



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/39114/2014

THE IMMIGRATION ACTS

Heard at Manchester
On 17th November 2015

Decision & Reasons Promulgated
On 20th January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR ALI RAZA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Holt, Counsel

For the Respondent: Ms C Johnstone, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 20th November 1980. The Appellant has an extensive immigration history having been granted leave to enter the UK as a student on 20th April 2006. Subsequent to that his leave was extended on four occasions. Thereafter on 9th August 2014 he made a combined application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points-based system and for a biometric residence permit. That application was refused on 6th October 2014. Detailed reasons are set out in the Notice of Refusal -

Appendix A: Attributes. It was noted by the Secretary of State that the Appellant stated that he had access to at least £50,000 held to invest in business in the UK as specified under provisions (d) in Table 4 of Appendix A of the Immigration Rules, but on the basis of the documents provided the Appellant did not qualify for the award of points in this area. Thereafter the reasons for decision were detailed with specific reference to paragraph 41-SD(e) of the Immigration Rules which states the evidence that must be submitted to demonstrate that the business was actively trading.

2. The Appellant appealed. It is appropriate to note at this stage that the initial application and appeal was a joint application with Mr Kamran Mukhtiar. I am advised that Mr Mukhtiar does not seek to appeal to the Upper Tribunal. On 2nd June 2015 the appeal came before Judge of the First-tier Tribunal Malik sitting at Manchester. In a decision and reasons promulgated on 15th June 2015 the Appellant's appeal was dismissed. On 25th June 2015 the Appellant lodged Grounds of Appeal to the Upper Tribunal. The Grounds of Appeal were settled by Counsel. In essence they contended that the judge:
 - (i) gave no adequate reasons for finding that the distribution of business cards did not amount to "publication" thereof; and
 - (ii) failed to give adequate reasons for her proportionality finding under Article 8.

On 3rd June 2015 First-tier Tribunal Judge Cox granted permission to appeal. He stated that the first ground raised an interesting issue which he considered arguable. As far as the second ground is concerned he stated:

"I suspect Ground 2 may be raised more in hope than expectation, given that As' tenure in the UK has always been precarious and there seems little reason to think that removal would adversely affect their physical and moral integrity, but I am disinclined to exclude it at this stage because it is supported by legal argument."

3. On 14th September 2015 the Secretary of State responded to the Grounds of Appeal. That Rule 24 response contended that the Judge of the First-tier Tribunal directed herself appropriately. The Rule 24 response submits that the findings at paragraph 21, that the business cards do not amount to advertising or marketing material that has been published locally or nationally, is a finding entirely open to the Judge of the First-tier Tribunal to make. The response goes on to state that it is arguable that any other finding on this point could be said to be perverse. The point in the grounds at paragraph 11 that the Rules should be given a purposive approach is resisted on the basis that the Rules should be interpreted as "black letter law and contra preferentum" is a creature of contract law. It was further submitted that the findings at paragraph 26 were entirely open to the judge to make and are more than adequately reasoned and that the grounds are no more than disagreement with findings of fact made by the First-tier Tribunal.
4. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The

Appellant appears by his instructed Counsel Mr Holt. Mr Holt is extremely familiar with this matter. He appeared before the First-tier Tribunal and he is the author of the Grounds of Appeal for the Upper Tribunal. The Secretary of State appears by her Home Office Presenting Officer Ms Johnstone.

Background

5. The Appellant is a national of Pakistan originally granted leave to remain in the UK as a student and eventually being granted leave to remain as a Tier 1 (Post-Study Work) Migrant. Following the changes to the Immigration Rules in 2014 the Appellant sought to apply for leave to remain as a Tier 1 (Entrepreneur) Migrant. His application was refused on 6th October 2014 on the basis that he had failed to provide advertising/marketing material for the required period (this being no older than three months but must predate 11th July 2014).
6. The appeal has been brought on two bases. Firstly that the Appellant succeeded under the Rules and that if otherwise found refusal be proportionate and that the appeal is sought on the basis that the judge at first instance had erred in finding that the Rules were not met and secondly had erred in finding that the refusal was proportionate.

The Law

Paragraph 41-SD(e)

7. *41-SD. The specified documents in Table 4 and paragraph 41, and associated definitions, are as follows:*
 - (e) *If the applicant is applying for leave to remain, and has, or was last granted, leave as a Tier 1 (General) Migrant or a Tier 1 (Post-Study Work) Migrant, he must also provide the following evidence that he meets the additional requirements set out in Table 4:*
 - (i) *his job title,*
 - (ii) *the Standard Occupational Classification (SOC) code of the occupation that the applicant has been working in since before 11 July 2014 or 6 April 2015 (as applicable), up to the date of his application, which must appear on the list of occupations skilled to National Qualifications Framework level 4 or above, as stated in the Codes of Practice in Appendix J,*
 - (iii) *one or more of the following specified documents showing that the business was active before 11 July 2014 or 6 April 2015 (as applicable) and that it remained active throughout the period leading up to the date of his application (if the applicant or his entrepreneurial team member does not own the domain name of the business's website, then the evidence in (2) may not be provided, and he must instead provide one or more of the documents specified in (1),(3),(4) or (5)):*

- (1) *dated advertising or marketing material, including printouts of online advertising other than on the business's own website, that has been published locally or nationally and showing the name of the business and the business activity, or*
 - (2) *if the applicant (or his entrepreneurial team member) owns the domain name of his business's website and submits evidence to this effect, dated printouts from the business's website detailing the service or product provided by the applicant's business, or*
 - (3) *dated article(s) or online links to dated article(s) in a newspaper or other publication showing the name of the business together with the business activity, or*
 - (4) *dated information from a trade fair, at which the applicant has had a stand or given a presentation to market his business, showing the name of the business together with the business activity, or*
 - (5) *personal registration with a UK trade body linked to the applicant's occupation; and*
- (iv) *one or more of the following specified documents showing that the business was trading before 11 July 2014 or 6 April 2015 (as applicable) and traded continuously throughout the period leading up to the date of his application:*
- (1) *one or more contracts for service. If a contract is not an original the applicant must sign each page. Each contract must show:*
 - (_a) *the name of the business,*
 - (_b) *the service provided by the applicant's business;*
 - (_c) *the name of the other party or parties involved in the contract and their contact details, including their full address, postal code, telephone contact number and any email address; and*
 - (_d) *the duration of the contract or, if it is a rolling contract with no defined end date, confirmation of when this arrangement began and a letter from the customer or their representative confirming that the contract has not been terminated, dated no earlier than three months before the date of application; or*
 - (2) *one or more original letters from UK-regulated financial institutions with which the applicant has a business bank account, on the institution's headed paper, confirming the dates the business was trading during the period referred to at (iv) above.*

The Issue

8. It is the contention of the Secretary of State that the evidence submitted in relation to advertising material is not acceptable as it does not cover a continuous period commencing before 11th July 2014 up to no earlier than three months before the date of the Appellant's application as the newspaper advertisement supplied does not show a date and the Gumtree advertisements were printed off on 7th August 2014 and also show no dates.

Submissions

9. Mr Holt refers me to the relevant Rule (recited above) and asks the question as to how does an Appellant satisfy the criteria. He points out that there is no definition given in the Immigration Rules of the phrase "published locally or nationally". On that basis he says that it is for the Tribunal to do so and that it is for the Tribunal to take a purposive approach and for an Appellant to show that he had engaged in business activity. He submits that the definition of publication should be given a purposive approach. He contends that the material error of law is to be found at paragraph 21 of Judge Malik's determination. Here she has stated:

"The business cards submitted with the application I find do not amount to 'advertising or marketing material ... that has been published locally or nationally' as again business cards are just that - given to individual contacts and not published."

Mr Holt submits that the judge thereafter fails to give adequate reasons for that finding and that that amounts to a material error of law.

10. Further at paragraph 23 of the determination the judge finds the Appellants were operating a business but he submits that she has failed to say why. He notes that at paragraph 9 of the judgment Judge Malik had noted that the Appellants in the original appeal had to show they already had a business before 11th July 2014. Consequently adverts placed after that date were effectively inadmissible. He contends that there are material errors of law in the decision of the First-tier Tribunal and asked me to set the judgment aside and to remake the decision allowing the appeal.
11. Ms Johnstone takes me to the Rule 24 reply which she says succinctly sets out the Secretary of State's position and that the judge was fully entitled to make the finding that she did and that handing over a business card is, she submits, not publishing it. She acknowledges that there is no definition of published. The judge had the evidence and found that the handing over of the business card did not amount to publication. She states that that was a finding the judge was entitled to make. As far as the reference to an entrepreneurial team is concerned she submits that that amounts to an application to vary the current application and in any event the Appellant is now an Appellant on his own and that the maintenance documents produced have to have his name on them to show that he meets the Rules. She submits that even if an error were to be found the Appellant could not succeed on

the argument based on the “team position” because as she points out the team no longer exists. She asked me to find that there is no material error of law.

12. Mr Holt responds by taking me to paragraph 52 of Appendix A – a section entitled Entrepreneurial Teams: Notes. He submits that a transfer from a joint application would not affect the issues in this appeal. Turning to the position regarding the business cards Mr Holt submits that Ms Johnstone’s response is that there is no evidence before the Tribunal to say the business cards constituted published material. He submits that the question is whether or not this is acceptable evidence and submits that it is, pointing out that business cards were printed and provided and that this finding is to be found at paragraph 21 of Judge Malik’s determination.
13. As far as Article 8 is concerned Mr Holt submits that the judge made findings at paragraph 23 that the business was formed prior to 11th July 2014 and therefore the terms of Appendix 41-SD of the Rules are, he submits, met. He submits that if the failure is only technical then the argument can be pursued and if I am satisfied it would not have a negative effect on the wellbeing of the country then it is open to me to allow the appeal.
14. In response to this Ms Johnstone points out that effectively what Mr Holt is seeking to do is to address this aspect on a “near-miss” approach and that that approach cannot succeed under Article 8.

The Law

15. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
16. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge’s factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge’s assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

17. It is important to address this matter on the basis upon which it is put before me. Initially I am required to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. In this case, particularly bearing in mind that I am asked quite specifically by Mr Holt to make a ruling with regard to the issue as to whether or not business cards amount to publication pursuant to paragraph 41-SD, I have gone into this matter in some detail with regard to the submissions that are put to me. As a starting point I find that whilst the First-tier Tribunal Judge made a finding, namely that “business cards are just that – given to individual contacts and not published” but has gone no further to explain as to why that does not amount to publication, I find that there is an error of law and I set aside the decision of the First-tier Tribunal. Having done that I proceed to remake the decision.
18. I am not influenced in my decision in this matter by the fact that only one of the two original Appellants proceeds in his appeal to the Upper Tribunal. Documentation required herein is set out in Appendix A 41-SD(e)(iii)(1). Those documents are set out above. They are referred to in considerable detail at paragraphs 18 to 21 of the First-tier Tribunal Judge’s determination. The judge found that the business cards submitted with the application did not amount to “advertising or marketing material that has been published locally or nationally” finding that business cards were just that, given to individual contacts and not published. I actually consider it debateable as to whether the judge needed to go further but I am persuaded that this is a point of some importance. The Rule requires advertising or marketing material being published locally or nationally. Such a process indicates, by the very nature of the words, a holding out to the general public either in a local manner or in a national manner that the enterprise which the entrepreneur seeks to become involved in is being published. Clearly what is specifically aimed at is a form of newspaper advertisement but I acknowledge that in these days of technological development that it is not restricted to such a form of marketing or advertising and indeed the Rule makes specific reference to online advertising. What it does not do is make reference to business cards. By their very nature business cards are small individual documents personally handed out at a face-to-face meeting. It cannot be construed as constituting local or national advertising or marketing. It is specifically targeted marketing or advertising handed to an individual. If the Rule intended to include within such definition a business card then it would have said so. Effectively what Judge Malik says is absolutely correct, namely that a business card is given to an individual contact. It is not published. To construe it in that manner would be to give a totally different meaning to the Rule and in such circumstances the Appellant does not meet the specific requirements of the Immigration Rules.
19. So far as Article 8 is concerned I again remake the decision of the First-tier Tribunal Judge. The judge has looked at this matter in some detail at paragraphs 24 onwards. Mr Holt submits to me that if the only failure is technical then the appeal should be allowed under Article 8. I disagree with Mr Holt that this is merely technical. Indeed it is fundamental and both parties in view of the manner in which this has been raised before me effectively acknowledged that for they seek a ruling on the

point. I support the views and endorse them of the First-tier Tribunal Judge and I remake and reiterate them and I agree with the submission made by Ms Johnstone that effectively what is being relied upon is a near-miss approach. In all the circumstances this is an appeal that cannot succeed for all the above reasons and the Appellant's appeal consequently is dismissed.

20. I acknowledge that the Appellant may well still wish to pursue his business venture but of course he now wishes to pursue it in a capacity as a sole trader rather than in partnership with the previous Appellant. It is a matter for the Appellant to discuss with his legal advisors as to the process that he should now follow and as to whether a further application would be appropriate. That is not a matter to be addressed before this Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and is set aside. The decision is remade dismissing the Appellant's appeal both under the Immigration Rules and pursuant to Article 8 of the European Convention of Human Rights.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT **FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris