Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36511/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 September 2014	**On 9 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

KHALID PERVAIZ
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Aslam, Counsel, instructed by UK Immigration Legal Services
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. At an error of law hearing on 10 July 2014 I found that a decision dismissing the appellant's appeal against a Tier 1 (Entrepreneur) Migrant decision of 19 August 2013 had to be set aside. The error of law decision and directions, sent to the parties after this hearing, were as follows.

    i. The appellant, a citizen of Pakistan, has been in the UK since 2006, first as a student, and then for post-study work. On 29 September 2012 he applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant. His application was refused on 19 August 2013, and his

appeal was dismissed by Judge of the First-tier Tribunal Eldridge, in a determination promulgated on 10 February 2014.

ii. Permission to appeal was sought. The grounds concentrated in particular on unfairness in the judge's approach to deposits and withdrawals in the appellant's business bank statements. The judge suggested that payments to the business might have been refunded to the client in cash, but this point was not mentioned at the hearing, and the appellant therefore had no opportunity to respond to it. Permission to appeal was refused by Judge of the First-tier Tribunal Nicholson, on 9 April 2014. On a renewed application to the Upper Tribunal, however, permission to appeal was granted by Upper Tribunal Judge Jordan, who observed that the receipts followed by withdrawals in similar amounts were suspicious, but the judge arguably had to raise the point with the appellant. The observation was then made that the appellant was now on notice as to what he needed to do.

iii. At the start of the hearing Mr Aslam, for the appellant, picking up on the final point in Upper Tribunal Judge Jordan's grant, referred to a further witness statement by the appellant, with attachments. This was to the effect that none of the payments from any clients had been returned to them, and was supported by a letter to that effect from the client who had made the payments in question, a further letter from the accountants, and receipts showing that the appellant had purchased various stationery and computer equipment for his business with the sums withdrawn, as well as paying for accountancy services for the business.

iv. Mr Aslam's submissions at the hearing can be summarised as follows. The adverse findings were based on two speculative assumptions. The first was that there were no other credits in the business account that were payments from clients. The judge had assumed that the only business credits were those for the named company. The third sentence of paragraph 37 of the determination made this assumption clear. If the appellant had been given an opportunity to do so he could have given evidence to show that other deposits in the account were fees from clients. The second assumption was that the pattern of withdrawals from the account suggested funds being repaid to the client in cash. This did not comply with the principle of fairness, in that the appellant would have been able to deal with this point if it had been raised, and in addition it was not based on sufficient evidence. There was an error that was material because this formed the central part of the adverse credibility findings that the appellant had not set up a genuine business. The Immigration Rules, including the new genuineness test, included no specific requirement for a

market research exercise to have been conducted. The matters at paragraphs 38, 39, and 40 were peripheral issues and could not sustain an adverse finding on their own. The core of the adverse findings rested on the point about the business bank statements, and these findings were flawed because they were speculative and unfair.

v. Mr Bramble, for the respondent, accepted that there was an error of law at paragraph 42, in that the judge had been required, as a matter of fairness, to put the point about possible cash repayments to the appellant, since it was not raised by the respondent, neither in the letter nor at the hearing. However Mr Bramble submitted that the error was not material. His submission was based on the words "strengthened me" in paragraph 42 of the determination. This suggested that the judge had reached adverse findings for other reasons. The other reasons were to be found at paragraphs 37, 38, and 39, and related to the need for evidence of payments from other clients, the judge's assessment of the appellant's own oral evidence, and other matters. The judge was therefore entitled to reach the view that he did of the facts, and the error at paragraph 42 was not material because of the other findings.

vi. As I indicated at the hearing I have decided that there was an error of law in the approach to the business bank statements, and that that was material to the outcome.

vii. Having considered the submissions by both sides I have decided that the other adverse findings cannot be separated from the agreed error at paragraph 42. It was agreed between the parties at the hearing before me that this did amount to an error because the appellant, as a matter of fairness, should have been given an opportunity to respond to the allegations. As is clear from the further evidence provided he would have been in a position to do so, and could have established that the judge's suspicions were unfounded. In addition, it appears to me that the judge's finding was speculative. It is well established that a finding cannot rest on suspicion alone. It may well be that the pattern of payments gave rise to suspicion, but for a finding that went considerably further than anything in the refusal letter, in that it amounted to an allegation of dishonesty against both the appellant and one of his clients, cogent evidence would have been required. I note the judge's observation that he was not making such a factual finding, but as a matter of consistency if such a finding was not being made, then it should not, as a matter of law, have been held against the appellant as an adverse point. If the respondent had made this sort of allegation it would have been clear that the burden lay with the respondent to provide evidence. If such evidence had not been provided then there could not have been a finding, and adverse

weight could not have been placed on the point. The principle remains much the same if the judge is raising the matter of the Tribunal's own motion, and there is no escaping the fairness point, which was that where such suspicions arose in the judge's mind it was necessary as a matter of fairness to give the appellant and his representatives a chance to respond.

viii. I have considered the submissions made by Mr Bramble, but I have decided that the matter on which it was agreed the judge erred in law cannot be safely separated from the rest of the adverse findings. The third sentence of paragraph 37 raised another fairness issue and I accept the submission made on the appellant's behalf that, on reading the determination as a whole, the correct conclusion was that the core of the adverse findings were based around the bank statements, both in respect of the only payments from clients being the six that were identified, and in respect of the suspicion of cash refunds at paragraph 42.

ix. I have therefore decided that the judge's decision must be set aside, and that the decision is to be re-made.

x. Having heard from both parties I decided that the matter could proceed at once to a re-making hearing, with evidence from the appellant. This was the course suggested by UTJ Jordan in granting permission. As it turned out, however, an Urdu interpreter should have been requested, and was not. After various enquiries the appeal was adjourned for a re-making hearing.

xi. Having found the above error of law, which was material to the outcome, the judge's findings as to the genuineness of the business, which was the sole point at issue in the appeal, are set aside.

2. As is clear from the above it was agreed that I was engaged in a remaking of the decision in the appeal, with no preserved findings. In a discussion at the start of the hearing it was noted that the application had been made on 29 September 2012, and that the refusal was dated 19 August 2013. The recent decision of **Ahmed and Another (PBS: admissible evidence) [2014] UKUT 365 (IAC)** held that the prohibition on new evidence in section 85A(4) of the Nationality, Immigration and Asylum Act 2002 applied to non-points-scoring aspects of a rule where those aspects were inextricably linked to the scoring of points. For the purposes of this appeal it was agreed between the parties that this applied, and that no evidence that was not submitted with the application was admissible in the appeal.

3. It was further agreed between the parties that the genuineness of the business and the investment was the sole point at issue (paragraph 245DD(h)(i) and (k)). This agreement flowed from the fact that the refusal letter referred back to the

genuineness issue when refusing to award points under each of the various headings, and there were no other matters raised in the refusal. It was accepted at the hearing that the refusal letter contained a typographical error in relation to Appendix C. The 10 points claimed had in fact been awarded, and the box under the heading "Points Awarded" should have read ten rather than zero.

4. Mr Aslam, for the appellant, confirmed that the sole ground of appeal being pursued was that the decision was not in accordance with the rules, with reference to paragraph 245DD, and the subparagraphs referred to above. There was no argument in relation to whether the decision was in accordance with the law, and no challenge on human rights grounds.

5. The documentary evidence referred to was contained in the respondent's bundle, and the appellant's bundle prepared for the First-tier hearing (84 pages). A further bundle had been prepared for the remaking hearing, which contained up-to-date business bank statements, various client contracts, invoices, and copies of cheques received from clients. In view of the agreement as to admissibility neither side, in the event, referred me to any of this evidence.

6. The appellant gave evidence at the hearing and was cross-examined. The cross-examination was concerned with his business experience, the nature of his market research, the nature of his business, and his family background.

7. Following the appellant's evidence Mr Melvin, for the respondent, made submissions which can be summarised as follows. He relied on the refusal letter. This had concluded that the documentary evidence did not establish that the business was actively trading; that there was no evidence as to the origin of the funds in the various accounts; that the quality of the market research appeared poor; that the business plan was vague and unspecific; that no reference could be found on a search for one of the client companies; and that it was unlikely that the appellant had gained much experience in marketing with his family business in Pakistan. Mr Melvin added the following points. This was not a genuine viable business. The marketing suggested no attempts at proper research. Many other companies were offering similar services in the area. There were no signs that the appellant had particular expertise. The family business in Pakistan was not evidenced by documents. It was not credible that businesses would go to a person with such limited experience. The business was nothing more than a leafleting service. An MBA was not enough in itself if somebody was inexperienced.

8. Mr Aslam, for the appellant, made submissions which can be summarised as follows. Following on from the application made in September 2012 this had been a long process. The appellant had been interviewed in 2013. He had been consistent throughout. He has business experience through his family in Pakistan, and he also has an MBA. He has targeted start-ups and small businesses in the Watford area, which were mainly run by people of Pakistani or Asian origin. He was not specialising in a particular area of business, but was able to provide useful services

for small businesses who could not afford more established marketing firms. Leafleting was a part of the service that he offered, but it was not limited to that. The business proposal was credible and genuine. He had in fact provided evidence of the sale of land, and his share of business profits, as well as providing initial contracts with the application.

Decision and Reasons

9. Having considered the evidence and the submissions I have decided, on remaking the decision, that the appeal falls to be allowed under the Immigration Rules.

10. The Secretary of State accepted, following the application, that the appellant had provided evidence of funds in excess of £50,000. This was in the form of £15,000 in his own UK account, and the remainder in two different accounts in Pakistan. It also appears to have been accepted that he had complied with all of the various detailed requirements as to specified documents, both in order to show the investment funds available, but also in order to show that he had been through all the necessary procedures for setting up his company and registering for corporation tax. The refusal was therefore based on new Immigration Rules that were introduced after the application was made, by HC943. These took effect on 31 January 2013. Although these were not in force when the appellant made his application they led to the decision that he should be interviewed, and this in turn led to the refusal. As a matter of fairness it appears surprising that the appellant was not given an opportunity to submit further documentary evidence at the time of the interview. It appears that the decision remained based on the documents submitted in September 2012, and that no opportunity was given for further documents to be submitted to meet the concerns that emerged from the interview under the new Rules. As it turns out, however, it appears to me that the decision falls in the appellant's favour in any event, and this issue is not therefore a material one in this particular appeal.

11. I have considered all of the documentary evidence, and have considered the interview record. I note, in relation to that record, the appellant's statement, where he indicates that the recorded answers in the interview record represent a brief summary of what he said, over a period much longer than that suggested by the notes taken. An example of this was that the refusal letter quoted an answer suggesting that the appellant had said that there was one other marketing business in the area, whereas the appellant has stated that his answer in fact included an observation that there were many such companies in the area, but that he gave the name of one as an example. This aspect was not explored in cross-examination. The appellant was not challenged on this aspect of his statement, and it was not argued on the respondent's behalf that the notes of the interview provided represented a full record of everything that the appellant had said. Any adverse weight to be placed on the interview answers, and the reliance placed on them, has to be seen in this context.

12. In relation to the concerns raised about the origin of the funds I accept the submission made on the appellant's behalf that documentary evidence was provided

with the application, in September 2012, to show that the funds came from the sale of land, and from the appellant's share of the profits of his family business. It appears that his grandfather passed on land and a business to his father. That business continues in Pakistan. The appellant's studies were funded by his father. His father is now also supporting him in his plan to establish a business in the UK.

13. I note that the relevant parts of paragraph 245DD of the Immigration Rules do not require that a business has been established. What is required is either that the applicant genuinely intends and is able to establish a business, or that he has established or taken over a business. Having considered all of the evidence it appears to me that the appellant has done enough to show that his intention to establish a business was genuine, and that he genuinely intended to invest the money, which was genuinely available to him from the sources described above. At the date of application the appellant's business was small: at that stage he only claimed to have two clients, and he did not claim to have invested more than a few thousand pounds of the sum available. He repeatedly said that he did not want to commit more funds until he knew that his application for a further visa had been successful. In the circumstances this does not appear to me to be an unreasonable position to have adopted, given that the appellant would have run the risk of wasting valuable funds if his application turned out to be unsuccessful.

14. The level of market research and the business planning involved does not appear to be particularly sophisticated, but what has been described is a small business offering services to other small businesses. I accept the submission made on the appellant's behalf that the types of business targeted are those that would not be able to afford the services of more established marketing firms, and that there may also be ways in which the appellant would be at a business advantage in dealing with small businesses owned or run by people with connections to the Indian subcontinent.

15. It was suggested that the appellant should have started the process of setting up his business earlier, but I can see nothing in the Rules that indicates that it would not be possible for a person to work during the two year post-study work period, and then put forward plans to establish a business. As I have said the relevant parts of 245DD relied on by the respondent do not require that the business is already up and running. In addition I note the appellant's comments in his statement that it was only when it became known to him that the £200,000 investment level was being dropped to £50,000 for those in the UK for post-study work that the possibility of using this route became a serious proposition.

16. For these reasons my decision is that the appellant did provide sufficient evidence to establish that he met the requirements of paragraph 245DD(h), taking into account the factors listed at paragraph 245DD(i). On close examination it does not appear to me that the reasons put forward in the refusal letter are of sufficient weight to justify the adverse conclusion. The points made have been adequately dealt with. On balance of probabilities my finding is that the appellant did genuinely intend to establish the business; that he did genuinely intend to invest the money; that the

money was genuinely available to him, and that the business plans were viable and credible.

17. In any event I note that the same changes introduced in January 2013 provided Rules that allowed the Secretary of State to curtail leave for a Tier 1 (Entrepreneur) Migrant in a number of circumstances, including where the funds available for investment had not been spent on the business, and where various requirements to register the business had not been complied with. The initial test is for the genuineness of the intention to establish the business. In essence the position will remain that if the business does not work, and the funds are not in fact invested, and the appellant cannot show this in due course, then it will be open to the Secretary of State to curtail leave, or not to renew it.

18. At this initial stage, however, it does not appear to me that there was enough, in a proper consideration of the evidence submitted with the application, and the answers given at interview, to justify a refusal on the genuineness grounds relied on in the refusal letter.

19. It was not suggested by either side that there was any need for anonymity in this appeal and I make no such direction. Neither side mentioned the fee award. As I have said the evidence relied on was entirely that submitted with the application. In the circumstances I have decided that it would therefore be appropriate to make a whole fee award.

Decision

20. The decision dismissing the appeal is set aside for the reasons set out above. The decision is remade as follows.

21. The appeal is allowed under the Immigration Rules.

TO THE RESPONDENT
FEE AWARD

Having allowed the appeal I have decided, for the reasons given above, to make a whole fee award, in the sum of £140.

Signed Date

Deputy Upper Tribunal Judge Gibb