Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/03938/2015**
IA/03939/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 January 2018	**On 19 February 2018**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

RANA WAQAS SHAMSHAD
MOHAMMED SOHAIL WAJID

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik, instructed by Connaught Law
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Pakistan, born on 19 February 1988 and 13 March 1982 respectively. They have been given permission to appeal against the decision of First-tier Tribunal Judge Maciel dismissing their appeals against the respondent's decision to refuse their applications for leave to remain as Tier 1 (Entrepreneur) Migrants.

2. The first appellant entered the United Kingdom on 15 May 2010 with leave to enter as a Tier 4 (General) Student Migrant and was subsequently granted leave to remain as a Tier 1 (Post Study) Migrant until 8 August 2014. On 8 August 2014 he applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. The second appellant entered the United Kingdom on 9 June 2010 with leave to enter as a Tier 4 (General) Student Migrant and was subsequently granted leave to remain as a Tier 1 (Post Study) Migrant until 22 August 2014. On 21 August 2014 he applied for leave to remain as a Tier 1 (Entrepreneur) Migrant.

3. The appellants applied as business partners. The first appellant was interviewed about his application on 30 September 2014 and the second appellant on 20 October 2014. Both applications were refused on 13 January 2015 for non-point scoring reasons on the grounds that the respondent was not satisfied that the appellants were genuinely intending and able to establish a business in the UK and was not satisfied that the appellants met the requirements of paragraph 245DD(h) with reference to paragraph 245DD(i) of the immigration rules. The respondent was not satisfied as to the viability and credibility of the business plan and market research, the appellants' previous educational and business experience and the appellants' immigration history and previous activity in the UK. With regard to the viability and credibility of the business plan and market research, the respondent considered that the appellants' evidence at interview about the setting up of the company's website was inconsistent with the business plan, that the evidence relating to employer's liability insurance was not credible, that the evidence about the one business contract with Naveed Anjum Limited was not credible and that there was no credible evidence of any market research having been undertaken. With regard to the appellants' previous educational and business experience, the respondent considered that the appellants had not provided evidence of the knowledge and experience required to run a consultancy services business. With regard to the appellants' immigration history and previous activity in the UK, the respondent considered that they had failed to show that they had effectively used their Post Study Work leave to develop a consultancy service business.

4. The appellants' appeals were initially heard in the First-tier Tribunal on 8 January 2016 and were dismissed. However the judge's decision was subsequently set aside by the Upper Tribunal on 24 August 2016. The judge was found to have materially erred in law by making adverse findings based on an absence of up-to-date evidence, when such evidence would have been inadmissible pursuant to section 85A(4) of the Nationality, Immigration and Asylum Act 2002.

5. The appeals were then heard *de novo* before First-tier Tribunal Judge Maciel on 8 March 2017 and dismissed in a decision promulgated on 29 March 2017. Judge Maciel did not agree with the respondent's concerns about the business plan and the evidence as to the company website. However she was not satisfied as to the evidence relating to the employers liability insurance and the contract with the client Naveed Anjum Ltd and considered that the contract was contrived. The judge did not accept that the appellants' business was genuine and viable and found that the first appellant had failed to substantiate his work experience. The judge found that the appellants did not meet the requirements of the immigration rules. She found, further, that the respondent's decision did not interfere with the appellants' private lives and did not breach their Article 8 human rights.

6. Permission to appeal to the Upper Tribunal was sought by the appellants and was initially refused in the First-tier Tribunal. A renewed application to the Upper Tribunal was made on the grounds that the judge had erred in law by making adverse findings on the basis of evidence that was excluded under section 85A of the 2002 Act, in particular oral evidence at the hearing, contrary to the findings in Ahmed and Another (PBS: admissible evidence) [2014] UKUT 365 and Olatunde v Secretary of State for the Home

Department [2015] EWCA Civ 670, and that the judge had erred by failing to take into account and carrying out any assessment of the matters listed in paragraph 245DD(i) of the immigration rules. Permission was granted on 19 December 2017 on the first ground, although the second ground was not specifically excluded.

Appeal Hearing

7. At the hearing both parties made submissions. Mr Malik relied upon the grounds and submitted that the judge had erred by making adverse findings on the oral evidence received at the hearing, which was inadmissible under section 85A of the 2002 Act, and that the judge had failed to take account of relevant matters in paragraph 245DD(i) such as the viability and credibility of the source of the money and the appellants' immigration history and previous activity in the UK.

8. Mr Tarlow relied on the respondent's Rule 24 response and submitted that any errors made by the judge in taking account of oral evidence were immaterial given the various reasons for not finding the business to be genuine.

9. Mr Malik responded that such errors were material.

Legal Framework

10. Paragraph 245DD provides as follows:

(h) the Secretary of State must be satisfied that:

(i)the applicant genuinely:

1 intends and is able to establish, take over or become a director of one or more businesses in the UK within the next six months, or

2. has established, taken over or become a director of one or more businesses in the UK and continues to operate that business or businesses; and

(ii) the applicant genuinely intends to invest the money referred to in Table 4 of Appendix A in the business or businesses referred to in (i);

(iii)the money referred to in Table 4 of Appendix A is genuinely available to the applicant, and will remain available to him until such time as it is spent for the purposes of his business or businesses.

(i) In making the assessment in (h), the Secretary of State will assess the balance of probabilities. The Secretary of State may take into account the following factors:

(i) the evidence the applicant has submitted;

(ii) the viability and credibility of the source of the money referred to in Table 4 of Appendix A;

(iii) the viability and credibility of the applicant's business plans and market research into their chosen business sector;

(iv) the applicant's previous educational and business experience (or lack thereof);

(v) the applicant's immigration history and previous activity in the UK;

(vi) where the applicant has already registered in the UK as self-employed or as the director of a business, and the nature of the business requires mandatory accreditation, registration and/or insurance, whether that accreditation, registration and/or insurance has been obtained; and

(vii) any other relevant information.

Consideration and findings

11. I do not agree with Mr Malik's submission that the case of Ahmed effectively precludes any oral evidence in points-based system appeals. The ratio of the decision in Ahmed was that the prohibition on new evidence in section 85A(4) applies to the non-points-scoring part of a decision as well as the points-scoring part in a points-based system application. It was in that context that the Upper Tribunal in that case said at [5]:

> "The purpose of that provision is quite clear. It is that 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."

12. I do not conclude that that inevitably excludes any oral evidence in such appeals. Indeed it is relevant to note that it was the appellants themselves who chose to give oral evidence before the Tribunal and the appellants cannot now complain, as they are in effect seeking to do, that the judge erred in law by permitting them to do so.

13. Judge Maciel was plainly fully aware of the restrictions imposed by section 85A(4) and made it clear throughout the decision which evidence she was able to take into account pursuant to that provision, making specific comments in that regard at [9], [14] and [21] and rejecting post-application evidence at [33]. She addressed in turn each of the respondent's concerns. At [26] she found that the appellants had failed to show that the respondent was wrong to have had the credibility concerns that she did about the employer's liability insurance and she provided reasons for concluding that the evidence provided to the respondent by the appellants was unsatisfactory and lacking in credibility. At [27] to [32] she gave reasons for finding that the evidence before the respondent in regard to the business contract with Naveed Anjum Limited and the services claimed to be provided to that company by the appellants including the hiring of staff, was not credible and that the contract was contrived. At [34] the judge found that the evidence before the respondent did not demonstrate that the first appellant had the required work experience for running the business.

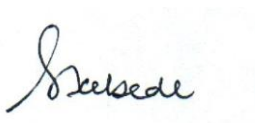
14. It seems to me that, in making the adverse findings that she did, the judge was simply confirming, and providing reasons for concluding, that the appellants had not been able to demonstrate that the respondent decision-maker should have made a different decision on the material before her. I find no merit in the suggestion that the judge reached her adverse findings and conclusions on the basis of the appellants' oral evidence, but in the event that there was any reliance on oral evidence which raised matters not considered by the respondent I fail to see how that was material in light of the many other adverse findings fully and properly made on the restricted evidence. The judge provided cogent reasons for concluding that the evidence submitted by the appellants with their application did not show that their business was a genuine and viable one. That was a conclusion which was fully and properly open to her and I find no merit in the first ground of appeal.

15. As for the second ground, the judge plainly had full regard to the relevant matters listed in paragraph 245DD(i) of the immigration rules and in any event it is clear from the wording of that provision that there was no requirement for all the factors therein to be considered and specifically addressed. The grounds assert that the judge accepted the appellants' business plan but failed to form a view as to its viability and credibility. However the judge's findings at [24] and [25] in relation to the business plan were simply that the respondent had wrongly found the appellants' evidence as inconsistent or discrepant, but in no way went as far as accepting the business plan as viable and credible. It is clear from the judge's findings at [26] to [33] that she did not find the business to be viable and credible in any respect. She did not consider that the business had any genuine contracts, she did not accept the appellants as credible witnesses and she did not consider that there was a genuine business at all. She found that the one and only business contract had been contrived and that the business was not providing services to any party. The viability of the source of the appellants' money and the appellants' immigration history were plainly immaterial matters in light of such significant adverse findings.

16. For all of these reasons I find no error of law in the judge's decision. The judge was fully entitled to dismiss the appeal on the basis that she did and for the reasons fully and properly given. Her consideration of the evidence was entirely in accordance with the provisions of the relevant immigration rules. Accordingly I uphold the judge's decision.

DECISION

17. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed 

Upper Tribunal Judge Kebede Dated: 12 February 2018