



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

Appeal Number: IA/17567/2013

THE IMMIGRATION ACTS

Heard at Field House

On 21 July 2014

**Determination
Promulgated
On 25 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

**ASHANK PRADEEP BIDRI
(NO ANONYMITY DIRECTION MADE)**

and

Appellant

Respondent

Representation:

For the Appellant: Mr M Ilahi, Solicitor

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of India born on 11 January 1987. He appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Ruth who dismissed his appeal against a decision of the respondent, made on 3 May 2013, refusing to vary his leave to remain as a Tier 1 (Entrepreneur) Migrant and to remove him under section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant's application was refused solely because the advertising and marketing material he enclosed with his application did not state his name. It did not therefore meet the requirements of paragraph 41-SD(c)

(iii) of Appendix A of the Immigration Rules, HC395. This provision stated as follows:

“41-SD. The specified documents in Table 4 and paragraph 41 are as follows:

...

(c) If the applicant is applying under the provisions in (d) in Table 4, he must provide:

...

(iii) one or more of the following specified documents:

(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,”

2. It is clear that the advertising materials are ‘specified documents’ for the purposes of the rules. The grounds of appeal lodged on behalf of the appellant acknowledged that the advertising material did not state the appellant's name but argued this was an error which, if the respondent had queried, could have been easily remedied.
3. At the hearing in the First-tier Tribunal submissions were made to the effect that the respondent should have contacted the appellant and operated the evidential flexibility policy now contained in paragraph 245AA of the rules. It was also argued that the decision to remove the appellant would interfere with the private life he had established in the UK. The respondent argued that paragraph 245AA did not assist the appellant because, had the appellant been contacted in this way, he would have had to change his advertisement.
4. Judge Ruth found the rules were not met because the advertising material did not state the appellant's name. He continued:

“28. The question becomes whether the appellant should have been contacted by the respondent as set out in paragraph 245AA of the immigration rules. These paragraphs incorporate the evidential flexibility policy referred to in *Rodriguez* into the rules.

29. In my view, the failure of the appellant to submit an advertisement containing his name is a failure to submit a specified document. It is not the submission of a document in the wrong format (such as a letter not on letterhead paper) since even if the respondent had contacted the appellant and requested an advertisement with his name on its face, the appellant would not have been in a position to submit such an advertisement because there was no such advertisement at that time. Such an advertisement now exists because the appellant has changed his position and re-advertised.

30. The result is that although the appellant is a genuine entrepreneur, has set up a genuine business, invested funds and is making an economic

contribution to the United Kingdom, his appeal must fail under the immigration rules."

5. The judge went on to find removing the appellant would not be a breach of article 8. He relied on *Nasim and others (Article 8)* [2014] UKUT 00024 (IAC).
6. The grounds seeking permission to appeal argued the appellant fell within paragraph 245AA(b)(ii) of the rules. In other words, the grounds argued the advertising material was a document in the wrong format. The judge had misdirected himself in finding the appellant had failed to submit a specified document as opposed to submitting a document in the wrong format. The minor omission could have been corrected. The grounds also challenged the judge's assessment of the article 8 ground.
7. In granting permission to appeal, Designated Judge of the First-tier Tribunal French noted the grounds argued the appellant had submitted a specified document which contained an omission rather than having failed to submit a specified document. He went on to say:

"The point may be arguable and potentially relevant, particularly as paragraph 245AA(d) refers to submission of a specified document which does not contain all the specified information; this implies that an incomplete document may nevertheless be regarded as a 'specified document'. That may have brought into play whether the missing information was readily ascertainable from other documents and whether the respondent should have exercised her discretion under paragraph 245AA."
8. The respondent has submitted a Rule 24 response opposing the appeal. This states the judge directed himself correctly. Discretion had been exercised correctly because, even if the respondent had contacted the appellant, the appellant would not have been able to provide the required information. The fact the advertising material did not state the appellant's name was not a fact which could be changed.
9. I would observe at this point that there is no evidence in the reasons for refusal letter that the respondent did exercise discretion. The letter containing the reasons for refusal makes no reference at all to paragraph 245AA or evidential flexibility. Having noted the omission of the appellant's name from the advertising material, the letter moves straight to rejection of the application.
10. Mr Ilahi confirmed the issue revolved around the correct interpretation of paragraph 245AA. No further reliance was placed on the so-called evidential flexibility policy. This would seem to be right in view of the guidance provided by the Presidential panel in *Durrani (Entrepreneurs: bank letters; evidential flexibility)* [2014] UKUT 00295 (IAC) that, absent evidence to the contrary, the policy has not been shown to have survived the introduction of paragraph 245AA into the rules on 6 September 2012, which was before the date of decision in this case.

11. Mr Ilahi made three concise submissions: (1) it was incorrect for the respondent to argue that paragraph 245AA does not apply because the required document was not already in existence. The rule encompasses situations in which a document is in the wrong format so plainly replacement documents which were not already in existence can be produced in response to a request by the respondent. (2) The respondent should have exercised discretion to request the missing information and the judge erred by not recognising that. (3) Information could readily be obtained from other documents to show the appellant was the sole director of the company and his mistake was a small one. Given the judge's finding that the appellant is a genuine entrepreneur, the decision was "disproportionate".
12. Mr Melvin argued there was no material error in the decision. The requirement was to meet the rules in their entirety. The application was bound to fail. He relied on *SSHD v Rodriguez* [2014] EWCA Civ 2 in which the Court of Appeal held that the 'PBS Process Instruction' did not require case workers to speculate and there must have been sufficient reason to believe that any evidence requested existed. However, he accepted the judge erred by failing to find the section 47 removal decision was not in accordance with the law (see generally *Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures)* [2012] UKUT 00414 (IAC)). Of course, that error does not have any impact on the separate consideration of the refusal to vary leave.

13. Paragraph 245AA states as follows:

245AA. Documents not submitted with applications

- (a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the UK Border Agency will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).
- (b) If the applicant has submitted:
 - (i) A sequence of documents and some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);
 - (ii) A document in the wrong format; or
 - (iii) A document that is a copy and not an original document, the UK Border Agency may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received by the UK Border Agency at the address specified in the request within 7 working days of the date of the request.
- (c) The UK Border Agency will not request documents where a specified document has not been submitted (for example an English language certificate is missing), or where the UK Border Agency does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.

- (d) If the applicant has submitted a specified document:
 - (i) in the wrong format, or
 - (ii) that is a copy and not an original document,

the application may be granted exceptionally, providing the UK Border Agency is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The UK Border Agency reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b).

14. As said, the advertising material is a specified document. Does the fact it omitted to mention the appellant by name mean it was in the wrong format, as the appellant argues? The answer is found in another recent decision of the same Presidential panel: *Akhter and another* (paragraph 245AA: *wrong format*) [2014] UKUT 00297 (IAC). In that case, the would-be entrepreneurs had produced bank letters which did not contain all the required information. The Upper Tribunal held that paragraph 245AA could not avail them because the bank letters were not documents in the wrong format (see paragraph 18). The same applies in this appeal. Properly understood, the advertising material which the appellant submitted was not in the wrong format. None of the three possibilities set out in subparagraph 245AA(b) apply.
15. However, the appellant's contention is that the respondent failed to exercise discretion under subparagraph (c). This argument cannot succeed. Both subparagraphs (c) and (d) are linked expressly by their language to the preceding paragraph. As seen from the *Akhter* case, if subparagraph (b) does not apply, the claim falls outside paragraph 245AA and subparagraphs (c) and (d) are not engaged. Put another way, having failed to show the advertising material was not in the wrong format, the issue of whether addressing the issue would have been pointless does not arise.
16. It follows I find no error in Judge Ruth's determination which could be classed as material. He was right to say the appellant failed to submit a document which was a specified document. He was right to distinguish the omission from a document in the wrong format. He did not need to go further and the distinction flagged up in the order granting permission did not arise. The respondent did not have to exercise discretion.

17. That deals with Mr Ilahi's first two submissions. If his third submission was intended to argue the judge erred in reaching the decision he reached on proportionality, then this is bound to fail as well. The fact the judge recognised the appellant was a genuine entrepreneur and that he had failed to meet the rules by a narrow margin did not mean he had to find the decision disproportionate. He correctly applied *Nasim*. This is a "fuzzy penumbra" case. Mr Ilahi came very close to suggesting the judge ought to have allowed the appeal under article 8 because the appellant failed under the rules as a result of a near-miss. Following *Patel and*

others v Secretary of State for the Home Department [2013] UKSC 72, there is no room for “near-miss” arguments.

18. There is no material error in the judge’s approach to the rules, issues of evidential flexibility or article 8. His decision on these matters stand. The judge erred by failing to find the decision to remove was not in accordance with the law and a decision to that effect is substituted.

DECISION

The Judge of the First-tier Tribunal did not make a material error of law in his decision on the appeal against the refusal to vary leave and his decision dismissing the appeal shall stand.

The Judge should have found the decision to remove the appellant was not in accordance with the law and a decision to that effect is substituted.

No anonymity direction made.

Signed

Date 21 July 2014

**Neil Froom,
sitting as a Deputy Judge of the Upper
Tribunal**

Fee Award

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

In the light of my decision to re-make the decision in the appeal by allowing it to the extent the decision to remove was not in accordance with the law, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

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 has been dismissed with respect to the substantive decision taken under the Immigration Rules and also on human rights grounds.

Signed

Date 21 July 2014

**Neil Froom,
sitting as a Deputy Judge of the Upper
Tribunal**

