



IAC-AH-SAR-V1

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

Appeal Numbers: IA/21783/2014
IA/21784/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 6 July 2015**

**Decision & Reasons Promulgated
On 16 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MR NADEEM GOURI (FIRST APPELLANT)
MRS KHUSHBOO GOURI (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Z Nasim, Counsel, Milestone Chambers

For the Respondent: Mr T Melvin, Specialist Appeals Team

DECISION AND REASONS

1. The appellants, who are husband and wife, appeal to the Upper Tribunal from the decision of the First-tier Tribunal dismissing their appeals against the decision by the respondent to refuse to vary their leave to remain in the United Kingdom in the capacity (in the case of the first appellant) of a Tier 1 (Entrepreneur) Migrant and (in the case of the second appellant) as a PBS dependant. The first appellant is the main

appellant in this appeal, and I shall hereafter refer to him simply as the appellant, save where the context otherwise requires. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

2. The appellant made his application for leave to remain as a Tier 1 (Entrepreneur) Migrant on 12 May 2014. He had previously been granted leave to remain as a Tier 1 (Post-Study Work) Migrant on 14 April 2012, and his leave to remain in this capacity expired on 14 April 2014. In his application form, he said he was relying on a bank letter from Habib Bank Limited (HBL) which said that he had access to £500,754.40.
3. The appellant did not provide an original bank letter with the application. He provided a scanned copy of a letter from HBL dated 14 April 2014. The bank confirmed that the third party funder, Mr Khan, had an available balance of 8,200,000 Pakistani rupees (equivalent to more than £50,000) in his personal account held at the branch, and this amount was available to his family friend, the appellant, for investment in the United Kingdom.
4. On 25 April 2014 the Home Office sent an e-mail to the appellant, thanking him for his application, which was currently being considered. They had identified omissions with regard to the evidence that had been submitted. The scanned copy of a bank letter from Habib Bank for account number ending 5102 had been provided as access to funds evidence. As per paragraph 41-SD(c)(i)(1) of Appendix A of the Rules, the Home Office required the original.
5. He was asked to provide
 - an original bank letter from the financial institution holding the funds;
 - an original written declaration from the third party that had made money available to invest in a business in the United Kingdom;
 - a letter from legal representatives in relation to his third party funds;
 - maintenance evidence covering the period 1 April to 14 April 2014.
6. Pursuant to this request, the appellant provided a third party declaration dated 28 April 2014 and a letter from SHN Solicitors dated 28 April 2014.
7. He also provided an original bank letter from HBL dated 14 April 2014, but the letter was not the original of the scanned letter which had been provided with the application. In addition to some spelling errors being corrected, the available balance was said to be 8,208,100.00 Pakistani rupees and a different e-mail address was given for the third party funder. Whereas his e-mail address in the scanned e-mail was raznad@icloud.com, his e-mail address in the new bank letter was raznas-star@hotmail.com.
8. In a statutory declaration made on 28 April 2014 Mr Khan said that he had an available balance of 8,200,000 Pakistani rupees (equivalent to £50,754 as per conversion) in his personal account number held at a branch of HBL in Faisalabad,

and this amount was available to the appellant for the business he ran in the United Kingdom.

9. On 12 May 2014 the respondent gave her reasons for refusing the appellant's application. He stated he had access to funds of £50,000 being made available to him/his business by a third party, Mr Khan. As evidence of this he had provided:
 - (i) a scanned bank letter from HBL dated 14 April 2014;
 - (ii) an original bank letter from HBL dated 14 April 2014;
 - (iii) a declaration from Mr Khan;
 - (iv) a letter from a legal representative.
10. However, the bank letters he had provided were not acceptable because they provided contradictory evidence. He was asked for an original bank letter from the financial institution holding the funds. The Home Office had received by post on 6 May 2014 an original bank letter. But although the bank letters were dated on the same day, there were discrepancies in the detail. The respondent went on to enumerate the discrepancies, including the ones which I have highlighted above.
11. As he had provided contradictory evidence, in accordance with paragraph 41 of Appendix A of the Rules he was not considered to have access to the funds which he claimed to have.

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

12. The appellant's appeal came before Judge R J N B Morris sitting at Richmond Magistrates' Court on 10 March 2015. Mr Nasim appeared on behalf of the appellants, and the respondent was represented by a Presenting Officer.
13. In her subsequent decision, the judge set out the appellants' case at paragraphs 11 to 12, and she set out her findings at paragraphs 13 to 15. I reproduce these verbatim below.

"11. The Appellants states that:-

- (i) he had not provided 'contradictory evidence'. He was relying on third party funds from a family friend, Mr. Muhammad Shiraz Khan who held the relevant funds in the Habib Bank Ltd in Pakistan. There had been a delay in the Appellant receiving the bank documents from Pakistan and, since he was making his application on the day his leave was due to expire, he was advised to submit his application with whatever documentation he had available. He had realised later that there were some spelling mistakes in the documents he had sent to the Respondent in support of his application. This is why he had sent additional documentation with his Change of Circumstances Form;
- (ii) According to the Appellant, he had sent the further documents including the original of the bank letters by his own volition when he noticed the spelling errors in the documentation accompanying his application on 14th April 2014. He had not received the email dated 25th April 2014 from the

Home Office in which he was asked to send the original of the scanned bank letter, until after he had received the Reasons for Refusal Letter dated 12th May 2014 (“the Reasons for Refusal Letter”). When he saw that there was a reference to an email in the Reasons for Refusal Letter, he checked his email inbox and traced the email from the Home Office to his ‘junk’ email box;

(iii) The Appellant does not agree that there were any material inconsistencies between the scanned bank letter and the alleged original of that letter. The discrepancies were attributable to spelling errors and, in the case of the third party’s Sponsor’s name, it was very common for the same name to be spelt differently in Pakistan. The Respondent should have taken this into account.

12. It was also submitted on behalf of the Appellant at the hearing that the Decision was not in accordance with the law or the Immigration Rules. In addition, the Respondent had a common law duty to make enquiries and to take reasonable steps to ascertain if the Appellant’s documents were false, before she made her Decision.

Findings

13. Having considered all the evidence before me, I find that the Appellants’ appeals under paragraphs 245DD and 319C (b) of the Rules must fail. I come to this conclusion for the following reasons:-

(i) Appendix A provides that not only must an applicant meet the requirements of Table 4 of Appendix A, but he or she must also provide the ‘specified documents’ in the form set out in paragraph 41 – SD;

(ii) the scanned copy of the letter from Habib Bank Ltd sent with the Appellant’s application was refused by the Respondent because, contrary to the provisions of Appendix A, he had sent a copy rather than the original letter. The Respondent did not raise any questions regarding the substance of the letter itself. However, on receipt of the purported original of the scanned copy letter sent with the Appellant’s application, the discrepancies in the information contained in what was said to be the same letter were noted by the Respondent;

(iii) the Appellant argued both in his Witness Statement, and oral evidence, and submissions were made on his behalf, that the alleged discrepancies were no more than spelling mistakes. Clearly, this is not an acceptable explanation because of the varying nature of the discrepancies to which reference is made. For example, the Appellant explains that the third party’s name could be spelt as ‘Sheraz’ or ‘Shiraz’ in Pakistan. Accordingly, this would appear not to be a spelling mistake but an acceptable variation in the spelling of the same name. However, it cannot be said that the difference in the specified balance in the same account on the same day was also attributable to a spelling mistake. According to paragraph 4 of the Appellant’s Witness Statement, ‘it is clearly evident that the letter I sent on 2nd May 2014 was printed later’ – that is later than the scanned copy of a letter bearing the same date as the original letter eventually sent by the Appellant. However, when asked to explain how and why it was clearly evident that the original letter was printed later, the Appellant was unable to give a satisfactory explanation;

(iv) spelling mistakes would not explain why two grossly different email addresses were given by the same bank for the same client, that is Mr. Muhammad Shiraz Khan. In short, I concluded that on the balance of probabilities, the only defect identified in the Reasons for Refusal Letter, which is attributable to a spelling error was the spelling of 'Hounslow'.

14. It was asserted that the Respondent was under a common law duty to act fairly. In this case, this duty included making further enquiries of the Habib Bank Ltd and also requesting a Document Verification Report. However, the Respondent gave the Appellant the opportunity to provide the original bank letter. The queries raised by the Respondent were a legitimate enquiry of the Appellant as to why there were differences in the two letters. The Respondent has fallen short of asserting that either the scanned copy of the letter from Habib Bank Ltd or its alleged original were false. Instead, the Appellant was asked to provide a reasonable explanation for the differences. However, the Appellant has not adduced any evidence whatsoever to clarify the position. It was open to him to obtain a letter from Habib Bank Ltd to explain the differences, but he has not done so, and instead, he has relied on his own speculation as to the order in which the letters were printed. Moreover, even if they were printed at different times, they were printed on the same day and in the absence of any other information to substantiate his claim that the balances reflected the third party Sponsor's balance at different times on the same day, I am not satisfied that, on the balance of probabilities, the appellant's explanation accounts for the discrepancies in the balances. I find that the Respondent has discharged her duty to act fairly by giving the Appellant the opportunity to explain the reason for the defects identified in the Reasons for Refusal Letter.
15. The Appellant claims that he had made the Respondent aware of the differences in the bank letters because he had submitted a Change of Circumstances Form. However, Section 28 of that form merely states that a bank letter, a Solicitor's Declaration and an Affidavit had been enclosed with the Change of Circumstances Form. There is nothing in that form to make the Respondent aware that the original bank letter was not in fact in the same form as the scanned copy. Moreover, the Appellant has not adduced any evidence to show that the email sent on behalf of the Respondent on 25th April 2014 had been delivered into his 'junk' mailbox. Having considered this matter in the round and given the nature of the Appellant's explanations, (none of which are substantiated by any objective means), I am not satisfied that on the balance of probabilities, the Appellant had been unaware of the Respondent's concerns when he submitted the alleged original letter from Habib Bank Ltd".

14. The judge went on to find that the decision was in accordance with the law and the applicable Rules.

The Application for Permission to Appeal

15. Mr Nasim settled the appellant's application for permission to appeal, and he advanced five grounds. Ground 1 was that the judge had erred in law in stating that the appellant was given the opportunity to explain the reason for the defects identified in the Reasons for Refusal Letter, when in fact he was not. Ground 2 was that the judge had erred in failing to appreciate that the 2002 Act prevented the

appellant from adducing new evidence. Ground 3 is indecipherable. Ground 4 was that the judge had failed to appreciate that there was no legal basis on which the respondent could refuse the application. Ground 5 was that the judge erred in failing to give regard to the respondent's duty to investigate further.

The Grant of Permission to Appeal

16. On 29 May 2015 First-tier Tribunal Judge Landes granted permission to appeal for the following reasons:

"REASONS FOR DECISION (including any decision on extending time)

1. These are in-time applications by the appellants, husband and wife, citizens of India, for leave to appeal against the decision of Judge of the First-Tier Tribunal R J N B Morris promulgated on 27 March 2015 who dismissed their appeals against the respondent's refusal to grant further leave to remain as a Tier 1 (Entrepreneur) Migrant and his dependant respectively.
2. I have had some difficulty in reading the handwriting in the grounds. In particular I cannot make out the word in ground 3 before 'in the letters' which may be significant. Accordingly I cannot come to a conclusion whether ground 3 is arguable. Ground 5 does not specify what the respondent should have done by way of investigating further. I consider however that grounds 1, 2 and 4 are arguable as I explain below and given the decision in Ferrer I do not restrict the grounds which may be argued.
3. I consider that it is arguable as set out in ground 4 that there was no legal basis for refusing the application and therefore that the judge erred in concluding that there was. The first appellant had produced to the respondent an original bank letter, a third party declaration and a letter from a legal representative. Given that the first appellant had sent in a change of circumstances declaration pre decision with these documents (no third party declaration or letter from a legal representative had been submitted with the application originally - see respondent's email) it is arguable that the bank letter did not need to be the same letter as the scanned letter originally sent in order for the rules to be satisfied. The respondent did not assert in the decision letter that either the bank letter or the scanned bank letter were false, neither did the respondent say that she was unable to verify the letters.
4. In addition it is arguable that the judge erred in finding that the respondent had given the first appellant the opportunity to explain the reason for the 'defects' identified in the letter (ground 1). The respondent did not do so as it appears the first mention by the respondent of her contentions was in the refusal letter. It is arguable (ground 2) that for the first appellant to give an explanation post decision is too late bearing in mind the provisions of section 85A. It is not obvious that the evidence would come within section 85(4)(c) as being adduced to prove that the bank letter was genuine or valid given the respondent was not alleging that the bank letter was a false document or invalid. These points are arguably material as the judge found that the respondent had discharged a duty to act fairly by giving the first appellant an opportunity to explain the reason for the 'defects' identified".

The Error of Law Hearing

17. At the hearing before me, I reviewed the documents that had been before the First-tier Tribunal. These included the case of **Naved Pakistan [2012] UKUT 0014 (IAC)**, an extract from the Judicial Review Handbook on the Points-Based System Migrant and a Change Of Circumstances Form which the appellant had completed. I was also shown the appellant's witness statement in which the appellant said as follows at paragraph 4:

"It is unclear how the so-called discrepancies can result in the Home Office not accepting the documents. If there were concerns in relation to the documents, all they had to do was contact the bank for verification! I do not know what the Home Office mean by me providing 'contradictory evidence' in accordance with paragraph 41 of Appendix A of the Immigration Rules. Also I should mention the letters of the same date but it is clearly evident that the letter I sent on 2 May 2014 was printed later".
18. I observed that the appellant thereby appeared to be conceding that the original bank letter had been produced *after* 14 April 2014, notwithstanding the fact that it bore the date of 14 April 2014. The appellant, who was present, clarified that what he meant was that it was printed later the same day.
19. Mr Nasim indicated that his error of law challenge essentially boiled down to two grounds. The first ground was that the decision was not in accordance with the Rules, as on a proper construction of the Rules the appellant had provided the specified evidence. Alternatively, the judge's reasoning on fairness was flawed, as she ought to have found that the decision appealed against was not in accordance with the law, and that a lawful decision on the Tier 1 application was outstanding.
20. On behalf of the Secretary of State, Mr Melvin relied on the written submissions which he had prepared opposing the appeal. The grounds were no more than an expression of disagreement with the findings of the judge which were open to him. No documentary evidence was offered by the appellant for the discrepancies in the two letters, which had purportedly been written on the same day, and the oral evidence given by the appellant was rejected by the judge. The hearing had taken place ten months after the refusal decision, and so the appellant had ten months to provide an explanation for the discrepant documents. Now over twelve months had elapsed since the refusal, but he had still failed to provide an explanation for the discrepant documents.

Discussion

21. Ground 4 in the application for permission corresponds to the first ground advanced by Mr Nasim before me. The remaining grounds advanced in the application for permission effectively condense into Mr Nasim's new ground 2.
22. It is convenient to deal first with Mr Nasim's new ground 1. If he is right, there is no need to go any further. Mr Nasim's argument on ground 1 is supported by Judge Landes' observations. However, I am not persuaded that Judge Morris was wrong to find that the refusal decision was in accordance with the Rules.

23. There are two Rules which have a direct bearing on ground 1. Paragraph 41-SD(a) states that the specified documents to show evidence of the funding available to invest are one or more of the following specified documents:
- (i) A letter from each financial institution holding the funds, to confirm the amount of money available. Each letter must:
 - (1) be an original document and not a copy,
 - ...
 - (4) have been produced within the three months immediately before the date of the application.
24. Paragraph 245AA sets out the circumstances in which the Secretary of State will consider documents not submitted with applications under the points-based system. Under subparagraph (a), the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).
25. Subparagraph (b) provides that if the applicant has submitted specified documents in which:
- (iii) a document is a copy and not an original document ...
- the Secretary of State may contact the applicant or his representative in writing, and request correct documents. The requested documents must be received at the address specified in the request within seven working days of the date of the request.
26. Subparagraph (d) provides that if the applicant has submitted a specified document:
- (ii) which is a copy and not an original document ...
- the application may be granted exceptionally, providing that the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements.
27. The appellant failed to comply with paragraph 41-SD(a) when making his application as he failed to provide an original bank letter. So, prima facie, the Secretary of State could have refused the application without giving the appellant the opportunity to rectify the omission.
28. But the Secretary of State did give the appellant the opportunity to rectify the omission. He was given seven days in which to provide the original of the scanned copy of the bank letter provided with the application. Indisputably, the appellant failed to provide the original version of the scanned letter, but instead provided a different bank letter, albeit that there was no material difference in substance.
29. Reliance is placed on the fact that the new version of the bank letter had the same date as the old version of the bank letter. But even if the date of the new version was

taken at its face value (and there were good reasons not to take it at its face value), it still fell foul of the requirement in paragraph 41-SD(a) which was that the letter must have been produced “within the three months immediately before the date of the application”. The letter was not produced within the three months immediately before the date of application, but was produced to the Secretary of State some two weeks after the application. If it had been the original of the scanned copy, then the requirement in subparagraph (4) would have been met. But since it was not the original of the scanned copy served with the application, it did not meet the requirement of subparagraph (4). Also, the Secretary of State could not take the document into account pursuant to Rule 245AA. For it was not a document that had been submitted with the application in copy form, so as to enable the original version to be considered on an exceptional basis *after* the application had been made, pursuant to Rule 245AA(b). (Alternatively, the appellant had not shown that the original bank letter was genuine or valid: see below.)

30. I accept that the above points were not teased out either in the refusal letter or in Judge Morris’ decision. But this does not matter. The burden rests with the appellant to show that the judge materially erred in law in finding that the decision was in accordance with the Rules. The appellant does not discharge this burden for the reasons I have given.
31. Turning to ground 2, I accept that there are flaws in Judge Morris’ analysis. The appellant was not given the opportunity to explain the discrepancies between the two bank letters before an adverse decision was made; and, once the adverse decision had been made, the appellant’s ability to explain the discrepancies was circumscribed by Section 85A.
32. Under Exception 2, the Tribunal may consider evidence adduced by the appellant only if it –
 - (i) was submitted in support of, and at the time of making, the application to which the immigration decision related, or
 - (ii) relates to the appeal insofar as it relies on grounds other than those specified in subsection 3(c), or
 - (iii) is adduced to prove that a document is genuine or valid.
33. So the judge needed to resolve whether Mr Nasim was right in his submission that, absent an assertion of falsity by the respondent, the appellant was debarred by Section 85A from adducing admissible evidence to explain the discrepancies.
34. However, I am not persuaded that the judge made a material error of law in reaching the conclusion that the appellant had not been a victim of common law unfairness, and in her parallel finding that the decision was in accordance with the law.
35. As the judge indicated in paragraph 14, there was not common law unfairness in the **Naved** sense in that the appellant was aware, or should have been aware, when providing the new version of the bank letter that the differences between the

purported original and the purported copy were likely to trigger a legitimate enquiry of him as to why there were differences in the two letters. Ignorance of the Rules is no defence and, as I have analysed earlier in this decision, the appellant was inviting a refusal by failing to provide the original of the scanned copy. So this is not a case where the eventual refusal decision was based on grounds “of which he did not know and could not have known”. On the contrary, he knew, or ought to have known, that he was inviting trouble by not complying with the request for production of the original bank letter.

36. The other argument advanced by Mr Nasim before the First-tier Tribunal was that the respondent ought to have made further enquiries of HBL and requested a document verification report in respect of the new version of the bank letter. But I consider the premise which underlies his submission is fallacious. The respondent did not need to assert that the original bank letter was false. By rejecting the bank letter evidence as contradictory, the respondent was placing upon the appellant the burden of proving that the original bank letter was genuine or valid. So it was open to Judge Morris to find, as she did, that the respondent needed to do no more than to point out the differences between the purported original and the scanned copy.
37. Under paragraph 245AA(d) the burden rested with the appellant to show that the documents tendered by him were genuine. It was only if the respondent was satisfied that the specified documents provided were genuine, and that the applicant met all the other requirements, that the Secretary of State had discretion to grant the application exceptionally.
38. Under the statute, the appellant was not debarred from adducing evidence by way of appeal to show that the original bank letter was genuine or valid.
39. Given the respondent’s reliance on the discrepancies between the two documents as justifying the refusal under the Rules, the burden rested on the appellant to bring forward evidence to show that the original letter from HBL was valid or genuine by proving that it had been produced by the bank on 14 April 2014. (This would not necessarily get the appellant home, as a corresponding copy had not been submitted with the application.)
40. As the judge found, the appellant failed to give a credible explanation in his oral evidence as to how it could have come to pass that the bank would issue on the same day two different bank letters with two different credit balances. The appellant’s oral evidence was relevant to the issue of whether the original bank statement relied upon was genuine or valid, and so it was evidence that was admissible under the statute.
41. At paragraph 2 of his witness statement, the appellant said that he sent the documents on 14 April 2014 in a rush. The documents comprised whatever was given to him by his friend Shiraz Khan. He continued:

“Later we realised that there were spelling mistakes and I sent further documents with the circumstances changed form. The Home Office had referred to the e-mail they sent

me but it is not because of the e-mail I sent further documents. I only saw the e-mail once I had received the refusal letter as it made reference to an e-mail but when I looked up my e-mail inbox it was not there but in my junk e-mail box”.

The appellant did not disclose any e-mails passing between him or his friend and HBL on 14 April 2014 making corrections to the scanned copy of the bank letter that had been sent to the respondent. He also did not produce evidence to show that the e-mail from the Home Office had gone straight to his junk e-mail box. Accordingly, the judge was entitled to reject the appellant’s evidence for the reasons which she gave.

42. The judge’s real error was not to recognise that the effect of her finding was that the appellant had not discharged the burden of proving that the purported original letter from HBL was valid or genuine.
43. But her error is not material, as this finding is the inescapable consequence of her rejection of the appellant’s unsupported account that the original bank letter was generated on 14 April 2014 - rather than around the same time as the other documents that were served with the Change of Circumstances Form.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. These appeals are dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson