Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/48054/2014
& IA/48061/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 15 December 2015	**On 5 January 2016**

Before

The President, The Hon. Mr Justice McCloskey and
Upper Tribunal Judge Plimmer

Between

FAWAD MASUD
MUHAMMED NADEEM

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellants:	In person, accompanied by one Mr Wheeler, a "McKenzie" friend
Respondent:	Mr J Parkinson, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 12 November 2014, whereby the applications of the Appellants, nationals of Pakistan, for leave to remain in the

United Kingdom in the capacity of Tier 1 (Entrepreneur) Migrant were refused. Their ensuing appeals to the First-tier Tribunal (the "*FtT*") were dismissed.

The impugned decisions

2. In refusing the Appellants' aforesaid applications, the Secretary of State awarded zero points in respect of the "*attributes*" of (a) funds held in regulated financial institutions and (b) funds disposable in the United Kingdom. In the decision letter in the case of Mr Nadeem, the issue of the "*viability and credibility of the source of the money*" was considered and reference was made to an interview of this Appellant. This gave rise to the following conclusion:

> "Therefore from the evidence provided and the answers given at interview, I am not satisfied how you have obtained your share of the £50,000. The discrepancies provided at interview questions [sic] the source of income and your viability and credibility of any intentions to invest the £50,000 into a business in the United Kingdom."

The decision maker then turned to consider the issue of the "*viability and credibility of the applicant's business plans and market research into their chosen business sectors*".

Having rehearsed certain aspects of the documentary evidence, coupled with answers provided in interview, the decision maker further concluded thus:

> "Therefore, from the evidence provided, the discrepancy of the answers given at interview along with the lack of any feasible evidence to support your trading activity, I am not satisfied with the viability and credibility of your business plans and market research into your chosen business sector which outlines concerns over the genuineness of your business."

3. The decision letter contains a third conclusion:

> "Therefore I cannot be satisfied that during your period of Post-Study leave you have undertaken genuine and credible steps to make preparation for planning, launching and developing a business idea in the United Kingdom and that you have gained the relevant experience necessary to assist you in the day to day running of a business."

The omnibus conclusion was expressed in the following terms:

> "Based on the above consideration the Secretary of State is therefore refusing your application because you have not satisfactorily demonstrated that you are a genuine entrepreneur, as set out at paragraph 245 DD(h) …"

The refusal decision in the case of the other Appellant, Mr Masud, was couched in materially indistinguishable terms.

Decision of the FtT

4. We have considered this in conjunction with the grant of permission to appeal. The Judge stated, in [59]:

> "… It is recognised by and is part of the Rules that the assessment of the genuineness of the intentions of the parties regarding this money [£50,000] and whether it is

> genuinely available involves taking into account the viability and credibility of the source of the money."

The Judge then observed that the mere production of "*a bank letter and statement showing the amount in excess of £50,000 standing in the joint account*" did not necessarily satisfy the requirements of the Rules. In the same context, he commented that "*… it is not a case of subjecting the finances stated to be available to an audit or other forensic accounting mechanism …*"

5. In the ensuing passages, the Judge made the following observations and/or findings:

   (a) There were several significant deposits in the relevant bank account which the second Appellant, Mr Nadeem, had failed to explain. This "*… gives rise to serious concerns that the funding was genuinely his own and available for the purposes of the business*".

   (b) While Mr Nadeem had claimed in interview that he was not then employed, this cast a shadow over three specific credits to his bank account, totalling over £3,000.

   (c) Mr Nadeem's claim that he had saved some £20,000 from earnings since his arrival in the United Kingdom was not, duly analysed, credible.

   Having conducted this analysis, the Judge made the following conclusion:

   > "I do not find … that the second Appellant [Mr Nadeem] has established on the balance of probabilities that he genuinely intended to invest [the requisite finances] … in the business, that the money … was genuinely available to him and would remain available to him until such time as it was spent for the purposes of his business and that he did not intend to take employment in the United Kingdom other than under the terms of paragraph 245 DE of the Rules."

   Founding on this conclusion, the Judge decided that Mr Nadeem (the second Appellant) did not meet the requirements of paragraph 245 DD(h)(ii)(iii) of the Rules and paragraph 245 DD(b). As the application was a joint one, this meant that the appeal of the first Appellant must necessarily fail also.

6. The essence of the grant of permission to appeal to this Tribunal emerges in the following passage:

   > "In fact, the Appellants had explained in their witness statements, at interview with the Respondent and in evidence at the hearing, the precise source of the £50,000. They exhibited to their witness statements and their appeal bundle various bank statements evidencing the transfer of their respective contributions of £25,000 from their own individual bank accounts into their joint business bank account. The Respondent had chosen not to cross examine either of the Appellants upon the banking entries or upon the bank statements, neither did the Judge raise any question of either Appellant as to the bank statements or the entries."

   Continuing, the permission Judge notes the suggestion that the Judge impermissibly traversed the boundary separating adversarial and inquisitorial proceedings. The linked complaint that the findings were not open to the Judge (ie were irrational) on

the basis of the evidence is noted. The arguable procedural unfairness of the Judge's decision is also acknowledged. Permission to appeal was granted accordingly.

Consideration and Conclusions

7. The grant of permission to appeal raises a clear issue as to the fairness of the hearing conducted by the FtT and its overall decision making process. In several recent decisions this Tribunal has given consideration to some of the fair hearing issues arising in this appeal. The question of law raised in appeals of this *genre* is whether there has been any infringement of the litigant's right to a fair hearing. In deciding this question, regard must always be had to the important contextual matters of the terms of the Secretary of State's decision, the manner in which the parties joined issue before the FtT, the issues which were expressly in contention between the parties in that forum and the focus of any cross examination of the appellant. We emphasise that this does not purport to be an exhaustive list. In making our decision, we have taken all of these factors into account.

8. We would highlight in particular, as noted in the grant of permission to appeal, the absence of any cross examination of the Appellants upon certain issues, the parallel lack of judicial questioning and the failure to engage properly with the explanations provided by the Appellants in their witness statements and when interviewed. This combination of factors impels to the conclusion that the decision making process of the FtT is vitiated by procedural unfairness.

9. We are also concerned that the FtT gave consideration to evidence which should have been excluded under section 85(a) of the Nationality, Immigration and Asylum Act 2002 and did so in a manner which was adverse to the Appellants. This discrete error of law has mixed elements of misdirection and procedural unfairness.

10. In the circumstances it is unnecessary to probe the further element of the grant of permission to appeal noted in [6] above. The decision of the FtT cannot survive and must be set aside.

11. One further issue identified by the panel as arising in this appeal focuses on the distinction between requirements in the Rules involving bright line answers and evaluative judgements by decision makers. In contrast, Rules requirements which involve the formation of an evaluative judgement on the part of the decision maker are of a different species. Given the decision which we have reached, it is unnecessary to explore this interesting legal issue further. The opportunity for the Upper Tribunal to provide more extensive guidance will doubtless arise in some future case. At this juncture, we simply alert the FtT to the importance of being cognisant of the distinction.

Decision

12. We decide and direct:

    (a) The decision of the FtT is set aside.

(b) We remit the appeal to a different constitution of the FtT for rehearing and fresh decision.

(c) The remittal is to Bradford.

(d) An early case management review should be convened.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 16 December 2015