



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/26875/2013  
IA/26896/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7 July 2014

Determination Promulgated  
On 4 August 2014

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR ADEEL AHMED SOOMRO  
MRS ASMA ADEEL

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Ms H Price, Counsel  
For the Respondent: Mr S Kandola, HOPO

**DETERMINATION AND REASONS**

1. The appellants appeal with leave against the determination of First-tier Tribunal Judge Braybrook in which she dismissed their appeals against the decision of the

respondent made on 24 June 2013 to refuse the first appellant leave to remain as a Tier 1 (General) Migrant. The second appellant is his wife and dependant.

2. The first appellant made his application on 31 May 2013 for leave to remain as a Tier 1 (General) Migrant. The respondent awarded no points on previous earnings. The appellant had claimed £9,767 from dividend vouchers and £7,953 from pay slips for KP Car Park Ltd but the pay slips and dividend vouchers were not clearly shown as entering his bank account as per the statement provided. He had claimed points for earnings of £18,496 from World IT Services Ltd and had supplied an accountant's letter, accounts and invoices as evidence of his earnings. The respondent stated that the documentation did not meet the requirements of Appendix A of the Immigration Rules.

*"Because these are not appropriate documents in your circumstances as you are an employee of your own company so therefore cannot claim the turnover of the company. This is a separate legal entity so therefore these cannot be considered your funds but the companies funds".*

3. The judge said that the hearing on 24 December 2013 was adjourned to 16 April 2014 because the HOPO below had amended the Reasons for Refusal Letter to state that the company accounts submitted by the appellants were false following oral evidence about his accounts for World Services Ltd for the period ending 2013. On 14 April 2014 the appellant lodged further documents. They included HSBC Bank statement for World IT Services showing a balance of £8,746 as at 13 April 2013. A letter dated 26 February 2014 from the company's accountants Adamson & Co enclosed revised accounts for the company for the year to 12 April 2013. In a letter dated 26 February 2014, his accountant Mr Ahmad said

*"With regard to our client World IT Services Ltd we would like to explain regarding accounts prepared for period ending 12 April 2013 that a clerical mistake was made while preparing accounts. Cash of £7,988 were wrongly debited to debtors account. Due to this debtors were wrongly shown that have now been rectified. Cash at bank and in hand now states correct reconciled balance of £9,246. The remaining £8,510 in other debtors relates to director's current account. Sales figure remains same as before reported in the accounts of £20,400. Please also note that an unpaid cheque of £2,650 on 18 January 2013 is not part of sales. We have corrected the accounts and relevant journal and ledgers are attached for your reference. We have also prepared corrected accounts for your kind consideration."*

The HOPO below acknowledged that this new evidence was admissible under Section 85A to enable the appellant to dispute his allegation of forgery.

4. The appellant gave oral evidence and acknowledged in effect that he had loaned himself £8,510 which he said he had taken out in cash in part payments. The figure of £8,150 was included in a sum submitted by the appellant in his application for claimed earnings. Mr Bryant, the HOPO below submitted that these were not earnings but a loan from the company but the appellant stated he could repay the

loan; HMRC states that if a loan is taken from a company it can be returned the next year. The appellant asserted that the director loan account was his earnings. He stated that according to HMRC a director's loan account can be repaid through salary or cash in account of dividends and he had opted for dividends.

5. Mr. Briant submitted to the judge that the appellant's account of what was permissible under HMRC guidance might be correct but for the purposes of the application for PBS Tier 1, the applicant had to rely on past earnings. The appellant was using a figure which included future earnings but which Mr Bryant submitted were not eligible for inclusion. The appellant needed £35,000 to obtain 20 points. The appellant accepted that the figure of £18,496 for World IT included at page 25 of his application included £8,510 which the appellant acknowledged were advance earnings. If the figure of £8,510 was excluded the appellant would only obtain 5 points for the previous earnings and would not meet the overall total of 80 points required. The figure of £18,496 was the gross profit of the company. The appellant was asserting that he was entitled to claim all the company's money as his but the appellant was not a sole trader but had opted for limited liability; given that he had chosen this protection he could not at the same time claim the company funds were all his.
6. The appellant's representative Mr Abbas at the hearing below relied on the Tier 1 guidance. He submitted an extract from the guidance relevant to the applications made on or after 1 October 2013. The judge noted that neither representative was able to access or submit the guidance relevant at the date of the application. The guidance in force as at 1 October 2013 states that *"if your accounts and bank statements only show the gross amount of profit for the business you should also provide a third piece of evidence showing the next profit of the business for the period claimed, for example a corporation tax return for an accountant's letter. This is because we can only consider the net profit of the business for your income"*. Mr. Briant submitted that he relied on the Reasons for Refusal Letter which appeared to the judge to be applying different guidance.
7. The judge found as follows:
  11. *Given the variations in the figures given by the accountants and the non compliance with the requirements for evidence from an accountant, the appellant was an alternative given a further 14 days for the submission of corporation tax return showing the net profit of the business at the relevant period. The appellant indicated that such a corporation tax return was available. Mr Abbas also indicated that he would submit the guidance relevant at the date of application. No further documentation was submitted.*
  12. *The burden of proof is on the appellant to establish that he meets the requirements of the rules relating to Tier 1 Post study work Migrants I have taken into account the documentation application form in particular section 3 which required details of the supporting evidence of previous earnings. There had been considerable confusion on the part of the accountant. I am not on the evidence before me*

*satisfied that the appellant can include in his calculation of previous earnings sums which he has borrowed in respect of future earnings and he has not therefore achieved the requisite number of points in relation to earnings."*

8. The grounds of appeal argued that the judge gave the appellant fourteen days to submit further documentation. The documentation was received by the Tribunal within that period but the determination did not take account of that documentation. The First-tier Judge who granted permission said that the last day of the fourteen day period was 30 April 2014. There was documentary evidence that the additional material was received by the Tribunal on 30 April 2014. The determination indicates that the material was not brought to the attention of the judge and her decision was promulgated on 30 April 2014 i.e. before the expiry of the fourteen days. This was arguably a procedural defect which may amount to a material error of law.
9. The respondent submitted a response in which it was argued that it would appear that the judge was considering relying on evidence that was not before the respondent in deciding a matter that concerned the award of points. Such evidence is excluded by virtue of Section 85A of the 2002 Act. It is not material whether the evidence was before the judge as it was not admissible. Alternatively it was argued that the judge dismissed the appeal on the basis that the appellant could not rely on borrowings from the company as amounting to earnings when they clearly were not earnings. It is far from clear how the accounts address this issue. Therefore the respondent did not accept that material errors in law were disclosed.
10. Counsel relied on two documents; the first was the CT 600 company tax return form for World IT Services Ltd issued by HMRC for the period 1/6/2012 to 31/5/2013. It shows a total turnover from trade of £20,400; net trading and professional profits of £17,656 and corporation tax of £3,531.20. The second was the UKBA Policy Guidance on Tier 1 General for applications made on or after 6 April 2013. The particular guidance Counsel relied on said this:

***"Self-Employed Earnings within a Business or Company Structure:***

*If an applicant has worked in a self-employed capacity in his/her own business or company structure and has chosen to keep his/her earnings within the business or company, he/she could provide:*

- *Business or company accounts that meet statutory requirements and show the net profit made for the earnings period claimed; and*
- *personal/business bank statements.*

*If the applicant's accounts and bank statements only show the gross amount of profit for the business he/she should also provide a third piece of evidence showing the net profit of the business for the period claimed, for an example a corporation tax return or an*

*accountant's letter. This is because we can only consider the net profit of the business for the applicant's income."*

11. Counsel submitted that the appellant submitted the company accounts and personal/business bank statements which meant that he was not required to produce a third piece of evidence because the accounts showed both sets of profits. The respondent was asking the appellant to produce a document that he was not required to produce under the policy guidance. The judge only dismissed the appeal because the document was not before her even though it was pointed out to the judge how the appellant qualified under the Rules. The policy document that she was now referring to had already been alluded to by Mr. Ahmad at the hearing. It was not evidenced at the hearing and that was why the judge asked for production of it.
12. Mr Kandola submitted that the judge gave the appellant time to produce evidence which was not admissible because the evidence was submitted after the date of decision. The CT tax form referred to by Counsel is dated 22<sup>nd</sup> April 2014 and by virtue of Section 85A of the 2002 Act the judge could not consider this piece of evidence.
13. As regards the Policy Guidance, Mr Kandola said that the particular guidance Counsel sought to rely on is under Self-Employed earnings. The appellant is not self-employed. He is the director. The director's report at page 63 states that the principal activity of the company is providing IT support services. The appellant cannot pray in aid the self-employed earnings within the guidance. In evidence the appellant relied on the company's funds as his own funds and then said that he had borrowed money from the company in respect of future earnings.
14. Counsel submitted that all this evidence was considered by the judge and that was why she gave them permission to submit those documents. In any event according to the financial statements issued by his accountants for the period ending 12 April 2013, the company is controlled by the appellant, the director, by virtue of his holding of the company's 100% issued ordinary share capital. Counsel submitted that as the appellant is the sole director of the company, the company's money is his money. The judge was convinced of this that was why she wanted evidence of the money the appellant could take from the company. The guidance which she referred to allows him to show net profits from the company.
15. I find that the judge made a procedural error. She had given the parties fourteen days from 16 April 2004 to submit a corporation tax return showing the net profit of the business at the relevant period and the Policy Guidance which was in force on 13 May 2013, the date the appellant made his application. The 14 day period ended on 30 April 2014, which was the day the judge's decision was signed and promulgated.
16. I find that the policy guidance submitted by the appellant was admissible as it was going clarify the evidence the respondent would consider when assessing the net

profit of the business. I accept that the CT tax return was not submitted by the appellant with his application and therefore by virtue of Section 85A of the 2002 Act was not admissible evidence which the judge could have considered.

17. In any event I find that the documents would not have made a material difference to the judge's findings at paragraph 12. I agree with the judge that there had been considerable confusion on the part of the accountant in respect of the appellant's previous earnings. Whether the appellant is a sole director, shareholder or self employed person, I agree with the judge that the appellant cannot include in his calculation of previous earnings sums which he has borrowed in respect of future earnings. I find on the evidence that the judge did not err in law.
18. I find that the judge's decision dismissing the appellant's appeal shall stand.

Signed

Date

Upper Tribunal Judge Eshun