



Upper Tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/46854/2014  
& IA/46859/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 8 January 2016

Decision and Reasons Promulgated  
On 29 January 2016

Before

Deputy Upper Tribunal Judge Pickup

Between

Abiola Iyadunni Kolawole  
Bamidele Jackson Kolawole  
[No anonymity direction made]

Appellants

and

Secretary of State for the Home Department

Respondent

**Representation:**

For the appellants: Ms K Anifowoshe, instructed by Chancery West Law  
For the respondent: Mr S Kotas, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the appellants' appeal against the decision of First-tier Tribunal Judge Steer promulgated 18.6.15, dismissing their linked appeals against the decision of the Secretary of State, dated 5.11.14, to refuse their applications made on 9.9.14 for leave to remain in the UK as a Tier 1 Entrepreneur and dependent spouse, and to remove them from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeals on 5.6.15.

2. First-tier Tribunal Judge Hollingworth granted permission to appeal on 19.10.15.
3. Thus the matter came before me on 8.1.16 as an appeal in the Upper Tribunal.

### **Error of Law**

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Steer should be set aside.
5. In granting permission to appeal Judge Hollingworth considered there to be an arguable error of law "in relation to the construction to be placed upon the requirements for advertising in relation to the evidence adduced... It is arguable that the Judge should have dealt with the question of whether there was a breach of article 8. The appeal was dismissed under the Immigration Rules."
6. The first appellant was last issued on 10.9.12 with leave to remain as a Tier 1 (Post Study) Migrant, valid until 10.9.14. The application in issue was made on 9.9.14, and thus within valid leave.
7. The first appellant's entrepreneur application was refused because she failed to qualify for the necessary 25 points under Appendix A Attributes. The issue is in relation to one of the specified evidence requirements under paragraph 41-SD(e), which require the applicant to submit particular forms of evidence with the application to demonstrate that the business is actively trading, namely "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]:" There are then set out a list of four types of documents.
8. The refusal decision stated, "The evidence that you have submitted in relation to advertising material is not acceptable as it does not cover a continuous period commencing before 11 July 2014, up to no earlier than three months before the date of your application. The online advertisements from Gum Tree and leaflets you have supplied are not dated, therefore we are unable to confirm they were advertised before 11 July 2014. You have not provided any evidence that you qualify for points under any of the other provisions of Table 4 of Appendix A of the Rules and we have therefore been unable to award points for Attributes."
9. Judge Steer stated at §15 of the decision that the appellants "were required to have provided, with the application, documentary evidence that they had advertised their business, which evidence covered a three-month period commencing before 11 July 2014. The three-month period commenced on 9 June 2014." Sadly, that was a misstatement of the requirements, which do not in fact require evidence of a three-month period of advertising. The three months referenced in the Rules relates to the end of a continuous period which must commence before 11 July 2014 and end no earlier than 3 months before the application, which in this case was 9.9.14. This is not necessarily a three-month period and no particular length of period is specified. On

the peculiar facts of this case, any evidence of advertising that commenced before 11.7.14 and ended no earlier than 9.6.14 would suffice as far as length of continuous period is concerned. Curiously, on the facts of this case, and because the application was made on 9.9.14, any period of continuous advertising would qualify, provided it commenced before 11.7.14.

10. The judge went on to find at §20 that the appellants provided only advertising material in the form of flyers, and an invoice for printing of the flyers dated 2.7.14. However, the invoice itself was not submitted with the application and should not have been taken into consideration, because of section 85A of the 2002 Act. The judge concluded, however, that there was no evidence that the advertising took place on or around 2.7.14 and that there was no continuity of advertising until the start of the Gumtree advertisement in August 2014. At §21 the judge found, "There was no documentary evidence of advertising from 9 June to 2 July 2014. There was no documentary evidence of advertising from 2 July to an unknown date in August 2014. The appellants have therefore failed to meet the requirements of paragraph 41-SD(e) and the appeal must be dismissed."
11. Whilst the reasoning was clearly flawed, for the reasons explained above, I am satisfied, for the reasons set out herein, that even if the decision were to be set aside and remade, the outcome would be the same and thus there is no material error of law requiring the decision to be set aside.
12. I first reject the submission made by the appellants' representative that there was no requirement for continuous advertising. The evidence required under 41-SD(e)(iii) must cover a continuous period, commencing before 11.7.14. The evidence can form one or more of the listed types of documents set out under 41-SD(e)(iii), but on the facts of this case the appellants could only adduce the first, "advertising or marketing material, including printouts of online advertising, that has been published locally or nationally..." Thus the appellants had to demonstrate a continuous period of published advertising. I reject the submission made to me that one advertisement is in and of itself continuous because it can be read ever after by anyone accessing the advertising. Such an argument would make complete nonsense of the use of the word continuous in the Rule. It follows that a single advertisement or a single distribution of a leaflet cannot meet the continuous period, shortened though it is because of the peculiar facts of this case and the date of application.
13. As at the date of application and indeed decision, neither the online Gumtree advertisement nor the leaflets were dated, and no evidence of date of publication had been provided with the application, and thus the Secretary of State was unable to confirm that the advertising began before 11.7.14. In fact, on the evidence considered by the judge, the Gumtree advert did not take place until August 2014 and thus cannot itself meet the requirement. At the appeal hearing the appellants produced an invoice for flyers, suggesting that they had been printed and thus distributed around 2.7.14. As stated above, that invoice was not admissible and thus the reasons for the Secretary of State's refusal decision are entirely well founded. There was no evidence

of continuous period of advertising of any length and no admissible evidence to demonstrate any advertisement began before 11.7.14.

14. It follows that from the outset the application was doomed to failure, because the evidence submitted did not meet the requirements of the Rules. Even if the decision were to be set aside and remade afresh, the appeal would still have to be dismissed on immigration grounds.
15. The Rule 24 reply, dated 5.11.15, does not address the issue of the advertising, the author not having had sight of the grounds of application for permission to appeal. However, in relation to the issue of private and/or family life, it places reliance on Sarkar v SSHD [2014] EWCA Civ 195 for authority that the judge did not need to address article 8 at all if it was not raised in the hearing.
16. In relation to article 8 ECHR outside the Rules, the Secretary of State issued a one stop notice pursuant to section 120 of the 2002 Act. The appellants were thus entitled to raise, as they did in their grounds of appeal to the First-tier Tribunal, the claim that refusal is a breach of the private and family life rights of the appellants, stating, "The appellants have lived lawfully in the UK for about 8 years and have made a contribution to the UK. They are married and have both a private life and a family life in the UK. The refusal is unfair and is disproportionate and therefore breaches article 8. The case of Gulshan applies: this is an exceptional case and the refusal is unduly harsh. The appellants are established within the UK and have been refused in an unfair manner."
17. However, the appellants' witness statements, dated 5.6.15, the day of the hearing before the First-tier Tribunal, address only the issue under the Rules about missing evidence as to advertising. They do not address private or family life at all. Other than the fact that first appellant (wife) came to the UK as a student in August 2007 and, after obtaining a Masters' degree in 2011, has set up a nursery and education consultancy business, and that the second appellant came to the UK in October 2008 and that he works for his wife in the business, there is nothing beyond the obvious that can be gleaned about their private or family life.
18. Although the First-tier Tribunal Judge referenced at §5 of the decision that in the alternative the grounds of appeal are that the decisions were a breach of their right to private life in the UK, it is not clear to me that article 8 was pursued at all at the hearing. The record of proceedings contains no reference to article 8 evidence or submissions. In the circumstances, following Sarkar, there was no error of law in the omission of the judge to specifically address article 8 ECHR outside the Rules.
19. In any event, I find that even if article 8 ECHR had been specifically addressed in the decision, there was no evidence before the First-tier Tribunal upon which the judge could reasonably have found that the appellants' circumstances were such as to justify a consideration of private and family life outside the Rules, or to demonstrate that either could meet either Appendix FM or paragraph 276ADE, which it is conceded they could not, or that even if the judge had proceeded to make an article 8

ECHR Razgar stepped assessment and proportionality assessment, balancing on the one hand the rights of the appellants and on the other the legitimate and necessary aim of protecting the economic well-being of the UK through immigration control, that there was anything disproportionate or otherwise unjustifiably harsh about the removal decision.

20. In any such assessment the judge would have also had to take account of section 117B of the 2002 Act; in particular that immigration control is in the public interest, and that little weight should be given to a private life developed in the UK when the immigration status of the appellants, whilst lawful, was always precarious, dependent as they were on obtaining further leave to remain under the Immigration Rules. The appellants would be able to continue their private life in Nigeria, where they have spent the most of their lives and to where they must have expected to eventually return on completion of studies. They had no legitimate expectation of being able to remain in the UK.
21. In the circumstances, I find that there was no error of law in the alleged omission of the judge to address article 8 ECHR private and family life.
22. The appeal of the first appellant thus fails on all grounds. The appeal of the second appellant as dependant of his wife must fall with that of the first appellant.

**Conclusions:**

23. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed on all grounds.



**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

**Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I make no anonymity order.

**Fee Award**                      **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: the appeal of each appellant has been dismissed and thus there can be no fee award.



**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**