IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/11050/2013
IA/11044/2013
IA/11057/2013
IA/11369/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 1 March 2016	**On 18 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

[M H B]
[P S N]
[N B]
[M Z B]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr. P. Skinner, Counsel instructed by ATM Law Solicitors
For the Respondent: Mr. G. Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants against the decision of Designated Judge of the First-tier Tribunal Garratt, promulgated on 15 August 2013, in which he dismissed [MHB]'s appeal against the Respondent's decision to

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refuse to grant leave to remain as a Tier 1 (Entrepreneur) Migrant. The appeals of his wife, [PSN] and their children, [NB] and [MB], were dependent on his appeal.

2. Permission to appeal was granted following the decision of the High Court to quash the decision of the Upper Tribunal refusing permission to appeal. The grounds of appeal submit that the judge erred in his approach to the documents from the bank.

3. The first Appellant attended the hearing. I heard oral submissions from both representatives, following which I reserved my decision, which I set out below with reasons.

Submissions

4. Mr. Skinner submitted that there was no dispute that the first bank letter dated 7 September 2012 was defective. The issue was what was required of the Respondent in a case where such a letter did not comply with the requirements of the immigration rules. The policy, as codified by the Respondent in paragraph 245AA of the immigration rules, was that the Respondent could request a further letter, and the time period given for this would be seven days. In the Appellant's case, the Respondent had only given the Appellant a period of three days in her letter of 4 March 2013. The Respondent had failed to follow her own policy as set out in the immigration rules.

5. As a result of this failure to follow her own policy, the judge should have found that the decision was not in accordance with the law, and should have remitted it to the Respondent for reconsideration of the documentary evidence. It did not matter that the failure to follow the policy would not have made a difference. The fact that the Respondent had failed to follow her policy made her decision not in accordance with the law.

6. The third letter from the bank dated 12 March 2013 did not reach the Respondent until after the decision had been made and could not be taken into account at that stage. However, it could have been taken into account by the Respondent had the application been remitted to the Respondent for reconsideration. The judge therefore was not entitled to find that the failure of the Respondent to follow her own policy would not have made a difference. He was not entitled under section 85A of the 2002 Act to take into account evidence which the Respondent could have taken into account had he remitted the application for reconsideration.

7. Mr. Skinner submitted that the judge was wrong to find that the letter from the Respondent dated 4 March 2013 was sent by email to the Appellant rather than by post. I was referred to the letter (page 31 of the Appellant's bundle). No email had ever been adduced by the Respondent. The only reference to an email was at the bottom of the first page of the letter. The Appellant had adduced in evidence the envelope in which the

letter had been sent and copies of the sticker which indicated when the envelope had been signed for (pages 33 to 35 of the Appellant's bundle). The judge had not taken account of this evidence. The judge had not accepted that the Respondent would have sent this letter by post, but this was a speculative finding not based on the evidence which was before him.

8. The period of time allowed by the Respondent in the letter had to be sufficient to enable the Appellant to comply, but the letter had been received by the Appellant after the expiry of the three day deadline set out in the letter. The judge had found that the letter arrived on 8 March 2013.

9. He submitted that, although it might be said by the Respondent that the Appellant had been given an opportunity to provide a further letter and that he had not done so, the opportunity had to be fair and in accordance with the Respondent's own policy.

10. He further made submissions, and there was a discussion at the hearing relating to paragraph [22] of the decision, which is where the judge made findings as to the genuineness of the documents provided. However, I stated that I could see no reason why the judge had made the findings in paragraph [22], given that he was not able by virtue of section 85A of the 2002 Act to take into account the letter of 12 March 2013. Any findings as to the genuineness of the document were otiose. Mr. Harrison agreed that he could see no reason for the judge having made the findings in paragraph [22]. Mr. Skinner submitted that the Tanveer Ahmed principles applied only to human rights and asylum cases, and the judge was wrong to apply them here. He submitted that, should I be with him in relation to the first ground, and remit the application for reconsideration by the Respondent, it should be stated that paragraph [22] should not be taken into account. Mr. Harrison was in agreement that the findings in paragraph [22] should not be taken into account by the Respondent, should I remit the application for reconsideration.

11. In conclusion, Mr. Skinner submitted that the appropriate relief was to set the decision aside, and remake it, allowing it to the extent that the Respondent's decision was not in accordance with the law, and remitting it to the Respondent for reconsideration. He submitted that, had the First-tier Tribunal done this, a fee award would have been made, and he asked that I make a fee award.

12. Mr. Harrison relied on the Rule 24 response. He submitted that however the letter of 4 March 2013 had been despatched, whether by email or post, there were 18 days between the date of the letter and the date of the decision, 22 March 2013. Whilst he appreciated the niceties of the policy, when given 18 days in which to provide further documents, not three or seven, it was churlish for the Appellant now to argue that the Respondent had not followed the requirements of the immigration rules.

The judge had considered all he needed to consider. The Appellant had not provided the evidence necessary and so did not meet the requirements of the rules. The discussion as to whether the policy had been followed or not was immaterial as more than enough time had been granted.

13. If I was not with him, Mr. Harrison agreed that the remedy was to remit the application for reconsideration by the Respondent.

14. In response Mr. Skinner submitted that procedural fairness should not be characterised as a "nicety". There was a bank letter which met the requirements of the immigration rules dated 12 March 2013. It had not been received by the Respondent prior to the decision having been taken, but it was clearly material that the Appellant had a letter which met the requirements of the immigration rules. He submitted that had seven days been given to the Appellant instead of only three, it was more likely that the letter would have reached the Respondent.

Error of law

15. It is accepted by the Appellant that the bank letter provided with the application dated 7 September 2012 did not meet the requirements of the immigration rules.

16. The Respondent wrote to the Appellant by way of a letter dated 4 March 2013. I find that this letter does not comply with the Respondent's own policy, as set out in the immigration rules themselves, to allow an applicant in the Appellant's position a period of seven days in which to provide evidence which meets the requirements of the immigration rules. This letter states "Please note we are only able to accept the documents received within UK Border Agency within **3 working days** of this email." Later it states "No further extension will be given if the requested information is not provided within the three days".

17. Paragraph 245AA(b) provides:

"(b) If the applicant has submitted specified documents in which:

(i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);

(ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(iii) A document is a copy and not an original document; or

(iv) A document does not contain all of the specified information;

the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the

address specified in the request within 7 working days of the date of the request."

18. I find it is clear that the letter sent by the Respondent is not in accordance with paragraph 245AA of the immigration rules, but this is not acknowledged by the judge. He finds that whether the letter said three or seven days is "irrelevant" (paragraph [21]). However, I find that the Respondent's failure to comply with the immigration rules and her own policy cannot be described as "irrelevant". I find that the judge has erred by failing to find that the letter of 4 March 2013 did not comply with the Respondent's policy, and therefore that the Respondent's decision was not in accordance with the law.

19. The judge found that the Respondent would not have sent this letter out by post, given the evidence before him. I find that this finding was not open to him on the evidence before him. He failed to give consideration to the evidence put forward by the Appellant consisting of the envelope in which he had received the letter, and the evidence that it had been sent by recorded delivery and signed for. He gave no reasons for not finding this evidence reliable. He had no evidence before him to show that the letter had been emailed. No email was provided by the Respondent to show that the letter was sent as an attachment to an email. The only mention of "email" is in the letter itself, where it states that documents must be received by the Respondent "within **3 working days** of this email".

20. I find that the judge has failed to refer to the evidence provided by the Appellant which showed that the letter of 4 March 2013 had been sent to him by post. He states that he is "not satisfied that a UKBA official would send out such a letter by post", but this runs counter to the evidence which was before him, and which he failed to take into account.

21. Consequently, having not accepted that the letter was sent by post, the judge found that the letter of 4 March 2013, which I have already found did not comply with the immigration rules, was received by the Appellant before the expiry of the three day deadline. However, the evidence before him pointed to the fact that the letter was not received until after the three days had expired, thus meaning that the Appellant did not have any opportunity to provide any documents. The letter is clear that "no further extension will be given". I find that it is immaterial that the decision was made 18 days after the date of the letter, given that the letter stated that no further extension would be given if the evidence was not provided within three days.

22. In relation to the materiality of the judge's failure to find that the Respondent's failure to comply with the immigration rules meant that the decision was not in accordance with the law, given that judge was not entitled under section 85A of the 2002 Act to take into account the bank

letter of 12 March 2013, which did comply with the immigration rules, but that the Respondent could have taken this letter into account had he remitted the application for reconsideration, I find that his error was material.

Notice of Decision

23. The decision of the First-tier Tribunal involved the making of a material error of law and I set the decision aside.

24. I remake the decision, allowing the Appellant's appeal to the extent that the Respondent's decision was not in accordance with the law.

25. I remit the Appellants' applications to the Respondent for reconsideration.

26. I have set the decision aside in its entirety, but for the avoidance of doubt, the findings in paragraph [22] of the decision are to be disregarded. The judge was not able to take into account any evidence which was not before the Respondent, as is the case with the letter of 12 March 2013. Further, the principles in Tanveer Ahmed did not apply to the evidence in this appeal. As accepted by Mr. Harrison, there was no reason for the judge to have made any findings such as those in paragraph [22].

Signed Date 11 March 2016

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal and a fee has been paid. The Respondent's decision was not in accordance with the law as she failed to comply with her own policy, codified in the immigration rules. In the circumstances I make a fee award for the entire fee paid.

Signed Date 11 March 2015

Deputy Upper Tribunal Judge Chamberlain