



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19056/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11 March 2014

Determination Promulgated
On 4 April 2014

Before

**THE HONOURABLE MR JUSTICE PARKER
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE CRAIG**

Between

NAZMUL GANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Q Hassan, Solicitor
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant in this appeal is a citizen of Bangladesh. It is common ground that he was granted further leave to remain as a student on 20 July 2013 which leave was valid until 23 March 2014.

2. On 23 March 2013 he went on holiday to Bangladesh, which holiday was, we are told, and this does not appear to be disputed, authorised by West Link College, which is the college he was at, and he had been due to return on 12 April 2013.
3. It appears that he became ill while in Bangladesh and had to cancel his return. It seems that he was worried that because he had been absent for a period which had not been authorised by his college, he might be in difficulties when he returned because it was certainly possible that questions could have been asked on entry as to why he had been away for so long when, as a genuine student, he would have been expected to attend his courses. Be that as it may, a friend of his, it would seem, sent an email to the college to extend his holiday and the appellant's case is that his friend subsequently gave him an envelope stating that the college had extended his holiday. It transpired that the letter that was supposedly sent by the college was not a genuine letter and certainly somebody knowingly produced this letter and must have known that the letter was not a genuine document. What the appellant says occurred was that he did not open this letter until he arrived at the UK airport on 28 February 2013 and that he did not know until that time that the letter was forged.
4. This letter was quite clearly not genuine and on looking at this letter at the airport on arrival the appellant acknowledged that it was not a genuine document, although he claimed that he had had no part in its production. Be that as it may, and for reasons that follow, it is not necessary for us to make any definitive finding as to whether or not the appellant was himself a party to the production of the false document. It cannot be disputed that the document was false.
5. Because the document was false, the Officer representing the respondent at the airport made a decision to curtail the appellant's leave and to refuse to allow him to enter which was said to be under paragraph 321A(1) and 321A(2) of the Immigration Rules. The relevant parts of these paragraphs provide as follows:

"Grounds on which leave to enter or remain which is in force is to be cancelled at port or while the holder is outside the United Kingdom

321A. The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply:

- (1) there has been such a change in the circumstances of that person's case since the leave was given, that it should be cancelled; or
- (2) false representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave; or in order to obtain documents from the Secretary of State or a third party required in support of the application...."

6. The respondent notified the appellant within the decision letter that future applications would be refused under paragraph 320(7B) of the Immigration Rules. This is a mandatory ground of refusal and the relevant parts of paragraph 320(7B) provide as follows:

“Grounds on which entry clearance or leave to enter the United Kingdom is to be refused

(7B) where the applicant has previously breached the UK's immigration laws (and was 18 or over at the time of his most recent breach)by:

...

(d) using Deception in an application for entry clearance, leave to enter or remain, or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not);”

7. It was the respondent’s case that by submitting the forged document in order to mislead the respondent that he had been granted extended leave from his college, this Section of the Rules applied.
8. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Paul, sitting at Richmond on 17 January 2014, but in a determination dated 18 January 2014 and promulgated on 24 January 2014, Judge Paul dismissed the appellant’s appeal. He decided that it was clear from the evidence that the appellant had recognised that the document was forged when it was opened and that he had made admissions to the Immigration Officer as such. There was therefore, as he said at paragraph 10 of his determination, no issue that the document was a forgery and accordingly the respondent did not have to prove this. This was plainly, in our judgment, correct because it does not matter for these purposes whether or not the appellant himself had been party to the issue of a forged document. What is relevant, or would have been relevant if the Rules applied, is that a forged document, that is a document known by its maker to be false, had been adduced on his behalf.
9. The appellant appealed against this decision and permission to appeal was granted by First-tier Tribunal Judge Colyer on 12 February 2014. In particular, Judge Colyer had in mind the decision of this Tribunal in *Khaliq (Entry clearance – para 321) Pakistan* [2013] UKUT 00350 in which the Tribunal in a determination of the Vice President held that:

“A person who has entry clearance that under the provisions of the Immigration (Leave to Enter and Remain) Order 2000 takes effect as leave to enter does not on arrival in the United Kingdom ‘seek’ leave to enter and paragraph 321 therefore does not apply to him. Paragraph 321A does but only if the circumstances set out in that paragraph can be shown to exist in his case.”

10. As Judge Colyer noted, the case of *Khaliq* did not appear to have been brought to the attention of the judge and it was therefore arguable that his failure to consider this case when considering the facts may have resulted in an error of law.
11. Before us, on behalf of the appellant, Mr Hassan submitted that paragraph 321 was not applicable in the circumstances of this appellant because he had not issued or relied on any false documents when obtaining his leave to remain or leave to enter. He had been granted leave to remain initially in Bangladesh and had been granted further leave, as has already been stated above, on 20 July 2013. So effectively the use of these documents was not relevant for the purposes of paragraph 321 of the Rules because they were not used in obtaining his leave.
12. On behalf of the respondent Mr Deller properly accepted that there could be no suggestion that the false document in question had been deployed to obtain leave to enter in this case because that document did not exist at that time. The appellant was not seeking leave to enter because he already had leave. Following the decision of this Tribunal in *Khaliq* any false representation therefore did not engage paragraph 322(1A) but the refusal letter did mention 322(1A)(2) as well which was not itself dealt with in *Khaliq*.
13. The difficulty with this argument, as Mr Deller acknowledged, was that the respondent could not establish that the production of the false document directly led to a variation of leave to enter or remain and while the respondent would have been helped if she was able or if Mr Deller was able on her behalf to say that the respondent was entitled to conclude from the production of this document that the appellant was not a genuine student (such that it could be said that there had been a change in his circumstances), she could not really do so. Although it was noted that the appellant's current leave expired in two weeks and he would no doubt be advised as to consequences were he to overstay that current leave, nonetheless, so far as this appeal was concerned, it could not really be properly argued following *Khaliq* that the respondent's decision was sustainable.
14. Although false documents had been submitted which was to be deplored, nonetheless following *Khaliq* it has to be established that these false documents had contributed to the grant of leave which this document had not. In our view, Mr Deller was correct to acknowledge the difficulties in the respondent's case. For our part, as the Vice President of this Tribunal did in *Khaliq*, we deplore the use of false documents and it may well be that the Rules could have made provision for circumstances such as this where documents are put forward in circumstances where they should not. However, the fact remains that as currently drafted the Rules do not cover a situation such as this. This appellant had leave to enter. It was not obtained through the use of the false document and accordingly neither paragraph 321(i) nor paragraph 321A(2) of the Rules applied to his situation. We have considered whether or not it would have been open to the respondent to take the view that in the circumstances which were that the appellant had been absent for longer than a genuine student ought to have been, given the absence of a proper explanation and the submission of false documents, it could have been said that he

was not a genuine student and that his circumstances had changed to this effect. But this is not what the respondent stated and that was not the reason, in itself, that the decision was taken to curtail the appellant's leave. The respondent just decided that in effect the production of the false document was in itself a change of circumstances and that cannot, in itself, be correct. As Mr Justice Parker stated during the course of the hearing, there would in any event have been a procedural difficulty if this point had been taken by the respondent because, if the respondent wished to draw an inference from the appellant's conduct that he was not a genuine student, this should at the very least have been put to the appellant so that he could have given an answer and the answer might very well have been that whatever the document said he nonetheless had a genuine reason for not returning earlier, which was that he was ill while he was away.

15. In these circumstances, the decision of the First-tier Tribunal cannot stand but will have to be remade. It was an error of law in our judgment for the First-tier Tribunal not to have regard to the decision in *Khaliq* and for the reasons which we have given we remake this decision by allowing the appellant's appeal.

Decision

16. **The decision of the First-tier Tribunal containing a material error of law we set it aside and remake the decision as follows. The appellant's appeal is allowed.**

Signed:

Date: 1 April 2014

Upper Tribunal Judge Craig