



**The Upper Tribunal  
(Immigration and Asylum Chamber)  
number: IA/22662/2014**

**Appeal**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On August 3, 2015**

**Determination  
Promulgated  
On August 13, 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**MR SALEH ALINIA  
(NO ANONYMITY DIRECTION)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms Rothwell, Counsel, instructed by BMAP  
For the Respondent: Mr Clarke (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Iran. On April 12, 2014 the appellant applied for leave to remain as a Tier One (Entrepreneur) Migrant. The respondent refused the application on May 8, 2014 finding that mandatory documents had not been submitted. A decision to remove him was also taken under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed that decision on May 22, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002. He argued the documents had been submitted and removal would also breach his right to private life.
3. The matter came before Judge of the First-tier Tribunal McMahon on January 27, 2015 and in a decision promulgated on February 10, 2015 the Tribunal upheld the refusal and dismissed the appellant's appeal under both the Immigration Rules and article 8 ECHR.
4. The appellant applied for permission to appeal on February 18, 2015 submitting the Tribunal had erred. Permission to appeal was initially refused by Judge of the First-tier Tribunal Heynes on April 9, 2015 but following renewed grounds Upper Tribunal Judge Eshun granted permission to appeal on the grounds it was arguable the Tribunal had erred.
5. A Rule 24 response was filed by the respondent on July 1, 2015.
6. The appellant was in attendance before me and was represented as set out above.
7. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

### **ERROR OF LAW SUBMISSIONS**

8. Ms Rothwell adopted her colleague's grounds of appeal and submitted the Tribunal had erred in two areas. Firstly, she submitted the Tribunal had erred by failing to recognise the appellant had an active business. She referred me to Paragraph 41-SD(e)(iv) and reminded me what evidence had been submitted. She argued the appellant had demonstrated he was actively running a business because he had done an MA in his area of work, completed post study work and had demonstrated he had set up a company, registered himself properly and opened a bank account. He had been sourcing work when his application was submitted and following the decision in Shebl (Entrepreneur; proof of contracts) [2014] UKUT 00216 (IAC) she invited me to find the appellant's actions demonstrated he met paragraph 41-SD(e)(iv)(2). Secondly, she argued that the Tribunal had erred by finding removal was proportionate. The Tribunal had accepted at the date of decision and/or hearing his business was active and fully functional and the conclusion in paragraph [23] of its determination undermined the Tribunal's finding on this point.

9. Mr Clarke adopted the Rule 24 response and submitted there was no error on either ground. The Rules set out what was required and the Tribunal refused to accept that the evidence submitted demonstrated an active business. The appellant relied on the bank statement (page 73) as evidence of an active business along with HMRC and Company House paperwork but the Tribunal was entitled to find the evidence merely showed the appellant was setting up a business as against demonstrating an active business. The Tribunal quite properly distinguished the facts of Shebl as in that case there was evidence of trading before the Tribunal. It was a leap to far to find the bank letter showed activity and there was no error. The Tribunal considered article 8 and whilst not setting out the specific requirements of Section 117B of the 2002 Act this was not an error as the Tribunal in Dube (ss.117A-117D) [2015] UKUT 90 (IAC) made clear it was not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form. The Tribunal considered all of the evidence and bearing in mind he had no expectation to be allowed to remain as a Tier One migrant when he submitted his latest application coupled with the fact he did not meet the Rules the Tribunal was entitled to find removal was proportionate.
10. Ms Rothwell reminded me that at the date of refusal the appellant was trading and the Tribunal's finding in paragraph [23] amounted to an error in law.
11. I reserved my decision and advised the parties I would issue a written decision on the matters argued before me.

### **CONSIDERATION AND FINDINGS**

12. The appellant came to the United Kingdom to study and having obtained an MA in landscape architecture from Greenwich University he applied to work as a Tier One (post study work) migrant. Shortly before this leave expired he submitted his current application.
13. The Tribunal accepted at the date of application he had:
  - a. He had provided evidence that he set his company up in February 2014.
  - b. Prepared a detailed business Plan.
  - c. Opened a bank account with national Westminster Bank in his company's name.
  - d. There was marketing material

14. The Tribunal concluded in paragraph [14] of its decision that the business was not actively trading.
15. Ms Rothwell has argued that the Tribunal erred in its approach because taking the evidence together there was evidence he was actively trading.
16. The steps taken by the appellant were steps he had to take to start his business. He had to register his company with Companies House and he had to demonstrate he was a director of his business. Any business needed a bank account and the mere opening of an account does not mean a person is actively trading. The appellant was unable to point to any “contracts” or any source of income for his business.
17. The Tribunal in Shebl dealt with a business that demonstrated purchase orders, pro-forma invoices and sales/commercial invoices. When he submitted his application the appellant’s business had not progressed this far as it was in its infancy. The appellant had set up a company but had not been engaged in any work when his application was submitted. This distinguishes this case from the facts considered in Shebl. The bank statement showed no history and there was nothing before the respondent when the application was submitted to show the business was active. The fact the business was subsequently active is not the test to be applied and the Tribunal identified this in paragraph [14] of its decision.
18. In the circumstances, the Tribunal was entitled to make the finding it did under the Rules and the dismissal of the application was open to it.
19. The Tribunal did not consider the application under paragraph 276ADE HC 395 and this was neither argued before the Tribunal nor raised in the grounds of appeal. The Tribunal considered the appeal under article 8 ECHR.
20. At paragraph [20] of its decision the Tribunal reminded itself the real issue was whether the refusal was proportionate. The Tribunal noted he was financially self-supporting and he had never been a burden on the state and throughout his time in the United Kingdom he had sought to comply with all immigration requirements. He was of good character and in reasonably good health.
21. The Tribunal did not specifically refer to Section 117B of the 2002 Act but as Mr Clarke has already submitted this is not a legal requirement as long as he has applied the test. More recently, the Tribunal in Forman (ss117A-C considerations) [2015] UKUT 00412 reminded us that the public interest in firm

immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified. The list of considerations contained in section 117B of the 2002 Act is not exhaustive. A court or tribunal is entitled to take into account additional considerations, provided that they are relevant in the sense that they properly bear on the public interest question. In cases where the provisions of sections 117B of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect.

22. In considering article 8 the Tribunal demonstrated that it was aware the appellant spoke English and was financially independent. The Tribunal also had regard to the appellant's immigration history. The issue is whether the Tribunal's recommendation in paragraph [23] undermined his proportionality assessment and whether the Tribunal had regard to Section 117B factors.
23. I am satisfied that the Tribunal had in mind Section 117B and made a number of positive findings on the appellant's behalf but those positive findings, set out in paragraph [20] of its decision, do not negate the fact that the maintenance of effective immigration control is in the public interest. If he did not speak English or was reliant on the State benefits or others for funding then they would be adverse factors but simply because he is not in that position does not fortify his claim.
24. The Tribunal considered the decision of Tekle v SSHD [2008] EWHC 3064 (Admin) and had regard to all of the factors identified in paragraph [8] of the grounds of appeal. The fact the Tribunal believed he deserved an opportunity to regularise his status does not alter the fact the Rules were not met and he had come here as a student and had subsequently been allowed to carry out post study work. Neither category of visa gave him any expectation that he would be allowed to stay unless he satisfied the Rules.
25. The findings on proportionality were open to the Tribunal and there is no material error in its approach to either the Immigration Rules or article 8 ECHR.

### **DECISION**

26. There was no material error. The original decision shall stand.

Signed:



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT  
FEE AWARD**

No fee award made.

Signed:



Deputy Upper Tribunal Judge Alis