Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/16254/2014
IA/16583/2014
IA/16589/2014

THE IMMIGRATION ACTS

Heard at Field House
On 22 April 2015

Decision Promulgated
On 18 June 2015

Before

LORD BANNATYNE
DEPUTY UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FARHAN ASIF (FIRST APPELLANT)
MR MUHAMMAD REHAN ASHRAF (SECOND APPELLANT)
MRS YASMIN (DEPENDANT OF THE SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Miss Everett, Home Office Presenting Officer
For the Respondents: Mr Michael Biggs, Counsel

DECISION AND REASONS

Introduction

1. The appellant before us is the Secretary of State for the Home Department who appeals against the decision of the First-tier Tribunal promulgated on 8 December 2014. The Secretary of State for the Home Department is hereinafter referred as "the Secretary of State". The respondents are hereinafter referred to as "the applicants". By the decision of the First-tier Tribunal the applicants' appeal of the Secretary of State's decision dated 26 March 2014 to refuse their applications for further leave to remain as Tier 1 Entrepreneurs was allowed.

Background

2. The applicants are nationals of Pakistan. The first applicant was born on 10 December 1984, the second applicant was born on 8 June 1984, the third applicant is the second applicant's wife and his dependant.

3. The first applicant entered the UK in July 2007 pursuant to leave to enter as a student. He was later granted further leave to remain as a Tier 1 Migrant. The second appellant entered the UK in September 2006 pursuant to leave to enter and remain as a student and was then granted leave to remain as a Tier 1 Migrant. The first and second applicants are not related, but met while they were students in the UK. On 14 March 2013 the first two applicants applied for further leave to remain as Tier 1 (Entrepreneur) Migrants, as an entrepreneurial team. Mrs Yasmin applied for further leave to remain as the second applicant's dependant.

4. The first and second applicants were called to an interview by the Secretary of State. They attended that interview on 20 February 2014. They were interviewed separately.

5. The applications of 14 March 2013 were refused by the Secretary of State on 24 March 2014, which generated a right of appeal pursuant to Section 82(1)(d) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

6. The applicants exercised their right of appeal. The hearing came before the First-tier Tribunal on 8 December 2014. In the course of that appeal hearing the first and second applicants gave oral evidence.

7. The First-tier Tribunal found as follows:

> "71. I am also satisfied that both appellants have satisfactorily demonstrated that they are a genuine entrepreneur and can meet the Immigration Rules as set out under paragraph 245DD"

and at paragraph 73:

> "73. Mrs Yasmin, the wife of Mr Ashraf, was also refused leave to remain as a dependant of a Tier 1 Migrant. As her husband's application has been granted, it follows that she should be granted leave in line with that of her husband".

Submissions on behalf of the Secretary of State

8. The submissions on behalf of the Secretary of State were sharply focused: it was first contended by Miss Everett that the First-tier Tribunal in reaching its decision had relied on inadmissible evidence. It had in particular relied on post-application evidence in the following paragraphs of its decision: 62; 63; 64; 66 and 67. Miss Everett submitted that this evidence was new evidence and she submitted was prohibited by the terms of Section 85A(4) of the 2002 Act. It was not disputed by Mr Biggs that in these paragraphs the First-tier Tribunal had had regard to post application evidence.

9. In support of her above submission Miss Everett directed our attention to the decision of the Upper Tribunal in Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC). In Ahmed it was held, by a panel of the Upper Tribunal chaired by Mr Ockelton, the Vice President of the Upper Tribunal, that:

> "1. Where a provision of the Rules (such as that in para 245DD(k)) provides that points will not be awarded if the decision-maker is not satisfied as to another (non-points-scoring) aspect of the Rule, the non-points-scoring aspect and the requirement for points are inextricably linked.
>
> 2. As a result, the prohibition on new evidence in s 85A(4) of the Nationality, Immigration and Asylum Act 2002 applies to the non-points-scoring aspect of the rule: the prohibition is in relation to new evidence that goes to the scoring of points".

10. For the foregoing reasons Miss Everett submitted the First-tier Tribunal decision contained a material error of law. Accordingly the decision of the First-tier Tribunal, having considered material inadmissible evidence, that the Secretary of State's decision was not in accordance with the Immigration Rules could not be sustained.

11. The second branch of her argument related to the following findings of the First-tier Tribunal at paragraphs 59 and 60 of its decision:

> "59. Turning initially to the allegation that the proposed business was not genuine, I note that despite the fact that both Mr Asif and Mr Ashraf were interviewed, this allegation was not put to them at the interview. The respondent clearly therefore had every opportunity of questioning the appellants about this matter, but chose not to do so. I therefore do not find it is reasonable that this matter therefore is raised only in the refusal letter, given that the appellants did not have an opportunity of responding at an earlier time and providing further documentation.
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> 60. Similarly, there is no requirement in the rules for any letters to be provided from family members confirming that the amount given is a gift. Again had this been put to the appellant at interview, then the appellant would have an opportunity of providing this additional evidence."

12. Her position with respect to the above findings was interlinked with the first branch of her argument and can be summarised as this: the First-tier

Tribunal had failed to have regard to Section 85A(4) of the 2002 Act which prevented the submission of further documentary evidence. On that basis the conclusion of the First-tier Tribunal that the first two applicants did not have an opportunity of responding and providing further documentation was wrong in law. They were prevented from putting forward such further evidence by the terms of Section 85A(4). If the applicants were not in a position to put forward such further evidence there had been no unfairness to them on the basis set forth by the First-tier Tribunal. Accordingly she submitted that this was a further material error of law.

Reply on behalf of the Applicants

13. The applicants opposed the Secretary of State's appeal on a number of bases. There were three chapters to Mr Biggs' submissions:

    - The First-tier Tribunal was entitled to conclude that the applicants had been treated procedurally unfairly, and that the 24 March 2014 decisions were Wednesbury unreasonable. The appeal was therefore properly allowed to this extent, and to this extent there had been no material error of law.
    - Ahmed did not prevent the First-tier Tribunal hearing oral evidence, and on the basis of the oral evidence the judge was entitled to allow the appeal under the Immigration Rules.
    - Ahmed was wrongly decided.

14. In development of his argument in terms of his first head it was Mr Biggs' submission that the Secretary of State had failed to observe her duty to act fairly in all the circumstances. As to what fairness meant in the circumstances of this case he referred us to the well-known passage in the judgment of Lord Mustill in Ex-Parte Doody [1994] AC531 at 560 D-G where the following guidance as to the principles to be applied when considering fairness was given:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that: - (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to

> procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer".

In particular Mr Biggs relied on what was said at point 6 by Lord Mustill: he argued that in the absence of the first two applicants being told what the gist of the Secretary of State's position was when she had them brought in for interview then they were not in a position to make worthwhile representations in the course of the interview.

15. It was his position that the argument based on unfairness was particularly strong in this case given the legal and administrative system within which the decision was taken (see: factor 4 in Lord Mustill's observations). This was the case, in that if Ahmed was correctly decided, the applicants would not be able to rely upon any evidence not submitted with the 14 March 2013 application. This he argued intensified the Secretary of State's duty to act fairly, and generated a duty to give an interviewee notice of the Secretary of State's case and a meaningful opportunity to be heard and respond thereto.

16. In conclusion in terms of this first chapter of his argument he submitted that the First-tier Tribunal had correctly held that the Secretary of State did not act in accordance with her obligations regarding fairness and thus her decisions were vitiated by public law error and the appeal was therefore bound to be allowed pursuant to Section 86(2) and 84(1)(e) of the 2002 Act. To that extent he submitted there had been no material error of law and the appeal should be dismissed.

17. Turning to the second chapter of his argument he generally submitted that if Ahmed was correctly decided the principle decided therein should be confined to the exclusion of documentary evidence that was not submitted with the application, but not oral evidence given before the Tribunal.

18. It was he argued unlikely that Parliament would have intended to preclude the Tribunal hearing oral evidence in appeals from immigration decisions on points based system applications. Indeed, were this to be the effect of Section 85A the fairness and utility of a statutory appeal in cases such as the instant was doubtful.

19. Further, the structure of Section 85A(4) indicated that oral evidence was admissible. The exceptions within this sub-section only applied to evidence "adduced by the appellant". However, while a witness may be tendered by an appellant, often the key oral evidence is that adduced during cross-examination of the witness by the respondent. Moreover, of course, it was not uncommon for First-tier Judges to ask questions of witnesses. It would be odd he submitted that if in those situations the Tribunal was obliged to ignore the witness's evidence-in-chief, but considered the witness' answer to the judge or the Secretary of State's representative.

20. He went on to submit, on the basis of his foregoing contentions regarding the proper understanding of the decision in Ahmed, that: on the oral evidence before the First-tier Tribunal, which was accepted by it, the first and second applicants' business was held to be genuine and thus the rejection of the 14 march 2013 application by the Secretary of State pursuant to 245DD(k) was properly held wrong. The appeal was therefore correctly allowed by the First-tier Tribunal under the Immigration Rules. Although the First-tier Tribunal had considered documentary evidence not submitted with the respondent's application, this could not have affected the outcome of the appeal and thus he submitted the error was not material.

21. Finally elaborating upon his third ground Mr Biggs said this: Ahmed turned on the construction of the words "to refuse an application on grounds not related to the acquisition of 'points' under the 'points-based system' in Section 85A(4)(c) of the 2002 Act. The words "related to" he submitted were crucial.

22. The Tribunal in Ahmed had given the expression "related to" its usual, broad meaning. However, that meaning led to what he submitted were absurd results, and undermined access to justice. In development of that submission he said this: such an interpretation prevented an appellant from rebutting allegations which were, as in this case, made for the first time in a refusal letter, and in many such cases nullified the utility of the statutory appeal system. Given this he submitted, Parliament was unlikely to have intended that the expression "related to" should be given the construction applied to it in Ahmed. The correct interpretation he submitted of the provision was more narrow: only a refusal on a ground or grounds directly related to the application of points under the Rules should be insulated from the adduction of new evidence.

23. For all of the foregoing reasons he submitted that the appeal should be dismissed.

Discussion

24. We turn first to the issue of the public law error. We believe that there is substantial force in the argument advanced by Mr Biggs.

25. We believe it is a reasonable inference that the reason for the first two applicants being invited for interview by the Secretary of State was that the Secretary of State had formed a preliminary view on the papers before her, as submitted with the application, that the proposed business was not genuine. We are unable to identify any other possible reason why the first two applicants should have been called in for interview and no other possible reason was suggested by Miss Everett.

26. That being the reason for the interview, then applying the observations of Lord Mustill in Doody, we are persuaded as a matter of fairness that the Secretary of State was required to inform the first two applicants that the

reason for them being interviewed was that she had at least formed a preliminary view doubting the genuineness of the proposed business. This was necessary in order for the first two applicants to understand that they required in their responses to questions to address this particular issue.

27. We are satisfied that in the absence of knowing the reasons for the interview it would have been difficult for the first and second applicants to make worthwhile representations.

28. Moreover, we agree with the submission made by Mr Biggs that the legislative context of this interview made it even more important as a matter of fairness to advise the first two applicants of the reason for the interview. The decision in Ahmed means that this was the last real opportunity for the first two applicants to satisfy the Secretary of State as to the genuineness of the proposed business as they would not be in a position to rely upon evidence submitted later than the date of application at any hearing before the First-tier Tribunal.

29. Miss Everett's submissions in relation to the public law error issue were to the effect that: first the Secretary of State had not made her mind up at the stage of the interview and only made a decision on the genuineness of the proposed business having looked at all of the evidence in the round and at the stage of issuing the refusal letter. Therefore she contended there was no reason to inform the first two applicants at the interview or prior thereto that the genuineness of the proposed business was doubted.

30. We accept that the Secretary of State did not make her decision until all the evidence was before her and therefore her decision was not made until the date of the decision letter. However, if as we have held she suspected on the basis of the application and the accompanying papers that the proposed business was not genuine (that being her reason for having an interview) that was sufficient in itself to engage the duty of fairness and to require her to inform the first two applicants of the reasons for the interview.

31. Miss Everett also submitted that a view on the genuineness of the proposed business might not be arrived at until some stage during the course of the interview. Thus the first two applicants could not be informed of any view prior to the interview.

32. Again as we have said the only reason we can identify for having the interview is that a preliminary view had been formed that the business was not genuine and so we do not accept this submission.

33. Beyond what we have stated above, regarding the interview and the ability of the first two applicants to give meaningful answers there is a further aspect of fairness which we believe requires to be considered. Had the first two applicants been informed of the reasons for the interview they would also have had an opportunity to produce further documentation in response to that preliminary view. We observe that in

Ahmed the Secretary of State also interviewed the applicants and was prepared to accept further documentation at that stage (see: paragraph 2 of the decision).

34. In the whole circumstances we are satisfied that if the interviews had been conducted fairly it might have made a difference to the decision of the Secretary of State. However, with respect to this argument, we are not persuaded that the First-tier Tribunal decided this case upon the basis that the decision was not in accordance with the law, rather on a fair reading of the whole decision the First-tier Tribunal has concluded that the applicants should be successful in terms of the Immigration Rules. The observations made regarding the public law error have not caused the First-tier Tribunal to hold the decision was not in accordance with the law. This may have been an oversight, alternatively it may have been that the First-tier Tribunal took the view that it was not necessary to rule on the issue given its conclusion in terms of the Immigration Rules.

35. With respect to the second chapter of the applicants' argument we are persuaded for the reasons advanced by Mr Biggs that Ahmed does not prevent the hearing of oral evidence. We note that Miss Everett for the Secretary of State did not submit to us that a proper understanding of the decision in Ahmed resulted in such oral evidence being inadmissible.

36. In particular we are persuaded that if such oral evidence could not be led then the fairness and utility of a statutory appeal in such cases as the instant one would be doubtful.

37. The next question in this chapter of Mr Biggs' argument is this: is the First-tier Tribunal's finding as to the credibility of the first two applicants, having heard their oral evidence, a sufficient basis to sustain its finding that the Secretary of State's decision was not in accordance with the Immigration Rules?

38. At paragraph 25 the First-tier Tribunal found that the evidence given by both of the first two applicants was truthful. Mr Biggs' argument was that on the basis of that finding, and that finding alone, notwithstanding the consideration by the First-tier Tribunal of the inadmissible evidence in terms of Ahmed, the First-tier Tribunal was entitled to find in the applicants' favour in terms of the Immigration Rules. There had thus been no material error of law.

39. Initially we were attracted by this submission, however, on reflection we are not convinced by it.

40. In considering the evidence the First-tier Tribunal would have taken a holistic approach to it and looked at the evidence in the round. In reaching its view on the credibility of the first two applicants we are unable to assess to what extent the First-tier Tribunal's view was formed on the basis of the evidence which was inadmissible in terms of Ahmed. We are persuaded that it is impossible to say what conclusion the First-tier

Tribunal would have reached on their credibility and therefore on the genuineness of the proposed business had the First-tier Tribunal not had regard to the evidence which it was not entitled to take into account.

41. Moreover the inadmissible evidence must, it appears to us, given its materiality to the issue of the genuineness of the business, have been a significant factor in the First-tier Tribunal's decision in terms of the Immigration Rules. Accordingly we reject the submission made on behalf of the applicants that there was no material error by the First-tier Tribunal in considering the inadmissible evidence.

42. Turning to the final branch of Mr Biggs' submissions it is perhaps convenient at this point to set out the relevant statutory framework: Section 85A of the 2002 Act provides as follows:

> "85A
>
> Matters to be considered: new evidence: exceptions
>
> (1) This section sets out the exceptions mentioned in Section 85(5).
>
> (2) Exception 1 is that in relation to an appeal under Section 82(1) against an immigration decision of a kind specified in Section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision.
>
> (3) Exception 2 applies to an appeal under Section 82(1) if –
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> (a) the appeal is against an immigration decision of a kind specified in Section 82(2)(a) or (d),
>
> (b) the immigration decision concerned an application of a kind identified in Immigration Rules as requiring to be considered under a "points-based system", and
>
> (c) the appeal relies wholly or partly on grounds specified in Section 84(1)(a), (e) or (f).
>
> (4) Where Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it –
>
> (a) was submitted in support of, and at the time of making, the application to which the immigration decision related,
>
> (b) related to the appeal insofar as it relies on grounds other than those specified in sub-section 3(c),
>
> (c) is adduced to prove that the document is genuine or valid, or
>
> (d) is adduced in connection with the Secretary of State's reliance on a discretion under Immigration Rules, or compliance with a requirement of Immigration Rules, to refuse an application on grounds not related to the acquisition of "points" under the "points-based system"".

43. The material sections of the decision in Ahmed for the purposes of the instant case are:

> "5. The purpose of that provision is quite clear. It is that where a Points Based application is made and refused, the assessment by the Judge is to be of the material that was before the decision-maker rather than a new consideration of new material. In other words the appeal if it is successful is on the basis that the decision-maker with the material before him should have made a different decision, not on the basis that a different way of presenting the application would have produced a different decision.
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> 6. As is apparent from her judgment, the judge took into account material other than that which was before the decision-maker. In a spirited defence of her procedure Mr Asme has submitted that the way in which the letter was divided into Non-Points Based and Points Based matters demonstrates that in assessing whether the business plans were genuine the decision-maker was refusing the application on grounds which were not related to the acquisition of points under the Points Based System. If that is right, Mr Asme submits, then the Judge was at liberty to look at further evidence. We are satisfied however that that is a submission which cannot succeed. There are two connected reasons for that.
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> 7. The first is that in paragraph 245DD(k) of the Statement of Changes in the Immigration Rules, HC 395 (as amended) is the following:
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> > "If the Secretary of State is not satisfied with the genuineness of the application in relation to a points scoring requirement in Appendix A those points will not be awarded."
>
> That clearly links the assessment of the genuineness of the scheme to the acquisition of points and rules out, in our judgment, the submission that the assessment of the genuineness of the scheme was a ground not related to the acquisition of points under the Points Based System. On the contrary, the wording of the Rule links the two matters inextricably.
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> 8. Secondly, as we pointed out to Mr Asme in the course of his submissions, if he were able to show that the Judge was entitled to look at the genuineness of the scheme for the purposes of the appeal before her, she would nevertheless not be able to reach a decision that because of her view about the genuineness of the scheme, points should have been awarded. That is because that would itself link the genuineness of the scheme to the acquisition of points, and she is prohibited from hearing evidence which does go to the acquisition of points.
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> 9. For those reasons we are satisfied that the Secretary of State's grounds of appeal are made out. The Judge erred in law in reaching her conclusion. It is impossible to say what conclusion she would have reached if she had not taken into account the evidence which she was not entitled to hear. We set aside her determination. The position then is that we are required to substitute a decision or remit the case to the First-tier Tribunal for a decision to be made. However, Mr Asme has told us after taking instructions that at that point the appellants would wish to withdraw their appeal against the Secretary of State's decision

> and make a new application supported by the documents which are now available to them, no doubt during the course of the business which they have been seeking to run ever since they set it up at the end of 2012. We will accept that withdrawal. The result is that the First-tier Tribunal Judge's judgment having been set aside, the decision of the Secretary of State is now unchallenged and stands as a refusal of the applications made at beginning of 2013".

44. We are satisfied that the analysis in Ahmed in the above sections of the decision is correct.

45. It seems to us that the identification of the purpose of the provision and the analysis of the provision which flows from the identification of its purpose is persuasive.

46. In our view on a proper construction of the language of the provision it was intended by Parliament that "the appeal, if successful, it is on the basis that the decision-maker with the material before him should have made a different decision".

47. We find that the reasons advanced by the Upper Tribunal in Ahmed as to why "related to" should have a broad meaning are when taken together cogent.

48. We do not agree with the submission advanced on behalf of the applicants that the reasoning in Ahmed leads to absurd results. Applicants are not prevented from rebutting allegations made in a refusal letter. They can give evidence as to why the material produced to the Secretary of State with the application should not have led the Secretary of State to hold for example: that the business was not genuine. We believe that it is not absurd to have an appeal right which only allows consideration of the material before the decision-maker and does not allow new material to be considered. Such an appeal system is not a denial of access to justice as was submitted to us.

49. The decision of the First-tier Tribunal that the decision of the Secretary of State was not in accordance with the Immigration Rules is, for the reasons we have earlier stated, subject to material errors of law, namely: the consideration of inadmissible evidence and accordingly the decision of the First-tier Tribunal cannot be maintained and we set it aside.

50. We remake the decision as follows: for the reasons earlier given we are satisfied that the Secretary of State's decision was not in accordance with the law. It follows that the original decision of the Secretary of State remains outstanding with the practical effect that the Secretary of State has to remake it.

Signed Date

Lord Bannatyne
Sitting as a Judge of the Upper Tribunal