



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

Appeal Numbers: IA/09813/2015
IA/09812/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 21 June 2016**

**Decision & Reasons Promulgated
On 13 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) N N

(2) A S

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Respondent: Miss F Shaw, counsel, instructed by Adam Bernard Solicitors
For the Appellant: Mr Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the decision of Designated Judge of the First-tier Tribunal J M Lewis (“the DJ”) promulgated on 16 November 2015, in which he allowed the appellants’ appeals against the refusals of further leave to remain in the UK.
2. Notwithstanding it is the Secretary of State who pursues this appeal, I refer to the parties as they were in the First-tier Tribunal, namely with the Secretary of State at the respondent, for ease of reference.

3. No anonymity direction was made in the First-tier Tribunal but I make an anonymity order now.

Background

4. The appellants are husband and wife and citizens of Pakistan. The first appellant sought leave to remain as a Tier 1 (Entrepreneur) Migrant under the points based scheme. The second appellant is his dependant; the outcome of her appeal depended on that of her husband.
5. The first appellant's application was refused by reference to paragraph 245DD on various grounds including concerns about the genuineness of the business, the first appellant's intentions with regard to that business and the availability of funds. The appellants appealed and the DJ found that the claimed funds were available to the first appellant and that the business was a genuine one. He allowed the appeals.
6. Permission to appeal was sought by the Secretary of State and granted in the following terms:

“It is arguable, as asserted in the grounds, that the Judge erred in finding the financial requirements met on the evidence and in light of the Secretary of state's power contained in paragraph 245 DD(j) allowing the Secretary of State to require additional evidence and to refuse the application if it is not forthcoming. It is also arguable that the Judge erred in taking into account the oral evidence of the Appellant which is precluded by s.85A Nationality, Immigration and Asylum Act 2002.”.

7. Hence the matter comes before me.

Submissions

8. Mr Avery submitted, for the respondent, that the DJ had made a fundamental mistake in his approach; it had not been a question of whether or not the first appellant had provided the respondent with evidence initially but whether he continued to have the funds available. Mr Avery submitted that the first appellant had not provided the evidence requested. This was one of the reasons the application had been refused. The DJ had failed to engage with that.
9. Mr Avery submitted that the DJ had not made it clear what evidence had been admissible and what was not. Oral evidence had been given but was not admissible per **Ahmed & Or (PBS: admissible evidence) [2014] UKUT 00365 (IAC)**. The issues in **Ahmed** were not dissimilar to those before the DJ: an assessment of the genuineness and viability of the business was required. He referred me to paragraphs 2 and 5 in particular. Only the evidence before the respondent should have been considered. Oral or documentary evidence which was not before the respondent should have been ignored. It was, in any event, unclear what the DJ had taken into account, irrespective of the admissibility issues.
10. Miss Shaw submitted that it had not been necessary for the DJ to identify all the evidence before him. The respondent had not “specifically challenged” the appellant's oral evidence at the hearing; oral evidence had been given to clarify/challenge the grounds for refusal. To that extent, the oral evidence and first appellant's witness statement were admissible. Otherwise there would be no purpose to the appeal hearing. She accepted, nonetheless, that post-application evidence was not admissible. That could, she said, be distinguished from the first appellant's oral evidence.

11. Miss Shaw submitted the DJ had recognised he was precluded from considering post-application evidence: paragraphs 3, 12 and 15. The DJ had noted that the first appellant had provided bank statements with his application (paragraph 10); this reflected the application form content. The DJ found that the statements must have been submitted because the refusal letter made no reference to their not being submitted (paragraph 13). Furthermore, the first appellant had said at the hearing that the bank statements had been submitted (paragraph 8). That reflected the interview evidence given on 13 January 2015, prior to the date of decision, that the first appellant had invested funds. That was not new evidence. The DJ was entitled to rely on the first appellant's interview evidence that the "rest are in account" (question 33 in interview).
12. With regard to paragraph 245DD(j), both parties' representatives agreed that this provided at the date of decision, that the requested documents must be received by the respondent within 28 working days of the date of the request. The respondent wrote to the first appellant on 5 February 2015 stating that the documents must be sent by 12 February 2015; that gave the first appellant only five working days to provide the additional documents when the rule provided that he should be given 28 working days.

Discussion

13. This appeal is pursued by the Secretary of State on three grounds and I take each in turn.
14. The respondent claims that, at paragraph 13, the DJ "makes the finding that "I conclude on the balance of probabilities that the Appellant did submit with his application...." It is submitted that it is not clear from the decision what evidence was before the respondent and how this evidence established that the appellant had demonstrate he still had the £25,000 available. It is argued that there is inadequate reasoning on the issue.
15. The DJ finds that "the decision does not assert that the Appellant did not submit financial evidence with his application. It asserts only that evidence had not been received from him to demonstrate that his share of the funds had remained available to the company since the time of the application. The application refers to bank statements having been submitted. Had they not been, it is not on balance probable that the appellant would have been granted the requisite points award in the category of maintenance (funds)." That finding is not challenged by the respondent before me. Nor could the respondent challenge the finding that "I conclude on the balance of probabilities that the Appellant did submit with his application evidence that the £25,000 attributable to him was available to the company ...". The respondent's issue is with the remainder of that sentence: "... and that, by the date of the decision, part of that money had been invested and the balance remained available". The DJ refers in paragraph 11 of his decision to evidence given by the first appellant in interview that "part of the monies had been spent and rest were in the account (questions 29 to 34)". The DJ also refers in paragraph 8 to oral evidence of the first appellant that funds had been invested by the time the respondent wrote to him asking him to provide personal bank statements covering the previous three months to demonstrate that funds had remained available to his company. The DJ noted that, according to his record (questions 2-4), the first appellant had said he had invested about £17,500. I agree with the respondent that the oral evidence on the availability of funds is inadmissible, being in contravention of s85A. However, this error of law is not material because the DJ also based his finding on the evidence of the first appellant in interview and that was an appropriate finding.

16. Whilst the DJ does not specifically deal with the impact of paragraph 245DD(j), I note the representatives now agree that the respondent should, according to the version of that paragraph in force at the date of decision, have given the first appellant 28 working days in which to respond to the respondent's request for evidence to demonstrate his share of the funds remained available to the company since the date of application. Given the respondent had not complied with that timeframe, it was inappropriate for her to draw an adverse conclusion as to the availability of funds. However, that is not an issue which was addressed by the DJ and he found nonetheless, in the first appellant's favour, that the funds remained available. For the reasons I have identified there is no material error of law in that finding.
17. The second ground of appeal relates to paragraph 15. It is claimed that the DJ's reasons are inadequate for finding that "some of the documents are admissible and some not. He does not ... explain which documents are admissible, why they are admissible and what they add to the [sic] appeal". Ms Shaw submitted that the parties' representatives had, before the DJ, agreed which documentary evidence was admissible and which was not. However, this is not noted in the decision. Nor is the documentary evidence produced by the appellant, either to the respondent or at the hearing, specifically identified in the DJ's decision. On the other hand, there is no reference in the decision to the parties being in dispute as to those documents which were admissible and those which were not and this is consistent with Miss Shaw's submission to me. Mr Avery was unable to comment on this because the Home Office Presenting Officer (HOPO) had made no note of any such discussion or agreement; nonetheless he did not dispute such an agreement might have been reached. Given Ms Shaw's submissions, which are not challenged by Mr Avery, I am unable to find that the DJ should have given reasons for finding that certain documents were admissible or otherwise. The DJ made it clear that he recognised the impact of s85A and that he had borne in mind the issue of admissibility throughout his decision-making.
18. The third ground of appeal to this tribunal also relates to paragraph 15. It is claimed that s85A of the 2002 Act precludes consideration of the first appellant's oral evidence given at the hearing. According to his decision, the DJ took into account not only that documentary evidence which he considered admissible but also the first appellant's oral evidence. The oral evidence has not been set out in the decision and the reader is unable therefore to identify it or those issues to which it relates. It is said in the decision that it was "not specifically challenged. It is essentially consistent, and derives support from a significant quantity of documentary evidence. The Appellant appeared to me to be a witness of truth. I accept his evidence, and refer to it as far as necessary.". It is not clear whether, in making that assessment the DJ was assessing the oral evidence against only the admissible documentary evidence or against all the documentary evidence.
19. The DJ notes the reasons the respondent did not accept the business was genuine. He then goes on to state:

"15. The appellant has submitted substantial documentary evidence. For the reason stated, some is admissible and some is not. At the hearing he gave evidence on these matters. It is sufficient for me to conclude, from the totality of his oral evidence and the admissible documentary evidence, that I accept the genuineness of each of the contracts and of the advertising and accept the explanations of the appellant in relation to these matters, the company website, its insurance and the appellant's education, qualifications and business experience. Assessing the admissible evidence as a whole, I find on the balance of probabilities that the business is a genuine one and that the Appellant was a genuine entrepreneur. ..."

20. Thus the DJ's decision that the business was genuine was based on the "totality of his oral evidence" as well as the "admissible documentary evidence". By inference, the DJ had not considered whether or not the first appellant's oral evidence was admissible under s85A. The DJ went on to accept "the explanations" of the first appellant with regard to the concerns of the respondent. There is no indication in the decision as to the nature of those explanations and the respondent is entitled to know the basis on which the DJ found that the business was a genuine one and to know that the DJ had not taken into account evidence which was not before the decision-maker (**Ahmed**). That is not clear from the decision. The DJ goes on to say that "assessing the admissible evidence as a whole I find on the balance of probabilities that the business was a genuine one ...". Thus in this sentence he has referred to making his decision on the basis of admissible evidence alone, whereas earlier in the paragraph he refers to relying on "the totality of his oral evidence and the admissible documentary evidence" when making his finding as to the genuineness of the business. I can only infer that the DJ concluded that all the oral evidence was admissible. However, in paragraph 8 the DJ cited a figure for investment, given in oral evidence, which was higher than that given in interview. This was new evidence and inadmissible. On this basis, I find that, at least to some extent, the oral evidence of the first appellant included new material. It follows therefore that the DJ made his findings in paragraph 15 partly on the basis of new material in the first appellant's oral evidence. This had a bearing on the outcome of the appeal and is therefore a material error of law. I set aside paragraphs 15 and 16 of his decision.
21. Mr Avery submitted that, in this event, I should remake the decision. Miss Shaw's primary submission was that the matter should be remitted to the First-tier Tribunal because it was "fiddly" but she accepted that it may be more appropriate for me to remake the decision in the Upper Tribunal. She said there was no need for the first appellant to give oral evidence for the decision to be remade.
22. I therefore remake the decision with regard to the genuineness of the first appellant's business. In doing so, I take into account the DJ's findings with regard to the availability of funds and his acceptance of the first appellant's evidence in interview that he had invested funds in the business.
23. I disregard the failure of the appellant to provide additional documents with regard to the availability of funds in response to the respondent's letter to him of 5 February 2015. The representatives agree that the version of paragraph 245DD(j) in force at the time provided that the respondent should have given the appellant 28 working days to respond to the request. The respondent gave him until 12 February 2015, a considerably shorter period. The decision to refuse the application was taken before the expiry of the period required in paragraph 245DD(j).
24. I make the following findings with regard to the genuineness of the business. According to the Company Register Information form the company was incorporated on 17 January 2014. The two consultancy agreements with Care Link UK Trust and Southwest Surplus Tools are each dated only three days later: 20 January 2014. The application which is the subject of this appeal is dated 22 January 2014, only two days after those agreements were signed. The first appellant's leave to remain was due to expire about two weeks later. The mere fact that the business was created relatively shortly before the expiry of his leave to remain does not of itself indicate that the business is not a genuine one but it suggests that the creation of the documentary evidence was not unconnected with the imminent expiry of the first appellant's leave to remain. I consider it in the round.

25. The respondent does not dispute the existence of Care Link UK Trust and acknowledges it is registered with the Charities Commission. The fact the agreement with Care Link UK Trust has not been signed by a person who is identified on that organisation's website as an officeholder does not render the agreement invalid.
26. The first appellant's evidence in interview in January 2015 is that his company "held some marriage ceremonies for people" and that the biggest event arranged so far (at the date of interview) was a "wedding event". However, the first appellant also said in interview that they had not taken out any insurance at that time. He acknowledged that professional indemnity insurance was needed and that it was "under way". He said that, as they did not have premises yet, they did not need "liability or insurance". Thus the evidence of the first appellant in interview is, on the face of it, contradictory. Furthermore, it is remarkable that the first appellant, on the one hand, acknowledged the importance of insurance cover yet had contracted to arrange a "wedding event" without it. I consider a person who is running a genuine business would not take the risk of providing a service such as the planning and provision of third party catering without such insurance in place. In interview the first appellant said the company had received £1,800 for that wedding event and that their income to date was about £8,000. It is not credible that the first appellant would embark on a genuine business without putting insurance cover in place, particularly given the level of income received to date and the public liability risks arising from the provision of such services. It is also relevant that, by this stage, funds had been invested in the company and were available for the purchase of insurance cover.
27. I have similar concerns about the lack of insurance cover for the product launch event for Southwest Surplus Tools which was contracted to be held on 12 February 2014. I find it incredible that the owners of a genuine business would not, by the date of interview in January 2015, have purchased insurance cover for a business which had been operating for over a year.
28. I agree with the respondent that the nature of the business as described by the first appellant in interview is at odds with the aims and objectives of Care Link UK Trust, including reducing domestic abuse. The organisation of wedding events is not, on the face of it, consistent with that organisation's aims. The first appellant's answers to questions in interview about the company's engagement with Care Link UK are also vague and lacking in detail.
29. Given that the business had been up and running for about a year by the date of interview, I would expect the first appellant to have been in a position to provide considerable detail in that interview about the activities and operations of the company in the previous year. Instead his answers are vague, hesitant and lacking in detail. He should have been in a position to provide considerable information about the running of the business, the business objectives and other aspects. For example, although he mentioned issuing questionnaires in connection with market research, he failed to explain the outcome of that research and how it impacted on their management of the business. He said only "from that data we based our business". By that time, the first appellant and his business partner had had sufficient time to analyse the outcome of their market research and to formulate a business strategy accordingly.
30. The respondent has noted that although the first appellant claimed in interview to organise wedding events, there was no mention of this type of event in his advertising material on free websites such as Scoot, TouchLocal, The Sun directory and The Independent directory; if

anything, the business targeted other businesses as customers. This is a significant inconsistency as regards the business' client base.

31. There are further inconsistencies in the evidence given in interview by the first appellant and his business partner. For example, the first appellant referred to having had about 8-10 responses to advertisements, whereas his business partner, when asked the same question, said he could not remember. Given the limited number of responses claimed by the first appellant, I would expect his partner to be able to comment on the level of response, even if he were not able to recall a number.
32. The interview provided the first appellant with the opportunity to address fully any anomalies arising from his application, yet he failed to do so. If anything, his evidence in interview raised further concerns. This was despite the fact that, by then, the business had allegedly been operating for nearly a year.
33. Taking the first appellant's evidence as a whole, I find that the respondent's decision is not in breach of paragraph 245DD(h), taking into account the factors at paragraph 245(i), particularly the viability and credibility of the applicant's business plans and market research into their chosen business sector (sub-paragraph (iii)).
34. The second appellant's appeal is dependent on that of the first appellant. It follows that the respondent's decision on her appeal was not in breach of the Rules either.

Decision

35. The making of the decision of the First-tier Tribunal did involve a material error of law, as set out above.
36. I set aside the DJ's findings at paragraphs 15 and 16 of his decision.
37. I remake the DJ's decision by dismissing both appeals under the Immigration Rules.

A M Black

Signed
Deputy Upper Tribunal Judge A M Black

Dated 13 July 2016

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (UT) Rules 2008

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

Fee Award

The DJ made fee awards. I set aside those fee award and direct that no fee award is to be made, the appeals having both been dismissed.

A M Black

Signed
Deputy Upper Tribunal Judge A M Black

Dated 13 July 2016