



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/16938/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons**

**On 24 March 2015**

**Promulgated  
On 30 April 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**MR NAFEES AHMED HASAN BAGDADI  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R Pennington-Benton of Counsel instructed by Farani  
Javid Taylor Solicitors LLP

For the Respondent: Ms A Holmes, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Chamberlain promulgated on 11 December 2014 dismissing the appeal of Mr Bagdadi against a decision of the Secretary of State for the Home Department dated 2 April 2014 to refuse to vary leave to remain and to remove him from the United Kingdom pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.

## **Background**

2. The Appellant is a national of India born on 21 April 1973. He entered the United Kingdom on 5 November 2009 as a Tier 4 (General) Migrant with leave until 31 July 2011. On 24 August 2011 he was granted further leave to remain as a Tier 1 (Post-Study Work) Migrant valid until 24 August 2013. On 23 August 2013 he made an application for further leave to remain as a Tier 1 (Entrepreneur). On 13 March 2014 the Appellant was interviewed by the Respondent in connection with his application. The application was then refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 2 April 2014, and a Section 47 decision was also communicated by way of that letter.
3. The Appellant appealed to the Immigration and Asylum Chamber.
4. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in her determination. The Appellant sought permission to appeal which was granted by First-tier Tribunal Judge Chambers on 4 February 2015.
5. The Respondent has filed a Rule 24 response dated 12 February 2015.

## **Consideration**

6. The Appellant's Tier 1 (Entrepreneur) application was based on his business enterprise, SNM Solutions Limited, offering marketing services. The Respondent was not satisfied in respect of the Appellant's business proposition. The Respondent was not satisfied that the Appellant genuinely intended and was able to establish his business within the next six months or that he genuinely intended to invest the money that he said was available for investment.
7. The Secretary of State essentially addressed three aspects of the application in the RFRL:
  - (i) In respect of the viability and credibility of the source of the money held by the Appellant in his UK-based account;
  - (ii) The viability and credibility of the Appellant's business plans and market research into his chosen business sector; and
  - (iii) The Appellant's previous educational and business experience.

These matters were essentially factors listed under paragraphs 245DD(i) of the Immigration Rules as being some of a number of disparate factors relevant to an assessment under paragraph 245DD(h) of the Immigration Rules. The Immigration Rules are a matter of record and I do not propose to set them out here.

8. On appeal the First-tier Tribunal Judge essentially upheld the Respondent's decision.

9. On appeal to the Upper Tribunal primary reliance is placed on essentially a single submission - albeit it is argued that it impacts upon each of the contentious areas identified above. The principal submission is based on the decision in **Ahmed v Secretary of State (PBS: admissible evidence) [2014] UKUT 00365 (IAC)**. This is a decision which has implications that usually provide difficulties for Appellants such as Mr Bagdadi. The head note to the case of **Ahmed** is in the following terms:

*"1. Where a provision of the Rules (such as that in paragraph 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 Section 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. The position is encapsulated at paragraph 5 of the decision in **Ahmed** in the following terms: having cited the substance of Section 58A the Tribunal continues

*"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."*

11. In the context of the present case Mr Pennington-Benton argues that the Judge repeatedly erred in according adverse weight to the Appellant's failure to produce supporting evidence to corroborate his assertions or otherwise to address the issues and concerns raised by the Respondent. It

is said that the Appellant was advised not to submit any further evidence as it was not admissible pursuant to the guidance contained in the decision of **Ahmed** and accordingly the Judge was in error to attach adverse weight to the failure to submit evidence that was in any event inadmissible.

12. That the Judge did find the absence of supporting evidence an adverse factor is not seriously disputed by Ms Holmes today. Indeed it is evident on the face of the determination that this is the case at a number of points. For example, in respect of the issue with regard to the source of funds the Judge says this at paragraph 10 of the decision:

*“He said in his witness statement that his father wanted him to establish a business in the United Kingdom but he provided no evidence from his father to corroborate this claim.”*

And then in the same context at paragraph 12 the Judge says:

*“I therefore do not know the source of the funds, and I do not know whether they are genuinely available to the Appellant. They are in his account, but the Appellant has not substantiated his claim that they have come from his father and from his previous earnings.”*

13. Similarly, in respect of the Appellant’s previous experience the First-tier Tribunal Judge says this at paragraph 20:

*“In the notice of decision the Respondent refers to experience as sales executive working in Dubai and as a marketing manager working in Mumbai but I have no evidence of either of these. Given that the Respondent was not satisfied as to his previous experience, it would have been reasonable for the Appellant to have provided evidence of this claimed experience.”*

14. However, Ms Holmes argues that at least insofar as the issue of market research and the business plan is concerned the First-tier Tribunal Judge made sustainable findings by reference to matters that were not directly related to the failure to produce supporting evidence post-application or postdecision. I will address those matters in due course but before I do so it is appropriate to give some further regard to the overall context in which those matters will require to be considered.
15. As identified above, there were really three areas of contention raised by the Respondent. In respect of the source of funds the position was that the Appellant had been asked about the money in his bank account during the interview that was conducted on 13 March 2014. The record of

interview is on file in the Respondent's bundle that was before the First-tier Tribunal. The Appellant had produced documents at that interview that confirmed the source of the funds essentially having been transferred from his father. In the Respondent's RFRL whilst reference is made to the Appellant's bank accounts no reference is made to the transfers that were seen at the interview. In the circumstances the following observation in the RFRL-

*"from this evidence I am unable to assess the source of these funds, therefore, I am not satisfied that you have proven that there is viable and credible source to the funds required as referred to in Table 4 of Appendix A"*

is not obviously sustainable and indeed before me Ms Holmes acknowledges that she would not seek to argue that there was a logical support for the conclusion bearing in mind what had transpired at the interview.

16. As regards the qualifications of the Appellant, the relevant part of the RFRL is in the following terms:

*"You have a Master of Business Administration awarded by University of Wales gained 2 August 2011.  
You also stated that you have a Bachelor in Commerce gained in India; no evidence of this has been seen.  
You have experience as a sales executive working in Dubai, as a Marketing manager working in Mumbai. With experience in the United Kingdom, as a team leader for EDF and N Power also as a consultant for Q4.  
As a result of the above I am not satisfied that you have demonstrated that you are suitable qualified or have any relevant experience to run a marketing business."*

17. Ms Holmes acknowledges that there is a 'gap' between the listing of the Appellant's qualifications and experience and the conclusion stated that this does not demonstrate that he is suitably qualified or has relevant experience. This passage of the RFRL is in fact devoid of any reasons, and Ms Holmes acknowledges that she would not be in a position to support the 'reasoning' accordingly.
18. That leaves the issue of the business plan and the market research. In this respect the RFRL identifies that the Appellant's business plan was essentially a copy of a standard plan and observes *"given that you are claiming to be offering services which will be tailored to individual clients the contract does not demonstrate this"*. It is also said that the Appellant

gave little detail of the market research that he had carried out into his potential market.

19. The First-tier Tribunal Judge addressed the issue of the business plan and market research from paragraph 14 of the decision. Within that, as has been identified during the course of submissions today, the Judge on at least four occasions makes reference to the absence of supporting evidence and at paragraph 16 the Judge states with regard to the Appellant's claim to have spoken to a particular business "*there was no evidence to substantiate his claim that he had approached them*". Within the same paragraph in respect of two other business concerns the Judge states: "*He was asked if he had any evidence to show that this is what he had done for these companies and said that he had not brought it with him as he had not been asked to*". I pause to note that the reference to "*not been asked to*" echoes the assertion that the Appellant was advised that any new evidence would be inadmissible. The Judge repeats a reference to this particular matter in the following sentence, stating:

*"Given that his application was refused because the Respondent did not consider him to be a genuine entrepreneur I find his failure to provide evidence of the work he claims to have done casts doubt on the genuineness of his application."*

20. A further reference to the absence of evidence is made at paragraph 17:

*"He said in his statement that his actual business plan was notes scribbled on an A5 pad but he provided no evidence of this. He said that he had had to digitalise the business plan to put it into a presentable format but did not give any further details or explanation of how he came up with his business plan in his statement",*

21. There is a yet further reference to the absence of evidence at paragraph 18:

*"I find that the Appellant has provided no evidence of the work that he has been doing, and that all of the businesses with whom the Appellant claims to be doing business are owned by friends."*

22. Over and above these quoted references there are references to the Appellant's oral evidence. I have already included in the quotation from paragraph 17 the reference to an absence of an explanation of how the Appellant had come up with his business plan in the first place. At paragraph 18 the Judge stated that she found the Appellant not to be credible with regard to the services that he was providing to two of the businesses with whom he claimed to have contracts:

*“The Appellant said that he was selling the products from these companies on eBay and Google. He was asked why these companies would need him to do this and said that these people were in retail and did not have much time to handle online sales. He said that they were busy handling customers, stock and staff. I did not find this to be a reasonable explanation. The companies he claims to be doing market research for operate in logistics (Zygon) and kitchen design (Space Project) and I find that it is unlikely that they would need the Appellant’s services in order to advertise their products online, given that he said that Zygon had been operating for two to three years and Space Project for about ten years.”*

23. The Judge also expressed concerns about the Appellant’s abilities in the following passage, also from paragraph 18:

*“The Appellant also said at the hearing effectiveness of the marketing for these companies by using Google ads. He was then asked whether he had put any of these companies onto Google ads and said that he had not, but that he would ask IT specialists to do so. Given that using Google ads was one of the main ways that he said he would help to maximise the effectiveness of the marketing, I find that it casts doubt on his claim that this is central to his methods, given that he has not done it yet.”*

24. It is clear in my judgment that the First-tier Tribunal Judge had regard not merely to the absence of supporting documents but also aspects of the Appellant’s presentation and his answers under cross-examination. However, I must consider this assessment within the overall context of the Appellant’s application and appeal. As identified within the Judge’s reasoning in respect of market research and business plan there are at least four passages where the Judge erroneously accords weight to the absence of supporting evidence. That must also be seen in the overall context of the errors in respect of the other aspects of the case, that is to say to do with the Appellant’s source of funds and his previous experience. I remind myself that under paragraph 245DD(h), which is what the Secretary of State has invoked, a decision-maker is required to undertake an evaluative process with reference to the factors in paragraph 245DD(i).
25. It seems to me that there are deficiencies in both reasoning and the approach to the admissibility of evidence in respect of some of those disparate factors and, looking at the case ‘in the round’, I am persuaded that those errors are not such that it can be said that the residual aspects with regard to credibility safely support the Judge’s overall conclusion. In the circumstances I find that the error in respect of the approach to evidence in not following the guidance in **Ahmed** as to the meaning and

effect of Section 85A(4) is a material error such that the decision of the First-tier Tribunal Judge must be set aside.

26. In reaching that conclusion, and in the context of considering remaking the decision, it seems to me that the effect of the errors is to have deprived the Appellant of a true and fair hearing before the First-tier Tribunal and in the circumstances the most appropriate outcome is for there to be a further hearing before the First-tier Tribunal in front of any Judge other than First-tier Tribunal Judge Chamberlain. The scope of that hearing and the evidence that may or may not be admissible will need to be considered very carefully in light of the decision of **Ahmed** or any other case that may follow it. I am given to understand that there may be a challenge to the substance of that decision albeit not necessarily a challenge within the context of that appeal because in that particular appeal the Appellants withdrew their appeal once the error of law point had gone against them and so there would be no onward appeal in that particular case.
27. Finally I should just mention Article 8. The First-tier Tribunal Judge dealt with Article 8 in paragraph 23 on the basis that it was not apparent that Article 8 was being pursued. There has been no challenge to that aspect of the First-tier Tribunal's decision to the Upper Tribunal and so the decision in respect of Article 8 remains unimpugned: accordingly it is only in respect of the Immigration Rules that the decision requires to be remade.

### **Notice of Decision**

28. The decision of the First-tier Tribunal contained material errors of law and is set aside.
29. The decision in the appeal is to be remade before the First-tier Tribunal by any judge other than First-tier Tribunal Judge Chamberlain.
30. No anonymity direction is sought or made.

*The above represents a corrected transcript of an ex tempore decision given on 24 March 2015*

Signed

Date: **27 April 2015**



**Deputy Upper Tribunal Judge I A Lewis**