



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01879/2014

THE IMMIGRATION ACTS

Heard at Field House
On 1 August 2014

Determination Promulgated
On 12 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MISS JYOTI SUMAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Khan

For the Respondent: Mr Whitwell, a Home Office Presenting Officer

DETERMINATION AND REASONS FOR FINDING
A MATERIAL ERROR OF LAW

Introduction

1. The appellant is a citizen of India. She appeals against the decision of the First-tier Tribunal (FTT) to uphold the decision of the respondent to refuse her application for leave to remain as a Tier 4 (General) Migrant.

2. The background to this application is that the appellant made her application for leave to remain on 28 August 2013. Her application was considered by the respondent on 10 December 2013 and was refused by reason of the fact that the respondent did not consider that the appellant met the requirements of the points-based scheme in relation to the requirement to show living costs of £1,600 for a consecutive 28 day period. The application was specifically refused on the basis of paragraph 322(1A) of the Immigration Rules in that the appellant had produced proof of her finances in the form of a bank statement with the reference number ...2888 with ICICI Bank. As a result of investigations carried out by the respondent it was ascertained that this document was false. Accordingly, the appellant had used deception in her application which fell to be refused under that paragraph. Any future applications would be refused under paragraph 320(7B).

The Appeal Proceedings

3. The appellant appealed that decision to the First-tier Tribunal because she said the decision was against the weight of the evidence, the respondent had not raised any query with the appellant over the authenticity of the documents supplied and clearly, therefore, she had not investigated the matter thoroughly "on fair and reasonably standards". Furthermore, the appellant ought to have had an opportunity to respond to the respondent's concerns. Had the respondent made enquiries of the appellant she would have provided a "valid explanation to issue raised by the respondent". Furthermore, the respondent had not acted in compliance with the principles of fairness and the reader is referred to the case of **Thakur**. Finally, the appellant claimed to have established rights under Article 8 of the European Convention on Human Rights (ECHR) in the UK. In her notice of appeal, dated 30 December 2013, the appellant ticked the box indicating that she wished to have an oral hearing of her appeal. Accordingly, a notice a hearing was sent out to the appellant, who at that time appears to have been unrepresented, indicating that her appeal would be heard on 5 August 2014 at Hatton Cross. That notice was issued on 5 February 2014. However, by 10 March 2014 the appellant had instructed Hafiz and Haque, Solicitors, to act on her behalf. They wrote requesting that the appeal be dealt with on the papers enclosing a witness statement dated 5 February 2014. The statement says that the allegation that the appellant had produced false documents/used deception was a serious matter that required her to raise an enquiry with the appellant. He she done so the appellant would have been able to address the matter. It was "abundantly evident" from the evidence which existed at the date of the application that the appellant had "sufficient funds available" to satisfy the requirements of the Immigration Rules and the relevant policy. New directions were sent out on 20 March 2014 requiring the appellant to serve any written evidence and submissions by 7 April 2014. In fact the appellant did not submit any new evidence.
4. The appeal to the First-tier Tribunal came before Immigration Judge Boyd on 6 May 2014. Judge Boyd dismissed the appellant's appeal because, although the required points were awarded for Confirmation of Acceptance for Studies, no points fell to be

awarded for maintenance and funds on the basis that the bank statement used as proof of finance was found to be false. The Immigration Judge referred to a document verification report (DVR) which had been supplied indicating that on 18 November 2013 ICICI Bank had confirmed the bank statement supplied was false. The appellant was therefore unable to establish that she had the required £1,600 for the consecutive 28 day period required and the respondent had correctly refused the application under the points-based scheme. The Immigration Judge also considered Article 8 but found it not to be engaged on the facts. Accordingly, he dismissed the appeals on both bases.

Proceedings before the Upper Tribunal

5. On 14 May 2014 the appellant appealed the decision of the First-tier Tribunal because, she claimed, she had been informed by the relevant bank that no such enquiry had been made by the respondent. The appellant had not been aware of the DVR except for the allegations raised in the refusal letter. The appellant had not been given a proper opportunity to respond to the allegations. The requirements of procedural unfairness had not been satisfied. Furthermore, the appellant claimed that it was for the respondent decision-maker to establish any contested facts and the documents produced by the appellant should be assumed to be genuine unless and until the respondent proved to the contrary.
6. On 6 June 2014 First-tier Tribunal Judge Hollingworth considered that the grounds raised an arguable issue on the basis that the conclusion at paragraph 10 of the determination that the appellant had failed to answer the document verification report appeared to be unsustainable in the light of a failure to apply the proper burden and standard of proof which rested on the respondent.
7. Standard directions were sent out indicating that the parties would not be able to rely on new evidence not before the First-tier Tribunal unless they made the appropriate application.
8. On 26 June 2014 the respondent responded under Rule 24 to say that she was unable to verify that the DVR had been served in advance of the hearing and therefore was unable to refute the suggestion the procedural unfairness allegation.
9. An oral hearing was fixed for 1 August 2014 at 10.00am. Both parties were represented at the hearing.

The Hearing before the Upper Tribunal

10. The respondent explained that the only issue in the appeal before the First-tier Tribunal was the issue of maintenance and in particular the questionable bank statement from the ICICI Bank. It was accepted by the respondent that the Immigration Judge had not mentioned the burden and standard of proof, although

his decision could be read as having incorporated an analysis (in paragraphs 8 and 9) which effectively considered the burden and standard of proof correctly.

11. Mr Khan on behalf of the appellant submitted that his client had never been served with the DVR so that the Tribunal could not be satisfied that the requirements of the Immigration Rules had been properly considered. In particular the burden rested on the respondent to produce evidence to sustain the allegation, relying on paragraph 322 (1A) of the Immigration Rules, that a false document had been submitted.
12. The respondent emphasised that the substance of the refusal included reference to the questioned bank statement and the DVR.
13. The appellant then said that there was an issue as to when the bundle had been served. It was unsafe to place reliance on telephone conversations between unknown individuals. The Tribunal was invited to allow the appeal especially since no issue had been raised in the refusal letter with regard to the DVR. That report was, in any event, said to be unreliable.
14. At approximately this point in the proceedings Mr Whitwell was informed that he was needed on the telephone. I therefore adjourned proceedings for approximately half an hour for him to take instructions. When I returned I was presented with a fax containing a letter written by an S Gayle, a senior caseworker on behalf of the Home Office. By her letter dated 12 May 2014 directed to the First-tier Tribunal, which was faxed to the Upper Tribunal on 1 August 2014 at 10.56am, she notified the Tribunal of the existence of the DVR and explained that she had not been notified of the change from an oral hearing (originally listed for 5 August 2014) to a paper determination on 6 May 2014. That explained the absence of the DVR from the documents produced to the appellant before the First-tier Tribunal.
15. Earlier in the proceedings I had asked Mr Khan to set out to the Tribunal what course of action he invited me to take in the event that I found a material error of law in the decision of the First-tier Tribunal. Mr Khan invited me to remake the decision. I called on him to address me about the facts referred to in the previous paragraph. He said that I should not allow the new evidence to be adduced having regard to its late service. Furthermore, the DVR could not be shown to be reliable even if it is admitted. Finally, Mr Khan said that the document produced did not contain a statement of truth.
16. At the end of the hearing I decided that there was a material error of law in the decision of the First-tier Tribunal in the manner in which the allegedly false document had been dealt with. In particular, the burden rested on the respondent to show that the document was false, albeit to the civil standard of proof. There was a lack of analysis in the Immigration Judge's determination. A clear explanation of the burden and standard of proof in relation to this important document was required. There was also a potential procedural irregularity in that at the point the Immigration Judge decided to place reliance on the DVR it could not be shown to

have been served on the appellant. For those reasons, but principally because of the lack of clear reasoning in relation to the burden and standard of proof, I decided to set-aside the decision of the First-tier Tribunal. I will now proceed to re-make the decision.

Discussion

17. The burden rests on the claimant to show that she satisfies the requirements of the Immigration Rules and specifically paragraph 245 ZX of those rules. It is accepted on behalf of the respondent that, but for the questioned document, she would satisfy those requirements.
18. The burden of showing that the requirements of paragraph 322 (1A) are met rests on the respondent. The burden may only be discharged by producing cogent evidence that the document the appellant seeks to rely upon in support of her claim that she meets the requirements of the points-based scheme is a forgery. This question is decided to the ordinary civil standard of proof but because the allegation is a serious one the evidence must be at least cogent and clear.
19. The substance of the refusal by the ECO was that the “issuing authority” had confirmed to him that the bank statement produced was a forgery. The DVR considered by the First-tier Tribunal Judge may not have been served on the appellant but the substance of what is contained therein has been with the appellant since at least the date of the refusal. The appellant has now been served with the DVR and has had an opportunity to consider it but has chosen to put forward no evidence in response. I allowed Mr Khan an opportunity to request a fresh hearing at which such evidence could be adduced but he declined that opportunity, requesting that I remake the decision based on the evidence already produced.
20. The evidence produced at the hearing before the Upper Tribunal, in the form of the letter from S Gayle dated 12 May 2014 directed to the First-tier Tribunal referred to in paragraph 14 above, is not “new evidence”. I infer that the letter dated 12 May 2014 was placed before the Immigration Judge as he expressly refers to the DVR in paragraph 8 of his determination. Furthermore, S Gayle gives a full explanation for the failure to obtain the DVR prior to the papers being placed with the Immigration Judge. She explains that she intended to serve the evidence on 9 May 2014 with a view to the hearing taking place on 5 August 2014 but was informed that the hearing was due to be aborted in favour of a paper determination. She was unaware of that fact until 9 May 2014, i.e. after the papers had been placed before the Immigration Judge. Even if the email dated 2 April 2014 at 08.31, which refers to the “certificate” relied on by the appellant as having been “falsified”, was not before the First-tier Tribunal the substance of the allegation contained in that e mail was. I do not consider the e mail to take matters much further than the DVR. Accordingly, even if the email did constitute fresh evidence it would not have led to any different outcome.

21. Knowing of the importance of this issue and seeing the Rule 24 response it was open to the appellant to prepare on the basis that a fresh hearing would be needed at which she could adduce evidence in rebuttal. However, she chose not to do this. I find that in the absence of any evidence to rebut the apparently cogent DVR the only inference that I can draw is that the appellant did indeed provide a false document to the respondent in support of her claim. The Immigration Judge commented on the lack of evidence in rebuttal as at the date of the hearing as at the date of his determination (13 May 2014). There is still no such evidence.
22. In the absence of any such evidence I am satisfied that the burden of proving that the bank statement submitted in support of the appellant's claim is false has been discharged by the respondent. Accordingly, there is no other basis upon which the appellant could be said to satisfy the requirements of the points-based scheme and her appeal against the respondent's refusal was correctly dismissed by the Immigration Judge albeit after a failure to consider the burden and standard of proof.

My Decision

The decision of the First-tier Tribunal contains a material error of law. Accordingly, that decision is set aside.

I have decided to re-make the decision.

Having fully considered the evidence produced before the First-tier Tribunal including, insofar as necessary, the evidence contained in the letter dated 12 May 2014 by S Gayle, I have decided to dismiss the appeal against the Secretary of State's decision to refuse the appellant further leave to remain.

Signed

Date

Deputy Upper Tribunal Judge Hanbury