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

Appeal Number: IA/02427/2016
1IA/02428/2016
IA/02429/2016
IA/02430/2016

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 22 November 2018**

**Decision & Reasons Promulgated**
**On 15 January 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE O'RYAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**(1) Mr MUDASSAR MOHIUDDIN**
**(2) Mrs AFSHAN SULTANA**
**(3) Mr VASEEM AHMED**
**(4) Mrs AYESHA BANU**
**(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr Avery, Senior Home Office Presenting Officer
For the Respondent: Ms Blair, Counsel, instructed by Zahra & Co Solicitors

**DECISION AND REASONS**

1

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1 This is an appeal brought by the Secretary of State for the Home Department against the decision of Judge of the First-tier Tribunal Malone dated 11th of June 2018, allowing the respondents' appeals against the decision of the Secretary of State dated 10 August 2016, refusing to vary the respondents' applications for leave to remain, and making decisions to remove them under section 47, Immigration and Asylum and Nationality Act 2006.

2 The first and third respondents had applied on 30 August 2014 for further leave to remain as a Tier 1 (entrepreneur) migrants. The second and fourth respondents are their respective spouses. 'Respondents' hereafter refers to the first and third respondents.

3 The respondents applied on 30 August 2014 for further leave to remain under paragraph 245DD of the Immigration Rules as an entrepreneurial team, operating a business known as Britinfo Services Ltd, which the judge described at [38] as a 'market research and surveying' business. The judge sets out the history of the application at [10]. The application was initially refused on 17 November 2014 on the grounds that the respondents' business advertising did not meet the requirements of the Immigration Rules. However, on appeal the Secretary of State conceded that the refusal could not be justified on the ground put forward, and the First-tier Tribunal allowed the Respondents' appeal and the matter came back to the Secretary of State for reconsideration. The respondents were then interviewed by the Secretary of State and 13 April 2016 in relation to the application, resulting in the decision made on 10 August 2016.

4 The judge noted that the Secretary of State had not been satisfied that the respondents met the requirements of paragraph 245 DD (iii), i.e. as to 'the viability and credibility of your business plans and market research into your chosen business sector'. The judge further summarised the Secretary of State's reasons for refusing the applications at [14]-[16], as follows:

> "14. The respondent was concerned as to (iii) because she considered the team, in interview, had given "indistinct" answers that "lacked specific information that we would expect the owner of the creditable business to be able to provide".
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> 15. Her concern was also in part caused by the fact that the business plan put forward by the team contained "substantial bodies of text from the sample business plan" for a business called "Palms and Bonds". The respondent had found this business plan on a website that provided "Business Development Sample Business Plans".
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> 16. The only other matter that led to the respondent's concern was that the team had not used a period of leave that have been granted under the Tier 1 (Post study work) provisions and 31 August 2012 until 31 August 2014 valuably. The team had acquired no business experience over that period."

5 The judge then gave reasons in the remainder of the decision for finding at [44] that "the respondent had no sustainable grounds for refusing the team's application". The judge allowed the appeals under the immigration rules, and on human rights grounds. It is common ground between the parties that the judge was entitled to, and indeed obliged, to determine the appeal under the 'saved provisions' under part 5 NIAA 2002 prior to the amendment of that part by Immigration Act 2014. It was also common ground that the evidential constraints of s.85A NIAA 2002 applied to the appeals.

6 The appellant Secretary of State's challenge to the judge's decision is on grounds, in summary, that the judge erred in law in allowing the appeal 'primarily' on the basis of post decision evidence (oral and documentary) that was submitted since the refusal letter (determination, paragraphs 18, 19, 21-24, 28, 29, 31-33, 43, 44), which, given that the appeal was governed by the saved provisions, including s.85A NIAA 2002 (4), and following Ahmed and Another (PBS: admissible evidence) [2014] UKUT 365 (IAC) and Olatunde v Secretary of State for the Home Department [2015] EWCA Civ 670, was impermissible in law.

7 Permission to appeal was granted on 4 September 2018 by Judge of the First-tier Tribunal Doyle on the basis that the appellant's ground of appeal was arguable.

8 I heard submissions from the parties. Mr Avery, for the appellant, argued that the judge had made reference within the decision to evidence contained within the respondents' bundle before the judge which clearly post-dated the date of decision, and the judge's finding that he was satisfied that the immigration rules were met was tainted by the judge having taken into account such post-decision evidence. The evidence was not admissible by reason of any exception as set out in s.85A NIAA, and Mr Avery argued that one could not unentangle the judge's findings based on the admissible evidence (submitted with the application or during the course of reconsideration), from the judge's findings on the post-decision documentary and oral evidence. The decision as a whole was unsustainable.

9 Ms Blair made submissions in defence of the judge's decision, with which I agree, and which I shall not set out; rather, I shall simply give my reasons below.

**Discussion**

10 The judge acknowledged at [12] that it was important to identify precisely why the team's application was refused. The judge then set out at [14]-[16] (see above) his understanding of the Secretary of State's reasons.

11 Indeed I find that at [14]-[16], the judge accurately reflects the content of the refusal letter, summarising the Secretary of State's position in relation to the application.

12 I now set out the way in which the judge resolved the issues that are raised at [14]-[16] of the judge's decision.

13 At [17], the judge provides:

> "I addressed the last point first. On the particular facts of these appeals, I am not persuaded that the team's failure to use the leave granted to it on the 31 August 2012 productively, if that were the case, could validly assist the respondent in gauging whether the team had been carrying on business since 30 August 2014."

14 It is correct to note that at [18] and [19], the judge refers to documentation before him regarding the third respondent's previous ownership of a different company, which he had sold to another party, before setting up the present company. The judge appears to consider documentation relating to the third respondent's ownership of that previous company, which does not fall within the list of evidence set out at page 2 of 7 of the decision letter dated 10 August 2016, describing the evidence which was considered by the Secretary of State in support of the application. At [21], however, the judge's reference to the respondent's incorporation of 'Britinfo' on 20 June 2014 does not appear to be a reference to new evidence; there is documentation regarding the existence of that company listed as having been considered by the Secretary of State, in the decision letter.

15 However, I find that even if the judge ought not to have considered post-decision evidence (not falling into the permissible exceptions under s85A), his having done so was not material to the judge's decision. That is because the judge had already, at [17], held that even if it were the case that the respondents had not used their period of leave to remain between 31 August 2012 to 31 August 2014 'productively', this would not validly assist the Secretary of State in gauging whether the team had been carrying on a business thereafter. There is no challenge brought in the appellant's grounds of appeal that that discrete finding was unsustainable in law. Paragraph [18] of the judge's decision commences 'In actual fact'. When considering the content and context of paragraphs [17] and [18], this expression is, in my view, equivalent to the judge saying 'In any event...'. I find that the judge had already rejected the third of the Secretary of State's complaints, as set out at [16] of the decision, at para [17] of the judge's decision. That that sustainable finding is not affected by any impermissible reference to post-decision evidence thereafter.

16 Further, the judge considers the appellant's concern that substantial parts of the respondents' business plan had been copied from another source at [34] onwards:

> "34. The witnesses told me they had engaged a professional to draft business plan. They had been referred to him. That evidence was not challenged. The respondent had visited a website showing sample business plans. It may well be that some standard wording had been incorporated into Britinfo's business plan. That, without more, does not call into doubt the genuineness of Britinfo's business plan. The business plan can only show what the proposed business was at the date of the plan.
>
> ...
>
> 36. I had little doubt that a not inconsiderable part of the business plan had been taken from sample business plans. As I say, without more, there is nothing of concern about that.
>
> ...
>
> 38. While the services the team provide can, in my judgement, be properly described as "market research and surveying", elegantly typed documents on Britinfo's headed writing paper were never contemplated and when ever created. Hence, I say the business plan was somewhat overwrought. I had no evidence to lead me to conclude that there was anything dishonest contained in the business plan."

17 Again, it seems to me that the judge considered the appellant's criticism of the respondent's business plan, and the fact that parts of it had been copied from a sample business plan, and has rejected that complaint. To the extent that the judge took into account oral evidence in that regard, it is to be noted that the oral evidence was to the effect, 'Yes, you're right, we did take it from somewhere else'. Such an admission could easily have been made in grounds of appeal or a skeleton argument. The fact that such a concession was made in oral evidence is irrelevant.

18 Again, the appellant's grounds of appeal to this Tribunal do not argue that the judge's reasoning was, in itself, unsustainable in anyway. The criticism is that the judge has taken into account post decision evidence in arriving at that conclusion. However, I find that this is not the case - the judge's reasoning at [34] is clear, that the use of sample business plans did not, in the judge's mind, without more, undermine the genuineness of the application for leave to remain.

19 Finally, the judge addressed the appellant's complaint that the respondents had given indistinct answers in interview that lacked specific information about their business plan and market research, at [39] onwards:

> "39. The final point raised in the Refusal Letter was that the team's answers in interview were "indistinct" and" lacked specific information that we would expect the owner of a creditable business to be able to provide".
>
> 40. I have read the interview record. I am unable to accept the Respondent's view of the team's answers. For instance, under the section headed "Contract Questions", appears the question: "What

> service/s have you provided for the contract/s?" Mr Mohiuddin replied: "We do marketing, we make strategy for them we given them market product knowledge and advertising strategy". Mr Ahmed answered the question as follows: "We do market survey, we do marketing plan, we help set up business, find locations for retail units, we do all the market surveys".
>
> 41. I do not find the answers given to that question to be "indistinct". Moreover, I do not find that they "lacked specific information the owner of a credible business would be able to provide". The team members gave the answers they did. They were not invited to develop those answers. The specific information it is alleged the team should have provided is not identified. I find that the team members answered the questions put to them satisfactorily. There is no force in the point the respondent makes."

20 I am of the view that the passages from the judge's decision which I have set out above adequately dealt with the Secretary of State's concerns. Although it is apparent from the judge's decision that some post-decision evidence was referred to elsewhere, the core reasoning given by the judge for rejecting the criticisms made by the appellant Secretary of State in the decision letter of 10 August 2016 was not dependent on the judge's view of any of that post decision evidence.

21 Therefore, I find that when the judge held at [44] "I have therefore come to the conclusion, for the reasons I have set out above, that the Respondent had no sustainable grounds for refusing the team's application", the judge was entitled to make that decision, and the outcome would have been the same even if the judge had not looked at any post-decision evidence.

22 I have found no material error in the judge's decision.

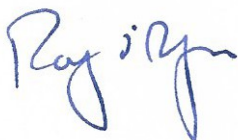
**Decision**

The decision did not involve the making of any material error of law.

The appellant Secretary of State's appeal is dismissed.

The decision of the judge allowing all of the respondents' appeals is upheld.

Signed: Date: 4.1.19



Deputy Upper Tribunal Judge O'Ryan