



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/47101/2013

THE IMMIGRATION ACTS

Heard at Field House
On 10 September 2014

Determination Promulgated
On 11 September 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Mohammed Tauhidul Islam
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr A Sayem, instructed by Uzma Law Ltd
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Mohammed Tauhidul Islam, date of birth 20.10.82, is a citizen of Bangladesh.
2. This is his appeal against the determination of First-tier Tribunal Judge Moore, who dismissed his appeal against the decision of the respondent, dated 21.10.13, to refuse his application made on 24.10.12 for leave to remain in the United Kingdom as a Tier 1 Entrepreneur, and to remove him from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 20.5.14.
3. First-tier Tribunal Judge Cox granted permission to appeal on 30.7.14.

4. Thus the matter came before me on 10.9.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Moore should be set aside.
6. For the reasons set out below, I find that the application made by the appellant was doomed to failure and could not have succeeded at the First-tier Tribunal, irrespective of the issue of false documents and paragraph 322(1A) of the Immigration Rules.
7. First, as Mr Sayem concedes, the documentation submitted by the appellant with his application did not meet the specified evidence requirements of paragraph 41-SD of Appendix A. Quite apart from the disputed banking documents, which also fail under this head and with which I deal more particularly below, the legal representative's letters did not contain the prescribed information. Mr Sayem described this as a minor error. However, by reason of this failure alone the application should have been and was refused.
8. I reject Mr Sayem's submission that there is an issue of fairness involved in this aspect of the decision. There is nothing unfair about the Secretary of State applying the requirements of the Immigration Rules to the appellant's application. The Secretary of State is not obliged to offer an applicant a second-bite opportunity to correct errors in the application.
9. Neither do I accept the submission that an evidential flexibility policy should have been applied to make further enquiries of the appellant as to defects in the evidence submitted. It is clear from the current case law, including Rodriquez [2014] EWCA Civ 2, that no such policy could assist the appellant on the facts of this case. No evidential flexibility policy in relation to Points Based Appeals survived the introduction of paragraph 245AA of the Immigration Rules in September 2012. 245AA does not assist the appellant, as the defective legal declaration is not akin to one of the types of situations set out in 245AA where the respondent will contact the applicant to request correct omissions in documentation. I also particularly bear in mind 245AA(c), where the UKBA will not request documents where it does not anticipate that addressing the omission or error would lead to a grant because the application will be refused for other reasons. In this case it was refused because of the submission of a false document. There was thus no purpose in contacting the appellant and for the reasons I have set out above, no requirement to do so on the facts of this case.
10. Further, I reject the argument that the missing information could have been gleaned from other documents submitted by the appellant with his application. It is not for the Secretary of State to go digging about in the documentation to try and address deficiencies in the evidence. Even if that information is available elsewhere, it remains the case that part of the specified evidence required by 41-SD includes the legal representative's declaration as to the availability of the funds and that this

declaration must contain the specified information. It did not and that fact cannot be gainsaid.

11. In the circumstances, the application could not possibly have succeeded and any appeal was doomed to failure because the appellant failed to submit the required documentation. In relation to this issue I find no error of law in the determination of Judge Moore, summarised at §27 of the determination, and thus ground 3 of the grounds of appeal fails.
12. In addition, the respondent contends that the appellant submitted a false document and thus his application should be refused under paragraph 322(1A) of the Immigration Rules, on the basis of the submission of false documents, whether or not to the applicant's knowledge. It is necessary to demonstrate dishonesty, but not necessary to demonstrate that it was on the part of the appellant.
13. Ground 1 submits that the First-tier Tribunal Judge made unreasonable findings about the respondent's verification process in relation to the offer of £200,000 in funding from the third party. This ground is in essence no more than a disagreement with the findings of the judge. In his determination, Judge Moore grappled with the evidence from both sides on this issue and the submissions on behalf of the appellant, suggesting that there were errors in the documentation relied on by the Secretary of State. Having earlier summarised Mr Sayem's submissions, at §24 of the determination the judge reached the conclusion that the verification of the banking letter was properly conducted and at §25 that the burden of proof had been satisfied to demonstrate the documents were false and not genuine. The judge regarded the alleged errors in the correspondence as not significant in the light of the fact that the bank confirmed that the questioned letter was "totally fake and false." The account number and account holder's name was provided. Not only was the letter false and had not been issued by the bank, but there was no such employee as named as the author of the letter.
14. Mr Sayem submitted that the judge had not followed the case law guidance of Shen (Paper appeals; proving dishonesty) [2014] UKUT 236 (IAC) and Adedoyin (formerly AA (Nigeria v SSHD)) [2010] EWCA Civ 773, to the effect that reference to false means dishonestly false. In Shen it was held that (i) In terms of the approach that a tribunal should adopt towards decisions of the SSHD in which dishonesty or deception is alleged against an applicant for leave to remain, the starting point should be, as the Court of Appeal in Adedoyin (formerly AA (Nigeria) v SSHD) [2010] EWCA Civ 773 have made clear, that pursuant to paragraph 322 of the Immigration Rules, the reference to "false" means "dishonestly" false; (ii) Where an application form etc is false in a material way, this may be relied on by the SSHD as prima facie evidence establishing dishonesty. The inference of deliberate deception can be strengthened by other facts: e.g. if a criminal conviction (not disclosed in an application) occurred shortly before completion of the application form. Here, the conviction must have been high in the applicant's mind and any explanation based on oversight would carry little weight. But it is always open to an appellant to proffer an innocent explanation and if that explanation meets a basic level of plausibility, the burden switches back to the SSHD to answer that evidence. At the end of the day the SSHD bears the burden of proving dishonesty.

15. The Tribunal in Shen also held that a finding of dishonesty can have catastrophic consequences for the appellant in social and economic terms and is not to be made lightly. I have considered the treatment of this issue by the First-tier Tribunal. The judge took into account that the appellant continued to maintain that the questioned documents were genuine. However, he had not himself contacted the bank but was allegedly relying on the assurance of his cousin, the third party financier, that the documents were genuine. He also considered the appellant's additional evidence comprising a further letter dated 26.1.14 confirming the original letter. The judge considered but rejected, for cogent reasons given in the determination, the challenges to the verification evidence. It is clear that the judge did not accept that the appellant's additional evidence displaced the verification evidence relied on by the Secretary of State to the effect that the documentation was false and had never been issued by the bank. At §29 of the determination, the judge was satisfied that the appellant had used false representations in the submission of false documents with the application, whether or not he personally knew that the documents were false. Paragraph 322(1A) does not require the appellant to personally know that the documents were false. In the circumstances, I find no error of law in the judge's treatment of this issue.
16. Finally, criticism is made of the judge's findings in relation to article 8 private life (the appellant laying no claim to any family life in the UK). The judge considered Mr Sayem's submissions on this issue but at §28 did not agree that the appellant's private life rights would be infringed. The judge pointed out that the appellant has had no legitimate expectation to remain in the UK on the conclusion of his studies. The only basis of a private life would be on the basis of residence in the UK since 2009, as a student. Those studies have now concluded. In the light of Patel and Nasim, there is no basis for considering the appellant has any private life sufficient to engage article 8.
17. In Patel [2013] UKSC 72 Lord Carnwath said:
 - “55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality.....
 56. Although the context of the rules may be relevant to the consideration of proportionality....this cannot be equated with a formalised “near-miss” or “sliding scale” principle.....Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart of article 8. conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.
 57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of States' discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right....”
18. The facts of Patel & others are worth summarising. Mr Alam's application for leave to remain as a Tier 4 student under the PBS system was refused as he had failed to provide the relevant documentation with his application. By the time of the First-tier Tribunal appeal he had produced qualifying bank statements but the Tribunal held

that they were excluded from consideration by section 85A, but went on to regard the evidence as relevant to article 8 and found the decision disproportionate on the basis that the appellant now met the requirements of the Rules. The Upper Tribunal reversed the decision of the First-tier Tribunal, finding that the judge had erred in treating the new evidence as effective compliance with the Rules for the purpose of article 8. The Supreme Court considered that the new evidence could not be excluded insofar as it related to human rights grounds and article 8 considerations, and could take the evidence outside the scope of exception 2 in section 85A. However, on the facts of the case, the Supreme Court found no error in the approach of the Upper Tribunal, as there was little merit in the article 8 claim, even if some weight was given to the unusual circumstances in which he lost his ability to rely on the new evidence, because of when section 85A came into force. The evidence did not significantly improve the human rights case and there is no near miss or sliding scale principle to be applied.

19. In Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR. Whilst each case must be determined on its merits, the Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "serve to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity." Presence in the UK for the purpose of study by itself does not give rise to a private life sufficient to engage article 8 so as to render the decision disproportionate.
20. I further notice that at §28 Judge Moore considered the appellant's private life under paragraph 276ADE, noting that he could not meet those requirements and that there were no compelling circumstances justifying consideration of article 8 ECHR outside the Immigration Rules. The appellant failed to demonstrate any such compelling circumstances and neither was Mr Sayem able to point to any such compelling circumstances. In the circumstances, there was no error of law in failing to consider the appellant's private life further by reference to the Razgar five steps. However, I am satisfied that even if the judge had done so, it is inevitable on the facts of this case that the conclusion would be that the decision was entirely proportionate and not disproportionate to the appellant's private life rights. Article 8 is not a shortcut to compliance with the Immigration Rules. The fact the appellant was unable to demonstrate compliance with the Rules and that false documents had been submitted with the application would weigh heavily against the appellant in any proportionality balancing exercise. In the circumstances, I find no error of law in the judge's treatment of the appellant's private life claim under article 8 ECHR.

Conclusions:

21. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.



Signed:

Date: 10 September 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I 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).

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

I make no fee award.

Reasons: The appeal has been dismissed.



Signed:

Date: 10 September 2014

Deputy Upper Tribunal Judge Pickup