



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/10482/2014

THE IMMIGRATION ACTS

Heard at Glasgow
On 26 November 2015

Decision & Reasons Promulgated
On 30 March 2016

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MIRZA SHAMAYEL MUSTAFA

Respondent

Representation:

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr G Coll, Advocate, instructed by Westkin Associates

DECISION AND REASONS

- 1) This is an appeal by the Secretary of State against a decision of Judge of the First-tier Tribunal Freer allowing an appeal by Mr Mirza Shamayel Mustafa (hereinafter referred to as "the applicant").
- 2) This appeal has a lengthy history. The appeal was brought against a decision dated 14 February 2014 by the Secretary of State refusing an application for leave to remain as a Tier 1 (Entrepreneur) Migrant and making a decision to remove the applicant. The appeal was heard in May 2014 before the First-tier Tribunal and dismissed. There was an appeal to the Upper Tribunal, which was heard in August 2014. The appeal was

remitted to the First-tier Tribunal to be heard before a different judge with no findings preserved.

- 3) Following the remittal the appeal was heard in January 2015 before Judge Freer, who allowed the appeal. The Secretary of State was then granted permission to appeal to the Upper Tribunal.
- 4) The hearing then came before me on 28 July 2015. I found errors of law in the decision by Judge of the First-tier Tribunal Freer such that the decision of the First-tier Tribunal should be set aside. I sought to re-make the decision in the Upper Tribunal. On the day of the hearing, however, there was insufficient time available and counsel for the claimant did not have before her all the documentary evidence which had been before the First-tier Tribunal. Because of this the hearing was adjourned for the decision to be re-made at a later hearing before the Upper Tribunal.
- 5) The appeal came back before me on 26 November 2015. At this hearing there was a different counsel for the applicant, namely Mr G Coll. There was discussion, to which I will refer further below, about the intended scope of the resumed hearing.

Error of law

- 6) My decision finding an error of law was issued to the parties on 28 October 2015. I do not proposed to repeat at length the terms of that decision but I will refer to the salient points.
- 7) The grounds upon which the Secretary of State had refused the application for leave as a Tier 1 (Entrepreneur) Migrant were that the applicant had not shown that he was a genuine entrepreneur or that he had access to the funds required under the Rules. Judge Freer made findings in favour of the applicant in relation to both of these issues. The Secretary of State argued that this decision was flawed by a number of errors. My decision on these errors of law was as follows:

“22) I find that there are errors of law in the decision by the Judge of the First-tier Tribunal such that it should be set aside and re-made. First, the judge referred to the wrong standard of proof. This may be a word-processing error. Even so, it indicates a lack of care. Where, as in an appeal such as this, there are issues of credibility and conflicts in the evidence, it is difficult for the parties to be satisfied that the proper standard of proof has been applied where there has been a misdirection of this nature. Ms Stein submitted that the misdirection by the judge was not shown to be material. This submission would have carried more weight had there been fewer contentious issues arising from apparent discrepancies in the evidence. In an appeal such as this the losing party was entitled to know that any findings made by the judge had been made on a proper basis having regard to the correct standard of proof. This is not the case in relation to this decision.

- 23) The Judge of the First-tier Tribunal did not consider that the Secretary of State was entitled to take into account in making a decision that the applicant had no

experience of setting up his own business. The judge actually referred to this, at paragraph 46, as imposing an additional requirement outside the Rules. On this point the judge made a misdirection in law. In terms of paragraph 245DD(i)(iv) in making an assessment as to whether the applicant genuinely intends and is able to establish, take over or become a director of one or more businesses in the UK, the Secretary of State is entitled to take into account the applicant's previous educational and business experience (or lack thereof). The judge might not have erred had the judge decided that the Secretary of State had placed too much weight on this issue and that there was countervailing evidence indicating that the applicant would be capable of running his own business but this is not what the judge stated. However, the judge stated at paragraph 46 that the Secretary of State had applied a requirement which was not in the Rules and for the judge to state this was clearly an error of law. As this point went directly to one of the issues in the appeal, namely whether the claimant genuinely intended to set up a business in the UK, it cannot be said that the judge's misdirection would not have affected the outcome of the appeal.

- 24) On the basis of these two errors of law alone, the judge's decision should be set aside and re-made. It was argued before me, however, that there was a further error arising from the judge having taken into account post-application evidence contrary to section 85A(3) of the 2002 Act.
- 25) This was an issue which was considered by a panel of the Upper Tribunal in the case of Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365. In that appeal the specific argument was put before the Tribunal that the Secretary of State's decision was divided between non-Points Based matters and Points Based matters. 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. This argument was rejected in its entirety by the Upper Tribunal for reasons set out in its decision. It was not argued before me that the decision in Ahmed and Another was wrongly decided and I consider that the reasoning in that decision should be followed. It is clear that the Judge of the First-tier Tribunal took into account post-application evidence not only in relation to the funding arrangements of the applicant for providing the required funds of £50,000, which was an issue under the Points Based System, but also in relation to the genuineness of the claimant's business plans. This is a further error of law leading to the setting aside of the decision."

Resumed hearing

- 8) Notwithstanding these findings about the standard of proof and the taking into account of inadmissible evidence Mr Coll nevertheless took the position at the resumed hearing before me that findings of fact in favour of the applicant which had been made by Judge Freer should stand. Mr Coll explained that all the documentary evidence was before the First-tier Tribunal. He was not expecting the applicant to give evidence at the resumed hearing. The applicant's wife was not available to give evidence. The appeal should be remade on the basis of submissions.

- 9) Mrs O'Brien pointed out that there were credibility issues relating to the evidence for the applicant. Mr Coll responded that he had expected the findings made by the First-tier Tribunal on credibility and reliability to be carried forward where there had been no remittal to the First-tier Tribunal. In response it was pointed out that the Secretary of State's refusal decision raised a number of issues, for example as to the genuineness of the business, where the issue of credibility was material.
- 10) At this point the hearing was adjourned for a short period to allow Mr Coll to take instructions. After the adjournment Mr Coll repeated that he did not intend to lead evidence. He proposed to make a submission.
- 11) I then pointed out to Mr Coll that it was not necessary for the decision to be re-made before the Upper Tribunal. As the Upper Tribunal had not yet made a final decision on the appeal, it was still open for the appeal to be remitted to the First-tier Tribunal.
- 12) Mr Coll then began his submission. I do not propose to record this in detail. During the course of his submission, Mr Coll referred to the decision of the Supreme Court in Mandalia [2015] UKSC 59. He submitted that where there was a gap in the documentary evidence provided by the applicant then, in accordance with Mandalia, the missing documents should have been requested from the applicant.
- 13) Mr Coll submitted that the decision of the Secretary of State should be quashed and re-made in favour of the applicant. It was pointed out that any change to the refusal decision was a matter for the Secretary of State. Mrs O'Brien confirmed this and said that there were policy instructions in relation to withdrawals. At this point Mr Coll indicated that remittal to the First-tier Tribunal would in his view be the proper course.
- 14) In the course of a brief submission, Mrs O'Brien pointed out that Mandalia referred to the Secretary of State's policy on evidential flexibility at a particular time. The current policy was now expressed in the Immigration Rules at paragraph 245AA. She submitted that this was not a case which depended upon the submission of a missing document. The case turned on credibility and there were concerns about the evidence. She could not see, however, how the case could be decided fairly at the resumed hearing.
- 15) Accordingly, as acknowledged by the parties, the position was that I was unable, albeit that I had wished to do so, to re-make the decision in the Upper Tribunal. The appeal will be remitted to the First-tier Tribunal for a hearing before a different judge with no findings made by the First-tier Tribunal preserved. In other words, the hearing before the First-tier Tribunal will be in effect a fresh hearing with the credibility of the evidence at issue.

Conclusions

- 16) The making of the decision of the First-tier Tribunal did involve the making of errors on a point of law.

17) I set aside the decision.

18) I remit the appeal to the First-tier Tribunal for rehearing before a judge other than Judge Freer with no findings preserved.

Anonymity

19) The First-tier Tribunal did not make an anonymity order. I have not been asked to make such an order and I see no reason of substance for so doing.

Signed

Date

Upper Tribunal Judge Deans