Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number:
IA/43845/2014

IA/43846/2014
IA/43847/2014
IA/43911/2014
IA/43916/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision Promulgated**
On 16th May 2017 **On 7th June 2017**

Before

Mr Justice Nicol
Deputy Upper Tribunal Judge Chapman

Between

Mr Mohammed Mahbubur RAHMAN
Mrs Aysa SIDDIKA
Mr Nazmus Sakib MAHBUB
Mr Md Mijanur RAHMAN
Mrs Sonia SULTANA
(no anonymity order made)

Appellants
v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:
For the Appellant: Mr D. Jones, counsel instructed by Chancery Solicitors
For the Respondent: Ms A. Holmes, Home Office Presenting Officer

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DECISION AND REASONS

1. This is an appeal by the Appellants against a decision of Judge of the First- tier Tribunal (FtTJ) Black, promulgated on 21 October 2015, dismissing their appeals against a decision by the Respondent (SSHD) made on 21 October 2014, refusing to grant the first and fourth Appellants leave to remain as Tier 1 Migrants (and the second, third and fifth Appellants leave to remain as their dependants).

2. Permission to appeal to the Upper Tribunal was refused, both by the First tier Tribunal and upon renewal to the Upper Tribunal, but following an application for a *Cart* judicial review on 23 January 2017, Sir Stephen Silber granted permission to apply for judicial review on the basis that it is an exceptional case which meets the high threshold for obtaining permission. The decision of the Upper Tribunal refusing permission to appeal was quashed in an order dated 16 February 2017 and permission to appeal was granted by the Vice-President of the Upper Tribunal in a decision dated 4 April 2017.

3. The first Appellant, who is a national of Bangladesh born on 31 December 1973, arrived in the United Kingdom on 14 November 2009 with leave to enter as a Tier 4 student until 31 December 2012. He was subsequently granted leave to remain as a Tier 1 post study Migrant until 21 August 2014, on which day he made an application for leave to remain as a Tier 1 Entrepreneur, along with the fourth Appellant (also Mr Rahman). The applications were refused on 21 October 2015.

4. At the hearing before us, Mr Jones sought to advance two grounds of appeal:

(i) that the SSHD and FTTJ erred in law in concluding that the Appellants were ineligible for a grant of leave due to failure to meet the advertising requirements at paragraph 41-SD(e) and that there is a differentiation between the two categories of entrepreneur: the category seeking leave to remain in order to invest funds, which falls for consideration under paragraph 41-SD ("*future investment*" category and those who have already made the required investment, which is the category into which the Appellants fall who should be considered under paragraph 46-SD and there is no advertising criteria in paragraph 46-SD. Thus the error of law is the fact that the appeal was dismissed on the basis that the Appellants did not meet the advertising criteria, when there was no advertising

requirement; and

(ii) in the alternative, on the basis that it was necessary for the Appellants to meet advertising requirements at paragraph 41-SD (e), the principle of evidential flexibility was engaged pursuant to paragraph 245AA (b)(i) or (iv) of the Immigration Rules *viz* it is one of a sequence of documents or a document that does not contain all of the specified information.

5. Mr Jones made detailed and helpful submissions in support of the first ground, including the construction of Annex A to the version of the Immigration Rules in force at the date of decision. He also drew our attention to the unreported decision of Deputy Upper Tribunal Judge Juss in *Neela & Gundu* IA/4415/2014 and IA/44121/2014, promulgated on 12 February 2016, where the Respondent's representative conceded that the SSHD had applied the wrong legal provisions because paragraph 46-SD deals with funds which are already being invested and this had been accepted by the SSHD (and that paragraph 46-SD complied with) but the SSHD had then proceed to treat the funds as only being available to invest and refused the application with reference to paragraph 41-SD, in the basis *inter alia* that the advertising material did not cover a continuous period commencing on a date before 11 July 2014 and up to no earlier than 3 months before the date of application. The 11 July 2014 is the date that the PSW category was phased out and transitional provisions were put in place that enabled a PSW to switch into investment categories under the Points Based System.

6. Mr Jones submitted that the only deficiency in the Rule is the failure to refer in addition to paragraph 46-SD in Table 4(d)(iv). In the alternative, his submission is that the documents that must be provided as specified are the documents concerning continuous work in an occupation skilled to National Qualifications Framework Level 4 or above, which equates to (e)(i) and (ii) but not (iii). He submitted that either Table 4(d)(iv) is not sufficiently clear as it does not distinguish between those who have invested and those who have yet to invest and so it does not reflect the rest of Annex A, or the practice of the SSHD may be a useful indicator of how to interpret the scheme given the potential ambiguity, which he asked us to rule on.

7. In respect of Ground 2, Mr Jones sought to argue in the alternative that the principle of evidential flexibility was engaged pursuant to paragraph 245AA (b)(iv) of the Immigration Rules. This was premised on the basis that the Appellants do have to meet the advertising requirements for a continuous period commencing before 11.7.14 up to no earlier than 3 months before the date of

application. Mr Jones drew our attention to the evidence that was before the First tier Tribunal Judge at page 265 of the Appellant's bundle which comprises registration of the domain and whilst this is undated it was posted on Monday 4 August 2014 and in a separate box the document states that the user has been posting advertisements since July 2014.

8. The principle of evidential flexibility relied on is set out at paragraph 245AA (b) (iv) of the Immigration Rules *viz "a document does not contain all of the specified information"*. Mr Jones submitted that the Appellants fit within this sub-category in that the evidence does not contain all of the specified information eg the date the advertisement was placed. He submitted that it could fit under (i) as well *viz* it is one in a sequence of documents because it is clear from the document that there had been earlier postings eg in July 2014 given that the posting was in August.

9. Mr Jones also drew our attention to page 116 of the Appellant's bundle, which is an extract from the Respondent's refusal decision of 21 October 2014 where reference is made to 245AA(c) indicating that the Respondent had considered applying the concession but had decided not to request additional evidence on the basis that it would not affect the outcome of the application. He submitted that the earlier (missing) date was crucial to the application. He also drew our attention to page 125, which is the covering letter to the application dated 20 August 2014 and at item 14 there is reference to renewal advertisements copies: 3 pages. Thus it would have been apparent to a reasonable decision maker that there were earlier advertisements. At page 268 there is an receipt for the placing of advertisements dated 5.11.14 which makes reference to the date and time of booking as 10.7.14 and that web and internet postings commenced on 11.7.14 and were still live. This later document was not before the SSHD at the time of her decision, but it was before the FtTJ and it showed that, contrary to the assumption made by the decision maker, it could readily be demonstrated that the advertising requirement was met.

10. Mr Jones submitted that the First tier Tribunal Judge erred at [15] of her decision in failing to accept that the Respondent should have contacted the Appellants under paragraph 245AA because the documents do not come with the provisions of (i)-(iv) as they were not missing documents nor documents omitted from a sequence. It is apparent from the documents that there was a series which are capable of amounting to a sequence, prior to 14.8.14. In the Supreme Court judgment in *Mandalia* [2015] UKSC 59 at [32] and [33] Lord Wilson considered the meaning of sequence. Whilst it is more obvious when numbered if it is clear that there is a sequence

it clearly falls within (i) and it is clear from the covering letter and the evidence that there was a sequence.

11. Mr Jones further submitted that there is no challenge to the credibility of the entrepreneurs contained in the decision and before the Judge there were two witness statements adopted as evidence at pages 97 and 101 of the Appellant's bundle, yet nowhere does the Judge engage with this evidence and its probative effect. At 2(2) of the grounds to the Upper Tribunal at 74-75 of the Appellant's bundle the Judge's approach was challenged on the basis that she erred in her approach to and findings regarding paragraph 41-SD(e)(iii) by failing to consider extrinsic evidence regarding the period which advertising material had to cover or otherwise.

12. Ms Holmes, on behalf of the Respondent indicated that she had taken the opportunity during the lunchtime adjournment to speak to a colleague in the Home Office policy unit regarding the position taken by the Respondent in *Neela & Gundu* and she was instructed that an investor has to meet all of the requirements set out at Table 4 and he has to meet paragraphs 46-SD and 41-SD(e) of the Rules. Thus her position was that the Appellants do not meet the requirements of the Rules. Whilst the Appellants met the requirements of
Table 4 because they had already invested the money [page 52] they also have to meet paragraph 46-SD and 41-SD(e) [page 58] and the advertising requirement at (e)(iii). Given that they failed to meet the advertising requirements she submitted that there was no error of law made by the First tier Tribunal Judge on the basis of the evidence before her.

13. Ms Holmes further submitted that it was open to the Judge not to apply the principle of evidential flexibility. She submitted that it was clear from
page 265 of the Appellant's bundle that the advertisement for Alpha Domino does not give a date and from page 267 it was not clear to her the date it was produced and the statement that "*user posting ads since: July 2014*" is very vague. Critically, it did not say whether the advertising had begun before *11th* July 2014

14. However, Ms Holmes accepted that nowhere in the Judge's decision did she consider all the sub-provisions of paragraph 245AA(i) to (iv) or provide sufficient reasons at [14]- [15] as to why she did not accept that the principle of evidential flexibility was not applicable on the facts of these cases. She accepted that this constitutes a material error of law and that, given the length of time that had passed since the application was made, she was content for us to re-make the decision ourselves.

15. Mr Jones submitted that the evidence at page 268 of the Appellant's bundle fulfils the advertising requirements set out at paragraph 41-SD(e) of the Rules and thus we could re-make the decision ourselves and allow the appeal on this basis. Ms Holmes did not seek to persuade us otherwise. In light of the agreement of the parties that Ground 2 of the grounds of appeal succeeds, we are not required to determine whether or not Ground 1 discloses a material error of law in the decision of the First tier Tribunal and we are content to leave that argument for decision on a different case.

16. We decided to allow the appeal and announced our decision at the hearing. We now give our reasons.

17. Paragraph 245AA of the Rules provides:

Documents not submitted with applications
"(b) If the applicant has submitted the specified documents and:
> *(i) some of the documents within a sequence have been omitted (for example, if one page from a bank statement is missing) and the documents marking the beginning and end of that sequence have been provided; or*
> *(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."*

18. The first and third Appellants made joint applications for further leave to remain as Tier 1 (Entrepreneur) Migrants pursuant to paragraph 245DD of the Rules on 21 August 2014. Their applications were rejected by the Respondent on the basis that the material submitted in relation to advertising was not acceptable as it did not cover a continuous period commencing before 11 July 2014 as the 'Friday-ad" copy advertisement was dated 4 August 2014. The Respondent's decision was upheld by First tier Tribunal Judge Black in a decision promulgated on 21 October 2015 on the same basis.

19. However, it is clear from the 'Friday-ad" advertisement for the Appellants' company "*alpha domino ltd"* whilst posted on Monday 4 August makes reference to the user posting advertisements since July 2014 [267 of the Appellant's bundle refers]. This document was before the Respondent and the First tier Tribunal Judge. We find that it is clear from the face of the document that since the user had been posting advertisements since July 2014, the advertisement posted on 4 August was an example and it was reasonably likely

that this was part of a sequence. Alternatively, the documents submitted did not contain all of the specified information, but, in the circumstances, the SSHD ought to have requested clarification under paragraph 245AA (b)(iv). In these circumstances, it was clear that, had the Respondent applied the principle of evidential flexibility, the Appellants could have provided further evidence that would have met the requirements of the Rules and crucially, addressed the question of whether or not this evidence pre-dated 11 July 2014.

20. We find, with the agreement of the parties, that the First tier Tribunal Judge erred materially in law in her approach to the principle of evidential flexibility.

21. We proceed to re-make the decision. Paragraph 41-SD (e)(iii) (1) of Appendix A of the Immigration Rules (the version in force at the date of decision of 21 October 2014) provides as follows:

"41-SD The specified documents in Table 4 and paragraph 41, and associated definitions, are as follows …

(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."

22. The evidence before us, in addition to the "*Friday-Ad*" at page 267 of the bundle, is a receipt from *Friday-ad* dated 5 November 2014 in respect of a booking made on 10 July 2014 for (1) internet advertising from 11 July 2014 and (2) web advertising from the same date [268]. There is also a copy of the advertisement/leaflet [at 269]; copies of business cards in respect of each Appellant [at 270] and an invoice from Dot Print UK dated 7 July 2014 in respect of the printing of 1000 A5 leaflets; 1000 business cards and 500 letterheads [271 refers].

23. In light of this evidence and bearing in mind that the

requirements of paragraph 41-SD(e)(iii)(1) of Appendix A makes provision for advertising or marketing material, we find that the Appellants met the requirements of paragraph 245DD of the Rules at the date of decision of 21 October 2014 because they provided evidence of relevant, specified documents commencing on a date prior to 11 July 2014, which was within 3 months prior to making their application for an extension of leave to remain as Entrepreneurs on 20 August 2014.

24. It follows that, in light of the date of decision, the Appellants are entitled to the grant of leave under the Immigration Rules and we would invite the Respondent to grant appropriate leave on this basis.

Decision

25. We find an error of law in the decision of First tier Tribunal Judge Black. We substitute a decision allowing the appeals of all five Appellants (the first and fourth Appellants as principals and the remainder of the Appellants as their dependants).

Signed: Rebecca Chapman Date: 7 June 2017

Deputy Upper Tribunal Judge Chapman