IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12372/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd October 2015	**On 29th October 2015**

Before

THE HONOURABLE MR JUSTICE HOLGATE
UPPER TRIBUNAL JUDGE MARTIN

Between

MR MOHAMMAD JAWAD ZEB
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Iqbal (instructed by Britain Solicitors)
For the Respondent: Mr S Whitwell (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellant, a citizen of Pakistan born on 30th March 1984. He came to the UK in January 2007 as a student and was granted further leaves until January 2012. He was then granted leave as a post-study worker until 2014 when he made an application as a Tier 1 (Entrepreneur). It was the refusal of that application on 25th February 2014 which has led to this appeal. The application was refused by the Secretary of State on the basis that he was

not entitled to be awarded 75 points required under Appendix A because he was not working at an occupation skilled at level NQF 4 or above.

2. He appealed that Decision and the appeal came before First-tier Tribunal Judge Eldridge sitting at Hatton Cross on 10th February 2015. In a Decision promulgated on 18th February 2015 Judge Eldridge dismissed the appeal. He found the Decision to be in accordance with the Immigration Rules. The separate Decision to remove the Appellant was not in breach of any duty owed and the entire appeal was dismissed.

3. Permission to appeal was sought to the First-tier Tribunal and initially refused but granted on a further application direct to the Upper Tribunal by a Deputy Upper Tribunal Judge on 22nd July 2015. Thus it comes before us today.

4. The grounds upon which permission to appeal was granted are two in number. The grounds are not terribly clear. However, the first ground seems to suggest that the judge was wrong to consider the circumstances at the date of the Decision because Section 85A applied which meant that only evidence submitted to the Secretary of State with the application could be considered. That is a rather odd submission as it complains about an error which assisted the Appellant. The judge took into account oral evidence by the Appellant which was clearly post-decision evidence. We would clarify at this point that there are errors in both the First-tier Tribunal's Decision and in the grant of permission.

5. At paragraph 12 of the First-tier Decision the judge says:

> "Because of the nature of the application, being for the acquisition of points under a points-based system, I may only consider evidence relevant to the circumstances appertaining at the date of the Decision to refuse the original application."

The relevant date the judge says is the date of the Decision. That is wrong because being a points-based application Section 85A of the 2002 Act applied and that specified that only evidence that was in front of the Secretary of State at the time of the application could be relied upon by the Appellant.

6. The Upper Tribunal Judge who granted permission himself fell into error by suggesting that in relation to applications by Tier 1 migrants, s.85A was repealed on 20th October 2014 and not saved by the transitional provisions. It was indeed repealed on 20th October 2014 by the Immigration Act 2014. On that date article 2 of the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 brought into force Part 4 of Schedule 9, subject to the saving provisions in articles 9, 10 and 11. Part 4 relates to all points-based applications. Repealing s.85A was made necessary because for Points Based System applicants after 20th October 2014 there is no right of appeal and thus s.85A is redundant. However, the effect of article 9 read together with article 1(2)(d) and (e) is that for persons other than those referred to in

articles 10 and 11, neither of which apply here, s. 85A is saved, which means that for all outstanding points-based appeals s. 85A continues to bite. It is clear that s. 85A did apply in this case.

7. We heard a submission in support of Ground 1 that the judge should have considered the documentary evidence identified in paragraph 20 of the determination because it did not refer to the documents but rather referred to the nature of the business. However, that point has been previously litigated and ruled upon by the Vice President of the Upper Tribunal sitting with a Deputy Upper Tribunal Judge in the Decision of Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC). That was a Decision promulgated on 21st July 2014 and decided:-

   (1) Where a provision of the Rules (such as that in para 245DD(k)) provides that points will not be awarded if the decision-maker is not satisfied as to another (non-points-scoring) aspect of the Rule, the non-points-scoring aspect and the requirement for points are inextricably linked.

   (2) As a result, the prohibition on new evidence in s 85A(4) of the Nationality, Immigration and Asylum Act 2002 applies to the non-points-scoring aspect of the rule: the prohibition is in relation to new evidence that goes to the scoring of points.

8. That then disposes of Ground 1 as being without merit.

9. Ground 2 argues that the judge was wrong to interpret the Immigration Rules as he did. The application was made under Rule 245D of the Immigration Rules which is the Rule in relation to Tier 1 (Entrepreneur) Migrants. The provisions about leave to remain on that basis are contained in paragraph 245DD of the Immigration Rules. 245DD(b) requires 75 points under paragraphs 35 to 53 of Appendix A to the Immigration Rules. Under the heading; “Attributes for Tier 1 (Entrepreneur), paragraph 35 of Appendix A states that an applicant must score 75 points for attributes and paragraph 36 states that available points for leave to remain are shown in Table 4. Paragraph (d) of Table 4, relied on by this Appellant, awards 25 points provided that the applicant:-

   “(i) is applying for leave to remain;

   (ii) has or was last granted leave as a Tier 1 (Post-Study Work) Migrant;

   (iii) was on a date falling within the three months immediately prior to the date of application

      (1) registered with HM Revenue & Customs as self-employed or

      (2) registered as a new business in which he is a director or

      (3) registered as a director of an existing business;

   (iv) is engaged in business activity other than the work necessary to administer his business in an occupation which appears on the list of occupations skilled to National Qualifications Framework

> level 4 or above, as stated in the Codes of Practice in Appendix J, and provides the specified evidence in paragraph 41-SD. 'Working' in this context means that the core service his business provides to its customers or clients involves the business delivering a service in an occupation at this level. It excludes any work involved in administration, marketing or website functions for the business."

10. It is sub-paragraph (d)(iv) that is relevant to the submission made to us.

11. It was argued that the requirement in (d)(iv), interpreted literally, would lead to absurd results and the grounds give examples at paragraph 12 of where in the author's view the results would be absurd :-

> "How about a chartered accountant who sets up a cash and carry shop and reserves accountancy work to himself and delegates other chores to his staff? How about a solicitor who takes a franchise of Domino's Pizza and reserves all legal matters to himself and employs staff for other chores? An HR manager for DFS sofas? Marketing manager for a carwash? These businesses do not provide services at NQF level 4 but the services that these personnel provide are certainly above NQF level 4. Therefore the learned judge is wrong in his construction of the Rule because it produces absurd results."

12. With the greatest of respect, we disagree. This is not a person seeking leave to remain in the UK for the purposes of a specific type of occupation but it is someone seeking permission to remain as an entrepreneur. That is what the Rule is about and that is why, one assumes, the Secretary of State saw fit to specify that the business itself must be above a certain level. Whilst of course it is true that a chartered accountant can set up a cash and carry shop if he wishes he would not be entitled to leave as a Tier 1 (Entrepreneur) on that basis. A solicitor taking on a franchise of Domino's Pizza can do so if he wishes but he will not be entitled to leave as a Tier 1 (Entrepreneur) on that basis. To qualify as a Tier 1 (Entrepreneur) Migrant he would have to set up a legal practice. The definition of "working" in paragraph d(iv) is perfectly clear on this point. The Appellant's argument disregards that definition.

13. There was no Article 8 challenge to the determination before us this afternoon.

14. For the reasons we have indicated we do not find merit in either ground and the appeal to the Upper Tribunal is dismissed.

Notice of Decision

The appeal is dismissed under the Immigration Rules.

No anonymity direction is made.

Signed Date 28th October 2015

Upper Tribunal Judge Martin

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed Date 28th October 2015

Upper Tribunal Judge Martin