



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

**Appeal
Number**

IA/28279/2013

IA/28289/2013

THE IMMIGRATION ACTS

Heard	at	Field	House
		Determination promulgated	
On 11 June 2014		On 4 August 2014	

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

(1) Muhammad Delwar Hossain Manzur
(2) Farzana Mustaeid
(Anonymity directions not made)

Appellants

and

Secretary of State for the Home Department
Respondent

Representation

For the Appellant:	Ms. J. Norman of Counsel instructed by Sterling & Law Associates LLP.
For the Respondent:	Mr. J. Parkinson, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Paul promulgated on 18 February 2014, dismissing the Appellants' appeals against decisions of the Respondent' refusing the First Appellant leave to remain in the UK as a Tier 4 (General) Migrant, refusing the Second Appellant leave to remain in the UK as the dependant of a Tier 4 Migrant, and to remove the Appellants pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

2. At all material times the Second Appellant has been treated as the dependant of the First Appellant and her immigration position has been contingent on that of her husband. Accordingly, the substantive issues - as opposed to procedural issues (see further below) - relate primarily to the First Appellant - and indeed in the determination of the First-tier Tribunal the First Appellant is generally referred to as "*the appellant*".

Background

3. The Appellants are nationals of Bangladesh born on 25 December 1981 and 17 April 1982 respectively. I set out in more detail below the First Appellant's immigration history.

4. The proceedings before the First-tier Tribunal arose in the context of an application by the First Appellant for leave to remain as a Tier 4 (General) Student Migrant recorded as having been made on 22 August 2012. In a refusal letter dated 20 June 2013 the application was refused with reference to paragraphs 322(1A), 245ZX(a), 245ZX(c), and 245ZX(d).

5. The Respondent determined that the First Appellant had submitted in support of his application a certificate for a Level 7 Diploma in Management from the Accrediting and Assessment Bureau for Post-Secondary Schools dated 22 August 2011 that was a forgery. It was also noted that the provider of the First Appellant's Confirmation of Acceptance for Studies (CAS), Seven Oaks College, was at the date of decision not on the list of Tier 4 sponsors. The Respondent was not prepared to grant the Appellant the usual 60 days grace in order to arrange a new sponsor in circumstances where a false document had been supplied with his application. The decision letter also contained the section 47 removal decision. (The decisions in respect of the Second Appellant were made 'in- line' with the decisions in respect of the First Appellant.)

6. The Appellants appealed to the IAC.
7. The First-tier Tribunal Judge dismissed the Appellants' appeals for reasons set out in his determination.
8. The Appellants sought permission to appeal which was granted by First-tier Tribunal Judge Page on 8 April 2014.
9. The Respondent has filed a Rule 24 response dated 17 April 2014 - but that merely indicates that the Respondent did not have access at that time to the determination or the application for permission to appeal.

Consideration

10. It was common ground before the First-tier Tribunal that the Diploma in Management certificate was indeed a forgery. However, the First Appellant claimed that he himself had been duped in this regard, and it was advanced on the Appellants' behalf that the issue in the appeal was whether or not the First Appellant had acted dishonestly, that is whether the First Appellant knew that the document was false (e.g. see paragraph 3). The First-tier Tribunal Judge concluded that the Appellant had "*not acted honestly*" (paragraph 13).

11. The Appellants challenge the conclusion of the First-tier Tribunal Judge. As before the First-tier, before me the premise of the Appellants' case was focused on the supposed innocence of the First Appellant's state of mind in submitting a false document in support of his application: e.g. see Grounds in support of the application for permission to appeal - "*However, if he was, as he says, the victim of a fraud, then he has not been dishonest and should succeed*".

12. In my judgement this focus is misconceived, and is based upon an incomplete understanding of **AA (Nigeria) 2010 EWCA Civ 773** - upon which reliance has been placed on behalf of the Appellants.

13. Paragraph 322(1A) of the Rules refers both to 'false representations' and 'false documents'. Consideration of the dishonest state of mind of an applicant in **AA (Nigeria)** is in the context of a representation. This is particularly manifest at

paragraph 67 where the adjective 'false' in the phrase 'false document' is utilised in reaching a conclusion as to the meaning of the adjective 'false' when attached to 'representation':

"First, "false representation" is aligned in the rule with "false document". It is plain that a false document is one that tells a lie about itself."

14. Indeed that a counterfeit document is a 'false document' within the meaning of paragraph 322(1A), irrespective of the innocence of the person who makes use of it in an immigration application, is manifest in the rest of paragraph 67:

"Of course it is possible for a person to make use of a false document (for instance a counterfeit currency note, but that example, used for its clarity, is rather distant from the context of this discussion) in total ignorance of its falsity and in perfect honesty. But the document itself is dishonest. It is highly likely therefore that where an applicant uses in all innocence a false document for the purpose of obtaining entry clearance, or leave to enter or to remain, it is because some other party, it might be a parent, or sponsor, or agent, has dishonestly promoted the use of that document. The response of a requirement of mandatory refusal is entirely understandable in such a situation. The mere fact that a dishonest document has been used for such an important application is understandably a sufficient reason for a mandatory refusal. That is why the rule expressly emphasises that it applies "whether or not to the applicant's knowledge"."

15. See similarly in this context, the quotation from Lord Bassam when the rule was before Parliament, reproduced at paragraph 71: *"We mean a document that is forged or has been altered to give false information. If people submit such documents, our belief is that they should be refused..."*.

16. It follows that in circumstances where the Appellants do not dispute the falsity of the level 7 Diploma in Management document, the First Appellant's application fell for mandatory refusal pursuant to paragraph 322(1A). It was therefore unnecessary for the Judge to embark upon a consideration of the state of mind of the First Appellant in respect of the document. Necessarily it follows that any error that the Judge *may* have made in this regard would be immaterial. In such circumstances the challenge brought by the Appellants cannot have the effect of overturning the substance of

the First-tier Tribunal's determination to uphold the Respondent's decision under the Rules.

17. As regards the substance of the Judge's determination on the state of mind of the Appellant, whilst I accept that there is a lack of flow in the reasoning at paragraphs 12 and 13, the finding that the Appellant had not acted honestly is clear. It is to be noted that there was no supporting evidence produced by the Appellant that he had ever studied at Princeton College (such as course work and materials), and seemingly no attempt to obtain such evidence (and in this context, no supporting evidence of the claimed fact of the closure of Princeton College). In all such circumstances the inference drawn by the Judge was, in my judgement both open to him and sustainable - though, as identified above, ultimately immaterial.

18. However, notwithstanding the analysis above, during the course of the submissions Mr Parkinson drew to my attention the particular history of the Appellants' applications, and indicated that it was now the Respondent's position that there was no right of appeal and therefore the Tribunal had no jurisdiction.

19. The First Appellant entered the UK on 18 September 2009 with entry clearance as a Tier 4 (General) Student until 7 April 2012. (The Second Appellant entered on 20 June 2011 as a dependent partner with leave in line with her husband; as noted above her subsequent applications were as a dependant.) On 4 April 2012 the First Appellant made an application as a Tier 2 (General) Migrant. Upon the expiry of the pre-existing leave, on 7 April 2012, the Appellants would have enjoyed statutorily extended leave pursuant to section 3C of the Immigration Act 1971. The Tier 2 application was refused on 13 June 2012 and removal decisions also made pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

20. The Appellants appealed to the IAC (refs. IA/14922/2012 and IA/14924/2012) - and their section 3C leave continued. A hearing took place on 22 August 2012 at which the Appellants did not attend. In their absence. In a determination promulgated on 13 September 2012 the Judge dismissed their appeals under the Immigration Rules and on human rights grounds. Strangely, and notwithstanding that the Judge acknowledged that the Respondent had no power to make a section 47 removal decision at the time, the Judge concluded that the removal was unlawful because "*the appeal appears to be doomed to failure in any event, and it would*

be unfair to the appellants to remain [sic.] the matter in such circumstances”.

21. Be that as it may, Ms Norman on taking instructions and seeking clarification from her instructing solicitors indicated that the Appellants did not attend the appeal hearing on 22 August 2012 because they had wished to withdraw their appeals, and a letter had been sent to the Tribunal accordingly. The Appellants had not wanted to pursue their appeals because they had decided to make the Tier 4 applications, which indeed are recorded by the Respondent as having been made on 22 August 2012.

22. It was common ground before me that pursuant to section 3C(4) of the Immigration Act 1971 it was not possible to make an application for variation of leave to enter or remain during the pendency of section 3C leave. It follows that the only way the Appellants could have made valid applications to the Respondent would have been subsequent to the withdrawal of their appeals, and subsequent to the lapsing of their section 3C leaves. Necessarily, it also followed that if the Respondent had accepted the applications as valid – as indeed the Respondent had – the applications must be treated as having been made at a time when the Appellants did not have leave. It was common ground that the refusal of an application for variation of leave made at a time when there was no extant leave did not attract a right of appeal.

23. So far as the section 47 removal decisions dated 20 June 2013 were concerned, it was also common ground that there was no power to make such decisions – notwithstanding that they post-dated the amendment of section 51(3) of the Crime and Courts Act 2013 – because pursuant to section 47(1) it is a pre-requisite that the subject of such a decision be a person with statutorily extended leave. Accordingly, although there was a right of appeal pursuant to section 82(2)(ha) of the Nationality, Immigration and Asylum Act 2002, the only possible outcome of such an appeal would be to find that the decision was not in accordance with the law.

24. The First-tier Tribunal Judge did not address the section 47 removal decisions.

25. In conclusion I find as follows:

- (i) Whilst the Respondent’s decision in respect of the First Appellant was entirely in accordance with paragraph 322(1A)

of the Immigration Rules, and whilst the First-tier Tribunal Judge unnecessarily embarked upon a consideration of the state of mind of the First Appellant in respect of his fake Diploma document, there was in fact no valid appeal for either Appellant against the refusals of variation of leave. Accordingly, in this context, the decision of the First-tier Tribunal was in error of law and is set aside. The Tribunal shall take no further action in this regard.

(ii) There was a right of appeal in respect of the section 47 removal decisions. However, as acknowledged by the Respondent today, there was in law no power to make such decisions. The Appellants' appeals are allowed to this limited extent as the decisions were not in accordance with the law – and any issue of removal remains outstanding with the Respondent.

Decisions

26. The decisions of the First-tier Tribunal Judge are set aside.
27. There is no right of appeal in respect of the refusal to vary leave of each of the Appellants.
28. The appeals against the decisions to remove the Appellants pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006 are allowed as being not in accordance with the law. The issue of removal remains outstanding before the Respondent.

Deputy Judge of the Upper Tribunal I. A. Lewis 30 July 2014