



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/50653/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 13<sup>th</sup> June 2017

Determination & Reasons Promulgated  
On 15<sup>th</sup> June 2017

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MITALY DEY  
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Iqbal, of Counsel, instructed by Solicitors Inn  
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

*Introduction*

1. The appellant is a citizen of Bangladesh born on 16<sup>th</sup> August 1986. She arrived in the UK on 18<sup>th</sup> September 2010 as a Tier 4 student migrant. She had leave in that capacity until April 2012. She then extended her leave as a Tier 1 post study work migrant until 3<sup>rd</sup> August 2014.
2. On 21<sup>st</sup> July 2014 the appellant applied to remain as a Tier 1 entrepreneur migrant. This application was refused on 1<sup>st</sup> December 2014 as it was not believed that the appellant was a genuine entrepreneur. Her appeal against the decision to refuse was dismissed by First-tier Tribunal Judge Ian Howard, in a joint determination

which also dealt with her business partner Mr Hasan Attique, promulgated on the 9<sup>th</sup> September 2015. However, an appeal to the Upper Tribunal was successful and Deputy Judge Drabu CBE remitted the matter to be reheard by the First-tier Tribunal in a decision promulgated on 9<sup>th</sup> March 2016. The appeal was remade by Judge of the First-tier Tribunal Cas O'Garro in relation to the appellant alone, and dismissed in a decision promulgated on 13<sup>th</sup> October 2016.

3. Permission to appeal was granted by Upper Tribunal Judge Southern on 9<sup>th</sup> May 2017 on the basis that it was arguable that the First-tier judge had erred in law for the reasons set out in the grounds, although he commented that it might not be material as the appellant's business partner had returned to Pakistan after the first appeal to the First-tier Tribunal was dismissed.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law. At the commencement of the hearing I asked the parties to make submissions both on error of law and remaking as the issue of whether the First-tier Tribunal had materially erred in law by failing to give reasons for finding that the appellant was not a genuine entrepreneur (if such an error was found) could only be answered by understanding the extent of the evidence that she was or was not such a person. It was clear that the reasoning was very limited but if there was good evidence that she was not a genuine entrepreneur this would not be a material failing.

#### *Submissions – Error of Law and Remaking*

5. The grounds of appeal contend that the First-tier Tribunal did not look at the appellant's evidence either in terms of what she said at interview; her documentary evidence as before the respondent at the time of decision; or her oral evidence to the First-tier Tribunal as there are no findings on any of these matters, and there was a failure to assess whether the appellant was a credible witness. Instead the Judge of the First-tier Tribunal became excessively and unnecessarily concerned with the question of post-decision evidence. The only statement regarding any of the matters relevant to the assessment of genuineness is that made at paragraph 40 of the decision where it is said that the appellant "has not dealt adequately or at all with the concerns raised about the market research or the concerns about the limited evidence she has submitted to the respondent about her experience to run her business". This is said to be unlawful as it is not a statement backed up with any reasons, and does not comply with Budhathoki (reasons for decisions) [2014] UKUT 00341 at paragraph 14.
6. Mr Iqbal submitted orally that there were three issues raised in the refusal letter which were said to mean the appellant was not a genuine entrepreneur. Firstly, failings in her business plan; secondly her lack of knowledge and experience as a legal consultant; thirdly that she had not utilised her post-study work leave to develop the business she now relied upon. By these submissions he outlines his position that the errors of the First-tier Tribunal were material in failing to give reasons for the appellant not being genuine as on a proper examination of

material she is to be seen as genuine. Mr Iqbal's submissions regarding these contentions by the respondent are, in summary, as follows.

7. Mr Iqbal submits that there was no obligation for the appellant to have used her post-study work leave to establish her business, and this does not mean that she is not a genuine business person. She had incorporated her business within 3 months of making her application and that was all that was required by the entrepreneur Rules.
8. In relation to her previous experience Mr Iqbal notes that she has highly relevant qualifications. The appellant's business H & M Associates is a legal consultancy and the appellant has a bachelor's law degree from Bangladesh, an LLM in business and commercial law obtained in the UK and a graduate diploma in law (formerly the CPE) from studies in the UK. She has also done relevant work. She submitted her CV to the respondent and in that document which shows she has previously worked as a paralegal assistant and legal assistant in the UK, and in Bangladesh as an assistant to a lawyer in a court. At interview the appellant gave details in response to question 9 about her UK work as a legal assistant. It should therefore be accepted that the appellant is genuine in the sense of having relevant academic/ work experience to this field.
9. In relation to market research Mr Iqbal submits that the allegation of the respondent is that her document is: "copied from other sources and adapted for your company". This is a perfectly reasonable and genuine approach. It is also contended by the respondent that the appellant had insufficient knowledge of the competition. At interview in response to question 18 the appellant was not able to give a precise number of competitors but indicated that the competitors mostly only dealt with immigration matters which is not one of the business sectors this company aims to deal with, see H & M business plan at page P9 of the bundle where the areas are described as: "student consultancy, business consultancy, tax return, will making and drafting and divorce".
10. The next criticism is that the appellant did not know how many clients she had, however in response to question 22 at interview she said ten to twelve clients and gave full details of the most recent client including name, type work done and payments made.
11. The respondent also contends that there is a lack of detail about services and no structure to the payment plan in the contracts however if the contract in the respondent's bundle at page A A 1-2 is examined with Glaxy Accountancy at item 4 an hour rate is set out and time scale for payment is set out, and there is a description of the services to be provided. Similarly, in the contract with Salam & Co Solicitors at X1 the services are described as completing out sourced tasks and procuring business for Salam & Co and the payment to be decided on a case to case basis with payments to be made by monthly invoicing. It is submitted for the appellant that there is therefore a relevant amount of detail. It is reasonable that the retainer agreements have less detail, and it cannot be properly said that

preparing wills and divorce documents is simply an administrative task, and not appropriate for a legal consultancy.

12. Also in relation to the business plan it is contended by the respondent that Americanised spelling and using copied sections interspersed with personalised sections. It is submitted that this is a perfectly reasonable approach for a genuine business plan.
13. Finally, in relation to the business plan it is said that the appellant had not considered how she would support herself in her business as her salary had not been fixed, and there was not a back-up plan regarding the initial stages of the business. Mr Iqbal submitted that the appellant had been awarded full points for maintenance so clearly had that amount of funds to deal with her support during the initial stages of business. Further the business plan at page P28 of the bundle shows the modest salaries that the appellant intended to pay herself in the initial years of the business.
14. Mr Iqbal also submitted that in coming to the conclusion the appellant was not genuinely intending or able to establish her business the respondent had not raised issues about a number of factors set out as relevant at paragraph 245DD of the Immigration Rules, and so was satisfied that she had a credible source of funding, her good immigration history, and that she was a registered director and had the appropriate registrations and accreditation. Overall he submitted that on the balance of probabilities she was a genuine entrepreneur; that the First-tier Tribunal decision erred in law for insufficient reasoning and that the decision should be remade allowing the appeal.
15. The respondent argues in a Rule 24 notice that it was lawful for the First-tier Tribunal to consider issues of new evidence under s.85A of the Nationality, Immigration and Asylum Act 2002 because the appellant put forward a new business scenario when she was the sole director as her business partner had left the UK, and in the context of this situation gave sufficient reasons for his decision.
16. Mr Tufan accepted however that s.85A of the 2002 Act was not a relevant matter: the appellant was not trying to introduce new material not before the respondent to argue that she was genuinely in business. He accepted the appellant had relevant qualifications but relied upon the points in the refusal letter and argued that there was sufficient reasoning in the First-tier Tribunal decision, and that in the alternative any failure to give more extensive reasons was not a material error as on the balance of probabilities the appellant was not a genuine entrepreneur. In particular, Mr Tufan drew attention to the fact that the appellant had been very vague about the financial provisions for her salary in the initial period of the business; the number of competitor businesses and her market research and the number of clients her business had at the point of interview.

#### *Conclusions – Error of Law*

17. The decision of Judge of the First-tier Tribunal O'Garro starts from the proposition that as the appellant's business partner had ceased to be part of the

business proposal that this was a situation of “new evidence” and thus the appellant could not succeed as the application was not as originally put to the respondent due to Mr Attique’s departure, see paragraphs 36 to 38 of the decision. On this basis the First-tier Tribunal deals very briefly with the actual evidence of the appellant from all sources, and simply identifies that limited evidence was before the respondent about how this appellant had done her market research and had experience to run such a business so the refusal was lawful as the respondent had made a fair assessment that the appellant was not a genuine entrepreneur.

18. S.85A(4) of the Nationality, Immigration and Asylum Act 2002 prevents the considering of evidence which was not submitted to at the time of the making of the application. Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC) confirmed that this prohibition extends to non-points scoring issues under the points-based Rules such as genuineness. I find that the First-tier Tribunal erred when using this provision to say that the appellant could not succeed in her appeal as I find it was irrelevant. The appellant was not trying to rely upon any new evidence, she just wanted her case assessed against the evidence she submitted. She did not submit evidence her business partner had left the UK and ask to be allowed to rely upon it in the assessment of her genuineness, as is suggested by paragraphs 36 and 37 of the decision, but wanted the genuineness of her application assessed only on her evidence as originally presented to the respondent. In this respect, therefore, I find that the First-tier Tribunal erred in law.
19. The First-tier Tribunal does then nonetheless go on to consider the assessment of the evidence, albeit very briefly at paragraphs 40 and 41 of the decision, so it is key whether this assessment is sufficient in its consideration of material evidence and in giving sufficient reasons. I find that there is an error of law as characterised in Budhathoki as I find that the First-tier Tribunal has not identified and resolved: “the key conflicts in the evidence and explained in clear and brief terms their reasons for preferring one case to the other so that the parties can understand why they have won or lost.” In simple terms the First-tier Tribunal has not gone through the issues identified by the respondent as counting against the appellant and those which were in her favour and explained sufficiently why they find that these matters means the appellant is not a genuine entrepreneur intending and able to establish her business on the balance of probabilities.
20. I find that the error is material as the outcome of a proper resolution of this issue could not be clear without remaking the appeal, and although ultimately the respondent may well not grant leave to remain in this case, as the appellant’s business partner has left the UK without pursuing his appeal, this appellant is entitled to a decision from the First-tier Tribunal as to whether she has presented on the balance of probabilities a genuine business proposal. Even if leave to remain is not granted at this juncture this is an issue which may be of importance in keeping her UK immigration record “clean”, and perhaps in relation to any new application she may wish to make in the future. It is relevant, in this respect only that she does continue to operate her business.

21. As a result of these conclusions I set aside the decision of the First-tier Tribunal in its entirety and proceed to remake it based on the submissions by the parties as set out above.

### *Conclusions – Remaking*

22. The appellant is refused because the respondent says she cannot meet the requirements of paragraph 245DD (k) of the Immigration Rules in showing that she genuinely intended and was able to establish her legal consultancy business within the next six months. In R (on the application of Zhang) v Secretary of State for the Home Department IJR [2015] UKUT 00138(IAC) the Upper Tribunal stated that: “Furthermore, as a matter of commonsense, when an ECO is assessing whether an Applicant genuinely intends to establish, and invest money in, a business in the United Kingdom, all of the relevant circumstances pertinent to such a consideration should be assessed in the round.”
23. Whilst accepting that the respondent has rightly identified some aspects of the appellant’s business venture which had elements of vagueness, particularly the financial provisions for her salary in the early days of her business and the number of competitor businesses in her local area I am satisfied on the balance of probabilities that this appellant intended and was able to establish her legal consultancy business within the next six months at the time of decision based only on material that was before the respondent for the following reasons. She clearly had some provision for her initial financial support having satisfied the “maintenance” requirements of the relevant Immigration Rules. and also had set out a low initial salary to be achieved of £7800 for herself and her business partner in her business plan. The appellant gave full answers about how she had promoted her business with marketing through leaflets, community papers and community radio stations and on-line websites in response to questions 19 to 21 at her interview.
24. I further find that the appellant had highly relevant legal qualifications and also relevant work experience for doing the relatively low level legal work her business proposal was based upon such as the preparations of wills, powers of attorney and divorce petitions. She had a business plan which whilst clearly being based on precedents was by the respondent’s own admission adapted to the particular needs of her own enterprise. She had some contracts which were specific about the tasks to be undertaken and modes of payment as well as more vague retainers which I find to be reflective of the likely arrangements to be made by a business such as her legal consultancy where the businesses she was aiming to assist would not know exactly the demands that they might experience and thus the work that they would subcontract. She was able to give a fairly precise number of contracts she had obtained and a comprehensive account of work done for the last client she had dealt with at her interview. The respondent was satisfied that she had a credible source of funding and that she was a registered director and had any appropriate registrations and accreditation. I do not find it relevant that she did not use all of her post-study migrant leave to remain to

develop her legal consultancy business; that she has done other non-relevant work in the past; or that her business plan contained Americanised spelling.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal
3. I re-make the decision in the appeal by allowing it.

Signed:

*Fiona Lindsley*

Upper Tribunal Judge Lindsley

Date: 13<sup>th</sup> June 2017

Fee Award

Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. I have decided to make a whole fee award because the decision I have made was based solely on the information before the respondent at the date of decision.

Signed:

*Fiona Lindsley*

Upper Tribunal Judge Lindsley

Date: 13<sup>th</sup> June 2017