



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

Appeal Numbers IA/42483/2014
IA/42490/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 3rd June 2015**

**Decision and Reasons
Promulgated
On 22nd June 2015**

Before

**DEPUTY UPPER TRIBUNAL JUDGE PARKES
and
DEPUTY UPPER TRIBUNAL JUDGE SAINI**

Between

**RIZQAN SHAHZAD
FARHANA MUNAWAR
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner (Counsel, instructed by Farani Javid Taylor, Solicitors)

For the Respondent: Mr E Tufan (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellants applied for leave to remain as a Tier 1 (Entrepreneur) and dependent which was refused for the reasons given in the Refusal Letter of the 8th of October 2014. The Appellants' appeal was heard by First-tier

Tribunal Judge Andrew at Birmingham on the 21st of January 2015 and dismissed for the reasons given in a decision promulgated on the 5th of February 2015.

2. The decision centred on whether the Appellant had supplied advertising material dated before the 11th of July 2014, he maintained that he had supplied a copy of his Facebook page. Having summarised the evidence in paragraphs 7 and 8 the Judge found that the Appellant had not shown that the advertising material existed before the 11th of July 2014 and accordingly dismissed the appeal.
3. The Appellants sought permission to appeal on the basis that the Judge had wrongly rejected the First Appellant's credibility when that had not been challenged by the Home Office Presenting Officer in cross-examination. It was also asserted that the Secretary of State could have verified the date on which the website came into existence and had done so in other appeals. It was also argued that no findings had been made in respect of Article 8.
4. Permission was granted by First-tier Tribunal Judge Shimmin on the 7th of April 2015. He did so on the basis that it was arguable that there had been insufficient scrutiny of the documentary evidence. He noted that there were removal directions and that the Article 8 issue required examination but the Record of Proceedings indicated that it was not proceeded with.
5. At the start of the hearing we indicated that the Record of Proceedings does clearly state that the Article 8 aspect of the case was not being pursued. That was accepted and the hearing shifted focus to other aspects. Before the hearing Mr Tufan for the Home Office provided to the Appellant's counsel a copy of a letter from the Home Office to the Appellants dated the 29th of September 2014, that letter was with regard to missing documentation but did not raise any issue with regard to the advertising.
6. Following the disclosure of that letter submissions were made with respect to paragraph 245AA(c) of the Immigration Rules which deals with evidential flexibility. This states "Documents will not be requested where a specified document has not been submitted... [where the] Secretary of State 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."
7. The implication is that when the letter of the 29th of September 2014 was sent requesting documentation that must have followed consideration of the application by an official acting on the Secretary of State's behalf. Given that paragraph 245AA(cc) indicates the request for other documents will only be made if it is thought that the application can succeed if the omission is addressed, and the letter was referred to in the First Appellant's witness statement before the First-tier Tribunal it suggests that the appeal hearing proceeded on a misconception following from an error by the Secretary of State in considering the Appellants' case.

8. It is not the fault of the Judge that neither of the representatives brought this point to her attention or sought to conduct their questioning on the basis of the letter that had been sent and the implications that it contained.
9. Having considered the matter we are satisfied that the approach by the Secretary of State is flawed to the extent that this is a matter that ought to be considered by the Secretary of State fully in the light of all of the information that was provided and is available. On that basis we find that the decision of the First-tier Tribunal contained a material error of law and the decision is set aside, the case is remitted to the Secretary of State to make a lawful decision on the Appellants' applications.

CONCLUSIONS

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

We set aside the decision.

This case is remitted to the Secretary of State for a lawful decision to be made.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and we make no order.

Fee Award

In the light of the decision to re-make the decision in the appeal and to remit the case to the Secretary of State, we 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).

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

We make a whole fee award.

Reasons: the decision contained an error of law.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 18th June 2015