Upper Tribunal
(Immigration and Asylum Chamber)

Mushtaq (clarity of judge's decision) Pakistan [2011] UKUT 00122 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8 March 2011	.....

Before

THE HON. MR. JUSTICE EDWARDS-STUART

SENIOR IMMIGRATION JUDGE GILL

Between

MUHAMMAD ASAD MUSHTAQ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mrs. J. Heybroek , of Counsel, instructed by Morgan Mark Solicitors

For the Respondent: Mr. J. Gulvin, Senior Home Office Presenting Officer.

It is wrong to allow an appellant's appeal simply on the basis that some findings of fact are made in his favour, when those findings do not entitle him to further leave to remain in the capacity sought under the Immigration Rules. In such a case, the appeal should be dismissed under the Immigration Rules.

DETERMINATION AND REASONS

1. The Appellant appeals against the determination of Immigration Judge K E Gordon promulgated on 23 September 2010. The terms in which the Immigration Judge disposed of the appeal potentially raises an issue of jurisdiction. At the end of her determination, the Immigration Judge said:

"5. I allow the appeal to the extent identified above".

2. The question which arises in this particular case is whether the Immigration Judge had allowed the appeal, and if so, whether she had only allowed it to some limited extent, or whether, on a true construction of her determination and reasoning, she had in fact dismissed the appeal. If the

Immigration Judge allowed the appeal, even if only in part, there is potentially an issue as to whether the Appellant had a right to appeal against the determination.

3. The appeal before the Immigration Judge was an appeal against a decision of the Respondent of 28 June 2010 to refuse the Appellant's application for leave to remain in the United Kingdom as a Tier 1 (General) Migrant under the points based system. The Respondent was not satisfied that the Appellant was entitled to the 40 points he had claimed under Appendix A of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the Immigration Rules) in respect of previous earnings. In order to achieve 40 points, it was necessary for the Appellant to establish that his previous earnings for the relevant period of assessment were between £35,000 and £39,999. As the Respondent was not satisfied that the Appellant had sufficient previous earnings to achieve 40 points, she was also not satisfied that he was entitled to 5 points in respect of UK experience. Accordingly, the Respondent refused the application under 245C(c) of the Immigration Rules.

4. At paragraph 4 of the determination, the Immigration Judge referred to the Appellant's documentary evidence and then said that it was not reasonably possible to tell the income from the invoices and that she considered that the income proven was £31,848.27, which she said entitled him to 30 points under Appendix A. This is then followed by paragraph 5, which we have quoted above, where the Immigration Judge said that she allowed the appeal to the extent she had indicated earlier (at paragraph 4).

5. On 14 December 2010, Senior Immigration Judge Poole granted permission to appeal, stating that the substantive grounds challenging the Immigration Judge's assessment of the documentary evidence as to the Appellant's previous earnings were arguable but he also raised in his decision the possibility that the Appellant's right to appeal against a determination which had been " allowed " may be restricted.

6. In our judgment, the Immigration Judge did not allow the appeal to any extent. In order to succeed in his appeal, the Appellant had to show that he was entitled to 40 points in respect of previous earnings and 5 points in respect of UK experience. A finding that he was entitled to something less than that meant that he had in truth lost his appeal. On any view, it cannot be said he had won his appeal to some extent, however limited. It was wrong to allow his appeal simply on the basis that some findings of fact were made in his favour, when those findings did not entitle him to further leave to remain in the capacity sought under the Immigration Rules. Accordingly, in our judgment, the Immigration Judge should have stated in the determination that the appeal was dismissed, and not that it was "allowed to the extent identified above" . Given that the true construction of the determination was that the appeal had been dismissed, there was no issue as to whether the Appellant had a right to appeal against the determination. The error of the Immigration Judge in describing her decision as a decision to allow the appeal to some limited extent could not deprive the Appellant of the right he had (on a true construction of the determination) to appeal against her determination. Accordingly, strictly speaking, the question as to whether there is a right of appeal against a determination which does allow an appeal in part did not arise in this case and will have to be left to another day.

7. At the hearing, Mr. Gulvin conceded that the Immigration Judge had materially erred in law in her assessment of the documentary evidence as to previous earnings and that we should proceed to remake the decision on the evidence before us. He accepted that the documentary evidence before us established that the Appellant's previous earnings for the relevant period of assessment were a little in excess of £35,000, which meant that he should have been awarded 40 points in respect of previous

earnings and 5 points in respect of UK experience. We agree. It follows that the Appellant’s appeal must be allowed.

Decision

8. The making of the previous decision on the appeal involved the making of an error on a point of law such that it falls to be set aside. We have remade the decision. Our decision is that the Appellant's appeal against the Respondent's decision is allowed under the Immigration Rules.

Signed

Senior Immigration Judge Gill,

Judge of the Upper Tribunal

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