



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01407/2016
IA/01406/2016
IA/01408/2016
IA/01409/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12th April 2018

Decision & Reasons Promulgated
On 14th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

ABDUL [K] (FIRST APPELLANT)
ZUBAIDA (SECOND APPELLANT)
[MK] (THIRD APPELLANT)
[KK] (FOURTH APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr G O'Callaghan, Counsel instructed by M and K Solicitors
For the Respondent: Mrs H Abosie, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Abdul [K], his wife and two children against the decision of First-tier Tribunal Judge Asjad to dismiss their appeals against refusal of their applications for further leave to remain, that decision being dated 22nd February 2016.

2. The way the matter came before Judge Asjad was unusual. The applications had been made as long ago as 22nd December 2014. Mr [K] made his application on the basis that he was a Tier 1 Entrepreneur, and his wife and two children made their applications on the basis that they were his dependants.
3. The applications were originally refused on 29th January 2015 on the basis that the First Appellant, Mr [K], had not met the requirements of the Immigration Rules for leave to remain as an entrepreneur in that he had failed to demonstrate that he had a viable business plan. It followed from this that his wife and children could not succeed in their applications for leave to remain as his dependents. They appealed that decision and the matter came before Judge Khawar on 15th July 2015.
4. In a decision promulgated on 13th August 2015, Judge Khawar found that the First Appellant, Mr [K], did in fact have a viable business plan and thus fulfilled the requirements for leave to remain as a Tier 1 Entrepreneur. It may thus have been expected that Secretary of State would have granted his application for leave to remain in line with that decision.
5. However, the problem arises in this appeal arises from what Judge Khawar said in his concluding remarks at paragraph 16 of his decision

“Accordingly the Appellant is entitled to succeed in this appeal ... However, I note that the Respondent has not fully considered the Appellant’s application and intends to carry out a full verification check upon all documents submitted and will undoubtedly consider any credibility issues which may or may not arise”.
6. The above reference appears to have been to a standard paragraph that appears in every written refusal by the Secretary of State of an application of this type. This reads as follows -

“Please note, on this occasion we have not carried out full verification checks on the documents you submitted or the statements that you have made on your application form, as your application falls for refusal on other grounds as outlined above. However, the Home Office reserves the right in future to request independent third-party verification of any pieces of supporting documentation that you have provided with this application ...”.
7. Unfortunately, as a result of the observations quoted at paragraph 5 (above), the decision-maker in the instant appeal concluded that Judge Khawar had only allowed the appeal to the limited extent of remitting the matter for a full reconsideration by the Secretary of State upon all matters, including the viability of Mr [K]’s business plan. Indeed, that is the way the matter is put in the ‘immigration history’ section of the introductory notes to the Respondent’s bundle of documents. So it was that the decisionmaker in the instant appeal proceeded to refuse the applications upon substantially the same grounds as her predecessor, namely, that the Appellants had failed to meet the requirements of the Immigration Rules by showing that Mr [K] had a viable business plan.

8. Unsurprisingly, the Appellants appealed again. The matter this time came before Judge Asjad. The Appellant's took the point at this hearing that it was not open to the Respondent to re-refuse the application given that Judge Khawar had already allowed the appeal against its refusal under the Immigration Rules. This is how Judge Asjad dealt with that argument

"5. It would certainly appear from Judge Khawar's decision that the appeal was allowed outright under the Immigration Rules. Paragraph 18 of the decision explicitly states that the appeal is allowed under the Immigration Rules and there is no reference to the matter being remitted back to the Respondent. However in paragraph 16 of the decision the judge noted that the Secretary of State intended to carry out further verification checks which led to the decision being made on 22nd February 2016. As this is a decision that has been made by the Respondent and is the matter under appeal before me I do not find that I am in a position to do anything more than look at this decision and see whether or not it is correct. Whether or nor there are any issues regarding the original decision are matters that the Appellant ought to have raised by way of judicial review or appeal on a different occasion and it is not something that I am able to rectify in this decision. I am only able to assess the evidence before me and that is what I intend to do".

9. She then proceeded to look at the substantive merits of the application and thereafter reached adverse conclusions in relation to whether or not Mr [K] had a viable business plan such as to qualify for leave to remain as a Tier 1 Entrepreneur. She consequently dismissed the appeals.

10. I am satisfied that Judge Asjad's analysis at paragraph 5 is fundamentally flawed in law.

11. The position with regard to the second decision which was under appeal before Judge Asjad is succinctly summarised in the head note to the decision of **Secretary of State for the Home Department and Shamen Chomanga [2011] UKUT 00312 (IAC)**

"The parties are bound by un-appealed findings of fact in an Immigration Judge's decision. It is therefore not open to the Respondent following a successful and unchallenged appeal by an Appellant to make a further adverse decision on the same issue relying on the same evidence as before unless there is evidence of fraud or one of the exceptions identified in paragraph 35 of the judgment of the Court of Appeal in **Secretary of State v TB [2008] EWCA 997** applies".

12. It was not argued before either Judge Asjad or me that any of the limited exceptions to the principle that un-appealed findings are binding on the parties were applicable in the present appeal. Judge Asjad was of course right to say that the decision under appeal was the second decision. She was however wrong to say that it was for the Appellants to seek judicial review of that decision if they were dissatisfied with it. On the contrary, it was for the Secretary of State to challenge Judge Khawar's decision if she was not satisfied with it. It was not therefore open to the Secretary of

State simply to circumvent the appeal process by making a fresh decision which again refused the applications on the same grounds, although I should hasten to add that I am not suggesting that was done intentionally.

13. The correct analysis in my judgment, and therefore the one that Judge Asjad should have adopted, was as follows. The present application had been made prior to the amendments by section 15 of the Immigration Act 2014 to the rights of appeal under the Nationality, Immigration and Asylum Act 2002 had come into effect. It therefore followed that all the original Grounds of Appeal remained available to the Appellant. Where Judge Asjad went wrong in my view was in assuming that she had to deal with the second appeal on the same ground as that upon which the first appeal had been brought, namely, that the decision was not in accordance with the Immigration Rules. However, it was quite clear from the submission that was being made to her that the Appellants' representative was arguing that the appeal should be allowed on the ground that the second decision was 'not in accordance with the law'. The effect of allowing the appeal on this ground would have been to ensure that the original decision of Judge Khawar (to allow the appeal under the Immigration Rules) stood.
14. I therefore set aside the decision of Judge Asjad to dismiss the appeals under the Immigration Rules and substitute a decision to allow the appeals against the purported refusal on 22nd February 2016 on the ground that that refusal was not in accordance with the law. For the avoidance of doubt, and absent evidence that they are tainted by fraud, the Secretary of State must now grant the applications for leave to remain.

Notice of Decision

1. The appeals are allowed.
2. The decision of the First-tier Tribunal to dismiss the appeals under the Immigration Rules is set aside and substituted by a decision to allow the appeals on the ground that the decision of the Secretary of State to refuse the applications for leave to remain was not in accordance with the law

No anonymity direction is made.

Signed

Date: 9th May 2018

Deputy Upper Tribunal Judge Kelly