Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25829/2013
IA/25835/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5th March 2014	**On 26th March 2014**

Before

UPPER TRIBUNAL JUDGE COKER

Between

OLATUNJI OLADELE ONI
OLADIMEJI EMMANUEL ONI

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr V Lovejoy, Samuel & Co solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

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DETERMINATION AND REASONS

1. The appellants appeal a decision of the First-tier Tribunal promulgated on 30th December 2013 which dismissed an appeal against a decision by the respondent dated 9th July 2013 to refuse to vary their leave to remain as Tier 1 (Entrepreneur) Migrants on the grounds, *inter alia* that the documents provided by the bank did not include the full details of each third party; that the letter provided by their uncle had not been counter-signed; that a letter from the lawyer had not complied with the required format; that the appellants had failed to provide evidence of advertising as required.

2. Permission to appeal was granted on the grounds, in essence, that the judge had failed to consider the documentation properly in particular that the relevant documentation had been provided with the application, contrary to the assertion of the respondent; had the judge considered the documentary evidence as a whole he would have seen that there were regular payments in and out of the account and that had the evidential flexibility policy been applied, any missing documentation would have been supplied and thus the appellants would have met the relevant requirements for variation of their leave to remain.

3. Mr Bramble produced the Immigration Rules and guidance in force at the date of the decision and very properly conceded that the caseworker and the judge had, unfortunately, not considered the application and appeal under the appropriate Rules and guidance. He confirmed that in the light of the guidance to caseworkers, missing evidence should have been sought and had it been, given the evidence that was in fact produced the application would have been allowed save for one issue.

4. Mr Bramble stated that even if the caseworker and the judge had applied the correct Rules and guidance the application would still have failed because the appellants had not submitted evidence of advertising as required. The documents in the appellants' bundle pages 17-19 were no more than invitations to a trade fair and did not and could not amount to advertising material. The evidential flexibility policy could not have availed the appellants given those documents. He accepted that the documents from page 21 of the bundle would have been sufficient but it was not accepted that the applicants had submitted those documents with their application as claimed. The evidential flexibility policy did not avail the applicants as regards advertising material because the trade fair invitations were plainly insufficient to raise the slightest argument that the appellants had advertising material available. Therefore, he submitted, even thought the judge was incorrect in finding against the appellants on other matters, the appellants had not met the requirements of the Rules to produce evidence of advertising their business as required; although the judge had made errors of law, those errors were immaterial in the light of that failure and thus the appeal must fail. Mr Bramble acknowledged that the covering letter

provided with the application referred to a list of documents supplied and that the list was not in his copy of the letter on file. He acknowledged that the list indicates documents in the appellants' bundle that include the trade fair invitations and that it was possible that other documents on the list "might have flagged up for the attention of the case owner that documents relating to advertising were missing. He submitted however that even if the caseworker had gone through the list, the list was insufficient to require the caseworker to request additional documents in connection with advertising.

5. Mr Lovejoy submitted firstly that the invitations to the trade fair were sufficient evidence of advertising, secondly if not then they were sufficient to initiate enquiries by the caseworker under the evidential flexibility policy particularly when read with the list of documents provided as per the covering letter which itself appeared to include further adverting material. He further submitted that in any event it had been accepted by the presenting officer before the First-tier Tribunal Judge that the appellants had submitted adequate evidence of advertising and thus this element of the refusal fell away.

6. With the agreement of the parties I consulted the record of proceedings made by the judge; although typed it is unfortunately not clear whether there was a concession by the presenting officer or not. There is no reference to a concession in the determination but nor is anything said by the judge about advertising other than setting out that it was one of the reasons for refusal; the bulk of the determination deals with shortcomings in the various bank and other documents which, as has been set out above, Mr Bramble very properly agreed were in error.

7. Neither Mr Bramble nor Mr Lovejoy had a copy of their record of proceedings on their files with them before me. I agreed that I would delay writing my determination to enable both parties to search their records and, if available, they would file with the Tribunal and serve upon each other a copy of their respective record of proceedings by 4pm on Wednesday 12th March 2014. Mr Bramble confirmed that if the record of proceedings showed that the issue of advertising was resolved in the appellants' favour, then the appeal should succeed.

8. The appellants' solicitors filed their handwritten record of proceedings at 15.15 on 12th March exhibited to an affidavit sworn by the solicitor and partner of the appellants' instructed solicitors who represented the appellants before the First-tier Tribunal. That record of proceedings clearly states that the presenting officer agreed that the online advertising (included in pages 17-27 of the appellants' bundle of documents) was accepted. I also note however that in submissions the HOPO states that the advertising does not meet the Rules. The appellants' solicitor in his affidavit states that the Judge advised the parties that the website met the Rules and that because the judge indicated he found in favour of the

appellants on that point he had made no submissions with regard to advertising.

9. The records of this hearing are rather inadequate: the judge's are unclear; the appellants' appear on their face to be contradictory and the respondent does not appear to have any. In these circumstances I have turned to the other documents before me and the determination. The determination is silent on any findings as regards advertising, as oppose to findings as regards the other matters. The application form does not state that advertising or marketing material is supplied but states that information from a trade fair is. The covering letter sent by the solicitors with the application forms clearly refers to a list of documents some of which are identifiable as the trade fair invitations and others "may' be indicative of other advertising material. The grounds of appeal state that documents enclosed with the grounds of appeal are "Details of information from a Trade Fair Business show in lieu of advertising, Screenshots of website constituting Internet Advertising." The grounds of appeal state "..the application form provided for the provision of proof of advertising as an option along with OR proof of information from a trade fair….In addition the Team Members Company have both a national and international presence through their website and have also publicised their business through…."

10. This is unsatisfactory. The burden of proof is upon the appellant and the documentary evidence before me, so far as can be seen, can point both ways. Given the detail of the judge's determination as regards the other documentation (albeit the findings were in error) I am however satisfied on a balance of probabilities that the appellants did send in details of their online advertising with their application form. I am also satisfied that even if they did not, the list accompanying the covering letter was plainly sufficient to raise queries with the caseworker as to what documents were there and further investigation should have been carried out.

11. I therefore find that the First tier judge erred in law in his assessment of the evidence such as to require the decision to be set aside and remade.

12. Mr Bramble had confirmed that if I were to find that the advertising material had been provided then the appeal would fall to be allowed because the appellants met the Rules. Both parties accepted that here would be no need to recall for submissions and were content for me to reach my decision on the basis of such evidence as was before me.

13. In these circumstances and in the light of my findings, I remake the appeals by allowing them.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by allowing them.

Date 25th March 2014

Judge of the Upper Tribunal Coker