



IAC-FH-CK-V1

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

Appeal Number: IA/51002/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10th February 2016**

**Decision & Reasons Promulgated
On 26th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**MR ZAHIDUL ISLAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Laughton, Counsel instructed by Zahra & Co
Solicitors

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Pakistan, appealed to the First-tier Tribunal against the decision of the Secretary of State for the Home Department of 10th December 2014 refusing his application for leave to remain as a Tier 1 (Entrepreneur) under the points-based system. First-tier Tribunal Judge I Ross dismissed the appeal in a determination promulgated on 19th August 2015. The Appellant appeals to the Upper Tribunal against that decision with permission.

2. The Appellant's Grounds of Appeal contend that the judge made a procedural error. It is contended that, at the end of the questions and answers at the hearing, the Appellant's representative made a brief submission and the judge immediately indicated that the Appellant had given satisfactory answers to his questions and that he would be allowing the appeal. However, in judge's written decision signed on 29th July 2015, he actually dismissed the appeal. It is contended that the effect of the judge pronouncing his decision at the hearing is that he has issued a final decision and that Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 has the effect that the decision is that pronounced by the judge at the end of the hearing rather than the written decision served subsequently. The Appellant relies in the grounds on the decision in **SK (Sri Lanka) v Secretary of State for the Home Department [2008] EWCA Civ 495** where the Court of Appeal considered the construction of a similar provision in the Asylum and Immigration Tribunal (Procedure) Rules 2005.
3. It is further contended that the judge acted unfairly by not convening a further hearing if he genuinely believed after the hearing that he was wrong to have allowed the appeal. The third ground is that the judge's decision was taken without proper consideration of all of the evidence. It is submitted that the judge put forward three reasons for dismissing the appeal and that these were not properly reasoned based on the evidence before him.
4. The judge granting permission to appeal noted that there is nothing in the Record of Proceedings to record that the Appellant's evidence was found credible and the appeal allowed but noted that the grounds strongly assert that this was the case and concluded that the grounds disclosed an arguable error of law.
5. Prior to the hearing before me this issue was put to First-tier Tribunal Judge Ross, who responded in writing to indicate that he regarded it as "inconceivable" that he would have indicated that he was going to allow the appeal in the circumstances of this particular case. He indicated that it was not his practice to make indications in open court unless the merits are totally overwhelmingly in favour of an Appellant and that had he given an oral indication he would have noted that on the Record of Proceedings so as to remind him when he wrote up the determination. He noted that this case was written up relatively quickly after the hearing and if he had given an oral indication this would still have been on his mind and would have been recorded as such.
6. The Appellant's solicitor, Mr Hussain, made a statement about this issue. In his statement Mr Hussain said that after the judge asked the Appellant a number of questions he turned to Mr Hussain as if he wished him to make submissions and that after Mr Hussain began making his submissions "he turned to the Appellant and said words to the effect that I am satisfied with your explanations. I will be allowing your appeal". Mr Hussain went on to say that upon hearing this he made no further submission other than

to express his gratitude to the court. Mr Hussain produced a copy of his contemporaneous notes which indicated that after the record of the evidence he made a submission that he was relying on the evidence and noted that the decision was that the appeal was allowed.

7. It is clear therefore that there is a significant dispute of fact between the judge and the Appellant's representative as to what was said at the hearing. There was no Presenting Officer present at the hearing before the First-tier Tribunal Judge and therefore the Secretary of State was unable to cast any light on what happened at the hearing.
8. At the hearing before me Ms Laughton initially requested an adjournment of this case so that oral evidence could be called from the Appellant's solicitor as there is clearly a conflict between the evidence of the Appellant's solicitor and of the First-tier Tribunal Judge. Ms Laughton sought an adjournment so that the representative could be given an opportunity to give oral evidence as to this issue. She indicated that as he is a fee paid First-tier Tribunal (IAC) Judge he requires permission from the President of that Chamber to give oral evidence.
9. She further pointed out that, even if factual findings were not made as to whether the appeal was allowed orally at the hearing, the statement from the solicitor indicates that he made no further submissions and that is supported by his contemporaneous notes and the judge's decision which shows one sentence of submissions at paragraph 7. She therefore submitted that it is clear that the Appellant's solicitor was under the impression that the judge was allowing the appeal and on that basis made no further submissions. There was no skeleton argument before the First-tier Tribunal so she submitted that oral submissions were going to be the crux of the appeal.
10. Ms Laughton relied on the case law which, she submitted, supported the Appellant's case that where the Appellant had been deprived of the opportunity to be heard the case should be remitted. She relied on the cases of **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)**, in particular paragraphs 17 and 18 where the Tribunal quotes from the case of **R v Chief Constable of Thames Valley Police, ex parte Andrew Brett Cotton [1990] WL 753309**. She also relied on the case of **R v Leicester City Justices, ex parte Barrow and Another [1991] 2 QB 261** and the case of **Kanda v Government of the Federation of Malaya [1962] HLPC 322**. She submitted that it was not necessary to show that there was any materiality to the error but the procedural error in itself was sufficient to lead to the case being set aside.
11. However she submitted that there were a number of substantive errors in the judge's decision as highlighted in the third ground of appeal. Ms Laughton submitted that the judge gave three reasons for dismissing the appeal. The first was that he rejected the business plan and she submitted that he gave insufficient reasons for his findings in relation to that matter. She highlighted paragraph 10 where the judge referred to

the Appellant having a contract with an individual whose company was based in the same building as the Appellant's business ignoring evidence from Companies House which clarified this issue. She also submitted that the judge failed to have regard to the evidence before him in relation to the Appellant's funds. She submitted that these issues would have been highlighted in the submissions.

12. Mr Whitwell submitted that Grounds 1 and 2 as outlined by Ms Laughton proceeded on the basis that it is established that the judge indicated at the end of the hearing that he was allowing the appeal whereas this matter is still in dispute and there no factual finding in that regard. In relation to Ground 3 he referred to the reasons for refusal letter which detailed the reasons why the Appellant's application was refused with reference to paragraph 245DD(h) and (i) of the Immigration Rules. He submitted that it was open to the judge to assess the evidence before him and to determine that the Appellant could not succeed on the evidence. He submitted that Ms Laughton had not detailed what submissions would have been made and what difference they could have made to the judge's findings.
13. In response Ms Laughton relied on her primary submission which was that the proceedings should be adjourned for oral evidence in relation to what happened at the hearing. She submitted that in his submissions Mr Whitwell had relied on issues raised in the reasons for refusal letter whereas the judge had only made three findings in relation to this appeal. She submitted that she had highlighted three areas where the judge could have come to different findings had he heard submissions on the issue.

Error of Law

14. I have considered all of the evidence and the submissions before me. I accept on the basis of the conflicting evidence in terms of the judge's statement about what happened at the hearing and the solicitor's statement and contemporaneous notes that there has been a significant misunderstanding in this case.
15. Although it is not established how this misunderstanding arose I nonetheless accept on the basis of his statement and notes that the Appellant's solicitor was under the impression that the appeal was allowed and that as a result he did not make full submissions. I accept that there is a possibility that those submissions may have made a difference to how the judge proceeded with the case. I take particular account of the fact that it appears that the judge may not have taken full account of all of the evidence before him, for example the evidence from Companies House contained in the Respondent's bundle. This was a matter that the judge found against the Appellant and it is possible that submissions may have clarified this issue to the extent that the judge may have come to a different finding in relation to this matter.

16. In these circumstances I accept Ms Laughton's submission that, given the potential procedural unfairness arising from the misunderstanding, it is appropriate to remit this case to the First-tier Tribunal to be heard afresh.
17. In light of the potential procedural unfairness arising from this misunderstanding I am satisfied that the appellant has not therefore had his case properly considered by the First-tier Tribunal. I am satisfied that in these circumstances the nature and extent of the judicial fact finding which is necessary in order for the decision to be remade is such that (having regard to the overriding objective in Rule 2 of the Upper Tribunal Procedure Rules 2008) it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

The judge made an error of law in relation to this appeal and I set aside the decision of the First-tier Tribunal. I remit the appeal to the First-tier Tribunal to be heard afresh.

No anonymity direction is made.

Signed

Date: 23rd February 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable because the Appellant has not had his appeal properly considered by the First-tier Tribunal for the reasons set out above.

Signed

Date: 23rd February 2016

Deputy Upper Tribunal Judge Grimes