Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42023/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th October 2015	**On 18th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR WASEEM HAIDER
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim (Counsel)
For the Respondent: Mr P Nath (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge M A Hall, promulgated on 9th March 2015, following a hearing at Birmingham Sheldon Court on 23rd February 2015. In the determination, the judge dismissed the appeal of Waseem Haider, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 16th September 1984. He appealed against the decision of the Respondent dated 6th October 2014, refusing his application for leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant.

The Appellant's Claim

3. The Appellant's claim is that he is entitled to 75 points under Appendix A of the Immigration Rules in relation to attributes in that all the required documentation had been submitted.

The Judge's Findings

4. The judge began his determination at the outset by stating that, "I ascertained that I had received all the documentation upon which the parties intended to rely, and each party had served the other with any documentation upon which reliance was to be placed …" (paragraph 10). The judge then went on to set out the background of the appeal and observed how the Appellant had come to the United Kingdom as a student and subsequently his leave had been extended in that capacity, and thereafter he was granted leave as a Tier 1 (Post-Study) worker until 10th August 2014. He then submitted his current application before the expiry of that leave (see paragraph 13).

5. The judge went on to hold that the Appellant did not discharge the burden of proof that was upon him because,

> "I note that the Appellant in his witness statement claimed that he had submitted leaflets with his application for leave to remain, but I do not accept that to be the case. Not only are these leaflets not included in the Respondent's bundle, but there is no reference to them in Section 7, at pages 56 and 57 of the application form, which lists the documents that were submitted with the application. The list was prepared by the Appellant's previous solicitors …" (paragraph 26).

6. The judge went on to hold that he would find as a fact that the Appellant did not submit with his application an online advertisement, which is contained at Section D of the Respondent's bundle (see paragraph 27). The judge also concluded that this was the only advertisement that was submitted with the application.

7. This being so (see paragraph 28) the Appellant had not satisfied the requirements of Table 4(b)(iii) with reference to paragraph 41-SD(e)(iii). Given that the burden of proof was on the Appellant, the judge held that the burden had not been discharged by the Appellant (see paragraph 29). The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the decision was procedurally unfair because the Appellant did not have the benefit of leaflets which were included in his application and the judge had wrongly disregarded advertising material included in the Appellant's bundle.

9. On 4th August 2015, permission to appeal was granted on the basis that there was an online free advertisement in the Respondent's bundle at D which the judge appears to have overlooked. Secondly, there were also duplicate copies of what appears to be a leaflet for the Appellant's business. Therefore, it was arguable that the judge had overlooked these documents.

10. On 21st August 2015, a Rule 24 response was entered by the Respondent Secretary of State. The response stated that the judge did properly consider the documents but proceeded to find that the advertisement did not satisfy the requirements of the Immigration Rules. He was entitled to so find.

The Hearing

11. At the hearing before me, Mr Nasim, appearing on behalf of the Appellant, submitted that the sole issue in this appeal was that of advertising. The judge had misconstrued the evidence in relation to the advertising. This was because he had held (at paragraph 26) that there was no evidence. However, if one looked at pages 9 to 11B of the Appellant's bundle it was clear that there was online advertising materials submitted. They were served on the Respondent and were in fact taken from the Respondent's bundle itself.

12. Second, there was no issue raised before the judge in relation to the absence of this advertising material. The leaflets for advertising were submitted with the application. The judge had erred in overlooking them.

13. Thirdly, at paragraph 28, the judge is only looking at the online advertisement but at page 35 of the Appellant's bundle, it is quite clear that the answer to D26 is given in terms of the submission of advertising material. Mr Nasim submitted that I should make a finding of an error of law and remake the decision in the Appellant's favour since it was quite clear that the advertising material had been included.

14. For his part, Mr Nath submitted that the refusal letter needs to be properly read. Under the section, "Appendix A: attributes" it is said that, "since before 11th July 2014 and up to the date of your application, you have been continuously engaged in business activity which was not, or did not amount to, activity pursuant to a contract of service with a business other than your own …" The issue was not simply that of advertising but of whether the Appellant could show that he was providing a contract of service to another business. This evidence was absent. Accordingly, the

75 points could not be awarded. The judge was correct in refusing the appeal.

15. In reply, Mr Nasim submitted that if one looks at the Appellant's witness statement, (and there was no cross-examination of the Appellant at the hearing), it is clear that the evidence that the Appellant had submitted was acceptable and should have been treated as such by the judge. His company was incorporated on 21st May 2013. He had gone around distributing leaflets and that is how he had set up his business. He was never cross-examined on this. A large number of additional documents were sent and these all predated the application. The Appellant should succeed.

No Error of Law

16. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law, such that I should set aside the decision and remake the decision. My reasons are as follows.

17. Notwithstanding Mr Nasim's clear and succinct representations before me, and his attempt to persuade me otherwise, it is clear that the refusal letter shows there to be quite fundamental disagreements with the nature of the business that the Appellant was conducting, so that it was not simply a question of the advertising having been done in relation to that kind of business.

18. The business itself was in question. This is because there was no contract of service with the business other than the Appellant. Such evidence had to be shown for the period under consideration. It had to be shown continuously. The reason for this is that the definition of "working" under the Rules "means that the core service your business provides to its customers or clients involves your business delivering a service in an occupation at this level …" (see (iv) in the refusal letter at page 2).

19. This meant that although the Secretary of State had been satisfied that the Appellant was applying for leave to remain and had been last granted leave as a Tier 1 (Post-Study Work) Migrant, the evidence that he had submitted in relation to the marketing material and advertising material was not acceptable as it did not cover a continuous period commencing before 11th July 2014, and up to no earlier than three months before the date of the application.

20. I am aware that Mr Nasim argues that no issues were raised of this type before the judge that the Appellant did not qualify as a worker for the purposes of the Rules. I am also aware that he points out that this was an appeal that had been put on the float list in Birmingham and was then taken up by a judge only at the last minute, thus resulting in the judge inadvertently failing to have regard to the advertising material which was attached to the bundles, but which the judge did not heed. However, were

this the only issue then I would have no hesitation in saying that there was an error of law.

21. The reality is that there was an additional issue in this case, namely, that, although the Appellant had produced evidence that he was engaged in business activity before 11th July 2014, this was not the kind of business activity which was being delivered pursuant to a contract of service with a business other than his own, and as such, the Appellant could not comply with the requirements of paragraph 41-SD because the core service that his business provided to its customers or clients did not involve his business delivering a service in an occupation at the appropriate level.

Notice of Decision

22. There is no material error of law in the original judge's decision. The determination shall stand.

23. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 16th November 2015