



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

Appeal Number: IA/47511/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 18 January 2016**

**Decision & Reasons Promulgated
On 5 February 2016**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

MR ZULFIQAR ALI KHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Alarayn of Counsel instructed by Farani-Javid-Taylor Solicitors LLP

For the Respondent: Mr Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has brought this appeal as a result of the decision by the First tier Tribunal (FtT) sent on 6 July 2015 dismissing his appeal against the decision made by the respondent on 10 November 2014 refusing his application for leave to remain as a Tier 1 Entrepreneur. The focus of the respondent's refusal was the requirements of para 41-SD(e) of Appendix A of the Immigration Rules, with reference to paragraph 245DD. In particular the respondent concluded that the appellant did not meet the requirements of

either para 41-SD(e)(iii) or (iv). To paraphrase, para 41-SD(e)(iii) requires an applicant to produce a number of documents in the form of advertising materials and articles or on line articles or other publications showing the applicant's name together with the business activity or personal registration with a UK trade body covering a three months period. Subpara (iv) requires one or more contracts for service or one or more original letters from UK-regulated financial institutions. I am particularly grateful to both representatives for their careful and attentive submissions.

2. The FtT judge dismissed the appeal because he considered that the appellant had failed to meet the requirements of para 41-SD(e), in particular by failing to provide evidence as regards advertising materials to cover a continuous period commencing before 11 July 2014 up to no earlier than 3 months before the date of application. It is as well to note at this stage that the appellant submitted his application on 6 September 2014. In the appellant's grounds, it was stated that the documents submitted in support of his application were:

- (i) Business cards
- (ii) Business leaflets
- (iii) Evidence of a website registered on 29 November 2013
- (iv) Certificate of Membership of IEE (Institute of Enterprise and Entrepreneurs)
- (v) Free Index Advertisement
- (vi) Advertisement on Gumtree
- (vii) Advertisement on Yell

3. The grounds go on, *inter alia*, to level a number of criticisms at the FtT judge's treatment of these documents.

4. In the event, it is unnecessary to set out these criticisms (save one relating to an alleged concession; see below) or indeed what the judge had said about the documents for the following reason. It was accepted by Mr Alarayn (with one caveat to which I shall return below) that the grounds could only succeed if in fact the above list of documents was sent with the appellant's application. That acceptance was a proper recognition of the binding force of para 245AA of the Rules which states at (a) that "Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, 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 ..."[the proviso that follows is not applicable in this case]. In particular, Mr Alarayn accepted (save for the same caveat to which I shall return to below) that the last two aforementioned documents - the Advertisement on Gumtree and the Advertisement on Yell - were critical to the appellant being able to satisfy the relevant rules because the other documents (the business cards, business leaflets and Certificate of Membership of Enterprise and Entrepreneurs) were not dated and the Free Index advertisement was dated 4 September 2014.

5. However, perusal of the file fails to substantiate that the Gumtree and Yell advertisement documents were in fact sent with the application. First, the refusal letter makes no reference to the Advertisement on Gumtree and the Advertisement on Yell. Second its assessment of the appellant's ability to meet the requirements of para 41-SD(e) states in categorical terms that "... the only evidence that you have submitted to demonstrate that you are active in that occupation as part of your business Calibre London Limited, is..." and the list that follows does not include either the Gumtree or Yell advertisements. Third, the appellant's own grounds of appeal include a page headed "Evidence". It is divided into two lists. The first list (numbered 1-4) includes the Gumtree and Yell advertisements. The second list (numbered 1-2) is headed "Evidence provided with application" and lists: "1. Contract with two companies. 2. Contract with the webdesigner...". Whilst it is clear that other items than these latter two were in fact submitted with the application, this sheet is a strong indication that the Gumtree and Yell advertisements were not submitted until the stage of submitting the grounds of appeal. Fourth, Mr Alarayn was unable to produce a file copy of the application together with the enclosed documents.

6. It is time to revert to Mr Alarayn's caveat made late in his submissions that in fact the appellant was entitled to succeed under para 41-SD(e) even without the Gumtree or Yell advertisements because the leaflets were sufficient in themselves to demonstrate the relevant activity over the three month period. That submission is simply not borne out by the fill and indeed Mr Alarayn accepted he was not in a position to substantiate that claim. Against that the respondent had said in the refusal letter they bore no dates and the appellant has never challenged that analysis before the hearing.

7. This brings me to the ground of appeal relating to an alleged concession. The grounds contend that the FtT judge was wrong to dismiss the appeal under requirement (iv) [it can be seen that in fact reference should have been to requirement (iii)] of para 41-SD(e) because:

"... on the date of the hearing the Respondent took no issue with the evidence that he had submitted in support of meeting [its] requirements... In particular, he submits that the Respondent confirmed that she was satisfied with the advertising material and that the leaflets (coupled with the invoice dated December 2013) and the yell advertisements (created on 2 January 2014) clearly met the requirements of the Rules. The Respondent then submitted that she only had an issue with the website domain and this was the only point that was raised in the course of the hearing itself. A duly signed witness statement is enclosed to this effect".

8. I am unable to accept this submission. The judge's determination makes no reference to such a concession and indeed if such had been made there would have been no point to the judge recording in [10] the appellant's evidence as given in cross-examination in summary as covering the issue of the business advertisements. Nor indeed would it have been sensible for the judge to have earlier summarised in some detail the respondent's reasons for refusal as regards para 41-SD(e) or the appellant's responses: see [3]-[4]. To say that the website domain "was the only point that was raised in the course

of the hearing itself” is clearly incorrect and is not in any event supported by the duly signed witness statement from the appellant which notes at para 3 that he was asked about “which advertisements I had in place...I was asked about any particular ones and I mentioned my Yell and Gumtree adverts. I then told them about dates. I was then asked about the domain name.” Further, there is no record of any concession in the documentation held by the respondent, as was confirmed to me by Mr Duffy. I informed the parties that I would look over the record of proceedings in their presence, which I did. I informed them that much of the handwritten script was illegible but there was nothing to indicate any concession was made. It is right to mention that the First tier Tribunal judge who granted permission had stated that “The FtT judge will need to be asked to decipher his records of proceedings on that issue”, but that was stated on 3 November 2015 and despite the parties being informed on 10 December 2015 that this case was listed for hearing on Monday 18th January 2016, the appellant’s representatives took no steps to pursue the lack of anything further from the tribunal regarding a record of proceedings, not to respond to the respondent’s Rule 24 notice of 16 November disputing that any such concession was made. In all the circumstance it is impossible say that any such concession was made and I do not consider it would be in the interests of justice to take any further steps to obtain a transcribed version of the record of proceedings.

9. For completeness I should mention that the grounds of appeal also raised the point that the judge appeared to have dismissed the appeal on a further basis, namely the genuineness of the appellant’s business activity. He is correct that no such basis of refusal was identified by the respondent in the reasons for refusal letter. If the judge’s decision on this matter had had a material impact on the outcome of the appeal, I would have accepted that in this regard the FtT erred, in that it is not apparent that the appellant was given a proper opportunity to deal with the judge’s own concerns about genuineness. But for reasons set out earlier I am satisfied that the judge properly concluded the appellant could not meet in full the requirements of para 41-SD (e) in any event.

10. Mr Alarayn is right to highlight that the respondent’s reasons for refusal appear ultimately to depend on a failure on the part of the appellant to produce with his application documents which were nevertheless in existence at the time. That may or may not afford some scope to the respondent to reconsider the appellant’s case on a discretionary basis outside the Rules, but this can have no impact on the outcome of the appeal against the decision of the FtT judge and is not a matter for this Tribunal. The FtT decision was unimpaired by any material error of law.

11. For the above reasons the appellant’s appeal is dismissed.

Signed

Date

Judge of the Upper Tribunal