Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/48272/2014
IA/48273/2014
IA/48322/2014
IA/48323/2014
IA/48324/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th December 2015	**On 9th March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR. ALEEM UDDIN (1)
MR. SYED IMRAN HUSSAIN (2)
[S I] (3)
[A H] (4)
[A S H] (5)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr. Tarlow, Home Office Presenting Officer
For the Respondent: Mr. M Iqbal of Counsel instructed by Denning Solicitors

DECISION AND REASONS

1. This is an appeal against a decision by First-tier Tribunal Judge Traynor promulgated on 25th June 2015, in which he allowed the appeals against

the decisions of the Secretary of State for the Home Department of 13th November 2014, to refuse the applications of Mr Aleem Uddin and Mr. Syed Imran Hussain for leave to remain in the UK as Tier 1 (Entrepreneurs) under the Points Based System. In line with his decision to allow the appeals of two principal applicants', First Tier Tribunal Judge Traynor allowed the appeals of the remaining three appellants before him, who are dependants of Mr Syed Imran Hussain.

2. The appellant before me, is the Secretary of State for the Home Department. However for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to the Secretary of State as the respondent.

3. Permission to appeal was granted by First-tier Tribunal Judge Brunnen on 18th September 2015. The matter comes before me to consider whether or not the determination by First-tier Tribunal Judge Traynor involved the making of a material error of law, and if so, to remake the decision.

Background

4. Much of the background to the appeal is uncontroversial. The first appellant, Mr Allem Uddin first arrived in the UK in 2010 with leave to enter the UK as a Tier 4 student. On 24th August 2012, he was granted leave to remain in the UK as a Tier 1 Post-Study migrant until 24th August 2014. The second appellant, Mr Syed Hussain first arrived in the UK in 2008 with leave to enter the UK as a student. On 1st September 2012, he was granted leave to remain in the UK as a Tier 1 Post-Study migrant until 1st September 2014. The third appellant is the wife of the second appellant and the second and third appellants, are the parents of the fourth and fifth appellants. The applications and appeals of the third to fifth appellants, stand and fall with that of the second appellant. Each of the appellants is a Pakistani national.

5. The first and second appellants had applied on 23rd August 2014 for leave to remain as Tier 1 (Entrepreneurs) in accordance with the Points-Based System of the Immigration Rules. The applications were refused for the reasons set out in decision letters dated 13th November 2013. Neither the first appellant nor the second appellant was awarded any points for attributes under Appendix A of the rules. In broad terms the respondent considered that the evidence submitted by the first and second appellants of advertising material was unacceptable because it did not cover a continuous period commencing before 11th July 2014, up to no earlier than three months before the date of their application. The respondent considered that the first and second appellants had not demonstrated that they meet the requirements of the Rules to be awarded points under provision (d) in the first row of Table 4 of Appendix A. The decision of the respondent went on to state:

> "The immigration rules for evidential flexibility only cover missing documents from a sequence of documents that have been provided with the application, such as one bank statement missing from a series, or missing information from documents which have been provided. Therefore in line with paragraph 245AA(b), as the missing specified documents do not fall within a series of documents that you provided, we have reached a decision based on the evidence provided in the application…."

6. The appellants appealed to the First-tier Tribunal against the respondent's decisions of 13th November 2014 in which the appellants were notified of the intention to remove them from the United Kingdom by way of Directions under Section 47 of the Immigration, Asylum and Nationality Act 2006, following the refusal of their applications for leave to remain.

The appeal before the First-tier Tribunal

7. On 16th June 2015, First-tier Tribunal Judge Traynor heard the appeals and allowed the appeals for the reasons set out in a decision promulgated on 25th June 2015. Paragraphs [2] to [9] of his decision sets out the background to the respondent's decisions of 13th November 2014. At paragraphs [10] and [11], the Judge records the evidence before him. He notes at paragraph [11(3)] of his decision, that he had before him:

> "The Appellants' bundle of documents comprising of 203 pages. This includes the witness statements of the First and Second Appellants, evidence of their academic qualifications; evidence of company registration and business activity; Bank statements and financial documents; advertising materials at pages 80-98; evidence of invoices, business plan and business agreements; Accountant's letters, Statutory Declarations and Appellants' CV's; payment receipts for Go Daddy.com for web launching etc.; miscellaneous documents pertaining to the Respondent's decision-making process."

8. The Judge records at paragraphs [23] to [32] of his decision the submissions that were made to him. It had been submitted by the respondent that pursuant to the provisions of s19 UK Borders Act 2007, the respondent, in points based applications, was not obliged to accept any evidence that had not been submitted with the application. It followed that any evidence that the appellants had submitted after the application, could not be taken into account. Counsel for the appellants drew the Judge's attention to the decision of the President of the Upper Tribunal in **Nwaigwe –v- SSHD [2014] UKUT 00418 (IAC)**, and to the decision of the Upper Tribunal in **Nasim and Others (Raju: Reasons not to follow) [2013] UKUT 610 (IAC)** in support of his submission that s85A of the Nationality, Immigration and Asylum Act 2002 does not prevent a Tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that

evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules.

9. First-tier Tribunal Judge Traynor found at paragraph [34] of his decision that the appellants were entitled to reply upon the decision of the Upper Tribunal in **Nasim and Others** as authority for the proposition that documentary evidence submitted after the application, but which preceded the decision, can be taken into account. He went on to find:

> "35. It is evident from the decision letters that the Respondent does acknowledge that relevant marketing materials were submitted after the application was made but before the decisions. However, the Respondent's view was such evidence could not be taken into account and, on that basis, concluded that the applications stood for refusal because of a failure to provide the specified evidence.
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> 36. Having carefully considered the submissions of Mr. Iqbal in conjunction with all of the documentary evidence which has been provided within the bundles of both the Respondent and Appellants, I find that the terms of paragraph 41 –SD (e) (iii) and (iv) have been met.
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> 37. I find that there is evidence of marketing materials in the form of flyers, business cards and online advertising. I also accept Mr. Iqbal's submission that the Appellants do not seek to rely upon establishing their own website but that they used 'Go.Daddy.com' as a platform to advertise their business. Nevertheless, there is evidence of their business being registered, marketing materials being provided, including flyers, adverts and business cards, prior to 11 July 2014 and sufficient evidence showing the continuity of that business from at least early June 2014. I find, therefore, that the business was clearly in operation for at least three months, including 11 July 2014, and on that basis the applications fulfil the requirements of the relevant Rule.
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> 38. Even if I am wrong in the above respect, I would have found that the Respondent's decisions were not in accordance with the law because of its failure to properly apply the evidential flexibility policy as now contained within paragraph 245AA of the Rules. Upon reading the Respondent's Decision Letters' it is noted that the terms of paragraph 245AA(b) have been set out in full. This will include the Respondent exercising discretion to request information which may perfect an application if there is missing information from the documents which have been provided. In the circumstances, the Respondent contends that dates have been missed from various documents, although it not usual to expect business cards to bear a date. Nevertheless, if the Respondent specifically wanted those items to be dated, and where the Appellants clearly had provided all other documents showing this as a genuine viable business, it was therefore open to the Respondent to request that information. However, she failed to do so. However, given that I find the Appellants have submitted evidence prior to the decisions which demonstrates their ability to meet the specific requirements under Appendix A which justifies them an entitlement to the 25 points claimed for their access

> to funds, then I find it is not necessary for me to make any further ruling that the Respondent's decisions are not in accordance with the law. It is sufficient for me to allow the appeals to the limited extent that the First and Second Appellants' applications are entitled to the initial 25 points claimed under Appendix A for access to funds."

The Grounds of appeal

10. The respondent appeals on the ground that First-tier Tribunal Judge Traynor correctly notes at paragraphs [13] and [15] of his decision:

> "13. …However, under the provisions of Section 85A of the 2002 Act, in Points-Based applications under the Rules I may only consider the circumstances appertaining at the time of the decision and I may only consider evidence which was submitted in support of and at the time of the making of the application.
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> 15. In addition, the Respondent had considered the provisions of paragraph 245AA and, in particular, sub-paragraph (b) in determining whether there should be discretion operated by the Respondent in accordance with her stated evidence flexibility policy as now incorporated within that Rule."

However, the Judge then erred in taking into account the post application documents without applying his mind to the provisions of section 85A(4) of the 2002 Act and Section 19 of the UK Borders Act 2007.

11. At the hearing before me, Mr Tarlow on behalf of the respondent adopts the grounds and submits that the decision of the Judge discloses a material error of law that is capable of affecting the outcome of the appeal. He submits that the Judge allowed the appeal, having taken account of evidence which the Judge notes at paragraph [18], was additional documentary evidence, submitted by the appellants in support of the application on three occasions, after they had made their application, but prior to the respondent's decision. Mr Tarlow submits that had the Judge limited his consideration to the evidence submitted in support of, and at the time of making the application, the appeal could not have succeeded.

12. In reply, Mr Iqbal submits that the respondent's grounds of appeal are misconceived. He submits that it is common ground that the additional material relied upon by the first and second appellants was provided to the respondent prior to the respondent reaching a decision upon the application. He submits that s85A of the 2002 Act does not preclude the respondent or the Tribunal from taking that further evidence, that is post application but provided in support of the application, into account, provided it was available before the respondent's decision. He relies upon the decision of the Court of Appeal in **Mansoor Ali –v- SSHD**

[2013] EWCA Civ 1198 and the two decisions that he had already drawn to the attention of the First-tier Tribunal Judge.

13. Mr Iqbal submits that any error of law with regard to the post-application evidence is immaterial because the First-tier Tribunal Judge found at paragraph [39] of his decision that he "..would have found that the Respondent's decisions were not in accordance with the law because of its failure to properly apply the evidential flexibility policy as now contained within paragraph 245AA of the Rules...". Mr Iqbal submits that the appeal was bound to be allowed in any event, by the First-tier Tribunal and that in any event, the matter would simply have been remitted back to the respondent for the respondent to properly consider the application of the evidential flexibility policy.

DISCUSSION

14. Section 85(4) Nationality, Immigration and Asylum Act 2002 provides that on an appeal, the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision, but that is subject to the exceptions set out in section 85A. Of these, only Exception 2 is relevant for present purposes. It is contained in subsections (3) and (4), which provide as follows:

> "(3) Exception 2 applies to an appeal under section 82(1) if–
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> (b) the immigration decision concerned an application of a kind identified in immigration rules as requiring to be considered under a "Points Based System", and
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> (c) the appeal relies wholly or partly on grounds specified in section 84(1)(a), (e) or (f).
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> (4) Where Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it–
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> (a) was submitted in support of, and at the time of making, the application to which the immigration decision related,

15. The first and second appellant made their application for leave to remain in the UK as Tier 1 (Entrepreneur) Migrants under the 'Points Based System" on 23rd August 2014. The Judge notes in his decision, at paragraph [18] that the appellants had submitted additional documentary evidence on three occasions prior to the decision. The Tribunal had been provided with various Royal Mail tracking references that confirmed that documents had been sent to the respondent in support of the application before the decision of the respondent was made. The appellants explained that the documents which were sent, included Santander Bank statements, printing bills, brochure, seminar invitation card, and a seminar venue bill. That additional material that

had been sent to the respondent between the 23rd August 2014 and the making of the respondent's decision was also referred to in the submissions made on behalf of the appellant and recorded at paragraphs [29] and [30] of the decision of the First-tier Tribunal.

16. The narrow issue in the appeal before me is whether the First-tier Tribunal Judge was entitled to have regard to that material that was submitted by the appellants to the respondent in support of their application, but between the date of the application and prior to the respondent's decision.

17. The clear policy underlying sections 85 and 85A of the 2002 Act is 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 which have to be considered under the Points Based system.

18. The decision of the Upper Tribunal in **Nasim and Others (Raju: Reasons not to follow) [2013] UKUT 610 (IAC)**, followed from the decision of the Court of Appeal in **Raju and Others –v- SSHD [2013] EWCA Civ 754** and, as the Upper Tribunal noted, provided a suitable vehicle for considering the arguments advanced regarding the effect of the judgment of the Court of Appeal in **Raju and Others**. At paragraphs [72] to [76] of the decision, the Upper Tribunal considered the application of s85A of the 2002 Act. The Upper Tribunal set out in the decision, the stance adopted by the respondent both before the Court of Appeal, and before them. The Upper Tribunal records;

> "73. Paragraph 29 of Mr Gullick's skeleton argument for the respondent in Raju reads as follows:-
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> > "29. Whilst the SSHD accepts, having further considered the position in the light of the Upper Tribunal's judgment, that following the coming into force of section 85A of the 2002 Act, an application is to be treated as continuing for evidential purposes after it is initially submitted to the SSHD (and so an applicant can provide further evidence, in addition to that initially submitted, prior to the SSHD's decision), the question of where the cut-off point in the '*fixed historic timeline'* for the award of points should fall is a somewhat different one." (original emphases)
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> 74. Mr Gullick's skeleton argument in the present contains this paragraph:-
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> > "41. It is clear … that the SSHD has never suggested in this appeal that the SSHD is not entitled to consider post-submission but pre-decision evidence. The SSHD has also made it clear that, in any event, the Tribunal is entitled to consider the evidence that the decision maker considered. Such evidence was considered in these cases (and in the *Raju* cases), but did not result in the

> award of 15 points for the reasons given in *Raju*." (original emphasis)
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> 75. In the light of the respondent's position, there is a considerable amount of agreement between Mr Gullick and Mr Iqbal. In particular, they agree on what is meant by the expression "the application" in section 85A. They disagree, however, about whether section 85A imposes any substantive restriction on the ability of the respondent to consider evidence submitted after the date on which the application is made for the purposes of the Rules (pursuant to paragraph 34G). We agree with the respondent that section 85A imposes no such restriction.
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> 76. Accordingly, the respondent's position, in cases such as the present, is that (as held in Khatel) section 85A precludes a Tribunal, in a points-based appeal, from considering evidence as to compliance with points-based Rules, where that evidence was not before the respondent when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the respondent when she took the decision, whether or not that evidence reached the respondent only after the date of application for the purposes of paragraph 34F. Although our view of the matter is *obiter*, we concur.

19. The Upper Tribunal found in **Nasim and Others**, although section 85A of 2002 Act precludes a Tribunal, in a points based appeal, from considering evidence as to compliance with points-based Rules, where that evidence was not before the Secretary of State when she took her decision, section 85A does not prevent a Tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules.

20. In my judgment, there is a distinction to be drawn between those cases where an appellant seeks to rely, at the hearing of an appeal, upon evidence that was not before the respondent at the time of her decision, and as here, cases in which an appellant seeks to rely at the hearing of an appeal, upon evidence that was not submitted with the application itself, but which was before the respondent at the time of her decision. In my judgment, where a Points Based application is made and refused, the assessment by the Judge is to be of the material that was before the decision-maker rather than a new consideration of new material. In other words, the appeal if it is successful, is on the basis that the decision-maker with the material before him or her, should have made a different decision.

21. The appellants' bundle before the First-tier Tribunal contained a number of material documents. The respondent acknowledged that the relevant marketing materials were submitted after the application was made, but

before the decisions. First-tier Tribunal Judge Traynor found that there was within the material provided to the respondent before she reached her decisions, evidence of the business being registered, marketing materials being provided, including flyers, adverts and business cards, prior to 11 July 2014 and sufficient evidence showing the continuity of that business from at least early June 2014. The Judge found therefore, that the business was clearly in operation for at least three months, including 11th July 2014, and on that basis, the applications fulfilled the requirements of the relevant Immigration Rule. In my judgment, section 85A did not preclude the Tribunal from taking these documents into account as they relate to the situation at the date of the applications, and were submitted before the decisions were made.

22. It follows that in my judgment, the decision of the First-tier Tribunal discloses no material error of law and the appeal is dismissed. As the First-tier Tribunal records at paragraph [40] of it's decision, the respondent is now entitled to conclude the assessment of the applications in line with the findings made.

Notice of Decision

23. The appeal is dismissed and the decision of the First-tier Tribunal shall stand.

24. No anonymity direction is applied for and none is made.

Signed Date

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

The First-tier Tribunal made a fee award, and as I have dismissed the respondent's appeal, that award shall stand.

Signed Date

Deputy Upper Tribunal Judge Mandalia