Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/36736/2014
IA/36738/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31st March 2016	**On 25th April 2016**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

RAJA HUSSAIN MUSHTAQ
RAJA FAWAD MUSHTAQ
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop, counsel, instructed by M A Consultants (London)
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These appeals come before me by way of an agreed consent order issued by the Court of Appeal allowing the Appellants' appeals against the decision of Deputy

Upper Tribunal Judge Woodcraft without consideration of the merits. The terms of the consent order, dated 09 February 2016 and supported by a statement of reasons, set aside the Deputy Judge's decision promulgated on 22 June 2015 which, in turn, dismissed the appeals brought by the Appellants against a decision of Judge of the First-tier Tribunal Wooley, promulgated on 02 February 2015, who, in turn, dismissed the Appellants' appeals against decisions dated 07 September 2014 refusing to grant the Appellants further leave to remain as Tier 1 (Entrepreneur) Migrants. The Appellants appeals were remitted back to the Upper Tribunal for a full hearing.

Background

2. The Appellants are brothers of Pakistani nationality. They were granted leave to enter the United Kingdom as Tier 4 (General) Students and their leave was subsequently extended following in-time applications. On 21 July 2014 both Appellants made in-time applications for further leave to remain as team members under the Tier 1 (Entrepreneur) Migrant category. Their applications were based on the establishment of R.HF Consultants Limited, a company offering professional marketing and business development services.

3. These applications were refused by the Respondent on the basis that

(i) the Appellants failed to demonstrate access to £50,000 on any one day;

(ii) that they did not own the domain name of their business's website; and

(iii) that they did not provide any documentation from HMRC to confirm their business was registered for corporation tax.

Decision of the First-tier Judge

4. The Appellants appealed the Respondent's decision and their appeal was heard by the First-tier Tribunal on 23 January 2015. The First-tier Tribunal judge dismissed the appeal upholding the Respondent's decision in respect of all points from (i) to (iii).

Decision of the Deputy Upper Tribunal Judge

5. Aggrieved with the decision of the First-tier Tribunal the Appellants sought, and were granted permission to appeal to the Upper Tribunal. In a decision promulgated on 22 June 2015 the Deputy Judge accepted that the First-tier Tribunal failed to apply the immigration rules in existence at the date of the Respondent's decision and applied instead the rules as they were at the date of the appeal hearing. This made a material difference in respect of (i) above. The Deputy Judge found that the Appellants did demonstrate that they had access to £50,000 in accordance with the immigration rules as they were at the date of the

decision. The Respondent has not challenged this aspect of the Deputy Judge's conclusion.

6. The Deputy Judge found that the requirement to demonstrate ownership of the domain name of the Appellants' business website was an alternative and, as the company was not trading online, the First-tier Tribunal Judge fell into legal error in requiring evidence of such ownership. The Deputy Judge was not however satisfied that the Appellants provided marketing or advertising material covering a continuous period commencing before 11 July 2014 up to no earlier than 3 months before the date of their application, as required by paragraph 41-SD(e)(iii) of Appendix A. This issue remains the central area of dispute in the appeals before me.

7. With respect to (iii) the Deputy Judge found that, although the Appellants had not provided evidence to show that their company was registered for corporation tax, this was not a requirement in the immigration rules as they were at the date of the Respondent's decisions. Ms Isherwood indicated at the outset of the hearing before me that this issue remained live.

8. Given that the Deputy Judge was not satisfied that the Appellants met the requirements of paragraph 41-SD(e)(iii) he dismissed the appeals. However, in so doing the Deputy Judge had not invited submissions from the Appellants representative in respect of the merits of the case. In the Statement of Reasons accompanying the Consent Order the Respondent agreed that the failure to allow the Appellants any opportunity to make submissions deprived them of the right to a fair hearing and amounted to a breach of natural justice.

Submissions from the parties

9. At the outset of the rehearing I sought confirmation from the parties as to the focus of the appeal. Mr Isherwood did not seek to challenge the conclusion of the Deputy Judge that the Appellants did have access to £50,000. She did however submit that the Appellants failed to provide the required Companies House documents under paragraph 41-SD(b), a point not previously raised. Ms Isherwood indicated however that the principle focus of her submissions would be with respect to the requirements of paragraph 41-SD(e)(iii).

10. Mr Balroop made brief submissions in respect of the Companies House documents and then focused his attention on paragraph 41-SD(e)(iii). He referred me to flyers at pages 19 and 20 of the Appellants' bundle that were provided to the Respondent with the Tier 1 application. He accepted that the Appellants' business was not trading online. He submitted that the provision of the advertising flyers with the applications was sufficient to satisfy the advertising and marketing requirements in paragraph 41-SD(e)(iii). Mr Balroop confirmed that there was no evidence before the First-tier Tribunal, or indeed the Respondent, that the flyers were 'published locally or nationally'. He submitted

that, if the flyers were accepted as advertising material, then a holistic approach must be adopted and the leaflets must be viewed as having been published.

11. Mr Balroop submitted, in the alternative, that the Respondent was obliged to exercise her discretion under paragraph 245AA of the immigration rules if not satisfied that the flyers contained all the 'specified information'. Further to this submission Mr Balroop submitted that, had a request been made under paragraph 245AA, an invoice dated 08 July 2014 from ISB Design & Print would have been provided confirming the printing of the flyers. This, it was submitted, would have demonstrated compliance with the requirement that the advertising material covered a continuous period commencing before 11 July 2014. Mr Balroop submitted that the invoice, in conjunction with the flyers, made it clear that there had been advertising material published in accordance with paragraph 41-SD(e)(iii).

12. Ms Isherwood submitted that the Appellants failed to provide with their applications evidence of actual advertising. There was said to be no obligation on the Respondent to exercise her discretion pursuant to paragraph 245AA as the applications were refused for other reasons as well. In any event, paragraph 245AA required the missing 'specified information' to be contained within the specified document itself and not an external document such as an invoice.

Discussion

13. It was agreed by the parties that the principle issue in this appeal was whether the Appellants met the requirements of paragraph 41-SD(e)(iii)(1) of Appendix A to the immigration rules. This paragraph reads, in material part and at the date of the Respondent's decisions (07 September 2014):

> **(e) If the applicant is applying under the provisions in (d) in Table 4, he must also provide:**
>
> **(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**

14. There was no dispute that the Appellants were applying under the provisions of (d) in Table 4 contained in Appendix A. As such, the specified documents provided by the Appellants had to cover a continuous period commencing before

11 July 2014. Furthermore, the advertising or marketing material had to have been 'published locally or nationally'.

15. At pages 19 and 20 the Appellants produced a flyer that they maintained was provided to the Respondent with their Tier 1 application. Ms Isherwood did not dispute this assertion. The flyer (or leaflet) described the Appellants' company and gave both their names and contact details. No reference was made to any website. As confirmed by Mr Balroop the Tier 1 application did not contain any other evidence of marketing or advertising.

16. Mr Balroop submitted that the provision of the flyers was in itself sufficient to satisfy the requirements of paragraph 41-SD(e)(iii)(1) both in respect of the publication requirement and the period that the specified documents had to cover. I reject this submission. I am entirely satisfied that the term 'published locally or nationally' requires the advertising or marketing material to have actually been distributed or communicated to the public. There is a clear distinction between a document being 'printed' and 'published'. I take the term 'published', in the context in which it is used in paragraph 41-SD(e)(iii), to mean that the advertising or marketing material must have been made available to the public. While flyers may have been printed with their 'publication' in mind, it is not necessarily the case that they would have been disseminated to the public.

17. The immigration rules require specified evidence that the advertising or marketing undertaken by an applicant has been genuine. It is clear that the rules have in mind marketing such as advertisements that have been inserted in newspapers or magazines which could then be produced with an application, or online advertising which can be printed showing the relevant date and details. The method of marketing is however left open and an applicant is fully entitled to show that their business has been marketed in another way provided that the marketing or advertising material has been 'published locally or nationally'. If an individual chooses to advertise by publishing leaflets 'locally or nationally' he or she must provide satisfactory evidence with her application that the leaflets have actually been disseminated in some manner to the public. This could, for example, be by way of statements from individuals who distributed the leaflets on a particular day and location, or a series of photographs showing the distribution which contain the date and time when they were taken.

18. No such evidence was provided with the Tier 1 applications. The existence of the flyers, by reference to the single example given in the Appellants' bundle, demonstrates that the flyers were printed. For the reasons given above I am not satisfied that they demonstrate publication locally or nationally.

19. Mr Balroop submitted, in the alternative, that the Respondent should have exercised her discretion under paragraph 245AA of the immigration rules and requested from the Appellants further evidence of advertising.

20. paragraph 245AA read, at the date of the decisions and in material part:

245AA. Documents not submitted with applications

(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).

(b) If the applicant has submitted specified documents in which:

(i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);

(ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(iii) A document is a copy and not an original document; or

(iv) A document does not contain all of the specified information;

the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.

(c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.

21. Mr Balroop submitted that the flyers provided by the Appellants with their applications did not contain 'all of the specified information' and that the Respondent should have considered exercising her discretion. Paragraph 245AA(b)(iv) relates to a 'document' that does not contain all the specified information. This suggests that the assessment as to whether the specified document contains all the specified information is an internal examination, i.e. one that is limited to the document itself. It is apparent from the terms of paragraph 245AA(b) that the exercise of discretion must result in a request for the 'correct documents'. It is therefore difficult to see how the provision of an entirely different type of document could correct an error in a specified document that does not contain all of the specified information. With respect to the instant appeals, it is difficult to imagine how any correction to the flyers themselves

could remedy the defects relating to the need to demonstrate publication locally or nationally, or indeed the need for the specified documents to cover a continuous period commencing before 11 July 2014.

22. Even were I to accept Mr Balroop's submission, and take into account the evidence provided after the application, I am not satisfied that the invoice date 08 July 2014 was capable of demonstrating that the leaflets were published locally or nationally. At the most the invoice shows that the leaflets were printed on 08 July 2014. For the reasons I have already given I find there is a distinction between a date on which a flyer was printed and the date on which it was published. I am therefore not satisfied that the leaflets were published locally or nationally. In these circumstances I find the Appellants could not have met the requirements of the immigration rules.

23. For completeness I am satisfied that the Deputy Judge was correct in his assessment of the need to provide evidence of the company's registration for corporation tax.

Decision:

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

I remake the decision and dismiss both appeals under the immigration rules.

21 April 2016

Signed: Date:
Upper Tribunal Judge Blum