



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

Appeal Numbers: IA/03988/2015
IA/03805/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 7 March 2016**

**Decision & Reasons Promulgated
On 31 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**FEROZ SHAH
BILAL KHAN
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondents: Mr Richardson instructed by Elegant Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal (“FtT”) Mays, promulgated on 4 September 2015, to allow the respondents’ appeal against the decision to refuse them leave to remain in the UK as Tier 1 (Entrepreneur)

Migrants. The FtT allowed the appeal on the basis that the decision was not in accordance with law and directed that the respondents be given an opportunity to respond to issues raised by the Secretary of State before a decision is made on their application.

2. The respondents (hereinafter “the claimants” and individually “the first claimant” and “the second claimant”) are citizens of Pakistan.
3. The first claimant, who was born on 21 December 1985, was granted leave to enter the UK on 10 January 2009 on a student visa and thereafter was granted leave to remain as a Tier 1 (post study) Migrant. On 22 August 2014 he applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points Based System.
4. The second claimant, who was born on 1 August 1989, was granted leave to enter the UK on 26 January 2009 as a student. Thereafter he was granted leave as a Tier 4 (General) Student and then as a Tier 1 (Post Study) Migrant. On 8 August 2014 he applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points Based System.
5. The claimants’ case is that they have established, and are directors of, a business consultancy firm and that they satisfy the requirements under the Points Based System to be granted leave to remain as a Tier 1 (Entrepreneur) Migrants.
6. The Secretary of State, following an interview with the claimants on 22 October 2014, rejected their applications on the basis that she was not satisfied as to the genuineness of their intention to establish and invest funds in a business. Both claimants were sent a refusal letter, dated 12 January 2015, stating that they had failed to demonstrate they were genuine entrepreneurs in accordance with Paragraphs 245DD(h) and (i) of the Immigration Rules. The Secretary of State gave several reasons for so finding, including:
 - a. The absence of evidence of the business being developed before it was incorporated on 8 July 2014 and the lack of preparation to establish it.
 - b. Only a single contract with a third party was submitted and it was considered to not be genuine. The Secretary of State gave a number of reasons for reaching this conclusion about the contract which were based on an analysis of the contract itself, internet research about the third party with whom the contract was entered (hereinafter “the third party”) and claimed discrepancies in the interviews with the two claimants.
 - c. Failure to supply documents to account for business expenditure.
 - d. Discrepancies in information given at interview by the claimants as to sums invested in the business, registering the website and involvement of a third party (called “The Scorp”).
7. The claimants appealed and their appeal was heard by FtT Judge Mays.

Decision of the First-tier Tribunal

8. The FtT stated that, following Ahmed and another (PBS): admissible evidence [2014] UKUT 00365 (IAC), it could not consider any documents that were not before the decision maker when the decision was made. The claimants had submitted a number of such documents and the FtT, at paragraph [22], made clear they would not be considered.
9. The FtT did not then address the substantive matter that was under appeal; that is, whether the claimants were entitled to leave to remain in consequence of meeting the requirements under Paragraph 245DD of the Immigration Rules including in particular those at sub-paragraphs (h) and (i) which pertain to the genuineness of the application.
10. Instead, the FtT considered whether the Secretary of State's decision was procedurally fair. At paragraph [23] the FtT stated that:

"The Appellants attended an interview relating to their applications, at which they were asked a number of questions. The issue which arises is whether that interview and the reliance on material procured by the Respondent from research carried out on her behalf which was not put to the Appellants was procedurally unfair."

11. Following a detailed review of the issues raised by the Secretary of State, the FtT concluded at paragraph [37]:

"I have found that the Respondent should have put the research undertaken and the conclusions she draw from that to the Appellants as a matter of fairness. The Respondent did not allow the Appellants the opportunity of making representations in relation to material factors upon which the Respondent founded in making her decision. The failure to do so means that the Respondent has failed to comply with the common law duty of fairness and the requirement to act fairly in the decision making process. For these reasons I conclude that the Respondent's decision is not in accordance with law"

Grounds of appeal and submissions

12. There are two grounds of appeal:
 - a. firstly, that the FtT failed to adequately reason why the Secretary of State's decision was not in accordance with law; and
 - b. secondly, that there was no procedural unfairness as the claimants had an opportunity to respond at the appeal hearing (which they attended) to the points taken against them in the refusal letter.
13. Mr Melvin argued that although the FtT made numerous findings for and against the refusal letter it did not adequately reason why the appeal should be remitted. He submitted that, read as a whole, and taking into account how the claimants responded during their interviews, it is clear that neither claimant has the expertise to run the proposed business. There were obvious discrepancies between them at interview, it was apparent little or no research had been conducted by them and they should not have been taken by surprise in respect of the points taken against them by the

Secretary of State. Based on the evidence before it, the FtT should have dismissed the appeal.

14. Mr Richardson responded by stating that there are only two points made in the grounds of appeal: (a) that the decision lacked adequate reasoning; and (b) the claimants had an opportunity to give oral evidence to counter the points taken against them but chose not to do so.
15. With regard to the first point, Mr Richardson argued that the FtT's decision is well reasoned and makes clear where it found there to be procedural unfairness and where it did not. As the claimants had not been given an opportunity to address a number of issues raised by the Secretary of State it was not possible for the Secretary of State (or for the FtT, making a decision on the basis of the evidence that was before the decision maker) to fairly make a decision.
16. In respect of the second point, Mr Richardson argued that under Ahmed the claimants were not able to give new evidence at the hearing and the FtT properly had Ahmed in mind when considering whether the decision taken by the Secretary of State was procedurally fair.

Consideration

17. In considering the first ground of appeal, which concerns the adequacy of the FtT's reasoning, I have kept in mind the recent Upper Tribunal decision VV (grounds of appeal) Lithuania [2016] UKUT 00053 (IAC) where it is stated:

An application for permission to appeal on the grounds of inadequacy of reasoning in the decision of the First-tier Tribunal must generally demonstrate by reference to the material and arguments placed before that Tribunal that (a) the matter involved a substantial issue between the parties at first instance and (b) that the Tribunal either failed to deal with that matter at all, or gave reasons on that point which are so unclear that they may well conceal an error of law.

18. The FtT's decision is far removed from the type of decision contemplated in VV as being one where a ground of inadequacy of reasoning could prevail. The FtT has dealt, in detail, with the issue of procedural fairness and has clearly explained why it reached the conclusion that the Secretary of State's decision was not in accordance with law.
19. The FtT set out its reasons for finding there was procedural unfairness at, inter alia, paragraphs [25], [26], [27], [29] and [31]. In these paragraphs the FtT considered particular issues raised by the Secretary of State in her refusal letter that were relevant to the question of the genuineness of the application and then set out its reasons why, in the context of reaching a finding on these issues, procedural unfairness had arisen. For example, at paragraph [25] the FtT described how the Secretary of State made an incorrect assumption about where the second claimant had previously worked but failed to give him an opportunity to clarify the position. At paragraph [27] the FtT

considered the Secretary of State's internet research which purported to show the primary business at the location of the third party appeared to be a hair stylist and found that unfairness arose from not putting this to the claimants. At paragraph [29] the FtT found unfairness arising from the Secretary of State placing reliance on the results of an internet search about the funds available to and activity of the third party without raising the matter with the claimants. And at paragraph [29] the FtT found that the Secretary of State, before relying on what it understood had been said by the first appellant about training employees, should have put her concerns to him.

20. Having found there to be a number of instances where the Secretary of State failed to give the claimants an opportunity to respond to or comment upon information obtained by, or conclusions drawn by, the Secretary of State the FtT determined that there had been a failure to act fairly in the decision making process.
21. In my view, the FtT has written a clear and cogent decision, in which the parties would not have been left in any doubt as to the reasons the decision had been reached. Accordingly, there is no merit in submitting, as the Secretary of State does in its first ground of appeal, that the decision contains an error of law because of inadequate reasoning.
22. I now turn to the second ground of appeal, whereby the Secretary of State argues that there was not procedural unfairness because the claimants had an opportunity to give oral evidence at the appeal hearing.
23. This appeal concerned a decision of the Secretary of State made under the Points Based System where the prohibition on new evidence specified in section 85A(4) of the Nationality, Immigration and Asylum Act 2002 applies.
24. The Upper Tribunal has interpreted the prohibition on new evidence in a strict fashion. As explained in Ahmed:

"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."
25. The Upper Tribunal in Ahmed makes clear that in a case determined under the Points Based System the FtT not only must ignore any material that was not before the Secretary of State's decision maker but cannot make a decision on the basis that a different decision would have been reached had the information been presented differently.
26. Following Ahmed, the FtT in this appeal could only have placed very limited and circumscribed reliance on oral evidence given by the claimants at the hearing. This is because the oral evidence at the FtT hearing would not have been before the decision maker and the claimant's appeal could only succeed before the FtT if the decision

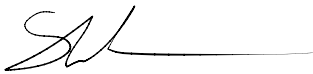
maker, with the information before him (which would of course not include the oral evidence at the FtT hearing) should have made a different decision.

27. Accordingly, I do not accept the Secretary of State's argument that the claimants had an opportunity to address the points raised in the rejection letter at the appeal hearing. They had no such opportunity because following Ahmed the FtT was obliged to make its decision on the basis of the material that was before the decision maker and not on the basis of new evidence given by the claimants at the hearing.
28. For the reasons I have given, I am satisfied that the Secretary of State is unable to succeed under either of her grounds of appeal and accordingly I find that the decision of First-tier Tribunal Judge Mays shall stand.

Decision

- a. The appeal is dismissed.
- b. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 18 March 2016