



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01796/2016

THE IMMIGRATION ACTS

Heard at Liverpool County Court
On 5 March 2018

Decision & Reasons Promulgated
On 7 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

Mr MUHAMMAD SHAHID NADEEM
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Parkin, Counsel, instructed by Rayan Adams Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1 This is an appeal brought by the Appellant against the decision of the Judge of the First-tier Tribunal Frankish dated 12.6.17. The Appellant, a citizen of Pakistan had appealed against the decision of the Respondent dated 6.4.16, refusing to vary the

Appellant's leave to enter or remain and making a decision to remove. The Appellant had on 7.10.14 made an application for indefinite leave to remain as a Tier 1 General migrant under para 245CD of the Immigration Rules, relying upon five years past residence in the United Kingdom under the points-based scheme.

- 2 As the decision was made on or after 6.4.15 to refuse an application to vary leave to enter or remain made before 2.3.15 and where the person was seeking leave to remain as a Tier 1 Migrant, Article 9 (1)(b) of the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 (as amended by The Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015) results in the 'saved' appeal provisions continuing to apply to the present appeal, including the availability of a ground of appeal that the decision was not in accordance with immigration rules. Although I had expressed a view at the hearing before me that the notice of immigration decision, referring as it does to such 'old' rights of appeal, may have been in incorrect form for a decision taken on 6.4.16, it would appear, considering the terms of the abovementioned Commencement Orders, that in fact the appeal did stand to be allowed or dismissed on the basis of whether Appellant met the requirements of immigration rules, rather than, as for post 2014 Act appeals, merely whether the decision was unlawful under s.6 Human Rights Act 1998.
- 3 It is also to be noted that the notice of decision contained a requirement under s.120 NIAA that the Appellant provide a statement of any additional grounds on which he claimed a right to reside in the UK.
- 4 In the separate reasons for refusal letter also dated 6.4.16, the Respondent refused the application for indefinite leave to remain on the following grounds:
 - (i) in an earlier application for leave to remain, made on 14.9.09, the Appellant had made false representations as regards his level of income (the Respondent having conducted enquiries with HMRC about the Appellant's declared level of income in the years 2008 to 2015), and the Respondent finding that there were therefore general grounds for refusing the Appellant's application for leave to remain under paragraph 322 (2) in Part 9 of the Immigration Rules, and the application also therefore falling to be refused under paragraph 245CD(b), which requires that the application must not fall for refusal under general grounds for refusal; and
 - (ii) that the Appellant had failed to provide documents specified in para 245CD - SD of the rules in respect of his absences from the UK during the five-year period prior to the date of application.
- 5 The Appellant appealed to the First tier. When the matter came before the Judge, Ms Rutherford, Counsel for the Appellant provided in her skeleton argument a statement of additional grounds in response to the section 120 notice, asserting that the Appellant also met the requirements for indefinite leave to remain on grounds

of long residence under paragraph 276B of the Immigration Rules, on the grounds that he had 10 years continuous lawful residence in the UK, although the Judge noted that 276B also contained a requirement at (iii) that an applicant does not fall for refusal under the general grounds for refusal (eg 322(2)).

6 The Appellant's case before the Judge was that, in relation to the discrepancies between his self employed income in 2009/10, this arose from the dishonest actions of a former accountant; the Appellant had since submitted an amended tax return for that year declaring a higher income than in the original return. In relation to the specified evidence issue, the Appellant submitted that he had in fact provided the relevant specified evidence.

7 In his decision, the Judge held at [15] that there was no merit in the Respondent's second ground for refusing the application relating to lack of specified documents.

8 In relation to the first ground, the Judge considered the Appellant's explanation for the discrepancies in his declared income at [17] onwards. The Judge made certain observations regarding the perceived plausibility of the Appellant's explanations in the last four lines of [20], and in a number of factors which the Judge described as 'side issues' at [22].

9 In the last 2 lines of [22], the Judge states 'The key problem, however, is that I simply do not believe that the Appellant had a genuine business'.

10 The Judge sets out at [23] that the Appellant was cross examined about which tax returns he had seen or not seen, and the Judge held that 'As a businessman, I find it totally implausible that the Appellant would have failed to keep a copy of the return he had approved, if only to compare when he came to file a return in the following year.'

11 The Judge then sets out at [24] that the Appellant was asked to clarify the nature of his business. The questions posed to the Appellant, and his responses, are recorded at [24] to [29].

12 At [30], the Judge finds:

"30 For his original applications, the Appellant relied upon income from consultancy services including the year ending 5.4.10. For his current application, he relies upon amended figures for that income from consultancy services. My conclusion concerning his evidence in relation to his work as an educational and immigration consultant is that it is a masterclass in flannel. What he has to say about the services he was providing is complete and utter rubbish. There was no pyramid, as the appellant describes, with Trading 4 Help at the top acting as an educational and immigration consultant paying the Appellant as an educational and immigration consultant to train others as educational and immigration

consultants and meeting the Appellant's invoices thereto for "Marketing Services" in respect of some 25 individuals per invoice who, as stated, also said to be training as educational and immigration consultants.

31 Having concluded that the Appellant relies upon a sham business, I conclude that the objection under 322 is made out and the Appellant fails to qualify under 245 CD.

32 Miss Rutherford says that it is irrelevant whether the Appellant fails under 245 CD because he is entitled to qualify under 276B. I disagree. Having failed under 245 CD via 322 for false information, he also fails under 276B(iii). It was confirmed that no particular personal relationships are relied upon. That being so, there are no exceptional circumstances to justify consideration of article 8 outside of the rules.'

- 13 The appeal was dismissed.
- 14 In grounds of appeal dated 26.6.17, the Appellant avers that the Judge materially erred in law in his decision by proceeding unfairly, the Appellant's credibility being assailed in the determination in circumstances where no credibility issues were raised in the Home Office refusal; he had no opportunity to gather evidence, or indeed his thoughts, demonstrating that his business was credible; his Counsel had no opportunity to consider the position as regards credibility or to take instructions; the Judge proceeded in breach of guidelines in MNM (Surendran guidelines for adjudicators) Kenya [2000] UKIAT 00005 and ST (child asylum seekers) Sri Lanka [2013] UKUT 00292 (IAC). Further, the Appellant asserts that the tribunal appeared to take into account speculation as to the likely results of online research denied to it as a result of AM (fair hearing) Sudan [2015] UK UT00656. If undertaking research outside the context of the evidence before the parties was impermissibly unfair, reliance on speculation as to the likely results of that research was grossly unfair.
- 15 Permission to appeal was granted by the First-tier Tribunal Nightingale on a 13.12.17 on the basis that the grounds of appeal were arguable, and additionally, given that the Respondent relied upon one of the general grounds for refusal, it was arguable that the Judge also fell into error at paragraph 1 of his decision in directing himself that the burden of proof was on the Appellant, rather than on the Respondent to make out the alleged fraud.
- 16 Before me, the Appellant was represented by Mr Parkin (not Ms Rutherford), and the Respondent by Mr McVeety. I heard submissions from both parties, which are recorded in my record proceedings.
- 17 During the proceedings, I raised the question as to whether it was known who had asked the questions regarding in the nature of the Appellant's business at [24] to [29]. As procedural unfairness is asserted in the grounds of appeal, it may have

been of assistance to have received a witness statement from Ms Rutherford setting out what the Appellant asserts actually transpired during the hearing. However there is no such statement. Mr McVeety stated that the notes taken by Mr Malcolm, Presenting Officer before Judge, did not establish who the questions about the Appellant's business were asked by. He suggested, without objection from Mr Parkin, that I consult the Tribunal file to see if the Judge's own record proceedings made matters any clearer. I did so.

- 18 There is on file a typed record signed by the Judge. Copies were made for the parties to consider.
- 19 I am of the view, and both parties were in agreement, that it was sufficiently clear from the record that:
- (i) the questions regarding the nature of the Appellant's business were asked by the Judge himself;
 - (ii) the Judge's summary of the submissions made by both the Respondent and the Appellant indicated that no argument regarding the genuineness of the Appellant's business was made by either party;
 - (iii) there was nothing within the record of proceedings which indicated that the Judge invited any submission to be made to him regarding the genuineness of the Appellant's business.

Relevant rules:

- 20 Immigration Rules part 6A: the points-based system

“Tier 1 (General) Migrants

245C. Purpose

This route is now closed except for indefinite leave to remain applications.

245CD. Requirements for indefinite leave to remain

To qualify for indefinite leave to remain, a Tier 1 (General) Migrant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

(a) DELETED

(b) The applicant must not fall for refusal under the general grounds for refusal (except that paragraph 322(1C) shall not apply if the applicant meets the conditions in (f)(i)-(iii) below), and must not be an illegal entrant.

(c) The applicant must have spent a continuous period as specified in (d) lawfully in the UK, of which the most recent period must have been spent

with leave as a Tier 1 (General) Migrant, in any combination of the following categories:

- (i) as a Tier 1 (General) Migrant,
 - (ii) as a Highly Skilled Migrant,
 - (iii) as a Work Permit Holder,
 - (iv) DELETED
 - (v) DELETED
 - (vi) DELETED
 - (vii) as a Tier 2 (General) Migrant, a Tier 2 (Minister of Religion) Migrant or a Tier 2 (Sportsperson) Migrant, or
 - (viii) as a Tier 2 (Intra-Company Transfer) Migrant, provided the continuous period of 5 years spent lawfully in the UK includes a period of leave as a Tier 2 (Intra-Company Transfer) Migrant granted under the Rules in place before 6 April 2010, or as a Work Permit Holder where the work permit was granted because the applicant was the subject of an Intra-Company Transfer.
- (d) The continuous period in (c) is:
- (i) 4 years, if the applicant:
 - (1) received a Highly Skilled Migrant Programme approval letter issued on the basis of an application made before 3 April 2006,
 - (2) was subsequently granted entry clearance or leave to remain on the basis of that letter, and
 - (3) has not since been granted entry clearance or leave to remain in any category other than as a Highly Skilled Migrant or Tier 1 (General) Migrant; or
 - (ii) 5 years, in all other cases.
- (e) If the applicant has or has had leave as a Highly Skilled Migrant or as a Tier 1 (General) Migrant under the Rules in place before 19 July 2010, and has not been granted leave in any categories other than these under the Rules in place since 19 July 2010, the applicant must have 75 points under paragraphs 7 to 34 of Appendix A.
- (f) Where the applicant:
- (i) received a Highly Skilled Migrant Programme approval letter issued on the basis of an application made before 7 November 2006,
 - (ii) was subsequently granted entry clearance or leave to remain on the basis of that letter, and
 - (iii) has not since been granted entry clearance or leave to remain in any category other than as a Highly Skilled Migrant or Tier 1 (General) Migrant, the applicant must be economically active in the UK, in employment or self-employment or both.
- (g) in all cases other than those referred to in (e) or (f) above, the applicant must have 80 points under paragraphs 7 to 34 of Appendix A.
- (h) The applicant must have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance

with Appendix KoLL of these Rules, unless the applicant meets the conditions in (f)(i)-(iii) above.

(i) The applicant must not be in the UK in breach of immigration laws except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded, unless the applicant meets the conditions in (f)(i)-(iii) above.

(j) The applicant must provide the specified documents in paragraph 245CD-SD to evidence the reason for the absences set out in paragraph 245AAA, unless the applicant meets the conditions in (f)(i)-(iii) above.

(k) DELETED

(l) DELETED

(m) The application for indefinite leave to remain must have been made before 6 April 2018.”

21 Appendix A:

“Attributes for Tier 1 (General) Migrants

7 ...

Previous earnings: notes

18 ...

19 ...

(i) The Secretary of State must be satisfied that the earnings are from genuine employment. If the Secretary of State is not satisfied, points for those earnings will not be awarded.

(j) In making the assessment in paragraph 19(i), the Secretary of State will assess on the balance of probabilities and may take into account the following factors:

(i) the evidence the applicant has submitted;

(ii) whether the money appears to have been earned through genuine employment, rather than being borrowed, gifted, or otherwise shown in the applicant’s financial transactions or records without being earned;

(iii) whether the business from which the earnings are claimed can be shown to exist and be lawfully and genuinely trading;

(iv) verification of previous earnings claims with declarations made in respect of the applicant to other Government Departments, including declarations made in respect of earnings claimed by the applicant in previous applications;

(v) the applicant’s previous educational and business experience (or lack thereof) in relation to the claimed business activity;

(vi) the applicant’s immigration history and previous activity in the UK;

(vii) where the nature of the applicant’s employment or business requires him to have mandatory accreditation,

registration or insurance, whether that accreditation, registration or insurance has been obtained;
 (viii) any payments made by the applicant to other parties; and
 (ix) any other relevant information.”

22 Paragraph 322(2) of the Immigration Rules provides:

“Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused

(2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave.

Discussion

23 The Respondent’s case in its decision letter was, in relation to 322(2), only that false representations had been given by the Appellant in relation to his application for leave to remain made on 14.9.09, thus entitling the Respondent to invoke the provisions of 322(2), which in turn resulted in the Respondent finding that 245CD(b) not being satisfied.

24 It would appear that the genuineness of the business relied upon on an application for ILR under para 245CD of the Rules can be a relevant consideration in the application, as the awarding of points required under para 245CD(e) or (g) may depend on whether the requirements of paragraphs 19(i) or (j)(iii) of Appendix A are met, which require that the Secretary of State must be satisfied that the earnings are from ‘genuine employment’, and whether the business from which the earnings are claimed can be shown to exist and be lawfully and ‘genuinely trading’.

25 However, no reference to points, or Appendix A of the rules, or to the genuineness of the Appellant’s’s business, is raised by the Respondent in the decision. Rather, it appears to be the case that the Judge has of his own motion disputed the genuineness of the Appellant’s business. The questions put about the nature of the business were from the Judge, and the Judge does not appear to have specifically invited submissions from the parties on the point, and no submissions on the point are recorded from the parties.

26 Was that course of action procedurally unfair to the Appellant?

27 I find that it was, for the following reasons.

28 The Grounds of appeal refer to the starred case of MNM (Surendran guidelines for Adjudicators) Kenya*[2000] UKIAT 0005, which provided guidance as to the

appropriate manner for Judges to raise issues and ask questions if the Respondent Secretary of State is not represented. Those guidelines are as follows, insofar as relevant:

- “4. Where matters of credibility are raised in the letter of refusal, the special adjudicator should request the representative to address these matters, particularly in his examination of the Appellant or, if the Appellant is not giving evidence, in his submissions. Whether or not these matters are addressed by the representative, and whether or not the special adjudicator has himself expressed any particular concern, he is entitled to form his own view as to credibility on the basis of the material before him.
5. Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, the special adjudicator himself considers that there are matters of credibility arising therefrom, he should similarly point these matters out to the representative and ask that they be dealt with, either in examination of the Appellant or in submissions.
6. It is our view that it is not the function of a special adjudicator to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversarial system and the special adjudicator is an impartial Judge and assessor of the evidence before him. Where the Home Office does not appear the Home Office's argument and basis of refusal, as contained in the letter of refusal, is the Home Office's case purely and simply, subject to any other representations which the Home Office may make to the special adjudicator. It is not the function of the special adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of the papers, in which case these matters should be drawn to the attention of the Appellant's representative who should then be invited to make submissions or call evidence in relation thereto. We would add that this is not necessarily the same function which has to be performed by a special adjudicator where he has refused to adjourn a case in the absence of a representative for the Appellant, and the Appellant is virtually conducting his own appeal. In such event, it is the duty of the special adjudicator to give every assistance, which he can give, to the Appellant.
7. Where, having received the evidence or submissions in relation to matters which he has drawn to the attention of the representatives, the special adjudicator considers clarification is necessary, then he should be at liberty to ask questions for the purposes of seeking clarification. We would emphasise, however, that it is not his function to raise matters which a Presenting Officer might have raised in cross-examination had he been present.

8. There might well be matters which are not raised in the letter of refusal which the special adjudicator considers to be relevant and of importance. We have in mind, for example, the question of whether or not, in the event that the special adjudicator concludes that a Convention ground exists, internal flight is relevant, or perhaps, where, from the letter of refusal and the other documents in the file, it appears to the special adjudicator that the question of whether or not the Appellant is entitled to Convention protection by reason of the existence of civil war (matters raised by the House of Lords in the case of Adan). Where these are matters which clearly the special adjudicator considers he may well wish to deal with in his determination, then he should raise these with the representative and invite submissions to be made in relation thereto.
9. There are documents which are now available on the Internet and which can be considered to be in the public domain, which may not be included in the bundle before the special adjudicator. We have in mind the US State Department Report, Amnesty Reports and Home Office Country Reports. If the special adjudicator considers that he might well wish to refer to these documents in his determination, then he should so indicate to the representative and invite submissions in relation thereto."

29 It is to be noted of course that in the present appeal, the Respondent was represented.

30 I also have regard to WN (Surendran; credibility; new evidence) Democratic Republic of Congo [2004] UKIAT 00213 in which the following was stated:

"29. Third, it is necessary to say something here about the significance of the Surendran guidelines. Too often there have been challenges to Adjudicators' conduct of a hearing, both during the hearing and subsequently on appeal to us and indeed as here, on a further application for statutory review, based upon asserted breaches of these guidelines. The guidelines are guidelines and guidance; they are not rules of law. They are not a strait-jacket. They do not represent black and white answers to all the situations, many and varied as they are, which arise before an Adjudicator where the Home Office Presenting Officer is not present. The object behind them is to provide guidance as to how to ensure a fair hearing and how to avoid circumstances arising in which a fair-minded and informed observer would conclude that there was a real possibility or a real danger that the Adjudicator was biased; Porter v Magill [2001] UKHL 67, [2002] 2WLR 37.

30. The real test to be applied, however, is whether the hearing was fair or unfair and whether a fair-minded and informed observer would conclude that there was a real possibility that the Adjudicator was biased. In each case where there is non-compliance with the guidelines, it remains for the person asserting the unfairness or apparent unfairness to show that the actual or

apparent unfairness was present. It is not sufficient merely to assert that the guidelines were not complied with. It is not by itself an error of law not to comply with the guidelines. The point rather is that compliance with the guidelines will make it very difficult, if not impossible, for an Appellant to show that the Adjudicator acted, or could properly be thought to have acted, unfairly. If they are not complied with, it plainly assists an argument as to actual or apparent unfairness. But it is not conclusive as to it at all. The statement in MNM paragraph 19 that they must be observed was never intended to elevate the guidelines into a distinct set of rules which had to be complied with, regardless of the underlying effect of any non-compliance. The Surendran guidelines should never be the means, and were never intended to be the means, whereby the proper and fair conduct of the hearing by the Adjudicator and the proper raising of issues by the Adjudicator should be prevented.

31. The guidelines now need to be read in the light of the two decisions in Koca and Maheshwaran where, as here, credibility is generally at issue. The obligation is on the Appellant to deal with obvious points which relate to his credibility without necessarily being asked to comment on them by the Adjudicator. The Appellant cannot expect to be able to make tactical decisions as to whether he should deal with an issue or ignore it, later to complain successfully if an Adjudicator has not raised it with him. An Appellant cannot simply say that a question was not put and therefore it was unfair for an inference to be drawn adversely to him on that point, where his credibility has been put at issue and the issue dealt with by the Adjudicator in the determination goes to credibility. Whether it is unfair depends on the circumstances in the case.
32. Guideline four is clearly sound; there remains, in the light of those two decisions, an obligation on the Appellant to address issues of credibility raised in the letter of refusal. But it is clearly not inappropriate for the issue of concern to be raised in questions by the Adjudicator. It may be more useful for the Adjudicator to put those questions than to ask the representative to do so. This can all be seen as "clarification", for that emphasises that the task is not one of cross-examination and is subject to the caveats as to timing, manner, length and content which we deal with later.
33. Where guideline five applies because no matters of credibility have been raised in the refusal letter, and there is no new material before the Adjudicator, the Adjudicator should raise any issues which concern him, as guideline five says. But as with guideline four, it is proper for the issue to be raised by the Adjudicator himself directly in questions of a witness, subject to the same caveats as to timing, content, manner and length. The Adjudicator must here be especially careful not to invent his own theory of the case and must deal with what are significant problems, not minor points of detail. In this situation, it is much less likely that an Appellant would be

aware that his credibility was under consideration if it were not raised with him, and it is unlikely to be fair for the issue to be raised in the determination for the first time. This is rather different from Koca and Maheshwaran.

34. Guideline five also needs to cover the position where no issue of credibility has been raised in the Refusal Letter and yet it may be obvious that further material provided to the Adjudicator raises issues of credibility. Issues of credibility which arise from the new material should be raised or put by the Adjudicator to the Appellant so that he may answer it, but it does not mean that the hearing has been unfair, where that is not done. That depends on the degree to which the issue of credibility was one which an advocate ought properly to have realised needed to be dealt with on the material which he was presenting to the Adjudicator, in the light of the Secretary of State's decision. Obvious points are: why the material had not been mentioned before; why there were contradictions between that and what had been said before; and how obvious implausibilities or improbabilities in it are to be answered. For an unrepresented Appellant, the Adjudicator is likely to have to draw his attention explicitly to the point, in order fairly to be able to rely on it.
35. Guideline six does not confine the Adjudicator to questions arising out of the Secretary of State's material. But as it is the Secretary of State's material which an Appellant usually seeks to answer, often with further evidence, it is right for Adjudicators to put questions on it and on the further evidence as the total case put forward by the Appellant emerges.
36. As to guideline seven, clarification goes beyond checking whether something has been understood or for confirmation of a fact. It is legitimate for an Adjudicator to raise the questions relevant to the Secretary of State's decision letter or later material to which the Adjudicator considers he needs answers if he is to deal fairly, adequately and intelligibly with the material upon which he is being asked to adjudicate. He is not obliged to be the silent recipient of whatever an Appellant puts forward. If obvious points are not dealt with, the Adjudicator can deal with them in his determination and it is generally better that he should do so having given the Appellant the chance to answer them.
37. The last sentence of guideline seven can be misleading. It is designed to prevent cross examination or the appearance of cross examination, rather than to prevent a question being asked if it was a question which the Home Office Presenting Officer could have put if he had been present. The risk of cross-examining or appearing to cross-examine can be avoided by an Adjudicator in the manner, style or length of questions, which he asks. Generally, questions other than those designed to clarify what was said or intended to be said are better left until after the conclusion of evidence where no Home Office Presenting Officer is present and (after re-examination

where a Home Office Presenting Officer is present but see K (Côte D'Ivoire) [2004] UKIAT 00061.

38. Questions should not be asked in a hostile tone. They should not be leading questions which suggest the answer which is desired, nor should they disguise what is the point of concern so as to appear like to a trap or a closing of the net. They should be open ended questions, neutrally phrased. They can be persisted in, in order to obtain an answer; but they should not be persisted in for longer than is necessary for the Adjudicator to be clear that the question was understood, or to establish why it was not being answered, or to pursue so far as necessary the detail underlying vague answers. This will be a matter for the judgment of Adjudicators and it should not usually take more than a few questions for an Adjudicator to establish the position to his own satisfaction. An advocate should always be given the chance to ask questions arising out of what the Adjudicator has asked, which will enable him to follow up, if he wishes, the answers given thus far. The Adjudicator can properly put, without it becoming a cross-examination, questions which trouble him or inferences from answers given which he might wish to draw adversely to a party. These questions should not be disproportionate in length to the evidence given as to the complexity of the case, and, we repeat, an Adjudicator should be careful to avoid developing his own theory of the case.
39. There is a tension, reflected in the guidelines, between fairness in enabling a party to know the points on which an Adjudicator may be minded to reach conclusions adverse to him where they have not directly otherwise been raised, and fairness in the Adjudicator not appearing to be partisan, asking questions that no-one else has thought it necessary to ask. This has proved troublesome on a number of occasions.
40. The tension should be resolved, so far as practicable, by recognising the following:
- (1) It is not necessary for obvious points on credibility to be put, where credibility is generally at issue in the light of the refusal letter or obviously at issue as a result of later evidence.
 - (2) Where the point is important to the decision but not obvious or where the issue of credibility has not been raised or does not obviously arise on new material, or where an Appellant is unrepresented, it is generally better for the Adjudicator to raise the point if it is not otherwise raised. He can do so by direct questioning of a witness in an appropriate manner.
 - (3) We have set out the way in which such questions should be asked.
 - (4) There is no hard and fast rule embodied in (1) and (2). It is a question in each case for a judgment as to what is fair and properly perceived as fair.

The Surendran guidelines and MNM should be read with what we have set out above.”

- 31 Following WN, it may not be procedurally unfair for a judge to rely upon certain matters relating to the genuineness of an appellant’s business, even without putting them to the appellant, if they were deemed obvious. However, businesses vary widely in their nature, and in the present appeal, the matter not having been raised by the Respondent in this or other prior applications for further leave to remain, I struggle to see that it was an obvious matter that the Appellant’s business was not genuine, such that a judge would not be obliged to put certain matters before relying on the alleged non genuine nature of the business.
- 32 However, it is to be acknowledged that the Judge *did* in fact ask questions about the nature of the business, and received replies.
- 33 Was this sufficient, proceeding fairly, to put the Appellant and his representative on notice that there was an issue which the Judge required to be addressed in submissions, even if not invited? I find, on balance, that it was not.
- 34 I find that the Respondent’s raising the question of whether the Appellant had made false reputations in relation to his asserted income for the tax year 2009 to 2010 is a distinct matter from the question of whether the entirety of his business was genuine. Different evidence may have been produced to respond to those two different allegations. The former may have been capable of being addressed by evidence relating specifically to the period in question, whereas an allegation that the Appellant’s whole business was a sham, and not genuine, might have been rebutted by the Appellant by reliance upon different, and probably more voluminous evidence.
- 35 It is to be noted from the Judge’s record of proceedings, that upon the Judge commencing questions about the nature of the Appellant’s business, the Judge recorded that ‘docs showing clients and invoices not in bundle’. With respect to the Judge, that was only to be expected, the matter of the genuineness of the Appellant’s business not having been raised by the Respondent in the decision letter.
- 36 The genuineness of the Appellant’s business (aside from the specific allegation made in the present decision that there were discrepancies in his tax returns) was a matter that had not troubled the Respondent within the decision letter or in previous decisions. Further, questions might be asked by a Judge by way of clarification only as to the nature of an Appellant’s business without it being apparent to the Appellant or their representative that the Judge had such serious concerns about the genuineness of the business that they intended to rely on those concerns in dismissing the appeal. The Appellant was clearly taken aback, unprepared, by the Judge questions –it is apparent from [24] and [25] that the Appellant started to hand up documents piecemeal.

- 38 Another indicator that the Appellant and his representative may not have realised that the genuineness of his business was being disputed by the Judge, even in light of the questions asked by the Judge, is that the Respondent did not appear to realise it either, no submissions being made by the Presenting Officer on the genuineness issue.
- 39 Although, as per WN, it will not be every case that a Judge must give notice to a party that they are concerned with a specific issue and require submissions to be made on it, I find in the particular context of the present appeal, that such notice was required, and the Judge's reliance on the alleged non genuine nature of the Appellant's business was unfair.
- 40 Mr McVeety argued that even if the Judge had not been entitled to take issue with the genuineness of the Appellant's business, without giving more notice that he intended to do so, this was not a material error, as it was clear, he said, that the Judge had made adverse findings of fact at paras [20], [22], and [23] of the decision relating to the disputed tax payment which meant that the Judge was entitled to find that false representations had been made by the Appellant.
- 41 Whilst the Judge does state at [23] that it was totally implausible that the Appellant would not have retained copies of certain documents, I find that at paras [20] and [22] there are no findings of fact; merely a list of issues or indeed side issues. The last two lines of [22] are telling: "The key problem, however, is that I simply do not believe that the Appellant had a genuine business". At [31], the Judge then clearly uses his negative finding on the 'key problem' of the genuine business issue to support his conclusion that false representations had been made in the application of 14.9.09.
- 42 Further, where the Judge has relied on the alleged non genuine nature of the Appellant's business to support the conclusion that false representations had been made in the earlier application, I find it is also material to note that the Judge failed to direct himself in law appropriately at [1] by failing to direct himself that in relation to all the general grounds contained in part 9 of the immigration rules (which included 322(2)), the burden of proof rests on the Respondent to establish any contested precedent fact (see JC (Part 9 HC395- burden of proof) China [2007] UKAIT 00027). Such burden being on the Respondent would arguably have made it less obvious to the Appellant or his representative that an issue not raised in the refusal letter, but now being used to support the finding of false representation, was being taken against him by the Judge.
- 43 Finally, even if the Judge was correct in finding that the Appellant had used false representations in 2009, the Judge errs in law in failing to consider that such a matter should 'normally' result in refusal of leave to remain under para 322(2); refusal would not be mandatory under that provision, and there was no exercise of discretion by either the Respondent or the Judge in that regard.

44 I therefore find that the Appellant was not afforded a fair hearing. I also find that the Judge's error was material to the outcome of the appeal; had the Appellant had adequate notice of the issue of the genuineness of his business being taken against him, it is likely he would have adduced different evidence in support of his appeal.

Decision


45 I find that the decision involved the making of a material error of law.

46 I set aside the Judge's decision, except that the Judge's finding at [15] that there was no failure by the Appellant to provide specified evidence, is retained, such finding not being vitiated by any error of law.

47 In light of the extent of fact finding that will be required in the remaking of the decision, I remit the matter for fresh hearing (subject to paragraph 46 above).

Signed:

Date: 6.3.18

A handwritten signature in blue ink, appearing to read 'Ray O'Ryan', written in a cursive style.

Deputy Upper Tribunal Judge O'Ryan