



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

Appeal Numbers: IA/43337/2014
IA/43344/2014

THE IMMIGRATION ACTS

Heard at Field House (Taylor House)

Decision & Reasons

Promulgated

On 21 October 2015

On 3 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MRS BINAL BHAVSAR (FIRST APPELLANT)
MR BHARGAVKUMAR KANTILAL PATEL (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr H. Patel, Solicitor

For the Respondent: Mr I. Jarvis, Senior Presenting Officer

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Handley sitting at Bradford on 9th January 2015) dismissing their appeals against the decision of the respondent to refuse to vary their leave to remain in the United Kingdom as, in the case of the first appellant, a Tier 1 (Entrepreneur) Migrant and, in the case of the second appellant, as the dependant spouse of a Tier 1 (Entrepreneur) Migrant, and against the respondent's concomitant decision to make directions for their removal in the United Kingdom under Section 47 of the 2006 Act. The First-tier Tribunal did not make an anonymity direction in

favour of the appellants, and I do not consider that the appellants require to be accorded anonymity for these proceedings in the Upper Tribunal.

Relevant Factual Background

2. The first appellant, Mrs Bhavsar, is the main appellant in this appeal, and so I shall hereafter refer to her simply as the appellant, save where the context otherwise requires.
3. The appellant and her husband are both nationals of India. The appellant first entered the United Kingdom as a student on 24 September 2009, when she was granted leave to remain as a Tier 1 (Post-Study Work) Migrant on 16 August 2012 until 16 August 2014. On 15 August 2014 she applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. Her husband applied for leave to remain in line as her dependant.
4. The appellant's application was refused on 15 October 2014 on points scoring grounds. A third party declaration was not acceptable for two reasons. Firstly, her signature on the third party declaration had not been attested by her legal representative, and the third party funder had not declared his relationship to her.
5. The respondent also raised an issue about compliance with the criteria contained in paragraph 41-SD(e)(iii). She had to show that since before 11 July 2014 and up to a date no less than three months before the application, she had been continuously engaged in her relevant business activity. The evidence she submitted in relation to advertising material was not acceptable, as it did not cover a continuous period commencing before 11 July 2014 up to no earlier than three months before the date of her application.
6. The respondent went through the various items of evidence provided by the appellant, and explained in each case why the evidence was not acceptable. Some of the evidence provided was not acceptable because it was clearly dated after 11 July 2014.
7. She had also submitted printouts from her website. It was noted the website was registered on 23 May 2014, but the website was not registered in her name. It was registered in the name of her business, which was unacceptable. She had to be the domain owner of her website.
8. Finally, she had submitted a membership card and letter from the Chartered Institute of Marketing (CIM). Her membership was that of an affiliate. CIM's website clearly stated that an affiliate (studying) membership was for those currently studying for marketing qualifications. As she already had a business, which appeared to be trading (judging by the contract she supplied), her level of membership with the CIM should be that of an affiliate (professional). She had not been able to demonstrate that her membership was the latter. Also the Immigration Rules at Appendix A, paragraph 41-SD(e)(iii)(4) required personal registration with the UK Trade Body links to the applicant's occupation. Her job title and

services offered in her contract had a very tenuous link to the CIM. She stated she was a business development consultant, not a professional in the field of marketing. So her membership of CIM was deemed to be irrelevant.

9. Accordingly, she had not submitted the specified evidence as listed under paragraph 41-SD to establish that she had access to the funds she was claiming.

The Hearing Before, and the Decision of, the First-tier Tribunal

10. The appellant was legally represented before the First-tier Tribunal, and she gave oral evidence. She also produced a document which had not been before the Secretary of State which confirmed that she was an affiliate (professional) member of the Chartered Institute of Marketing.
11. In his subsequent decision, Judge Handley accepted that the appellant had addressed many of the issues raised in the refusal letter. But he dismissed her appeal as he was not satisfied she had met the requirements of the Rules in regards to the production of the specified documents relating to advertising or marketing material.
12. The Judge's reasoning on this topic is to be found in paragraphs [13] to [15] of his decision, which I reproduced below:
 13. The respondent was concerned because although the first appellant had provided printouts of her website, the website was not registered in her name but registered in the name of her business. The respondent considered that the first appellant must be the domain owner of the website. However, my reading of the relevant paragraphs of the Immigration Rules is that confirmation of ownership of the domain is only required when the business is trading online. The first appellant's position is that she is not trading online and I accept her suggestion that she does not therefore need to show that she was domain owner of the website.
 14. The respondent also had concerns because of the nature of the advertising material which had been presented in support of the application. The first appellant is required to submit documents covering a continuous period commencing before 11 July 2014 up to no earlier than three months before the date of her application. The first appellant made her application on 15 August 2014 and she produced a "Gumtree" printout dated 15 August 2014. As far as I understand, the first appellant does not dispute that this advertisement was published on Gumtree on 27 July 2014 and it is clear that this document does not meet the requirements of the Immigration Rules. The first appellant also presented evidence in the form of a document from Facebook in support of evidence of continued marketing. Although the respondent had concerns about this document, I accept the submission that the respondent has not properly explained these concerns. In any event the Facebook documents show that the first appellant joined Facebook on 3 August 2014 and again these documents do not comply with the requirements of the Immigration Rules.

15. The respondent had concerns regarding the submission of a membership card and letter from the Chartered Institute of Marketing. The first appellant has suggested that she has produced evidence of Personal Registration with a United Kingdom Trade Body linked to her occupation (the Chartered Institute of Marketing). The respondent had concerns because the membership card produced by the first appellant indicated that her relationship was that of an "Affiliate". She suggests that the membership card does not indicate that she is studying but that she is an "Affiliate Professional member". The respondent clearly conducted some research into this issue by viewing the Chartered Institute of Marketing's website. I accept that responsibility is at all times on the first appellant to ensure that she has provided the relevant information pursuant to the requirements of the Immigration Rules. However she did provide documentary evidence to show that she was a member of the Chartered Institute of Marketing and in these circumstances the respondent should have sought clarification from the first appellant in regard to this matter. The first appellant has now presented a document which confirms that she is an Affiliate (Professional) member. As far as I understand Affiliate Professional membership is open to anyone who is actively engaged in or considering a career in marketing or has any active interest in the marketing industry. I also accept that "Marketing" is likely to be of relevance to the role of a Business Development Consultant. It is likely that the role would include assisting clients to grow their business by finding new channels and markets.

The Application for Permission to Appeal

13. Ms Samina Iqbal of Counsel, who did not appear below, settled the appellant's application for permission to appeal to the Upper Tribunal. Under sub-paragraph (e), if the applicant was 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 of 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,
 - (2) articles or online links to articles in a newspaper or other publication showing the applicant's name (and the name of the business if applicable) together with the business activity,
 - (3) information from a trade fair ...; or
 - (4) personal registration with the UK Trade Body linked to the applicant's occupation.
14. Ms Iqbal submitted that under paragraph 41-SD(e)(iii) the appellant only had to demonstrate that she had *one or more* of the specified documents in one or more of the classes (1) to (4) covering a continuous period

commencing before 11 July up to no earlier than three months from the date of application.

15. The most pertinent document upon which the refusal letter took issue was the membership card and letter from the Chartered Institute of Marketing. The evidence demonstrated that the appellant's membership of the CIM began on 27 June 2014, and this would therefore bring her squarely within the terms of sub-paragraph (iii). So she had produced specified evidence covering a period from 27 June 2014 (which was before 11 July 2014), and which was no earlier than three months before the application made on 15 August 2014. So the Judge erred in law in concluding that the appellant could not meet the requirements of the Rules.
16. Also the Judge had overlooked the fact that he had rightly found at paragraph [13] of his decision that the appellant provided acceptable evidence predating 11 July 2014 in class (1) through evidence that she had registered her website on 23 May 2014. As she was not trading online, she did not need to confirm personal ownership of the domain name of the business's website.

The Hearing in the Upper Tribunal

17. At the hearing before me, I received extensive submissions from Mr H Patel, who represented the appellant before the First-tier Tribunal, and from Mr Jarvis, Senior Presenting Officer. There was extensive discussion of paragraph 245AA of the Rules, and Mr Patel submitted that the recent judgment of the Supreme Court in **Mandalia [2015] UKSC 59** was relevant, which Mr Jarvis disputed. I reserved my decision.

Discussion

18. I find that an error of law is made out insofar as Judge Handley wrongly treated the appellant as having a freestanding obligation to provide advertising material of the type discussed in paragraph [14] which covered a period beginning earlier than 11 July 2014.
19. While it was relevant that the material discussed in paragraph [14] did not predate 11 July 2014, this was not determinative of the outcome of the appeal. Provided that at least one document in one of the specified classes predated 11 July 2014, the appellant could be found to satisfy the overarching requirement of demonstrating business activity which extended further back in time than 11 July 2014.
20. But there are also discernible errors in the reasoning which led to the judge making findings in favour of the appellant on the topic of the appellant's website and on the topic of her membership of CIM. Accordingly, Mr Jarvis submits that the Judge reached the right result, albeit for the wrong reason. Hence he submits that the error of law is not material.

21. The Judge was wrong to find at paragraph [13] that the appellant did not need to show that she was the domain owner of the website. She needed to do so if she was going to rely on the website as demonstrating business activity prior to 11 July 2014. The mere fact that the website was registered before 11 July 2014 does not show that the appellant's business was trading before 11 July 2014. On a proper construction of sub-sub-paragraph (1), an applicant can rely on printouts of online advertising which have been posted on his business website prior to 11 July 2014. But unless his business is trading online (which is not the case with the appellant's business) the applicant cannot rely on confirmation of his ownership of the domain name of the business's website, irrespective of when the confirmation is issued. As the appellant's business was not trading online and she was not able to provide confirmation of her personal ownership of the domain name of the business's website, she was doubly disqualified from relying on the printout from her website (and the accompanying evidence of the date of registration) as constituting a specified document which met the criteria in sub-sub-paragraph (1).
22. The evidence provided with the application did not show that the appellant had become a member of the CIM before 11 July 2014. The post-decision evidence referred to in paragraph [15] of the judge's decision was inadmissible. So the judge was wrong to find that the appellant had provided a specified document which met the criteria in sub-sub-paragraph (4).
23. Earlier in the same paragraph, the Judge indicated that he was of the view that the respondent was under a duty to seek clarification of the evidence which the appellant had provided. The Judge had in mind clarification of the significance of the appellant being an affiliate member. But it would also have been necessary for the respondent to clarify whether the affiliate membership had begun before 11 July 2014. The evidence provided with the application was ambiguous. The membership card indicated that her membership had begun in July, but the accompanying correspondence indicated that she had become a member at the beginning of August and her membership had been backdated to July.
24. On this issue, I do not consider that the case of **Mandalia** is of any assistance to the appellant. At the time of assessment, the duties of the respondent were clearly delineated in paragraph 245AA of the Rules. Her discretion under the rules is permissive, not mandatory. The Rules did not engender an obligation on the part of the Secretary of State to investigate with either the appellant or with the CIM when precisely the appellant had become a member so as to ascertain whether, other things being equal, she could rely on her membership of CIM as evidencing business activity prior to 11 July 2014.
25. Although Judge Handley disagreed with the caseworker's view that there was only a very tenuous link between the CIM and the appellant's role as a business development consultant, it was reasonable for the caseworker to take a different view. As a matter of common sense, joining a trade organisation which is aimed at those whose core activity is marketing is

not evidence of an applicant working as a business development consultant. As it was reasonable for the caseworker to treat the appellant's membership of the CIM as being irrelevant to the question of whether she was operating as a business development consultant, there was no breach of the common law duty of fairness or evidential flexibility principles in the caseworker not making further enquiries about her membership of the CIM before making a decision on the application.

26. For the above reasons, the decision of the First-tier Tribunal was not vitiated by a material error of law, and accordingly the decision stands.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson