



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

Appeal Numbers: IA/22080/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 3 May 2016**

**Decision and Reasons Promulgated
On 16 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**SALAMAT HUSSAIN
(NO ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Parkin, Solicitor
For the Respondent: Mr Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan who appealed against the decision to refuse him leave to remain as a Tier 1 (Entrepreneur) under paragraph 245DD(h) of the Immigration Rules. The appellant had applied for leave on 25 February 2014 and his application was refused on 7 May 2014. His appeal against that refusal was dismissed by Judge of the First-tier Tribunal Watt (“the FTTJ”) on 15 September 2015.
2. No anonymity order was sought and none is required.
3. The appellant sought permission to appeal on the ground that the FTTJ had considered new evidence contrary to s85A of the Nationality, Immigration and Asylum Act 2002; had ignored the respondent’s concerns about plagiarism; had not considered whether payments were corroborated in the bank statements; in making a findings that the appellant had not charged VAT, had failed to take account of the evidence that his income was below the VAT

threshold; and failed to make an assessment of the appellant's background and experience pertaining to the business.

4. Permission to appeal was granted by Upper Tribunal Judge Goldstein on 9 March 2016, as follows:
 - “1. The renewed grounds continue to rely upon the original grounds submitted in support of the first application for permission to appeal, but also challenge the reasoning of the First-tier Tribunal judge who refused permission.
 2. Whilst I observe that in considering inter alia, the further evidence tendered by the appellant at the hearing, the First-tier Tribunal Judge found in the appellant's favour that the relevant investment sum was available for investment by him, I am mindful that the clear policy underlying ss. 85 and 85A of the Nationality, Immigration and Asylum Act 2002 was that the Tribunal should be able to consider a broad range of evidence in relation to appeals generally but a more limited range of evidence in relation to appeals against decisions that had to be considered under the Points Based System, whether or not the appeal as here also involved a removal decision under s.47 of the 2006 Act.
 3. I am therefore persuaded that notwithstanding that the Judge reached both positive and negative findings on the evidence tendered by the appellant at the hearing to which it does not appear that the Presenting Officer raised an objection, that in all the circumstances permission to appeal on all of the grounds should be granted.”
5. The grounds of appeal in the First-tier Tribunal mirror those made in the Upper Tribunal for permission to appeal. Thus the appeal came before me today.
6. Both Mr Parkin, for the appellant, and Mr Whitwell, for the respondent, agreed that the FTTJ had erred in law in allowing the appellant to adduce additional evidence, contrary to s85A. Both referred to the guidance in **Ahmed & Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC)**. I agreed with them and asked for submissions on the materiality of the error.
7. Mr Parkin submitted that all those documents adduced for the appellant and listed at paragraphs 12 and 13 of the FTTJ's decision had been produced after the date of decision. He had a “strong suspicion” but “no firm knowledge” that those documents listed as being in the Home Office bundle were those submitted by the appellant with his application. These would, if so, have been admissible. It was clear, he submitted, that the FTTJ had taken into account documents which were inadmissible under s85A (eg those to which reference is made at paragraph 33 onwards). He submitted that the adverse credibility findings arose from the findings derived from the inadmissible evidence. Thus the adverse credibility findings were not sustainable. He submitted that, in line with **Ahmed**, it was impossible to say what finding the FTTJ would have reached if only the admissible evidence had been considered. This was not a case where the FTTJ had adopted wholesale the reasons of the respondent for refusal: the FTTJ had accepted the appellant's case with regard to the availability of funds for investment, for example. There was no assessment of the respondent's concerns, merely silent approval of her reasoning.
8. For the respondent, Mr Whitwell submitted that whilst the FTTJ had erred in law, the error was not material. At paragraph 31, the FTTJ had made it clear that there were “additional concerns about the genuineness of the business”; at paragraph 39 the FTTJ endorsed the

respondent's view. That view was set out in the reasons for refusal letter, page 2, where the respondent had set out a number of points as to why this was not a genuine business. No concession had been made at the hearing before the FTTJ with regard to the admissibility of the evidence.

9. In reply, Mr Parkin submitted that it was not suggested that the hearing before the FTTJ had been other than a "poorly run appeal". It was correct that paragraph 31 alluded to additional concerns, but there was nothing to indicate that those concerns were sufficient to persuade the FTTJ that the appellant was not a genuine businessman or that the business was not credible. There was no detailed consideration of the respondent's reasons for refusal. With regard to paragraph 39, while the FTTJ agreed with the respondent, it was not clear the extent of that agreement, particularly as the FTTJ had found for the appellant with regard to the origin of funds. Even if it could be treated as wholesale agreement, it was not clear on what basis it had been agreed, ie whether as a result of the original evidence submitted with the application, or the inadmissible evidence. Nor have reasons been given on the basis of the original evidence. Whilst it was accepted that the appellant had undermined his case by adducing inadmissible evidence, it could not conversely be said that, had he not done so, his appeal would have been dismissed anyway. There was the "possibility" he could have "won his appeal". This was because the FTTJ had formed a view that the inadmissible documents had detracted from his credibility, with the implication that those documents tended to undermine his case. Thus, without the inadmissible evidence, it was not possible to identify what the decision of the FTTJ might have been. "The appellant would have had a better shot at success had he not produced the additional material". It was, he submitted, impossible to determine what the outcome would have been without them; it could have been more favourable to the appellant had the material not been produced.
10. I indicated to the parties that I would find that the FTTJ's decision taking into account evidence contrary to s85A contained an error of law for that reason. I so find. I turn to the issue of whether that error was material to the outcome of the appeal.
11. There is no statement or finding in the FTTJ's decision as to the nature and extent of those documents which were submitted with the application. Mr Parkin helpfully indicated that it was likely to be those documents listed at paragraph 10 of the decision, but he was not sure that all the submitted documentation was listed there. Having checked the documents produced to the FTTJ, I find that most of those listed at paragraph 12 as being in the appellant's first bundle appear to be the same as those in the Home Office bundle. Having also checked those listed at paragraph 13 of the decision, I note that these all post-date the appellant's application and the respondent's decision. None of the documents listed at paragraph 13 were therefore admissible by the FTTJ.
12. It is submitted for the appellant before me that the FTTJ made an adverse credibility finding solely on the basis of the inadmissible evidence. The FTTJ states at paragraph 20 that "The Appellant is not an impressive witness. When asked questions by his own Counsel, by Mr Macrae or by myself, he did not seem to be able to give a straightforward answer, but answered in vague, general terms." The FTTJ then goes on to say

"21. He was asked by me how it was that a small business such as Khan's Kebabs which ran a single unit and effectively operated a takeaway could afford to pay £600 per month to him as a business consultant. He could offer no sensible answer to this. He said that the business had six or seven employees working in a takeaway making kebabs, doners and pizzas. He said he attended meetings of the staff and gave training. He was asked about the other two companies, BGN Security and Best Business Centre

with whom his company appeared to have contracts. He said that Best Business Centre was a travel agency but also had a currency exchange in Luton. He said he attended meetings, seminars and motivated people at this business. He was not able to say how many people they employed.

22. He said that BGN Security Company had about six or seven employees but he was not able to explain what services he was able to provide to this company.”

13. The FTTJ’s decision on credibility appears to have been made, at least partially, on the appellant’s oral evidence, some of which relates to inadmissible evidence, including copy cheques payable to the appellant’s company and post-dating the application (they are included in the bundle of documents produced at the hearing).
14. Whilst the FTTJ identifies and summarises the issues of concern for the respondent and addresses each of these in turn under three headings, the FTTJ does not assess the evidence which was before the respondent at the date of decision; instead the FTTJ identifies the respondent’s concerns and considers the evidence produced by the appellant to address those concerns. That evidence is not admissible. The FTTJ makes no specific findings as regards the evidence before the respondent. Whilst the FTTJ refers at paragraph 31 to having “additional concerns about the genuineness of the business allegedly conducted by the Appellant”, it is not stated how and to what extent the FTTJ agrees with the concerns of the respondent and why that is so. Instead the FTTJ considers the additional evidence of the appellant and makes an assessment of that evidence before agreeing (paragraph 39) “with the respondent in this case that [he is] not satisfied with the genuineness of the alleged business to be carried out by the Appellant.”
15. I have been referred to the guidance in **Ahmad**. As is stated at paragraph 5: “the appeal if it is successful is on the basis that the decision-maker with the material before him should have made a different decision, not on the basis that a different way of presenting the application would have produced a different decision.”
16. In the present case the FTTJ has failed to carry out any assessment of the material before the respondent’s decision-maker, instead summarising the reasons for refusal and assessing the inadmissible evidence adduced by the appellant to address the respondent’s concerns. This is the wrong approach. As there is no assessment by the FTTJ of the evidence which was before the decision-maker, it is impossible to say whether the appeal would have been dismissed without consideration of the inadmissible material. Indeed I am also concerned that the adverse findings on credibility have been taken in the light of inadmissible evidence as well as the appellant’s oral evidence on matters which were before the respondent at the date of decision.
17. As in the case of **Ahmed**, I am unable to say what conclusion the FTTJ would have reached if the FTTJ had not taken into account the inadmissible evidence. I set aside the FTTJ’s decision. Both parties’ representatives agreed that in such a situation, the appropriate course was for the matter to be remitted to the First-tier Tribunal for a fresh hearing. I agree with them, also because it is not clear to me what documentary evidence was before the decision-maker at the date of decision. I am unable to ascertain this from the decision of the FTTJ or the tribunal file. I consider it necessary to make a direction that the appellant produce, for the fresh hearing, a bundle of those documents which were submitted with his application, so that the FTTJ who hears the appeal afresh knows what evidence can be taken into account.

18. Mr Whitwell, for the respondent, indicated at the outset of his submissions that he was minded to make an application for costs. However, in the event, he did not do so and I have not therefore considered the matter.

Decision

19. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ Watt.

A M Black

Deputy Upper Tribunal Judge

Dated: 9 May 2016