Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43302/2014
IA/43304/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 December 2015	**On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

PALASH KUMAR DAS
JOYA DAS
(No anonymity order made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellants: Mr S. Karim, Counsel instructed by A1 Law Chambers
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant (hereinafter referred to as "the appellant") is a citizen of Bangladesh born on 2 February 1985. The second appellant is his wife and dependent.

2. This appeal arises from the respondent's decision to refuse to vary the appellant's leave to remain as a Tier 1 (Entrepreneur) Migrant under the

Points Based System and to remove him from the UK by way of directions under section 47 Immigration Asylum and Nationality Act.

3. The reason for the refusal was that the respondent was not satisfied that the appellant met the requirement under section (d)(iv) of Table 4 Appendix A of the Immigration Rules ("section (d)(iv)") under which the appellant must have been working in an occupation which appears on the list of occupations skilled to National Qualifications Framework level 4 or above. The ensuing appeal was dismissed by First-tier Tribunal ("FtT") Judge Coll in a decision that was promulgated on 29 May 2015.

4. In his application for leave to remain the appellant stated that he was a purchasing manager, which is an occupation that meets the requirement of section (d)(iv). The FtT did not accept this. Its reasons are given at paragraph [32], where the judge states:

> "... on the evidence before me, the two service contracts indicate clearly that the appellant bought clothes from one company and sold clothes to another company. I find furthermore that neither contract shows the appellant was hired by another company to act on their behalf as a purchasing manager. I therefore find furthermore that there was no evidence before the respondent at the date of application that the appellant was engaged by any company as a purchasing manager."

5. In reaching its decision, the FtT refused to hear oral evidence from the appellant in respect of his job and whether he in fact was a purchasing manager. The reason given by the FtT was that under Section 85A(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") it could only consider evidence adduced at the time of the application and that this was consistent with the Upper Tribunal decision in *Ahmed and Another (PBS: admissible evidence)* [2014] UKUT 00365 (IAC). The FtT, at paragraph [30], stated:

> "I find that any oral evidence produced today by the appellant about his job would amount to new material in that it would be a different way of presenting the original application. It follows that I cannot allow the appellant to give oral evidence on his job today."

6. The FtT also considered, and dismissed, the appellant's claim that his removal would breach his right to private and family life under Article 8 ECHR.

7. The grounds of appeal argue (a) that the FtT erred by refusing to hear oral evidence about the appellant's role as a purchasing manager; (b) that the FtT should have recognised that an issue of common law fairness arose as the appellant had provided all of the evidence required of him under the Points Based System and there was no evidential requirement on him to produce pre-emptively evidence to allay concerns about his job description he could not have expected to arise; and (c) that the FtT erred in concluding the appellant was not a purchasing manager. It is also argued that the FtT erred in failing to consider paragraph 245AA of the

Immigration Rules. The grounds also challenge the FtT's approach to Article 8.

8. Permission to appeal was granted by the Upper Tribunal on the ground that there was an arguable error of law in the judge's finding that the appellant was not a purchasing manager and the failure to hear oral evidence from the appellant as to his role as a purchasing manager.

9. In his submissions before me, Mr Karim, for the appellant, expanded on the arguments made in the grounds of appeal. Inter alia, he argued:

   a. The appellant complied with the requirements of the Points Based System and provided the respondent with all specified documents as required by the Rules. The appellant could not have anticipated that the appellant would take issue with the job title he gave as the respondent did not interview him or let him know about the concern in advance of making the refusal decision. In these circumstances the FtT should have concluded that the respondent's decision making process was unfair.

   b. *Ahmed* should be distinguished from the present case because in that case the Secretary of State accepted further evidence and gave the appellant an opportunity to rebut and address concerns raised – an opportunity that was not afforded to the appellant in this case.

10. Mr Melvin argued that *Ahmed* makes it clear that the appellant must provide the relevant evidence with his application and the FtT hearing is not an opportunity to put before the Tribunal evidence that was not before the Secretary of State. It is clear why the appellant's application was refused - the evidence did not show he met the job specification. There was no reason in this case why the respondent should have had to interview the appellant and there was no requirement to do so. Moreover the findings of the judge were clearly based on the evidence before the FtT.

Consideration

11. Section (d)(iv) of Table 4 of Appendix A of the Immigration Rules provided at the time of the appellant's application that:

> 'Since before 11 July 2014 and up to the date of this application,[the appellant] has continuously been working 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.'

12. Paragraph 41-SD sets out specified evidence that must be supplied with the application. This includes, at sub-paragraph e(iv), *"one or more*

contracts for service" that must show, inter alia, *"the service provided by the applicant's business".*

13. The appellant was required, therefore, in accordance with Paragraph 41-SD, to provide with his application contracts for service showing the services provided by his business (i.e. that of being a purchasing manager). He provided two such contracts. The FtT did not accept that these contracts showed the appellant was providing the services of a purchasing manager. The FtT stated at paragraph [32] that the contracts indicate that the appellant bought clothes from one company and sold clothes to another rather than that he was hired to act as a purchasing manager. Having considered the contracts, I am satisfied this is a reasonable and proper interpretation of them.

14. It may be that if the FtT had given the appellant an opportunity, through oral evidence, to explain these contracts and/or provide further evidence about his business and the services it provides he may have been able to satisfy the FtT that he met the requirements of section (d)(iv). It is therefore understandable that the appellant would have wished to give such evidence and was disappointed he was not permitted to do so. However, the FtT did not err in law by not allowing oral evidence about the appellant's job. It is well established that under the Points Based System the onus is on the applicant to ensure his application, at the time the application is made, is supported by evidence to establish he meets the specified requirements See, for example, *EK (Ivory Coast)* [2014] EWCA Civ 1517 and *Ahmed and Another (PBS: admissible evidence)* [2014] UKUT 00365 (IAC). At paragraph [5] of *Ahmed* the Upper Tribunal makes the position clear:

> "... 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."

15. Any oral evidence heard by the FtT in respect of the appellant's job would have constituted material that was not before the decision maker and therefore the judge did not err in finding that to allow such evidence would be inconsistent with *Ahmed*, or indeed with the wording of Section 85A(4) of the 2002 Act, which limits the evidence to be considered by the FtT to that which was submitted at the time of making the application.

16. The appellant argues that *Ahmed* should be distinguished because in that case the applicants were interviewed by the Secretary of State whereas in the present case the appellant has not had an opportunity to address the concerns raised by the Secretary of State. I do not accept this argument. *Ahmed* makes it clear that the purpose of Section 85A(4) is that the FtT should base its assessment on the material that was before the respondent's decision maker. In some cases the decision maker will have

interviewed the applicant. In others it will not have. Either way, when the matter comes before the FtT, the FtT is required to limit its assessment to the information before the respondent's decision maker.

17. The appellant has also argued that the FtT's decision making process was unfair as the appellant could not be expected to pre-emptively produce documents to allay concerns about him being a purchasing manager when none were required. I do not accept there is any merit to this argument. Paragraph 41-SD(e)(iv)(b) required the appellant to submit, with his application, contracts for service showing the service provided by his business. The appellant submitted this evidence, in the form of two contracts. The respondent reviewed the contracts and concluded that they did not show the appellant's role was that of a purchasing manager. It was entitled to do so and there was no obligation on the respondent, before reaching its conclusion, to offer the appellant an interview, or invite him to provide further evidence. The design of the Points Based System is such as to allow the respondent to base its decision on the evidence submitted without requiring it to give the appellant the opportunity to submit further evidence and documents.

18. There are some circumstances in which the Secretary of State has discretionary power to request further documents as set out paragraph 245AA of the Rules. Paragraph 245AA is designed to assist applicants where a document has been omitted, is in the incorrect format, is not the original, or does not contain all of the specified information. As explained in *Sultana and Others* [2014] UKUT 00540 (IAC) paragraph 245AA can, in appropriate cases, operate as a mechanism for relaxing the strictness of a particular requirement under the Points Based System. At paragraph [25] the Upper Tribunal in *Sultana* commented that paragraph 245AA was *"designed to ensure that applications suffering from minor defects or omissions which can be readily remedied or forgiven do not suffer the draconian fate of refusal"*. The appellant's application, however, did not suffer from the type of defect or omission that could be saved by paragraph 245AA. Rather, he submitted contracts that failed to demonstrate his occupation was that of purchasing manager. Accordingly, there was no error of law by the FtT in its approach to paragraph 245AA.

19. No submissions were made before me in respect of Article 8 ECHR but for completeness I state my finding that there was no error of law. The FtT has considered and applied the relevant case law and statutory provisions, notably Section 117B of the 2002 Act, and has carried out the balancing exercise under Article 8 noting in particular that the appellant's private life was established whilst his immigration status was precarious. The FtT's conclusion that removal of the appellant to Bangladesh would not be disproportionate and not be in breach of Article 8 was one that was clearly open to it.

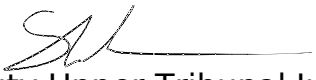
Decision

a. The appeal is dismissed.

b. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.

c. No anonymity order is made.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 30 December 2015