients in the restaurant trade was for an online ordering service. This evidence was not taken into account at all.

The Tribunal weighed against the Appellant his failure to directly answer a question put to him about whether his contract with Tesco contained an anti-competition clause. The Tribunal failed to take into account the fact that

the Appellant had not understood the question and that when it had been clarified in re-examination had answered it.

The Tribunal had weighed against the Appellant the fact that much of the information he purported to provide his clients with was readily available on the internet. The Judge failed to take into account the submission that some companies would not be able to conduct their own research in this way. These were services that were typically provided by a business consultancy.

b) *The Judge took a strict approach to the requirement for supporting documents.*

The Immigration Rules in force at the date of the decision had not contained any requirement as to specified evidence relating to market research.

The Tribunal found that there was no evidence that the Appellant had conducted any preparation prior to establishing his business. This was not correct: at a bare minimum he had his business plan.

The Tribunal further fails to consider that much of the market research had been conducted whilst the Appellant was undertaking his employment as a store manager for Tesco, and could not therefore be documented.

c) *The refusal had been contrary to the principles of fairness.*

At paragraph 31 of the determination the Tribunal weighs against the Appellant his failure to provide certain documentary evidence (relating to market research) prior to the refusal. His evidence had been that he had offered to submit such evidence when he was interviewed, and the interviewing officer had declined, assuring him that he would be contacted if it was necessary. It was therefore not fair for this matter to be weighed against him. The determination has not addressed that explanation.

d) *The Tribunal erred in questioning the Appellant's business plan*

The Appellant had explained that he intended to start his business within the Bangladeshi community and grow it from there. The Judge had erred in not accepting this as viable.

6. In his oral submissions Mr Rees concentrated on (c). He submitted that the Tribunal appeared to have placed considerable weight on the absence of marketing materials in the application and that given the Appellant's evidence about what had transpired at the interview, this was contrary to common law principles of fairness. He had a legitimate expectation that he would be

contacted if necessary. When pressed to set out what the Appellant would have submitted, had the interviewing officer got back to him, Mr Rees said that he would have supplied "hard evidence of business progression". There was no evidential foundation for the finding that the business plan – to expand from the Bangladeshi community – was not credible. This was their target group and it did need help using the internet. The Judge "cherry picked" the evidence in order to reach an adverse conclusion.

7. For the Respondent Ms Brocklesby-Weller took issue with the Appellant's description of events at his interview. The interview record does not support his claim that he tried to submit documents and that the officer declined to take them, or that he was told he would be contacted if they needed any further information. The Tribunal made a global appraisal of the evidence which is what it was meant to do. Unlike in many PBS appeals it was not simply a 'tick-box' exercise because the overall question was whether the Appellant had demonstrated, on a balance of probabilities, that he was a genuine Tier 1 Entrepreneur.

My Findings

8. It will be observed from the foregoing that the vast majority of the closely argued grounds of appeal are no more than disagreements with the decision of the Judge. The grounds frame these challenges as "a failure to take material evidence into account" but in fact it is apparent that the Appellant's explanations were considered, and not accepted. The Tribunal's findings were all within the range of reasonable responses. The Appellant had submitted that apparent discrepancies as to the nature of the contracts had arisen because the Appellant had reached *ad hoc* oral agreements with his clients; the Tribunal was entitled to reject that evidence as it did on the basis that the contracts themselves stipulated that any changes were to be done in writing. The point about the lease does not reveal any flaw in the reasoning. In order to explain why so little had apparently been done in pursuit of this business the Appellant had blamed the uncertainty arising from his lack of immigration status – the Tribunal was quite right to query why he had then signed up to a three year lease agreement on a business property, regardless of the terms of the break clause. Overall I am satisfied that the Tribunal paid careful attention to the evidence placed before it.
9. The central ground, as framed by Mr Rees, is the fairness point. I am satisfied that this ground is not made out. First of all, there is absolutely no support on the face of the record for the Appellant's claim about what happened at interview. In order for there to have been a legitimate expectation there would need to be a clear unambiguous indication. There isn't. Secondly, I am satisfied that the point made at paragraph 31 of the determination is a good one. If these business partners were genuinely intending to start a business and invest

£50,000 in it, one would expect there to be extensive documentary evidence of research and business development over a substantial period and for this to have been submitted with the application, regardless of whether the documents in question were 'specified' mandatory evidence. It might also be said that it was not at all clear what evidence the Appellant could have supplied that would have allayed the decision maker's (or indeed Tribunal's) concerns about the overall credibility about this application.

10. The Respondent had given numerous reasons as to why the Appellant had not discharged the burden of proof. The determination sets these out in detail at paragraph 7 and the Appellant's responses at 10. It is clear from the findings that the Tribunal is not satisfied that the concerns have been adequately addressed. The company had only been incorporated very shortly before the Appellant's last grant of leave expired and there was no evidence that they had been developing the idea in the months preceding that. The only evidence of business activity was limited and recent. There had been fundamental contradictions in the evidence given by the Appellant and his business partner when interviewed which could not rationally be explained by the fact that the interviews took place at different times. The Appellant's partner told the decision-maker that their contracts had been signed in August and November 2014 when the Appellant had submitted evidence that they had been signed in July. As there had only been two contracts signed, it was reasonable to assume that both directors would have an understanding of them. Checks had been run on one of these client companies and the Respondent had doubts about whether it in fact even existed. The business plans were generic and the Tribunal was in my view perfectly entitled to draw adverse conclusions from their wild aspirations. The idea that a business could start by giving HR advice to two small companies in Whitechapel (the nature of which was unclear) and from there expand to a "global market" in 24 months could properly be described as not credible. I am satisfied that the First-tier Tribunal undertook a holistic appraisal of the evidence and made clear findings of fact. I am satisfied that the Tribunal took into account the evidence of the Appellant and the submissions made on his behalf.

Decisions

11. The decision contains no error of law and is upheld.

Upper Tribunal Judge Bruce
5th July 2016