



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/04251/2015

THE IMMIGRATION ACTS

Heard at Field House
On Tuesday 20 October 2015

Determination Promulgated
On Friday 30 October 2015

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NADIR ALI
[ANONYMITY DIRECTION NOT MADE]

Respondent

Representation:

For the Appellant: Mrs Willocks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Mr Khalid, Solicitor

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal.
2. The Appellant is a citizen of Pakistan. He appeals against the Respondent's decision dated 19 January 2015 refusing his Tier 1 (Entrepreneur) Migrant application and directing his removal to Pakistan. The basis of the Respondent's refusal was that, for the purposes of paragraph 245DD(h), she was not satisfied that, on the balance of probabilities, the Appellant had genuinely established himself in business, that he genuinely intended to invest the funds claimed in his business and that he had the funds claimed genuinely available to him.
3. The Appellant appealed the Respondent's decision. In a decision promulgated on 25 June 2015 ("the Decision"), First-Tier Tribunal Judge Manyarara allowed the appeal. The Respondent was unrepresented at the hearing. The Appellant did however give oral evidence. Permission to appeal the Decision was granted by First-Tier Tribunal Judge Andrew on the basis that the Judge should not have considered additional evidence produced at the hearing and which was not before the Respondent. The matter comes before the Upper Tribunal to determine whether the First-tier Tribunal Decision involved the making of an error of law.

Submissions

4. The Respondent's appeal turns on the proper interpretation of section 85A Nationality, Immigration and Asylum Act 2002 ("section 85A"). Mrs Willocks-Briscoe directed me to the evidence in the bundle which was not before the Respondent and which is relevant to the Respondent's appeal against the Decision. This consists of a signed statement by the Appellant's cousin attesting to the transfer of funds to the Appellant with underlying documents [AB/99], a signed statement from the Appellant's wife in similar terms [AB/105], an e mail from the Appellant's aunt which refers to a transfer to the Appellant from his aunt [AB/107], a number of P60 tax certificates [AB/63-69] and a certificate and statement from Allied Bank in relation to funds held in the third party's account [AB/57-58]. It is worth noting at this point that the transfer from the Appellant's aunt is not one of the transactions which the Respondent queries since it was not made within the period of the statement produced (it was made later). It is also worthy of note that the P60s are produced to show only that the Appellant's previous earnings permitted him to have some savings. The Judge found that the Appellant had the funds genuinely available to him, and relied in part in her reasoning on the documents at [AB/99], [AB/105] and [AB/63-69].
5. Mrs Willocks-Briscoe submitted that, as a points-based system application, the Judge was not entitled to take account of the additional evidence and, if that

were excluded, the appeal could not have been allowed. She relied on the case of Ahmed v Secretary of State for the Home Department [2014] UKUT 00365 (IAC) as authority for the proposition that the issues under challenge still relate to a points-based decision even though they are raised under the heading of “Non-points scoring reasons for refusal”. In response to a question from me, she submitted that the exclusion of new evidence in section 85A related as much to oral evidence as to documentary evidence and as such, the Appellant’s explanation as to the source of the funds in oral evidence and in his statement was not permitted under Section 85A either. She submitted that the decision in Butt v Secretary of State for the Home Department [2011] UKUT 00353 (IAC) does not assist as that case concerns evidence falling within one of the exceptions under Section 85A.

6. Mr Khalid submitted that the issues raised by the Respondent do not relate to the acquisition of points and as such fall within Section 85A(4)(d). He accepted that the documents which Mrs Willocks-Briscoe identified were not before the Respondent. However, he submitted that those provide support only for the Appellant’s case relating to the origin of the funds. He referred me to the application form in relation to the availability of funds and what the Appellant was required to produce in order to support his application in that regard. The Appellant provided the specified documents. There was nothing in the application form, Rules or guidance which required him to produce evidence in relation to the source of the funds. He submitted that it would be contrary to the rules of common law fairness to preclude an Appellant from relying on documents which he was not required by the Respondent to produce when making the application and could not then produce to answer matters taken against him in the decision letter as a result of the Respondent’s reliance on Section 85A. The Respondent interviewed the Appellant prior to making the decision but the copy of the interview record before the Judge was incomplete and the Respondent was not present to be asked for a full copy. Mr Khalid submitted that if the full interview record had been before the Judge the outcome would be the same. Mrs Willocks-Briscoe was able to provide me with a full copy of the interview record and I have had regard to that when reaching my decision even though it was not before the Judge.
7. Mr Khalid submitted that the decision in Ahmed is not determinative because the Appellant there withdrew his appeal after the error of law stage. The decision in that case does not elaborate on the new evidence which the Appellant sought to produce. He submitted that Section 85A could not be intended to preclude oral evidence. On that basis, the Appellant was entitled to give evidence to explain the source of the funds and the Judge relied on that in addition to the documents.

Decision and reasons

8. The Judge’s reasons for allowing the appeal appear at [15] – [23] of the Decision. As noted at [16], the Judge found the Appellant’s oral evidence very helpful.

The Judge accepted for the reasons set out in that paragraph that the Appellant had the funds available to him as asserted. Those funds are £22,000 in his bank account in the UK and £28,000 in his father's bank account at Allied Bank in Pakistan. As the Judge noted and Mr Khalid rightly submits, the Respondent does not take issue with the existence of the funds or the genuineness of the documents showing those funds. She does not accept that the funds are genuinely available because the amount in the NatWest bank account totalling over £26,000 was accumulated over the course of a period of a few weeks preceding the statement end date. Issue is taken with the Allied Bank statement of funds on the basis that the funds were credited to the account only one day before the date of the letter.

9. Although the Respondent raised concerns in the decision letter about whether the Appellant is a genuine entrepreneur, none of the documents on which the Judge relied in her findings on that aspect amount to new evidence and accordingly the Judge was entitled to her finding at [19] for the reasons set out in that paragraph and at [20] to [21] that the Appellant is a genuine entrepreneur, having heard him give evidence. Mrs Willocks-Briscoe's submissions were therefore restricted to the genuineness of the availability of funds.
10. Having now had sight of the interview record, the issue regarding the genuine availability of funds is dealt with at questions [25] to [28]. In short summary, the Appellant said that the £22,000 was his personal savings and the £28,000 in Allied Bank was funds held by his father and was a gift from his father. He was not asked why he said that the £22,000 was savings when it had only recently been paid in to the account. He was not asked why the credit to his father's account was so recent or whether the money remained in the account. In his statement, the Appellant confirms the answers he gave at interview. He goes on to say that the amount of money in the UK is personal savings but that recent deposits were from his wife and cousin to whom he had loaned money and that his aunt in America had sent him some money. As such, with the exception of the money received from his aunt, that is not inconsistent with his answer that the money came from his savings but that those savings were used in the past to loan money to his wife and a relative who paid him back when he needed the money for his application.
11. The documents submitted by way of new evidence merely confirm his account. In the case of the money held in the UK, they confirm the source of the payments in from those who had made the transfers. In the case of the money in Pakistan, they confirm that various credits and debits were made over a period of four months but that the underlying balance was maintained at the same approximate level. In circumstances where the Respondent did not identify any inconsistency about the Appellant's answers at interview or seek clarification of his answers at that stage, the Appellant was clearly entitled to provide that clarification in his oral evidence. That did not amount to new evidence for the purposes of section 85A.

12. I accept that the new documentary evidence as referred to at [4] above does not fall within any of the exceptions to section 85A. Although the documents were submitted to answer the Respondent's case in relation to the genuineness of the source of the funds, and although that case is put under a heading of non-points scoring, that is not decisive and, for the reasons set out in Ahmed, the genuineness of the application forms part of the Respondent's assessment whether points should be awarded and therefore the documents relate to the acquisition of points. I accept also that some of the Judge's reasoning for accepting the genuineness of the availability of those funds at [16] is based on those documents. However, it is clear from [16] read as a whole that, even without the documents, and based on the Appellant's statement and his oral evidence, the Judge was entitled to be satisfied that those funds were genuinely available based on the Appellant's explanation. The issue of whether the Appellant's explanation is credible is a matter for the Judge to assess. Of course, if the Respondent had been represented, she could have tested his explanation in cross-examination but the Appellant should not now be prejudiced by the Respondent's failure to provide representation at the hearing. As I note at [4] above, the funds from the Appellant's aunt were not one of the transactions which formed part of the balance in the account at the statement end date in any event. Further, when dealing with the money held in Pakistan, the Judge's findings are based in the main on the documents which were before the Respondent ie the Appellant's father's declaration and identity card.
13. I am therefore satisfied that, even if the Judge did make an error of law by taking into account the additional documents, the error was not material. The Judge would have reached the same decision on the basis of the documents before the Respondent as clarified by the Appellant in oral evidence. I am therefore not satisfied that the First-Tier Tribunal Decision involved the making of a material error of law and I uphold the Decision.

DECISION

The First-tier Tribunal decision did not involve the making of a material error on a point of law.

I do not set aside the decision



Signed

Date 28 October 2015

Upper Tribunal Judge Smith