



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/22080/2014

THE IMMIGRATION ACTS

Heard at Field House
On 7 July 2017

Decision & Reasons Promulgated
On 12 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

SALAMAT HUSSAIN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Parkin (Ryan Adams Solicitors)

For the Respondent: Ms J Isherwood (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Salamat Hussain, a citizen of Pakistan born 10 September 1976, against the decision of the First-tier Tribunal of 7 November 2016 dismissing his appeal against the refusal to vary his leave from Post Study Worker to Tier 1 Entrepreneur, itself brought against a Home Office decision of 7 May 2014 to such effect.

2. The refusal letter sets out his immigration history: he was granted leave to enter as a student on 24 September 2008, ultimately until 30 September 2012, and then as a Tier 1 post study migrant until 27 February 2014. He made an application for leave as an Entrepreneur on 25 February 2014, and was interviewed regarding the matter on 28 April 2014.
3. His application was refused because the Home Office doubted the genuineness of his proposed business, because
 - (a) There was inadequate evidence as to the source of the funds underlying his investment into the business, which he asserted had come from the sale of land, but as to which there appeared to be no corroborative evidence;
 - (b) The funds had not been invested into a UK business;
 - (c) His business plan repeatedly contained text which had been plagiarised from online sources showing that it “clearly cannot have been written with the intention of it truly and accurately representing your business”;
 - (d) The contract between his company and Khans Kebabs Ltd, the sole contract provided on the application, contained no information as to the cost of the services that would be provided;
 - (e) Although he had named a series of competitor businesses local to his own, he had not explained how it was that his own claim to provide excellent customer service and reasonable prices would exceed their ability to do so;
 - (f) An internet search on Yell.com showed that some 150 firms in the LU3 residential postcode offered “management consultancy” services;
 - (g) Whilst he was given credit for his MBA from the University of Wales and his work as a Business Development Manager which could reasonably be expected to provide him with some transferable skills on which to build, he lacked previous business experience inside or outside the UK.
4. His appeal was first heard and dismissed by the First-tier Tribunal on 15 September 2015. The First-tier Tribunal accepted his evidence regarding the availability of the relevant investment sum, as he had “now produced an estate agent’s valuation report and a sale agreement for a plot of land in Pakistan” and documentation showing he had by otherwise transferred £23,650 from Pakistan to the United Kingdom of which he had invested £18,000 in his proposed business. However, the “great many documents” now put before the First-tier Tribunal gave it additional concerns about the genuineness of the business: there was no satisfactory explanation for why a small kebab takeaway would pay £600 a month for his services, and similarly as to why a security company would pay £12,000 annually or why Best Business Centre, a small travel agent and currency exchange, would pay £650 monthly. Furthermore, the invoices he had put forward did not tally with the sums charged under the contracts he had provided. Furthermore, notwithstanding his business qualification, he had been unable to explain these issues, which also counted against him.

5. Permission to appeal was granted against that decision and the Upper Tribunal remitted the appeal for hearing afresh, having found that the First-tier Tribunal had failed to indicate the extent to which it had relied upon post-decision evidence as opposed to upon the material supplied on the application, both directly and via taking account of the Appellant's oral evidence which had referred to such material.
6. The First-tier Tribunal reheard the Appellant's appeal and again dismissed it in a decision of 23 November 2016. It refused an adjournment application made on the basis of the Appellant's difficulties with a hearing problem, back pain and depression because there was nothing to indicate he was unable to give evidence before the Tribunal.
7. Having noted that the parties agreed that all the evidence now before the First-tier Tribunal was admissible having been before the Respondent's decision maker (save for the witness statement evidence), the First-tier Tribunal went on to summarise the evidence the Appellant had given at interview in some detail, and then stated it gave "significant weight" to his registration of his business, opening of bank accounts, and provision of a service agreement and a business plan. It upheld the reasoning of the Respondent on the basis that:
 - (a) He had been unable to detail of the services that his business would have offered or the agreed costs with Khan's Kebabs;
 - (b) He was vague as to his business's competitiveness;
 - (c) The use of template business plans was not of itself objectionable, but nevertheless the Home Office had been right here to have some concern about the extent to which material had been copied from the internet;
 - (d) The Service Agreement was invalid as it referenced agreed payment rates which were in fact not ultimately outlined therein;
 - (e) The Appellant lacked experience in running a business, and, recognising that any entrepreneur had to start somewhere, management consultancy of all businesses was surely one in which experience would be at a premium.
8. Having regard to these considerations, the First-tier Tribunal found that "I then consider whether the oral evidence and written statement of the Appellant is such to satisfy me that he is a genuine entrepreneur. It does not. He again provided only vague evidence as to the services he intends to supply and the fees with Khan's Kebabs. He provided inconsistent evidence as to whether he had ever intended to charge fees up front."
9. Before me Mr Parkin submitted that the First-tier Tribunal had essentially erred on this occasion just as its predecessor had done; it had entertained and considered oral evidence, which by its very nature was inevitably post-decision material, contrary to the statutory scheme as interpreted in *Ahmed*. The Upper Tribunal could no more separate out any reasoning on this occasion that was based on

material provided on the application than post-decision evidence than on the last occasion. Whilst the parties had agreed in the Tribunal below that oral evidence was admissible, that was before the full implications of the strictures of *Ahmed* had not been appreciated.

Findings and reasons

10. The Immigration Rules relevant to this application are found within Part 6A of the Rules addressing the Points Based System.

“245DD. Requirements for leave to remain

To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements: ...

(h) Except where the applicant has, or was last granted, leave as a Tier 1 (Entrepreneur) Migrant, a Businessperson or an Innovator and is being assessed under Table 5 of Appendix A, the Secretary of State must be satisfied that:

(i) the applicant genuinely:

(1) intends and is able to establish, take over or become a director of one or more businesses in the UK within the next six months, or

...

(i) In making the assessment in (h), the Secretary of State will assess 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;

(iv) the applicant's previous educational and business experience (or lack thereof) ...”

11. In *Ahmed and Another (PBS: admissible evidence)* [2014] UKUT 365 (IAC) the Upper Tribunal ruled that where a provision of the Rules (such as that in para 245DD(k)) provides that points will not be awarded if the decision-maker is not satisfied as to another (non-points-scoring) aspect of the Rule, the non-points-scoring aspect and the requirement for points are inextricably linked; as a result, the prohibition on new evidence in s 85A(4) of the Nationality, Immigration and Asylum Act 2002 applies to the non-points-scoring aspect of the rule: the prohibition is in relation to new evidence that goes to the scoring of points. The reasoning therein was effectively upheld in *Olatunde* [2015] EWCA Civ 670.
12. The Appellant has already had the theoretical advantage of one constitution of the First-tier Tribunal taking account of post-decision evidence to make good the

shortfalls in his application as put to the Home Office, albeit that the evidence in question ultimately counted against him rather than in his favour. His case before the First-tier Tribunal was clearly ineptly presented on the first occasion the appeal was heard, otherwise the judge would not have fallen into such an obvious error. This time round, the First-tier Tribunal was astute to identify which documents were before the original decision maker before embarking on its enquiry into the credibility of the Appellant's application.

13. There is no doubt that the response of the Judge below to the material before him was to be very critical of its cogency in rebutting the Home Office assertion that his application was not a viable one.
14. Although the grounds of appeal alleged that the reasoning of the First-tier Tribunal was perverse, inadequately reasoned, or gave uncertain weight to particular factors, Mr Parkin only faintly pressed those criticisms before me. He was right to do so: in reality the findings made were perfectly cogent, and I can detect no irrationality or failure to take matters into account within them.
15. Although not every entrepreneur will be able to recall chapter and verse of their business plan, it cannot be said that vague answers must nevertheless be accepted as satisfactory. One can reasonably expect an entrepreneur to have a distinct sense of their business's unique selling points when measured against extant competitors; here the Appellant's answers at interview had been unsatisfactory. The Rules unsurprisingly identify past experience as relevant to the assessment of the viability of a prospective business. Material omissions of relevant material such as payment rates in service contracts tends to undermine a claim that they are indicative of a viable business. Reasoning of this nature is certainly not beyond the legitimate range of responses that might have been taken to the Appellant's case.
16. I accordingly find that the decision of the First-tier Tribunal was, subject to the question of taking account of post-decision evidence, wholly lawful.
17. It seems to me that when it came to assess the Appellant's witness statement and oral evidence, it did so with a view to seeing whether that material overcame the objections to his case that it had already identified, rather than taking that post-decision material into account as part of its original reasoning. Accordingly though it was wrong to enter into that enquiry, no material error of law arises from it having done so.
18. There is also the question of the adjournment application that was refused. Given that it is now accepted that the oral evidence that the Respondent was ultimately to give was not relevant on the appeal, nothing arises from the concerns originally expressed that his health might have affected the manner in which he gave such evidence. Besides, the approach the First-tier Tribunal took to the medical evidence before it was perfectly reasonable.

Decision:

The decision of the First-tier Tribunal does not contain any material error of law and stands. The appeal is dismissed.

Signed:

Date: 7 July 2017

A handwritten signature in black ink, appearing to read 'M.A.S. Symes'. The signature is written in a cursive style with a large, sweeping flourish at the end.

Deputy Upper Tribunal Judge Symes