



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

Appeal Number: IA/19047/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 14 July 2015**

**Decision & Reasons
Promulgated
On 27 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**MR SWAGATA ROY CHOWDHURY
(ANONYMITY ORDER NOT MADE)**

Appellant

Claimant

Representation:

For the Appellant: Ms A Holmes, Home Office Presenting Officer
For the Respondent: Mr S Karim, (Counsel instructed by Uzma Law Limited)

DECISION AND REASONS

1. This is an error of law decision. For convenience I shall refer to the parties as the Secretary of State who is the appellant in this matter and to Mr Chowdhury as the Claimant.
2. The Claimant born on 2 October 1981 and a citizen of Bangladesh, appealed the Secretary of State's decision to refuse to vary leave to

remain in the UK as a Tier 1 Entrepreneur under paragraph 245DD of the Immigration Rules HC 395 (as amended).

3. In a decision and reasons promulgated on 15 December 2014 the First-tier Tribunal (Judge Metzger) (FTT) allowed the appeal under the Immigration Rules. The FTT found the evidence given by the appellant to be credible. The FTT decision made reference to a substantial Reasons for Refusal Letter challenging that the Claimant was a genuine entrepreneur and to a witness statement prepared by the Claimant in response dated 3 November 2014. At [20] the FTT found "I found the appellant to be a credible witness. Although not all the documentation had been provided at the time of the application, I find that the appellant did provide sufficient information to address all the issues the respondent raised concerning whether the appellant was a genuine entrepreneur. Given the appellant's qualifications and employment history and, as the respondent acknowledges, his previous immigration history which had not caused any difficulties, I find the appellant has established to the relevant standard that he is a genuine entrepreneur. I find that he has addressed all the concerns the respondent raised in the refusal letter."

Grounds of Application

4. The Secretary of State argued that the FTT failed to give reasons or adequate reasons for findings on material matters. The refusal letter referred in detail to the application and discrepancies were raised. The credibility of the funds and credibility of the business plans were of concern. An advert on Gumtree was no longer running, and reference was made to a previous application refused for credibility reasons, and because the appellant lacked qualifications to take up the position. The FTT failed to engage with any of the credibility points or provide reasons for allowing the appeal.
5. The second ground relied on was that the FTT made a material misdirection of law. The FTT [10] admitted evidence not included in the application (**Ahmed and Another** (PBS: admissible evidence) [2014] UKUT 365 (IAC)). No points had been awarded under the three categories of Appendix A.

Permission

6. Permission to appeal was granted by First-tier Tribunal (Judge PJG White) who found arguable errors of law, firstly as to the central issue in the appeal, the viability and credibility of the appellant's proposed business. Secondly that the FTT failed to make adequate findings on many of the numerous issues raised in the refusal letter and thirdly that the FTT wrongly took into account documents not submitted with the application (**Ahmed**).

Rule 24 Response

7. The Claimant submits that it is not necessary for the FTT to address every single issue in the determination. The FTT was entitled to come to the decision it did having heard the evidence and read the documents in support. Reasoning need not be extensive if the decision as a whole makes sense. There was no misdirection of law. Reliance was placed on **Shizad (sufficiency of reasons: set aside) [2013] UKUT 0085.**
8. The Secretary of State raised no issues in relation to the mandatory evidence. It was submitted that **Ahmed** was not applicable.

Submission made at Error of Law Hearing

9. At the hearing before me both representatives made submissions. Ms Holmes relied on the grounds of appeal.
10. Mr Karim produced a skeleton argument upon which he sought to rely in preference to the Rule 24 response.
11. He submitted that the FTT was fully aware of the respondent's reasons why the matter was refused. The FTT decision set out evidence given by the Claimant which correlated with the concerns raised by the Secretary of State and with his account given in interview. Documentary evidence did not have to be provided to establish credibility of the Claimant and/or his business. The Claimant submitted all the documents needed, he attended an interview and had not been asked to produce further documentation. It was open to the FTT to accept the Claimant's credible oral evidence. It was unfair that the Claimant was not given the opportunity to produce new documents following the interview.
12. In **Ahmed** the Secretary of State was prepared to give the opportunity to provide further documentation post interview. Reliance was placed on **Ex parte Gondolia** and **Shizad** (headnote (2)).
13. Mr Karim further submitted that the second ground disclosed no error of law in light of the fact that the FTT had already found the Claimant to be credible.
14. Ms Holmes responded that it was simply not sufficient for the FTT to indicate that the Reasons for Refusal Letter had been read, to set out evidence and allow the appeal on credibility findings. There was a necessity to make actual findings which engaged with the issues raised in the refusal letter.
15. At the end of the hearing I reserved my decision. Ms Holmes submitted that in the event of finding a material error, it was open to the Upper Tribunal to dismiss the appeal on the basis of the evidence before the First-tier Tribunal. Mr Karim argued that if it is concluded that the Tribunal

failed to grapple with the evidence and issues, a rehearing by the FTT was needed. There were issues of fairness to be pursued before the First-tier Tribunal.

Discussion and Decision

16. I find a material error of law in the decision of the First-tier Tribunal. Whilst accepting that reference was made to the “substantial” Reasons for Refusal Letter and to the Claimant’s witness statement responding to concerns raised by the Secretary of State, the FTT failed to engage in any further detail or at all.
17. The Secretary of State raised concerns about the provenance and source of the investment funds that the Claimant was seeking to rely on and was not satisfied with the Claimant’s explanation that they came from his savings, his parents and from a previous business. For example bank statements showed large amounts credited to the account on four dates in October 2013 and no evidence was provided as to the provenance of those funds. The Secretary of State raised concerns as to the viability and credibility of the business plans and market research and as to the Claimant’s previous educational qualifications and lack of business experience. The Claimant failed to provide a transcript or diploma to show what modules were studied and there was no evidence to confirm that he was working for Costa Coffee as an assistant manager.
18. I am satisfied that the FTT erred in law by a failure to show that careful consideration was given to the concerns raised by the Secretary of State and/or give any or any adequate reasons for finding that the Claimant was a credible and reliable witness and/or reasons why his oral evidence was capable of meeting the concerns raised. Other than a finding that the Claimant was a credible witness the FTT did not make any findings of fact in terms of establishing that the Claimant was a genuine entrepreneur with reference to the concerns raised in the Reasons for Refusal Letter.
19. As was emphasised on behalf of the Claimant at the hearing before me, no concerns were raised by the Secretary of State as to the reliability of the documents produced in support of the application and which are listed in the hearing bundle marked C-R. However, I am satisfied that the FTT admitted in evidence documents that were not before the decision maker and which were produced at the hearing, for example the Lloyds bank statements appearing at pages 27 to 29, P60s, documents from Costa Coffee, leaflets, a business card, market research and an MBA transcript. In so doing the FTT failed to apply Section 85A(4) of the Nationality, Immigration and Asylum Act 2002. This statutory provision is expressed as an exception to a general Rule that all relevant evidence may be considered and applies where there is an appeal against an immigration decision under the points-based system. As was held in **Ahmed** “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." Further, the Tribunal in **Ahmed** found no distinction as between non-points based and points based matters. I am satisfied that the FTT did take into account evidence that was not before the decision maker and as evidenced in the decision at [6, 9, 11, 12 and 16], and which amounts to an error of law.

20. I find material errors of law in the decision. I set aside the First-tier Tribunal decision.

Remaking the Decision

21. I have considered the submissions made by both representatives as to how this matter should be remade. The decision is lacking as a result of the absence of findings of fact and reasons demonstrating an engagement with the detailed concerns raised by the Secretary of State. I find that aside from the Claimant's oral and written evidence the Claimant himself has failed to adequately address the matters raised and has failed to discharge the burden of proof (to the required standard) on him to show that he meets the relevant Rules. The First-tier Tribunal took into account evidence that was not admissible and that was not before the decision maker. I am prevented by statute from admitting that evidence. I see no merit in a fresh hearing before the First-tier Tribunal notwithstanding that lack of findings made. On the evidence that was before the First-tier Tribunal there was no prospect of the Claimant succeeding in his appeal without more evidence. I dismiss the appeal on immigration grounds. It is of course open to the Claimant to submit a fresh application and to rely on the documents that have since been provided in support of his application.

Notice of Decision

22. I find material errors of law by the FTT.
23. The decision is set aside.
24. I remake the decision by substituting my decision that the appeal is dismissed on immigration grounds.

No anonymity order is made.

Signed

Date 24.7.2015

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and so there is no fee award.

Signed

Date 24.7.2015

Deputy Upper Tribunal Judge G A Black