Upper Tribunal
(Immigration and Asylum Chamber)

Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC)

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 2 May 2014	
Delivered orally	
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Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE PHILLIPS
Between

FURQAN AHMED
BACHAN SUBEDI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Azmi, instructed by AMR Solicitors
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

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.*

DETERMINATION AND REASONS

1. Mr Ahmed is a national of Pakistan and Mr Subedi is a national of Nepal. They are both in this country having entered as students and both had leave as Post-Study Migrants. They seek to remain in the United Kingdom in order to be in business together supplying IT services to various other firms. In order to do that they made an application to the Secretary of State for leave to remain as Tier 1 Entrepreneur Migrants. Their application was made originally at the very beginning of 2013.

2. The Secretary of State interviewed the applicants and was prepared to accept further documentation in April 2013. On 9 July 2013 the applications were refused for detailed reasons set out in the letter of refusal. The form of the letter of refusal has been the subject of submissions by Mr Asme and we must therefore refer to them briefly. The decision is stated at the beginning followed by the immigration history and there is then a section entitled "Non-Point Scoring Reasons for Refusal". In that section of the letter the decision-maker looks at all the material available to her that she considered related to the genuineness and viability of the appellants' proposals. She took into account the documents provided and concluded that she was not satisfied that the applicants were genuine entrepreneurs. The second part of the assessment is headed "Points Scoring". No points are awarded for Access to Funds, Funds held in Regulated Financial Institutions, and Funds Disposable in the United Kingdom; and in each case the reason for the non-attribution of points is "for the reasons stated earlier in this letter under the heading "Non-points Scoring Reasons for Refusal". Points were however added for English language and maintenance as claimed.

3. As we have said, the applications were refused and the applicants then appealed to the First-tier Tribunal. Their appeal came before Judge Jessica Pacey on 9 January 2014. Both appellants appeared and apparently gave evidence: and there were a number of other documents which enabled the Judge to take the view that the business proposals were indeed genuine and viable and she allowed the appeals.

4. The Secretary of State applied for and obtained permission to appeal on the basis that the Judge had behaved in a way that was not by statute open to her. The decision in the present case is of the sort specified in s 82(2)(d). The relevant law is contained in s 85A(3) and (4), expressed as an exception to a general rule that all relevant evidence may be considered:

"(3) Exception 2 applies to an appeal under section 82(1) if –

(a) the appeal is against an immigration decision of a kind specified in section 82(2)(a) or (d),

(b) the immigration decision concerned an application of a kind identified in immigration rules as requiring to be considered under a 'Points Based System', and

(c) the appeal relies wholly or partly on grounds specified in section 84(1)(a), (e) or (f).

(4) Where Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it –

(a) was submitted in support of, and at the time of making, the application to which the immigration decision related,

(b) relates to the appeal in so far as it relies on grounds other than those specified in subsection (3)(c),

(c) is adduced to prove that a document is genuine or valid, or

(d) is adduced in connection with the Secretary of State's reliance on a discretion under immigration rules, or compliance with a requirement of immigration rules, to refuse an application on grounds not related to the acquisition of 'points' under the 'Points Based System'."

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.

6. As is apparent from her judgement, the judge took into account material other than that which was before the decision-maker. In a spirited defence of her procedure Mr Asme has submitted that the way in which the letter was divided into Non-Points Based and Points Based matters demonstrates that in assessing whether the business plans were genuine the decision-maker was refusing the application on grounds which were not related to the acquisition of points under the Points Based System. If that is right, Mr Asme submits, then the Judge was at liberty to look at further evidence. We are satisfied however that that is a submission which cannot succeed. There are two connected reasons for that.

7. The first is that in paragraph 245DD(k) of the Statement of Changes in the Immigration Rules, HC 395 (as amended) is the following:

> "If the Secretary of State is not satisfied with the genuineness of the application in relation to a points scoring requirement in Appendix A those points will not be awarded."

That clearly links the assessment of the genuineness of the scheme to the acquisition of points and rules out, in our judgement, the submission that the assessment of the genuineness of the scheme was a ground not related to the acquisition of points under the Points Based System. On the contrary, the wording of the Rule links the two matters inextricably.

8. Secondly, as we pointed out to Mr Asme in the course of his submissions, if he were able to show that the Judge was entitled to look at the genuineness of the scheme for the purposes of the appeal before her, she would nevertheless not be able to reach a decision that because of her view about the genuineness of the scheme, points should have been awarded. That is because that would itself link the genuineness of the scheme to the acquisition of points, and she is prohibited from hearing evidence which does go to the acquisition of points.

9. For those reasons we are satisfied that the Secretary of State's grounds of appeal are made out. The Judge erred in law in reaching her conclusion. It is impossible to say what conclusion she would have reached if she had not taken into account the evidence which she was not entitled to hear. We set aside her determination. The position then is that we are required to substitute a decision or remit the case to the First-tier Tribunal for a decision to be made. However, Mr Asme has told us after taking instructions that at that point the appellants would wish to withdraw their appeal against the Secretary of State's decision and make a new application supported by the documents which are now available to them, no doubt during the course of the business which they have been seeking to run ever since they set it up at the end of 2012. We will accept that withdrawal. The result is that the First-tier Tribunal Judge's judgement having been set aside, the decision of the Secretary of State is now unchallenged and stands as a refusal of the applications made at beginning of 2013.

Signed

C M G OCKELTON
VICE PRESIDENT OF THE
UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 3 July 2014