



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

Appeal Numbers: IA/48983/2014
IA/48976/2014

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 26 August 2015**

**Determination Promulgated
On 14 September 2015**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

**NOUMAN RAFIQUE
YASIR ARAFAT
+ dependents**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Fripp (Counsel)

For the Respondent: Mr McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellants are citizens of Pakistan. They are business partners who have applied for leave to remain as Tier 1 (Entrepreneur) Migrants under the Points Based System (PBS) on the basis of a joint application. Their appeals raise the same issues and have been linked.

Procedural history

2. In a decision promulgated on 27 March 2015 First-tier Tribunal Judge Mathews dismissed the appellants' appeals on the basis that he was not satisfied that they met the requirements of the relevant Immigration Rule - para 245DD.
3. In grounds seeking permission to appeal it was submitted that the Judge erred in law in failing to grant an adjournment and in deciding certain issues against the appellants, which had not previously been raised in the SSHD's decision dated 19 November 2014. Permission to appeal was granted by Judge P. J. M. Hollingworth in a decision dated 2 July 2015, on the basis of these grounds.
4. The matter now comes before me to determine whether or not the decision of the First-tier Tribunal contains a material error of law.

Hearing

5. At the beginning of the hearing Mr Fripp submitted a skeleton argument. This focussed upon the Judge's failure to address the appropriate question set out in 245DD(h). Mr Fripp argued that the Judge misdirected himself in deciding that the decisive issue was whether the appellants had a credible business plan demonstrating a viable business.
6. Mr McVeety was content not to take issue with the late amendment to the grounds of appeal. In those circumstances Mr Fripp indicated that he no longer relied upon the ground of appeal challenging the Judge's failure to grant an adjournment. He was right to do so. It is difficult to see how the failure to grant an adjournment had any material bearing upon the outcome of the case. Both parties accepted that the basis of the adjournment was to locate the final page of an interview transcript involving the second appellant. That has still not been found and in the premises an adjournment would not have achieved anything. In addition, the Judge accepted the credibility of the second appellant's aspirations [29] and it is difficult to see what the final page would have added to this when the Judge had the final page for the first appellant's interview.
7. Mr Fripp amplified upon his skeleton argument and made it clear that this is the document he relies upon to support his submission that the decision contains an error of law. I then heard briefly from Mr McVeety who asked me to find that the Judge was entitled to make his findings for the reasons provided.
8. After the completion of submissions I reserved my decision, which I now provide with reasons.

Error of law discussion

9. In order for the appellants to meet the requirements of 245DD, the decision-maker must be satisfied that, *inter alia*:

“(h) the applicant genuinely...intends and is able to establish, take over or become a director of one or more businesses within the UK in the next six months ...”.

At (i) it is said:

“in making the assessment in (h), the Secretary of State will assess on the balance of probabilities. The Secretary of State may take into account the following factors:

- i. the evidence the applicant has submitted;
- ii. the viability and credibility of the source of the money referred to in Table 4 of Appendix A;
- iii. the viability and credibility of the applicant’s business plans and market research into their chosen business sector; ...”

10. I entirely accept, as Mr Fripp submitted, that the decision maker, in this case the First-tier Tribunal, must apply the language of the relevant Immigration Rule. I also accept, as observed in **Alam v SSHD** [2012] EWCA Civ 960, that the PBS is said to be highly prescriptive and based upon objectively verifiable criteria. The PBS is intended to be based upon a “*hard-edged point scoring exercise*”, which emphasises “*certainty in place of discretion, on detail rather than broad guidance*” – see **Miah v SSHD** [2012] EWCA Civ 1719.
11. It is against this backdrop that Mr Fripp submitted that the Judge erred in law in engaging in a detailed analysis of whether the business was a viable one. Mr Fripp submitted that the Judge was limited to simply considering whether or not the appellant’s genuinely intend and are able to establish a business.
12. I accept that the Judge has clumsily described the issue in dispute as being whether or not the appellants’ business is credible and viable [18 and 19]. The real issue for him to determine is that set out within the wording of 245DD(h)(i)(1). He should have asked himself whether as at the date of decision, there was sufficient evidence to satisfy him that the appellants intend and are able to establish the business. The question for me is whether this misdirection constitutes a material error of law. I have decided that it is not for the reasons set out below.
13. First, the Judge expressly accepted that the appellants had “*genuine aspirations to establish a business*” [29]. The Judge clearly decided in the appellants favour in relation to the first aspect of 245DD(h)(i)(1) i.e. the Judge accepted that the appellants genuinely intend to

establish the business. Such a finding is consistent with the Judge's others findings [18] and seemingly with the SSHD's own views.

14. Second, when the decision is read as a whole the Judge was clearly more concerned about the question of whether the appellants' are genuinely able to establish the business. In order to answer that question i.e. in order to answer the second part of 245DD(h)(i)(1) the Judge (who at this stage was standing in the shoes of the SSHD in a full merits based appeal) was entitled to take into account "*the viability and credibility of the [appellants] business plans and market research into their chosen business sector*" as set out at 245DD(i). The Judge was entitled to regard this aspect of the evidence as particularly important on the facts of this case, and was entitled to consider the issue for himself.
15. Third, as I set out above, I entirely accept that the PBS has been re-designed with a view to minimising discretion and maximising predictable consistency (as observed more recently in **Hossain v SSHD** [2015] EWCA Civ 207). However it is inevitable that the question of whether an applicant genuinely intends and is able to establish a business is one that involves the use of discretion. This aspect of 245DD does not require mere hard-edged point scoring. Indeed the decision-maker has a discretion as to which factors to take into account (see the use of the word "may" at 245DD(i)) when determining the issues at (h). The decision-maker is obliged to consider the credibility of both intentions and ability to establish the business. It is therefore important to consider the Judge's findings in light of the relevant wording of the Rule, which, as Mr Fripp acknowledged involves an assessment of credibility, which is bound to include the use of discretion and subjective judgment.
16. Fourth, by virtue of 245DD(i) the Judge was entitled to take into account evidence relevant to the viability of business plans and market research when considering (h). The Judge was therefore entitled to express his concerns about the market research into the business sector undertaken by the appellants [22 and 28] and the lack of projections and other deficits in the business plans [23 and 30]. These are factual findings, which were open to the Judge.
17. Even assuming that the Judge misdirected himself when considering the overall question to be determined [18 and 19], that misdirection is not a material error of law. The findings of fact are such that if the correct question was asked there could only be one answer: notwithstanding the positive aspects of the appellants' application (as outlined at [18, 20, 21, 26, 27 and 28]) the business plans and market research are so deficient as to be unviable and in the circumstances the appellants cannot be said to genuinely be able to establish the business. For this reason, any error of law is immaterial and I therefore exercise my discretion not to set the decision aside.

Decision

18. I do not find that the decision of the First-tier Tribunal contains a material error of law.
19. I do not set aside the decision of the First-tier Tribunal.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
26 August 2015