**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number**

**IA/45014/2014**

**THE IMMIGRATION ACTS**

| **Heard at Taylor House** | **Decision and Reasons promulgated** |
|---|---|
| **On 23 October 2015** | **On 19 April 2016** |

**Before**

**Deputy Judge of the Upper Tribunal I. A. Lewis**

**Between**

**Secretary of State for the Home Department**

**Appellant**

**and**

**Mahabubul Rana**

(No anonymity order made)

**Respondent**

**Representation**

For the Appellant: Ms A Brockleby-Weller, Home Office Presenting Officer.

For the Respondent: Mr M Iqbal of Counsel instructed by Simon Noble Solicitors.

**DECISION AND REASONS**

**Background**

**1.** This is an appeal against the decision of First-tier Tribunal Judge Morgan promulgated on 11 June 2015, allowing the appeal of Mr Mahabubul Rana against the decision of the Secretary of State for the Home Department dated 27 October 2014 to refuse variation of leave to remain as a Tier 1 (Entrepreneur) and to issue removal

directions pursuant to section 47 of the Immigration Asylum and Nationality Act 2006.

**2.** Although before me the Secretary of State is the appellant and Mr Rana is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Rana as the Appellant and the Secretary of State as the Respondent.

**3.** The Appellant's personal details and immigration history are a matter of record on file and known to the parties; they are also set out in the body of the decision of the First-tier Tribunal. It is unnecessary to re-rehearse all such matters here. What is particularly pertinent for present purposes is that following a period of leave as a Post-study work migrant, the Appellant made an application for variation of leave to remain as a Tier 1 (Entrepreneur) migrant on 22 August 2014. The application was refused on 27 October 2014 for reasons set out in a combined Notice of Immigration Decision and 'reasons for refusal' letter, with particular reference to the requirements in respect of marketing and advertising materials (Immigration Rules, Appendix A, paragraph 41-SD(b)(iii)).

**4.** The Appellant appealed to the IAC. The First-tier Tribunal Judge allowed the Appellant's appeal for reasons set out in his determination.

**5.** The Respondent sought permission to appeal which was granted by FTTJ Cox on 24 August 2015.

## Consideration: Error of Law

**6.** The Respondent did not award the Appellant the points claimed under 'Attributes' because it was considered that there was no evidence that the leaflet and business card submitted by the First Appellant with his application as marketing material and advertising material - as required pursuant to paragraph 41-SD(e)(iii) - were 'active' prior to 11 July 2014.

**7.** The First-tier Tribunal Judge – whom it seems did not hear oral evidence, but proceeded by way of submissions only – concluded in these terms at paragraphs 7 and 8:

> "*7. In summary in light of the documentary evidence outlined above I find that the specified documents were in the requisite format and that the documentary evidence submitted to the respondent demonstrated that the appellant had been conducting the business since before 11 July 2014 and up to the date of the application and that the contract provided was also the specified format.*
>
> *8. In summary I find that the appellant did provide the specified documentation to demonstrate that he satisfies the requirements of paragraph 245 of the Immigration Rules and consequently I allow the appeal under the immigration rules.*"

**8.** Judge Cox in granting permission to appeal helpfully summarises the basis of the Respondent's challenge in these terms:

> "*The grounds in essence contended that there was unfairness in the proceedings because the Judge insisted that he did not need to hear from [the Appellant] and thereby prevented pertinent cross-examination; and, secondly, that he failed to give adequate or sustainable reasons for finding [the Appellant] had met the evidential requirements of paragraph 41-SD.*"

**9.** In all of the circumstances I have reached the conclusion that the second of those bases of challenge identified by Judge Cox is made out, and in consequence it is unnecessary for me to consider further the issue of procedural unfairness.

**10.** I take as my starting point the relevant requirement set out in the Rules in respect of advertising and marketing material. Paragraph 41-SD(b)(iii) of Appendix A of the Rules, when applicable, requires the applicant to provide one or more of the documents specified at paragraphs (1), (2), (3) and (4) "*covering either together or individually a continuous period commencing before 11 July 2014 up to no earlier than 3 months before the date of application*".

**11.** A difficulty identified by the Respondent in the Appellant's application is that the domain name of his website was not registered until after 11 July 2014.

**12.** It is to be noted that whilst the Appellant produced a business flyer with his application, it made use of the domain name, both as the website address and also the email address for information: e.g. see photocopy of leaflet contained in the Appellant's bundle before the First-tier Tribunal at page 43, and identified in the index as 'Advertisement Sent with the application'.

**13.** I pause to note that the leaflet at page 43 is in a slightly different format from the leaflet that is attached to the printers' invoice at page 30 of the Appellant's bundle, but even that leaflet makes use of the domain name in the email address. It is a curiosity as yet unexplored as to how it came to be that the printer was commissioned to produce a leaflet, for which an invoice was rendered purportedly on 30 June 2014, including a domain name that was not registered until some time later. This issue may require further exploration at a later stage in these proceedings, and both parties should now be considered 'on notice' as to its pertinence both in respect of the issue of the date of use of the marketing material, and in respect of the reliability and credibility of the Appellant's documents and narrative account.

**14.** In any event, what emerges, is that clearly the documents in and of themselves did not provide reliable or determinative evidence – without at the very least some further exploration by way of oral testimony - that the materials relied upon by the Appellant in respect of paragraph 41SD(b)(iii) were in use prior to the key date of 11 July 2014.

**15.** Whilst I accept that Judge Morgan was correct to observe at paragraph 6 that it would be unusual to expect the business flyers themselves to be dated, I am not satisfied that he has thereafter appropriately and sustainably reached a conclusion based on his consideration of the documentary evidence, or given clear and adequate reasons for any such conclusion, that the business flyers were in use prior to 11 July 2014. Indeed, in the conclusions set out at paragraph 7 (quoted above), whilst the Judge states that he was satisfied that the documentary evidence was "*in the requisite format*" he does not make an express finding as to *when* the business flyers were in use.

**16.** In this context I am not prepared to infer that the subsequent finding -that he was satisfied that the Appellant had been conducting business since before 11 July 2014 - is demonstrative of a finding in respect of the date of use of the business flyers: it is not congruent with a finding that the business flyers were in use since

before that date, and may in itself have been based on, for example, the Judge's satisfaction in respect of the contract for services. If, in the alternative, however such an inference was being drawn, then in my judgement the Judge has set out no adequate reasons to support such an inference - and in particular has not identified or otherwise engaged with the tension between the date of registration of the domain name and its appearance on publicity leaflets said to have been in use prior to the date of registration.

**17.** In all such circumstances I am satisfied that there was a material error in law in that the decision of the First-tier Tribunal lacks adequate sustainable reasoning. The decision of the First-tier Tribunal must be set aside accordingly, and requires to be remade. Because there was no oral evidence before the First-tier Tribunal, and such evidence is required, the decision in the appeal is to be remade before the First-tier Tribunal.

**18.** In such circumstances it is unnecessary for me to make any further comment on the first basis of challenge identified in the summary of Judge Cox.

**19.** Finally I note that the combined Notice of Immigration Decision and 'reasons for refusal' is essentially silent on the viability of the Appellant's business. It does not include the paragraph frequently seen in 'Entrepreneur' decisions to the effect that in line with paragraph 245DD(l) of the Immigration Rules an assessment as detailed in paragraph 245DD(h) has not been carried out because the application has been refused, and reserving the right to carry out such an assessment in any challenge of the decision or in future applications. In the event that the Respondent may in this particular case wish to challenge the viability of the Appellant's business, consideration should be given to raising any such issue formally in order to put the Appellant on notice of the nature of any such challenge.

## Decision

**20.** The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

**21.** The decision in the appeal is to be remade before the First-tier Tribunal before any Judge other than Judge Morgan with all issues at large.

**Deputy Judge of the Upper Tribunal I. A. Lewis  16 April 2016**