



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

Appeal Number: HU/07757/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 2 November 2018**

**Decision & Reasons Promulgated
On 14 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MOHAMMAD ABU-SYED KOUSER
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

Representation:

For the Appellant: Mr Sebastian Kandola, Senior Office Presenting Officer

For the Respondent/
Claimant: Mr Michael Biggs, Counsel instructed by City Heights Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department ("the Department") appeals from the decision of First-tier Tribunal Judge Shamash who in a decision promulgated on 27 June 2018 gave her reasons for allowing the human rights appeal of the claimant, whose application for ILR on the grounds of continuous lawful residence for a period of at least 10 years had been refused on the sole ground that a general ground for

refusal applied. The Department asserted that Rule 322(5) was made out, namely the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct, character or associations or the fact that he represents a threat to national security. The Judge found that the Department had failed to discharge the burden of establishing that the appellant was part of a scheme designed to obtain Tier 1 visas by deception.

The Reasons for the Grant of Permission to Appeal

2. On 13 September 2018 First-tier Tribunal Judge Mark Davies granted permission to appeal for the following reasons:

“It is arguable that the Judge placed undue weight on the fact that there were acquittals in the criminal proceedings connected to the appellant without giving full or proper consideration as to whether the appellant had utilised deception.”

Relevant Background

3. The claimant is a national of Bangladesh, whose date of birth is 1 January 1983. He came to the UK on 25 July 2006 with valid entry clearance as a student. He extended his stay in the UK in the capacity of a student until 24 November 2012. On 5 November 2012 he applied for leave to remain as a Tier 1 (Entrepreneur) migrant. The application was eventually refused on 2 July 2015. The Department was not satisfied that he had genuinely taken over or established a business in the UK, or that the money purportedly at his disposal had been or was going to be genuinely invested in the business, or that he actually had any money genuinely at his disposal.
4. The claimant’s appeal against this refusal came before Judge Lal sitting at Hatton Cross on 8 June 2016. Both parties were legally represented. In his subsequent brief decision, Judge Lal said that he had considered the evidence with some care, and on balance he was prepared to accept that the material now provided by the appellant dealt with the concerns raised by the Department, including access to UK funds. He found that the claimant had given a credible explanation as to how he was able to pay off his business partner when the latter left the business. He also accepted the claimant’s explanation as to how he was able to work full-time at Sainsbury’s at the same time as being a genuine entrepreneur. The Judge accepted his oral evidence that, with the purchase of an operating system for £29,000, in effect the business was run remotely as it was a web-based business operating through an App:

“The Tribunal noted the evidence of Paypal payments into the business from online purchases which would suggest that customers are accessing this service.”

5. Judge Lal went on to allow the appeal, and his decision was not challenged by the Department. Instead, the Department granted the claimant leave to remain as a Tier 1 (Entrepreneur) migrant from 12 May 2017 until 12 May 2020. In the meantime, the claimant, having accrued 10 years’ continuous lawful residence as of 25 July 2016, applied for ILR on that basis shortly after the 10 year anniversary had been reached,

and in September 2017 he dissolved the company through which he had operated the business.

6. As previously stated, the sole ground of refusal was that Rule 322(5) applied. The Department relied on the connection between the claimant's company, Ourtel Ltd and (1) ABC Bookkeeping & Accountancy Ltd ("ABC"), (2) its principal, Ashraf Pervez and (3) other companies connected with him and/or ABC.
7. ABC had registered over 325 companies at Companies House, and 80 of these had been identified as having been used in numerous Tier 1 (Entrepreneur) applications. 31 out of these 80 companies had been formally investigated so that the money flow from them could be identified. The money flow from the companies was found to be supporting Tier 1 (Entrepreneur) leave to remain applications that were being fraudulently made to the Home Office. One of the companies thus identified and investigated was the claimant's company, Ourtel Ltd. The investigation had shown that the companies were sold as packages to applicants. The package included: company registration; a bank account; the loan of the necessary £50,000 for a matter of a few days; business plans; marketing material; service or sales agreements; and accountancy material purporting to show the shareholding of the applicants. There was also evidence to show that applicants such as the claimant were paying £7,000 for this service.
8. The Department then went on to give a detailed account of various transactions between the claimant and Ourtel Ltd, on the one hand, and Ashraf Pervez, ABC and connected companies, on the other hand.
9. As rightly identified by Judge Shamash, the account given in the refusal decision was a digest of a longer account given at pages 23-26 of a lengthy witness statement made by Immigration Officer Andrew Lintern on 21 December 2016 in support of a criminal prosecution of Ashraf Pervez and others on a charge of conspiracy to do an act facilitating the commission of a breach of United Kingdom immigration law by individuals who are not citizens of the European community, contrary to section 1(1) of the Criminal Law Act 1977.
10. As set out in the indictment reproduced a page 151 of IO Lintern's witness statement, Ashraf Pervez and other named accused were charged with conspiring with others unknown, between 1 August 2012 and 22 October 2014, to form companies on behalf of Tier 1 (Entrepreneur) applicants for which the bank accounts would become temporarily credited with sufficient funds to enable them, whilst acting as directors thereof, to claim the requisite number of points in the course of submitting applications under the Tier 1 (Entrepreneur) Rules to the Home Office, which facilitated the commission of a breach of immigration law, namely the obtaining of leave by applicants to remain in the UK by deception, namely by submitting application forms that contained false details concerning their investment of a sum of not less than £25,000 if acting as a Team Member, or £50,000 if acting alone in their business, knowing that the acts facilitated the commission of a breach of immigration law by those individuals.

11. Having set out the digest of the transactions identified by IO Lintern (but not cross-referencing them to the evidence), the Department stated, at the top of page 4 of the refusal letter, that it would be undesirable to permit the claimant to remain in the UK *"in the light of your character and associations in respect of your financial dealings with ABC Bookkeeping and Accounting Ltd, the details of which have been clearly set out within this refusal letter."*
12. Reliance was also placed on the fact that (a) the last returns for Ourtel Ltd were listed as being made on 29 April 2016, and that Ourtel Ltd was listed as having been dissolved since September 2017; and (b) that Ourtel Ltd was clearly set up to facilitate the provision of fraudulent evidence for other individuals to obtain leave to remain as a Tier 1 (Entrepreneur) migrants

The Hearing Before, and the Decision of, The First-tier Tribunal

13. Both parties were legally represented before Judge Shamash. The claimant's solicitors compiled an extensive bundle of documents running to 250 pages. The material provided included a 16-page witness statement from the appellant in which he addressed each of the transactions identified in the refusal decision, and sought to give an innocent explanation for them. It also contained, at page 159, a certificate issued by the Crown Court at Snaresbrook on 28 April 2017 certifying that Pervez Ashraf had been acquitted. He had been found not guilty by the direction of the Trial Judge.
14. At the outset of the hearing, the Judge raised with the Presenting Officer, Ms Ferrar, her concern that the refusal letter of 14 March 2018 did not address the fact that the defendants were found not guilty following criminal proceedings in 2017. Ms Ferrar accepted that this was unsatisfactory, but submitted that there was a difference between the civil standard of proof and the criminal standard of proof. The Judge invited her to telephone a Senior Caseworker. Ms Ferrar attempted to do so, but then applied for an adjournment on the basis that she could not get hold of the decision-maker. Mr Siddiq for the claimant opposed the application for an adjournment. He submitted that no purpose would be served by an adjournment.
15. The Judge refused the adjournment request, and also indicated to Ms Ferrar that she did not think that she could cross-examine on the basis of an unsigned witness statement from IO Lintern that had been prepared for a trial where there had been an acquittal.
16. At paragraph [24] of the subsequent decision, Judge Shamash recorded that Ms Ferrar chose not to ask questions of the claimant, who adopted his witness statement in the bundle as his evidence in chief.
17. In her closing submissions on behalf of the Department, Ms Ferrar solely relied on the contents of the refusal letter, and reminded the Judge that the burden of proof in civil proceedings was different to that in criminal proceedings.
18. The Judge's findings of fact were as follows:

“32. On the evidence before me, the respondent has failed to discharge the burden of establishing that the appellant was part of a scheme designed to obtain Tier 1 visas by deception. The respondent may be correct in her points and I note that the appellant claimed at his hearing before IJ Lal that his business was still operational at a time when it had been dissolved, but this is not relied on by the respondent. Instead the respondent relies on a criminal investigation which has resulted in acquittals without addressing the fact that the defendants were acquitted. This is unacceptable.

33. In addition, I cannot rely on an unsigned statement prepared for criminal proceedings. As this was the sole basis for the points contained in the refusal letter and Mr Lintern did not attend Court, there is absolutely no evidence before me that the appellant was involved in a conspiracy to obtain Tier 1 visas by deception.

34. The sole ground of appeal is under the Human Rights Act. I find that as the basis for the respondent’s decision is flawed and not based on evidence, it breaches the appellant’s human rights and is not proportionate.”

The Hearing in the Upper Tribunal

19. At the hearing before me to determine whether an error of law was made out, Mr Kandola drew my attention to the fact that the evidence relied on by the Department was not confined to the witness statement of Mr Lintern. The Home Office bundle also included a number of primary documents evidencing some of the transactions detailed in the refusal decision. He submitted that the matters set out at pages 3 and 4 of the refusal decision made out a *prima facie* case of deception, and the Judge had not adequately engaged with this case.
20. Mr Biggs developed the Rule 24 response filed by his Instructing Solicitors opposing the appeal. He submitted that there were five reasons as to why I should find that there was no error, or no material error. Firstly, there was no meaningful or adequate evidence to support the Department’s case of deception. Secondly, the Department failed to present evidence addressing the significance of the acquittals. Thirdly, the Department’s case failed to take into account the earlier favourable decision in respect of the claimant, which fell to be applied on **Devaseelan** grounds. Fourthly, the claimant was not cross-examined on his innocent explanation for the allegedly suspect transactions. Fifthly, the Department had not in any event put forward a coherent case in the refusal decision as to why the transactions relied upon showed that the claimant had used deception.
21. In reply, Mr Kandola observed that arguably there had been unfairness in the conduct of the hearing, but unfortunately this had not been pleaded as a ground of appeal to the Upper Tribunal.

Discussion

22. I consider that the most controversial aspect of the Judge’s conduct of the hearing was her encouraging the Presenting Officer not to ask any questions on the material derived from the unsigned witness statement of IO Lintern. The Rules of Evidence do not apply in this jurisdiction. Furthermore, even in the civil jurisdiction hearsay

evidence is admissible. It was not necessary that IO Lintern should attend at the hearing to adopt his statement in order for that statement to form part of the evidence that the Tribunal should take into account. Moreover, in taking the stance that she did, the Judge overlooked the fact that the line taken by the claimant in his witness statement was not generally one of denying that the transactions had taken place, but of “*confession and avoidance*.” In short, the claimant maintained that the transactions were above-board and/or did not evidence deception.

23. However, as Mr Kandola acknowledges, the Department did not seek permission to appeal on the ground that there was procedural irregularity or procedural unfairness. Specifically, there is no appeal against the decision of the Judge to discourage the Presenting Officer from cross-examining the claimant on IO Lintern’s evidence. It is also doubtful that the Presenting Officer would have asked the claimant questions, even without the Judge discouraging her from doing so. For Mr Kandola reported to me that, according to her minute, the Presenting Officer was concerned that that she did not have enough time to ask questions as it was approaching 5pm.
24. The fact that the claimant gave unchallenged evidence to the effect that the transactions relied upon in the refusal decision were above-board, and did not disclose any impropriety or deception on his part, is fatal to the Department’s appeal to the Upper Tribunal. For, in these circumstances, it cannot reasonably be contended that any asserted deficiency in the Judge’s reasoning was material to the outcome.
25. Moreover, for the avoidance of doubt, I consider that the Judge gave adequate reasons for finding that the Department had not discharged the burden of proving that Rule 322(5) was made out, in circumstances where:
 - (a) The case advanced in the refusal decision was opaque and it did not disclose a clear or coherent *prima facie* case of deception;
 - (b) The same material referred to in the decision had not been deemed fit to be left to a Jury – the Trial Judge must have been satisfied that no reasonable Jury could return a verdict of guilty on this material (and the rest of the material in IO Lintern’s witness statement), and so the Jury had been directed to acquit the defendants;
 - (c) The Department had previously accepted the finding of the Tribunal that the claimant had operated a genuine and viable business through Ourtel Ltd;
 - (d) It was not now being alleged, on the basis of new evidence from the criminal trial, that in retrospect Ourtel Ltd was a sham, or that in retrospect the claimant had not genuinely set up and operated a viable business through Ourtel Ltd;

- (e) It was not being alleged that the money required to be invested in the Company had only stayed in the Company's account for a few days in order to support a fraudulent Tier 1 application, and that the money had then been moved by ABC to another company to support another fraudulent application, although this was said to be the central feature of the alleged conspiracy in the criminal prosecution of Ashraf Pervez.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed

Date 5 November 2018

Deputy Upper Tribunal Judge Monson