



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/04711/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 18<sup>th</sup> July 2016**

**Decision & Reasons  
Promulgated  
On 27<sup>th</sup> July 2016**

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**WASIM ARIF  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**And**

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

Respondent

**Representation:**

For the Appellant: Ms A Benfield, instructed by Hartley Bain Solicitors  
For the Respondent: Mr P Duffy, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant with permission appeals against the decision of Judge Suffield-Thompson in which he dismissed the appeal against the respondent's decision to refuse his application for leave to remain as a Tier 1 (Entrepreneur) Migrant.
2. The appellant made an application on 28<sup>th</sup> August 2014 and that application was dismissed by the Secretary of State on 19<sup>th</sup> January 2015 further to paragraph 245DD(h) and (i) of the Immigration Rules.
3. In the refusal letter the Secretary of State set out:

**“Non-Points Scoring Reasons for Refusal**

*You have applied for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant but the Secretary of State is not satisfied on the balance of probabilities that:*

- you genuinely intend or are able to establish, take over or become a director of one or more businesses within the next six months; or*
- you genuinely intend to invest the money referred to in Table 4 of Appendix A in the Immigration Rules in your business or businesses; and*
- the money referred to in Table 4 of Appendix A of the Immigration Rules is genuinely available to you and will remain available to you until such time as it is spent by your business or businesses ('available to you' means the funds are:
  - 1) in your own possession or*
  - 2) in the financial accounts of a UK incorporated business of which you are the Director or*
  - 3) are available from a third party or parties named in the application under the terms of the declaration(s) referred to in paragraph 41-SD(b) of Appendix A); and**
- you do not intend to take employment in the UK other than under the terms of paragraph 245DE.*

*In making the assessment under the following factors have been considered, as per paragraph 245DD(i) of the Immigration Rules:*

*Paragraph 245DD(i) of the Immigration Rules states that, in making the assessment in (h) above, UK Visas and Immigration will assess the balance of probabilities, and 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, where that accreditation, registration and/or insurance has been obtained: and*
- (vii) *any other relevant information."*

4. One of the aspects that the Secretary of State considered was the viability and credibility of the applicant's business plans and market research into their chosen sector. This has an effect on the overall success of the application.
5. The Secretary of State proceeded to reject the applicant's evidence on the basis of the assessment of the appellant's business plan, market research, contract, insurance and the appellant's website.
6. The application for permission to appeal submitted that in reaching her findings:
  - (1) The judge had no regard to the appellant's oral evidence regarding the contract which included details of the contracts the appellant had generated for QHC with local taxi firms.
7. As per **Ahmed and Another (PBS: admissible evidence)** [2014] UKUT 00365 (IAC), I find that this is an impermissible ground Section 85(a) precludes the reliance on oral evidence and this ground of appeal and challenge is misconceived.
8. The second ground of challenge was that the judge misconstrued the contract with QHC at 34 to 36 of the decision, considering it unlikely that a client would sign such an agreement. But the appellant asserted, the "late payment" clause to which the respondent had referred in the refusal letter was one that disadvantaged the appellant himself and not the client. In signing that document the client did not deprive themselves of an opportunity to ensure the appellant provided the services as the judge thought.
9. It is clear that the judge did appear to misunderstand the point that was being made about the contract, which states that "no late penalty will be charged if the customer does not comply with the rates, amounts or payment dates provided in this agreement". The point made by the respondent is that it was of concern that the appellant had not included a clause within the agreement to assure that he would receive payments for services on time. It is clear from the point made in the reasons for refusal letter that the appellant would not insert this into his own clause to ensure that his services were fully paid for. The judge did not appear to grapple with the essential point made on either side.

10. Ground three seems to assert that the appellant had taken out employers' liability and the judge had no regard for the explanation given by the appellant in his witness statement having taken out such a policy. Once again it is impermissible to take into account further evidence. It is that which has been put before the Secretary of State in support of the application which the judge had to concentrate on. The judge clearly stated at paragraph 38 that she could not understand why the appellant would take out employers' liability when "he has not staff and his business is nowhere near the stage when he will need staff". That was a legitimate reason and finding made by the judge in the circumstances.
11. With respect to ground (iv), at paragraph 39 it would appear that the judge has employed some of her own opinion in relation to whether the appellant with a degree in IT would be able to create a website or not on the basis that "it is not a particularly difficult piece of IT for a layperson to learn let alone an IT graduate" and this would appear to be speculation and an error on the part of the judge.
12. In relation to ground (v) and the criticism that the judge took into account evidence which could not have been supplied with the application the judge notes that the appellant had failed to produce various documents before the Tribunal and yet in holding such an absence of evidence against the appellant the judge did misdirect herself in law because she was, in any event, unable to take that into account.
13. It is also the case that in relation to ground (vi) the judge took into account further information such that there was "nothing before me to show that the appellant has used his post-study migrant leave to legitimately develop Beam Marketing".

### **Notice of Decision**

14. I can accept that the grounds of challenge would appear on the one hand to criticise the judge for failing to take into account further evidence or expecting further evidence whilst at the same time criticising the judge for indeed taking into account further evidence which does seem curious. On balance, however, the judge did, despite her self direction, with consider further evidence not submitted with the application or consider the fact that further evidence was not in existence. I consider that the judge has cumulatively made rather too many errors either in fact or law for this decision to stand and the matter should be referred to the First-tier Tribunal for further consideration.
15. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed

Date 27<sup>th</sup> July 2016

Upper Tribunal Judge Rimington