



IAC-FH-AR-V1

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

Appeal Number: IA/37662/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 9 December 2015**

**Decision & Reasons Promulgated
On 19 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**NASIR ALI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Saini, Counsel, instructed by Hanson Young Solicitors

For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal brought by the Appellant, Mr Ali, against the decision of First-tier Tribunal Judge O'Malley (Judge O'Malley), promulgated on 22 April 2015, in which she dismissed his appeal. That appeal in turn was against the decision of the Respondent, dated 9 September 2014, to refuse the Appellant's application to vary

his leave to remain as a Tier 1 (Entrepreneur) and to make a removal decision under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The basis of the Respondent's refusal of the application was a narrow one. It was said that the Appellant had failed to submit advertising or marketing materials covering a continuous period commencing before 11 July 2014 and up to no earlier than three months before the date of the application. The relevant provisions of the Immigration Rules relied on was paragraph 245DD(b), with reference to paragraph 41-SD(e)(iii) of Appendix A to those Rules.
3. On appeal to Judge O'Malley it was accepted that the Respondent's appeal bundle did not contain all of the evidence submitted by the Appellant with the application (see paragraph 24 of the judge's decision). The judge accepted that certain items of evidence which were not in the bundle had in fact been submitted with the application, in particular an advert in the Ilford Recorder and an advert on the Gumtree website. However both of these items postdated 11 July 2014.
4. The judge did not accept that an invoice dated 10 June 2014 had in fact been included with the application. This finding was based upon the Appellant's own witness statement at paragraph 12. The judge accepted that the Appellant had registered the domain name for his website on 26 June 2014, and that he had requested flyers and business cards in June of that year. However, it appears that he did not accept that this evidence was before the decision-maker. It was also said that even if the invoice referred to previously had been submitted with the application it was not sufficient to show that the relevant material had been published locally or nationally as required by the Rules, and this conclusion was based upon the fact that the Appellant had only distributed his headed letter paper for the use of drawing up a contract. This, in the judge's view, did not constitute publishing.
5. The Appellant sought permission to appeal. This was refused in the first instance by the First-tier Tribunal but was renewed in lengthy grounds of appeal to the Upper Tribunal. Permission was granted by Upper Tribunal Judge Goldstein on 24 August 2015.

The hearing before me

6. Before me, Mr Saini, Counsel for the Appellant, sought to rely on the grounds. In the first instance he submitted that the fact that the Appellant had his own website prior to 11 July 2014 was sufficient to satisfy the alternative limb within paragraph 41-SD-(e)(iii)(1) because the existence of the website amounted to advertising the services provided by the Appellant's company.
7. Secondly, Mr Saini submitted that the judge had failed to properly address the issue of the other evidence submitted with the application, in particular business cards and the flyers. Although it is accepted that the question of what was or was not submitted with the application was not entirely clear from the papers before us, Mr Saini submitted that the judge had not taken any credibility issues with the Appellant's evidence and had failed to address the flyers and business cards

adequately or at all when reaching his findings. I was referred to particular pages in the Appellant's consolidated bundle and evidence which was said to have been submitted with the application. The invoice mentioned by the judge was simply corroborative evidence of the purchasing of the flyers and business cards. Mr Saini sought to resurrect ground 5 of the grounds, a ground upon which permission to appeal was expressly refused by Upper Tribunal Judge Goldstein.

8. A final point made by Mr Saini was that the change in the Rules brought about by HC535 in respect of the need to show a continuous period rendered the decision under appeal not in accordance with the law as the imposition of a retrospective requirement by the Rules was unreasonable.
9. For the Respondent, Mr Bramble submitted that when one looked at the wording of the particular provision in question, "trading" must mean something more than simply online advertising, as reference to such advertising was made prior to the use of the word "or" in that subparagraph. There was no evidence in this case that the Appellant had in fact been trading in the sense of conducting business through his website. In respect of the other materials referred to previously, in particular the business cards and the flyers, Mr Bramble asked me to look at paragraphs 12 and 18 of the witness statements, and paragraph 26 of the judge's decision.
10. It was submitted that paragraph 30 of the decision referred back to paragraphs 26 and 28, and when one looked at the decision as a whole the judge's findings were sustainable. Mr Bramble accepted that if the judge was wrong in the way that he dealt with the witness statement evidence and the issue of the materials submitted with the application, the flyers and business cards could in fact meet the requirements of the Rules if they were published locally or nationally. He objected to the attempted resurrection of ground 5 of the grounds of appeal.

Decision on Error of Law

11. I find that the judge has made material errors of law in this case.
12. It is clear that the evidential position before the judge was unsatisfactory in certain respects. The Respondent had failed to include all of the evidence submitted with the application in her bundle. The Appellant's witness statement is not as clear as it might have been and there are elements of the Rules themselves which are not entirely straightforward. Having said that I find the judge has failed to make clear findings and/or has failed to provide adequate reasons for her conclusions in material respects.
13. First, it is clear to me that the judge had no issue as to the Appellant's credibility (see for example paragraph 27 of her decision). [She] should therefore have regarded the Appellant's evidence as being truthful. In light of that, and having regard to the witness statement as a whole, the judge should have taken account of the Appellant's evidence that he had submitted relevant marketing materials together with his application, notwithstanding their omission from the Respondent's bundle. If the judge was to make sustainable findings to the contrary, adequate reasons were

required to be provided, and in my view no such reasons are set out on the face of the decision.

14. In respect of paragraphs 26 and 27 of the decision, it appears to me on a fair reading of these passages that the judge has focused on the invoice referred to previously and has failed to engage properly with the flyers and business cards themselves.
15. In respect of paragraph 34 of the decision, the judge's conclusion that relevant material had not been published locally or nationally was based solely upon the distribution of the headed letter paper. In my view this was too narrow a basis upon which to found the conclusion, and it failed to have any regard to the other items of evidence, in particular the business cards and the flyers.
16. Turning to the witness statement evidence, although as I have said it is not perhaps as clear as it might have been, on a fair reading of the statement as a whole, in particular the passages between paragraphs 12 and 20, it is apparent that the Appellant was in effect stating that he had in fact marketed and advertised his business before 11 July 2014, and that he was relying on the invoice only as corroboration of his obtaining the business cards and the flyers.
17. Having regard to the Appellant's consolidated bundle, the relevant parts of which it was agreed by both representatives were before the First-tier Tribunal, I have looked at pages 252 onwards which are printouts from the Appellant's website. I have also looked at pages 103 and 104, the former showing one of the business cards in question and the latter showing the flyer.
18. Mr Saini referred me to the covering letter at pages 192-195 of the Appellant's bundle, which accompanied the Appellant's application to the Respondent. This includes a long list of evidence submitted with the application, and on a fair reading of that list it includes the items to which I have referred previously. This information has not in my view been adequately addressed by the judge in her decision, either by way of express consideration or by way of reasons as to why it was found that these items of evidence had not in fact been submitted with the application, as stated on the face of the evidence.
19. For these reasons I find that the judge has materially erred in law. I find it unnecessary to go on and deal with the other grounds of appeal.
20. I set aside the decision of the First-tier Tribunal.

Remaking the decision

21. Both representatives were agreed that I could remake the decision on the basis of the evidence before me, and that I now do.
22. I find that the Appellant did in fact satisfy the requirements of the Rules in light of the very narrow basis upon which his application was refused by the Respondent. I accept that the Appellant himself has provided credible evidence in all material

respects. I accept that the evidence to which I have already referred in my decision was in fact submitted together with the application to the Respondent (see items 10 and 14 at page 195 of the Appellant's bundle). In particular, I find that the flyers and the business cards were in fact obtained prior to 11 July 2014 and were submitted with the application. Aside from the Appellant's own evidence, this is corroborated by the invoice dated 10 June 2014, which I also find was submitted with the application.

23. It is more likely than not, and applying a bit of commonsense to the scenario, that the Appellant in fact distributed these marketing and advertising materials locally. In short, they were published locally. There would have been very little point in him having gone to the trouble of producing them, only to have kept them in a box, as it were. This would have had the obvious effect of defeating his own application, and in light of the detailed covering letter and the fastidious manner in which the application was prepared I am not willing to impute such inaction onto the Appellant.
24. It was accepted by Mr Bramble that if these particular items had in fact been published locally that they would satisfy the requirements of the Rules. I find that this is indeed the case.
25. In addition, I find that the website was in existence prior to 11 July 2014 and that the printouts from that website were in fact submitted together with the application (see item 9 on page 195 and pages 252-257 of the Appellant's bundle). Therefore these printouts also satisfy the requirements of the relevant subparagraph of paragraph 41-SD(e)(iii)(1) of Appendix A.
26. For these reasons the appeal is allowed under the Rules, as the Appellant has in fact satisfied the particular requirements of the provision in question and no other provisions of the Rules are in dispute.

Notice of Decision

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

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal under the Immigration Rules.

No anonymity direction is made.

Signed

Date: 31 December 2015

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of £100.00. I have found that the Appellant did in fact provide relevant evidence with his application to the Respondent. The Respondent did not furnish the First-tier Tribunal with all of that evidence. The Appellant has succeeded in his appeal on the basis upon which he had originally sought an extension of leave from the Respondent. The only reason for reducing the fee award is that aspects of the Appellant's evidence on appeal has not been entirely clear, and thus required judicial adjudication.

Signed

Date: 31 December 2015

Deputy Upper Tribunal Judge Norton-Taylor