



IAC-FH-AR-V1

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

Appeal Number: IA/48941/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 6th April 2016**

**Decision & Reasons Promulgated
On 19th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

**MR JAY HARNISKUMAR PATEL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel, instructed by Vision Solicitors Ltd
For the Respondent: Miss A Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India who appealed against the Respondent's decision of 24th November 2014 to refuse to grant him leave to remain here as a Tier 1

(Entrepreneur) Migrant. A subsequent appeal to the First-tier Tribunal Judge Whiltcombe was dismissed in a decision promulgated on 17th June 2015. Grounds of application were lodged. A summary of the grounds is presented on page 1 of the grounds and I repeat them here:-

- “(a) The FtTJ’s erred in law by not considering IR and its mandatory requirements for T-1(E) visa and wrongly concluded that the date of start of business undermined seriousness of the business venture, however there is no such requirement in the relevant IR’s;
- (b) The FtTJ has cited many reasons for refusal by identifying those requirements as mandatory/quasi mandatory for there are no such mandatory/quasi mandatory requirements in the Immigration Rules, policy guidance or even in any of the documents of Home Office in public domain;
- (c) The FTJ’s failure to consider the published guidance describing interview procedure before conducting an interview and Respondent’s failure to abide by it;
- (d) FtTJ’s failure to consider the business venture is by a team and there is another person in the team who is responsible for business strategies and A is only responsible for the Marketing and HR aspect of the business;
- (e) The FTJ failed to consider **Shebl (Entrepreneur: proof of contracts) [2014] UKUT 216 (IAC)** especially accepting that the contracts entered by A’s company to be genuine.”

2. The grounds then go on to elaborate on these points.
3. Permission to appeal was initially refused on the basis that there was no arguable error of law but in the grounds’ further points were made to the Upper Tribunal and permission granted by Upper Tribunal Judge Reeds.
4. Judge Reeds pointed out that the business partner’s appeal was heard on the day before the Appellant’s but no attempt was made for the appeals to be heard together despite the fact that information would be relevant to both appeals. The Appellant’s business partner was successful in his appeal and as the decision in **MM (Unfairness: E&R) Sudan [2014] UKUT** demonstrated, an error of law may be found where material evidence was not considered and thus it is arguable that there was relevant evidence relating to the business partner available and also that had it been taken into account it may have resulted in a different outcome.
5. It was also said that the other grounds were also arguable.
6. A Rule 24 notice was lodged. It was submitted inter alia that the judge directed himself appropriately. For example, it was submitted that the Appellant’s complaint that it was irrational for the judge to take into account the Appellant’s other

employment was without merit. In considering genuineness under 245DD(h)(iv) the Secretary of State must be satisfied that the Appellant will not take employment other than the terms of paragraph 245DE. That issue was raised in the RFL. The judge's findings were reasoned. The Appellant's complaint that the judge failed to consider and apply 245AA was wholly without merit. 245AA is specific to "specified documents", the discretion to request further evidence at the date of decision is found under Rule 245DD(j).

7. There was no duty on the Secretary of State to request post-application evidence. The Appellant's complaint that he was not asked for further evidence to rebut issues arising from his interview fails to recognise the terms of the discretion under rule 245DD(j) and ignores Section 85A(4) and the reasoning in Ahmad.
8. Thus the matter came before me on the above date.

Submissions

9. The first complaint from Mr Karim was that the judge had made findings on the Appellant's oral evidence which should not have been allowed given that this was a points-based system case – see Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC). There was a prohibition in relation to new evidence.
10. Secondly, the judge had looked at circumstances as at the date of hearing which was well beyond the date of decision taken on 20th November 2014. He had therefore erred in law.
11. The decision of the business partner was heard before the appeal of the Appellant and the judge had failed to take into account that the application was from a team, and not just the Appellant. This was the most important error.
12. Thirdly, prior to refusal of the application, the Secretary of State should have provided the Appellant with an opportunity to deal with points of concern and this was a breach of the common law obligation of fairness.
13. In terms of Article 8, reliance was placed on the grounds. Firstly, there was a prohibition on hearing oral evidence. Secondly, although the judge may not have been at fault in not having regard to the position of the business partner, there was a material error of law – reliance was placed on MM (Unfairness; E&R) Sudan [2014] UKUT 00105 (IAC).
14. In response to observations from the Home Office Mr Karim referred to a bank statements in the Appellant's bundle which did suggest, contrary to the judge's findings at paragraph 39 that money had been spent on business development etc.; the bank statements showed that there had been transactions. There were therefore errors of law in the decision and the matter would have to be reheard at First-tier Tribunal level.

15. For the Home Office it was said that the judge had given cogent reasons for not accepting the Appellant's account.
16. It was the responsibility of the Appellant's representatives to present the evidence of the Appellant's business partner. They could have asked that the cases be linked or adjourned but there was no submission that this had been done.
17. The facts in **MM** were fundamentally different to the case before me. Various principles were set out in that case to allow evidence to be admitted, part of which was that a procedural failure caused by an Appellant's own representative did not lead to an appeal being in breach of the Rules of natural justice – see paragraph 25. In this case there had been a failing by the representatives to adjourn or conjoin the two cases.
18. There was no procedural unfairness. There was no duty on the Secretary of State to request further information from the Appellant.
19. There being no error of law the appeal should be dismissed.
20. I reserved my decision.

Conclusions

21. The judge found that the timing of the incorporation undermined the contention that it was a serious business venture and he therefore looked closely at the evidence that it was trading and developing as might be expected of a genuine business (paragraph 20). The judge noted at paragraph 24 that it became clear in cross-examination that the Appellant's involvement in "talent hunt" was limited to interviewing applicants for employment shortlisted by Costa Coffees HR department. The Appellant accepted in cross-examination that he interviewed applicants for employment about six times a year and the judge made a finding that his involvement with training and recruitment was extremely limited. He noted that neither the Appellant nor Mr D Patel (his business partner) had left their employment in order to commit their time wholly to the business "Start 2 End Solutions Limited". He found that this undermined the contention that "Start 2 End Solutions Limited" was a genuine business.
22. The judge observed that he had had heard no evidence that the Appellant's degree gave him any expertise in his human resources planning. He noted that Mr D Patel's specialism would be "business strategy, IT and business procedure" but pointed out he had not heard any evidence which substantiated his expertise in those areas.
23. He went on to note that the business had one client. He pointed out in paragraph 31 that it was the commercial substance of the contract which was questionable, not its legality or enforceability. He noted that the Appellant had struggled to describe precisely what services his business had performed for Mr N Patel and went on to say that a genuine start-up business would seek more than one contract with a small convenience store (paragraph 35).

24. He noted that the business was advertised on the well-known Gumtree classified ads website and it had approximately 150 views. That, in the judge's assessment, was a very small number even for a genuine start-up business.
25. He noted that the advertisement contained numerous grammatical errors.
26. In terms of the investment by the Appellant of £50,000 he said that "not a single penny" had been spent on business development etc." I interpose here that *prima facie* the bank statements referred to do not show that money had been spent on business development. The judge was critical of the financial projections given that the Appellant said he expected his company to turn over £1,000 to £3,000 in its next year of trading and he noted why the projections contained no specific targets for productions which the Appellant was not able to answer. For all the reasons given the judge found that the business plans were neither viable nor credible.
27. It cannot be said that any of these findings are perverse or irrational or were not conclusions the judge was entitled to make except that he did consider matters at the date of the hearing as opposed to what he should have done, the date of decision dated 24th November 2014. However it does not seem to me that this had a material bearing on the outcome on the appeal nor was it submitted that it did; in the circumstances it does not constitute a material error in law.
28. Mr Karim relied on Ahmed for the proposition that the judge should not have taken into account oral evidence given by the Appellant. That is not an attractive proposition particularly given that the Appellant elected to give evidence which of course most applicants do, as if they did not their appeal would probably fail for reasons given in the refusal letter. It is also a misunderstanding of Ahmed - that decision does not say that oral evidence given by an Appellant may not be taken into account but rather there is a prohibition in relation to new evidence - an entirely different proposition. It is difficult to understand the merit of a submission when a decision is taken to lead an Appellant in evidence and then to complain when the Tribunal takes account of what the Appellant has said. I find that the reasoning in Ahmed does not assist the Appellant.
29. Secondly, while it was said that the judge was not at fault for not considering the position of the business partner it was nevertheless argued that there was an error in law conform to what was said in MM and indeed that this was the most important error. In my view this submission is unsound. It was for the Appellant through his legal advisors to decide how to deal with the evidence of the business partner. On the face of it these appeals could have been consolidated in that the Tribunal could have been invited to hear them on the same day before the same judge. Certainly, with the benefit of legal advice, the Appellant could readily have made such a motion to that effect or move that the case should be adjourned or alternatively led the business partner, Mr Patel, in evidence. None of these steps were taken and Mr Karim had no explanation as to why not. The facts in MM were very different to the facts in this case and in this case, as put forward by the Home Office, the Appellant or his advisor were responsible for the apparent mistake (if that is what it was) which

arose in proceeding with the case in the absence of the Appellant's business partner. As noted above, the jurisprudence establishes that the procedural failure caused by the Appellant's representatives does not lead to an appeal being in breach of the Rules of natural justice.

30. No doubt some judges would have raised this issue with the Appellant's agents at the commencement of the hearing but there was no obligation on the judge to do that and he did not. It may be, of course and in the absence of any explanation to the contrary that it was a deliberate and measured decision by the Agents not to involve the business partner in this appeal but for whatever reason (none was forthcoming) that was a matter for them. There is no merit in this ground of appeal.
31. In these circumstances there was no breach of the common law duty of fairness to the Appellant. There is no authority which says that the Secretary of State is obliged to return to the Appellant in the event that that they had concerns on the merits of his application. There is no breach of Rule 245AA.
32. In all these circumstances there is no error of law in the decision which must stand. There is no need for an anonymity order.

Notice of Decision

33. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
34. I do not set aside the decision.

Signed

Date

Deputy Upper Tribunal Judge J G Macdonald

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge J G Macdonald