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**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/45181/2014  
IA/45187/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13 October 2015**

**Decision & Reasons Promulgated  
On 20 October 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE A M BLACK**

**Between**

**(1) MR MUHAMMAD MUDDASSAR  
(2) MRS NAZIA KHATOON  
(ANONYMITY DIRECTION NOT MADE)**

**Appellants**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr Sharma, counsel, instructed by Maher & Co.

For the Respondent: Ms Brocklesby-Weller, Home Office Presenting Officer

**DECISION AND REASONS**

1. No anonymity direction has been made in these proceedings and none was requested. I therefore make no such order.
2. The Appellants are husband and wife; they are citizens of Pakistan. The First Appellant had applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under

the Points Based Scheme. The Second Appellant is his dependent. They appealed against the refusal of further leave to remain. Their appeals were dismissed by First-tier Tribunal Judge Britton under the Immigration Rules and on human rights grounds. The Appellants were granted permission to appeal to this Tribunal.

3. At a hearing on 11 August 2015, Upper Tribunal Judge Chalkley and I found the First-tier Tribunal Judge had made an error of law in his approach to the marketing material adduced by the First Appellant. We found that the Judge had made a material error of law in his approach to that material. We did not accept the three remaining grounds of appeal and, as a result, set aside the Judge's decision as regards the marketing material and the Judge's findings at paragraphs 27 - 37 and 39. We directed that the appeal against the refusal of further leave to remain, with specific reference to paragraph 41-SD(e)(iii) of Appendix A to the Immigration Rules, be heard afresh in this Tribunal. The findings and decision with regard to Article 8 (paragraph 40) and the issue of fairness (at paragraph 38) were preserved.
4. The matter therefore came before me on 13 October 2015 at a resumed hearing. The Appellant attended the hearing and gave oral evidence. He was cross-examined by the Respondent's representative and his oral evidence is noted in my record of proceedings. I was invited by his representative to take into account the documents which were before the First-tier Tribunal Judge in making my findings on the issue of whether the First Appellant fulfilled the criteria in paragraph 41-SD(e)(iii) of the Immigration Rules. I also heard the submissions of the two representatives.
5. At the outset of the hearing, Mr Sharma, for the Appellants, indicated that it would be helpful to know whether the constitutionality argument put forward at the First-tier Tribunal would be addressed by me. I referred him to Judge Chalkley's and my reasons for finding an error of law (paragraph 3 of that decision) and indicated that the sole issue before me was whether the First Appellant fulfilled the criteria in paragraph 41-SD. He invited me to make further findings in line with s24(a) and(b) of the Tribunals, Courts and Enforcement Act 2007. This provides that "in acting under subsection (2)(b)(ii) [remaking a decision], the Upper Tribunal .. may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and ... may make such findings of fact as it considers appropriate". Mr Sharma referred me to the guidance at paragraph 39 of **R (Alvi) v SSHD [2012] UKSC 33** and to **Pankina v SSHD[2010] EWCA Civ 719**. He submitted that paragraph 41-SD(e) was not enforceable because the Respondent had failed to lay the relevant changes to that paragraph before Parliament as required. This failure fell into statutory error and rendered the amended paragraph unenforceable. He submitted that s3(2) Immigration Act 1971 required the Respondent to follow the "negative resolution procedure" and that, the Respondent having failed to follow that procedure in this case, the changes to the Immigration Rules, insofar as they were relied upon by the Respondent to refuse the First Appellant's application, were unenforceable; he argued that it was open to this Tribunal to make a finding that the decision to refuse the application under that paragraph was not in accordance with the law. However, that submission takes no account of the fact that Judge Chalkley and I have already made a finding that the error of law made by the First-tier

Tribunal Judge is limited to his approach to the marketing material. It is not therefore appropriate to address that issue again. This decision is therefore confined to remaking the decision as to whether the First Appellant has demonstrated he fulfils the criteria in paragraph 41-SD(d)(iii).

6. The First Appellant's oral evidence is that, with regard to the advertising material at pages 33-34 of his bundle, some leaflets had been delivered on 9 and 10 July 2014, the rest being delivered later. He had contracted with Samir Art on 10 July 2014. He told me he and his partner had previously printed about 200 leaflets on their office printer but they had been busy preparing contracts with potential clients and had thought it better to hire someone to print further leaflets. He told me that Samir Art had provided him with about 100 leaflets on 10 July; they were unable to provide more leaflets on that day because they were busy. The First Appellant had provided Samir Art with the format used on their system and it was this which was used to print the initial 100 leaflets on 10 July.
7. It was pointed out to the First appellant that the invoice issued by Samir Art stated that the proof would be ready on 11 July and the job ready on 13 July. He was asked to explain this, given his oral evidence that copies had been provided on 10 July. The First Appellant said that the format had already been printed in their office on 9 July and Samir Art had been asked to print using that existing format; as a result they printed about 100. The First Appellant had given some of those to Executive Services as they were distributing that day.
8. The First Appellant said that the reference in the Samir Art invoice to the job being ready on 13 July 2014 had arisen because Samir Art were very busy and had been unable to produce all the leaflets straight away; they had produced an initial batch of 100 and completed the job on 13 July. The First Appellant said that the leaflets provided on 13 July were slightly different to those provided on 10 July. Under cross-examination, it was pointed out to the First Appellant that his oral evidence was that he had asked Samir Art for 100 leaflets but the invoice referred to providing 250. The First Appellant told me that he had asked for 250 but that only 100 were provided on 10 July.
9. Ms Brocklesby-Weller submitted that, with regard to paragraph 41-SD(e)(iii)(1) and the requirement for advertising and marketing material, there was no evidence before the decision-maker of advertising material being published or distributed. She submitted that the only evidence was flyers or advertising material (pages 33 and 34 of the Appellants' bundle). She submitted that, to comply with the Rules, the First Appellant had to show that the leaflets had been printed and distributed locally or nationally. The First Appellant had not done this: he had given oral evidence but had not produced the requisite documents. The evidence was that leaflets were distributed in Slough, the date of the invoice for distribution being 9 July 2014. That invoice did not, she submitted, refer to the date of distribution.
10. As regard the online advertisements, the parties' representatives agreed that the documents submitted by the Appellants with the application were not included in

the Respondent's bundle. Indeed the First Appellant refers in his witness statement to these documents being missing from the Respondent's bundle. The Respondent's representative pointed out that those documents in the Appellants' bundle were dated August 2014 and did not cover a continuous period starting prior to 11 July 2014. Nor was there evidence of the First Appellant's business website being in existence prior to 11 July 2014.

11. The Respondent's representative sought, in the course of making her submissions, to adduce evidence of an internet search undertaken by the Respondent in the course of making her decisions on the applications. This application should have been made earlier and certainly before the Appellants' case had been concluded. I therefore refused it.
12. The Appellant's representative submitted that the Respondent had taken no point with regard to the contracts which had been provided by the First Appellant. With regard to sub-paragraph (iii), he submitted that the outcome of the appeal hinged on the definition of "published". It could be defined as being to print and make available for sale or to make public. Alternatively, it could be defined as printing and distributing the material. On the face of the two invoices, the First Appellant had provided documentary evidence of printing and distribution prior to 11 July 2014. The First Appellant had given oral evidence to explain the documents. He submitted that it was relevant that the oral evidence of the First Appellant had not been tested by the Respondent. It was accepted for the Appellants that the documentary evidence relating to website material post-dated the application and could not be taken into consideration. The Appellants' secondary submission was that the amendment to the Immigration Rules was unconstitutional (see above).
13. Paragraph 41-SD(e)(iii) requires that the applicant must provide "one or more of the following specified documents covering (either together or individually) a continuous period commencing before 11 July 2014 up to no earlier than three months before the date of his application".
14. It is not submitted for the Appellants that they have provided any of the material covered by sub-paragraphs (iii)(2), (3) and (4). The First Appellant does not dispute that he has been unable to provide contemporaneous evidence of "article(s) or online links to article(s) in a newspaper or other publication showing the applicant's name (and the name of the business if applicable) together with the business activity, ... information from a trade fair, or personal registration with a UK trade body linked to the applicant's occupation". There is no such material pre-dating 11 July 2014 in the Appellants' or Respondent's bundles; the only such material post-dates 11 July 2014.
15. I therefore focus on the issue of whether the First Appellant provided with his application any of the material listed in sub-paragraph (iii)(1). The First Appellant was required to produce:
  - (iii) one or more of the following specified documents covering (either together or individually) a continuous period commencing before 11 July 2014 up to no earlier than three months before the date of his application:

(1) advertising or marketing material, including printouts of online advertising, that has been published locally or nationally, showing the applicant's name (and the name of the business if applicable) together with the business activity or, where his business is trading online, confirmation of his ownership of the domain name of the business's website."

16. In considering the evidence I bear in mind the guidance in **Ahmed & Or (PBS: admissible evidence) [2014] UKUT 365 (IAC)**.
17. The First Appellant submitted with his application advertising and marketing material in the form of leaflets. It is not suggested by the Respondent that these do not include the First Appellant's name, the name of his business or the business activity. It is now submitted by the Respondent's representative that there is no evidence that these documents were published locally or nationally prior to 11 July 2014. However, I note from the reasons for refusal that the Respondent listed various specific reasons why she did not consider that the evidence submitted in relation to marketing and advertising material did not cover a continuous period commencing before 11 July 2014, as follows (and I summarise):
  - (i) The print-out from [www.gumtree.com](http://www.gumtree.com) was dated 25 August 2014.
  - (ii) The print-out from [www.friday-ad.co.uk](http://www.friday-ad.co.uk) was dated 25 August 2014 and the Respondent had been unable to find the First Appellant's business when conducting a search on the website.
  - (iii) The Respondent was unable to determine the dates on which the First Appellant's advertising had been posted on the websites.
  - (iv) Although the business website showed the First Appellant's team member and business partner as the owner of the domain it had not been created prior to 11 July 2014.
18. It is specifically stated in the reasons for refusal letter that it was for the above reasons that the First Appellant had not demonstrated he met the requirements of the Rules for the award of points. All of these reasons relate to the lack of internet material pre-dating 11 July 2014. There is no reference at all in the reasons for refusal to the existence of leaflets and the two invoices regarding printing and distribution although the Respondent's representative did not dispute that those leaflets and invoices were produced with the application. I therefore find that they were so produced. The inference from the absence of reference to these in the reasons for refusal letter is that either there was no issue with the advertising material or that the decision-maker had failed to note the material and take it into account.
19. The issues are whether the First Appellant's leaflets cover a continuous period commencing before 11 July 2014 and whether they had been published locally or nationally. The Respondent's case is that the documents do not demonstrate this. The First Appellant says that some leaflets were printed by his business prior to 11

July, some were also printed by Samir Art on 10 July and that leaflets were delivered in the Central Slough area by Executive Services prior to 11 July 2014.

20. The invoice issued by Samir Art is dated 10 July 2014 and refers to 250 leaflets and a price of £25 which was paid in cash. It states that the proof would be ready in the afternoon of 11 July 2014 and the job would be ready in the afternoon of 13 July 2014. The invoice is annotated with the word "email" adjacent to the "proof ready" box on the invoice which suggests that the proof was to be emailed to the First Appellant's business (which is the addressee on the invoice). The "job ready" box on the invoice also contains the number "2" which has been circled; this is adjacent to a circle around "pm". No explanation has been given for this but it appears to suggest that the job would be ready at 2pm on 13 July 2014. The invoice has a standard annotation as follows: "you must check the proof on the date above otherwise we will be unable to complete the job on time". The First Appellant told me that Samir Art had printed 100 leaflets using the format which had been prepared by the First Appellant on his business premises and that the rest of the order comprised reformatted leaflets produced by Samir Art. However, there is no reference to this in the invoice issued by Samir Art. Indeed the content of the invoice points to the job being one single task, rather than, as the First Appellant claims, a job in two parts (ie the printing of 100 leaflets to the First Appellant's format and the preparation of a proof and printing of further leaflets. This invoice does not demonstrate that some of the leaflets had been printed and returned to the customer on 10 July 2014. Given the content of this invoice, the Respondent would have been entitled to conclude that this document did not constitute documentary evidence of the printing of leaflets by Samir Art prior to 11 July 2014. Whilst I accept the First Appellant's evidence as to the printing of leaflets prior to 11 July 2014, this invoice does not demonstrate that and it does not therefore fulfil the criteria in paragraph 41-SD in that regard, notwithstanding his oral evidence.
21. The invoice issued by Executive Services is dated 9 July 2014 and addressed to the First Appellant's business. The authenticity and reliability of this invoice is not challenged by the Respondent. It states that the invoice was issued for delivery of leaflets in the Slough area. Whilst it does not provide the date of delivery, it is dated 9 July 2014 and refers to delivery in the past tense which suggests that delivery had already taken place by the date it was issued. This is consistent with the First Appellant's oral evidence that some leaflets had been delivered on 9 July 2014. Given this, I find that the document is a reliable one and that some leaflets had been printed and distributed prior to issue of the invoice on 9 July 2014. This constitutes local publication. For this reason, I find that the First Appellant had complied with the terms of paragraph 41-SD(iii)(1) in providing with his application advertising material which had been published locally prior to 11 July 2014.
22. Paragraph 41-SD(iii)(1) is drafted in the alternative to allow for businesses which trade online. As the First Appellant provided marketing material published locally, there was no requirement on him to provide confirmation of ownership of the business' domain name.

23. For these reasons I am satisfied the First Appellant had fulfilled the criteria in paragraph 41-SD(iii)(1) of the Immigration Rules. Therefore the refusal of the First Appellant's application for failure to comply with that paragraph was in breach of the Immigration Rules. The Second Appellant's appeal is dependent on the outcome of the First Appellant's appeal, the Second Appellant being the partner of a points based system migrant. Her appeal is therefore also successful under the Immigration Rules.

**Notice of Decision**

24. These appeals are allowed under the Immigration Rules.

Signed  
Deputy Upper Tribunal Judge A M Black

Date 19 October 2015

**FEE AWARD**

As I have allowed the appeals and because fees have been paid or are payable, I have considered making fee award and have decided to make fee awards of any fees which have been paid or may be payable for the following reason: the appeals have been successful on the grounds in the notices of appeal.

Signed  
Deputy Upper Tribunal Judge A M Black

Date 19 October 2015