



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34378/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On 13 November 2014

Determination Promulgated
On 26 November 2014

Before

The President, The Hon. Mr Justice McCloskey

Between

QUN YU

and

Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Not present and unrepresented

Respondent: Mr Richards, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal was listed for hearing today (13 November 2014). By a letter dated 12 November 2014, the Appellant's solicitors communicated the following request:

"The Appellant initially intended for an oral hearing of the appeal. However, under her personal extenuating circumstances, our instructions now confirm that the Appellant wants a paper hearing of her above referred appeal."

The remaining contents of the letter were consequential upon this request. Consistent therewith, the Appellant did not attend today and was not represented. Some very brief submissions were made on behalf of the Respondent by Mr Richards.

2. This appeal originates in a decision made on behalf of the Respondent, dated 07 August 2013, whereby the application of the Appellant, a Chinese national aged 26 years, for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant was refused. The ensuing appeal to the First-tier Tribunal (the "FtT") was dismissed. The Appellant appeals with permission to this Tribunal.
3. The primary reason for the Respondent's refusal decision is expressed thus:

"In your application, you submitted a letter and account statements from Affin Bank. I am satisfied that the documents were false because the bank have confirmed that they have not issued the documents

As false documents have been submitted in relation to your application, it is refused under paragraph 322(1A) of the Immigration Rules."

A second refusal reason was added. This is, in essence, that the application was not considered genuine on the ground of contradictory statements made by the Appellant and her proposed business partner relating to the origins of the funds allegedly available for the purpose of establishing the business in question, a Chinese fast food outlet. This reason is duly particularised in the refusal decision.

4. The evidence served by the Respondent in connection with the hearing at first instance included the document verification enquiry addressed to the bank in question and the response of the latter. The enquiry stated:

"The attached document is in the name of [XY] who holds a bank account with your bank. Mr [XY] is sponsoring [the Appellant and the other named person] in support of their visa application in the United Kingdom, who has [sic] submitted bank letters and bank statement from your institution. Can you please confirm the following details:

- *The document submitted to the Home Office (see attached scanned copy) is genuine/not genuine as issued?*
- *The account balance as of 06 December 2012 [amount] belongs to [XY]?*
- *The account number [specified] belongs to [XY]?"*

This elicited the following swift response:

“With reference to the document you had email [sic] to me today, 31/07/2013, we wish to confirm that the Bank had not issued the document and these documents are not genuine.”

The author of this response is described as the “*Manager, Branch Services*” of the bank concerned.

5. The following features of the FtT’s determination illuminate the grounds upon which the appeal was dismissed:

- (i) The Judge refused an initial application to adjourn the hearing, for the expressed purpose of securing evidence from “XY”/the bank concerned to demonstrate the authenticity of the relevant documents, on the ground of late timing and the Appellant’s admitted failure to make any real attempt to secure this evidence during the previous eight months.
- (ii) In [9], the Judge recorded: “*The burden of proof is on the appellant and the standard of proof required is a balance of probabilities*”.
- (iii) The Appellant’s pre-decision interview and the document verification evidence were noted.
- (iv) The Appellant was asked in cross-examination whether her application had been made in the knowledge that she did not have access to the necessary funds:

“The Appellant did not reply, but clearly nodded her head. The presenting officer asked if I had seen the response. I confirmed I had observed it

It was submitted that the Appellant has lied about the source of her funds in her interview and as accepted at the hearing, by nodding, that this is solely her opportunist (sic) attempt to stay in the K.”

(v) Describing the Appellant’s demeanour and her evidence to the Tribunal, the Judge stated:

“She was mostly ignorant in respect of any question about her sponsor or the money that he would supposedly invest. At one point she struggled even to remember his name. She has lied about him being a family member and her uncle, when he is in fact the uncle of her business partner

The idea that she would receive £200,000 in funds from a sponsor who she had never met, is not related to and who she has been unable to contact is simply not believable. Her whole demeanour suggested that she was caught in a trap of her own making."

See [24] of the determination.

- (vi) *"I find as a fact that the letter and the statement referred to are not genuine" and that the evidence of falsification "is compelling evidence of deception": see [25].*
- (vii) *"The Appellant did not speak the words when this deception was put to her, but she did nod her head in resignation to being found out": see [26].*
- (viii) *"The Appellant has been unable to demonstrate at hearing that she satisfied the requirements of the Immigration Rules, as required*

On the totality of the evidence before me, I find, for the reasons above recorded, that the Appellant has not discharged the burden of proof and the reasons given by the Respondent do justify the refusal": see [31] and [32].

The FtT's overall conclusion was that the impugned decision was in accordance with the law and the applicable Immigration Rules.

6. Permission to appeal to this Tribunal was granted on the following basis:

".... There is an arguable error of law in that the Judge wrongly states that the burden of proof lies on the Appellant and makes no self direction that the burden of proof, where an allegation that false representations have been made and false documents are produced, lies on the Respondent."

I find that there was indeed an error of law of this variety. As the passages reproduced above demonstrate, the FtT repeatedly stated that the burden of proof rested on the Appellant, effectively in all respects. There is no reference, implied or even oblique, to the Respondent's burden in relation to the alleged deception.

7. However, I am satisfied that this error of law is not material. I concur with the Judge's description of the evidence of deception as *"compelling"*. I have subjected this evidence to careful scrutiny. Moreover, I have juxtaposed it with the relevant passages in the determination, rehearsed above. Having conducted this exercise, I conclude confidently that if the error of law had been avoided the outcome would have been the same. Alternatively phrased, I consider that had the requisite self-direction been made the result would inevitably have been a dismiss of the appeal.
8. I have also reflected carefully on the "Appellant nodding" issue, set out in [5] (iv) above. I consider that a gesture of this kind, which has scope for ambiguity, misinterpretation and misunderstanding should normally be probed by a Tribunal

by appropriate questions, with a view to eliciting desirable clarification and confirmation. This did not occur. My reservations about this were exacerbated by the following passage in the record of the Appellant's pre-decision interview:

"The applicant's level of verbal English was poor and the interviewing officer had to reiterate each question asked in several different ways before the applicant understood."

None of this is acknowledged in the judgment. However, I take into account that at the hearing before the FtT the Appellant had the benefit of legal representation and, moreover, no interpreter was required. In addition, within the text of the determination there is no hint of any communication, comprehension or language barriers or difficulties. Accordingly, while this factor, in the abstract, has the potential to vitiate a Tribunal's decision on the ground of procedural unfairness, I am satisfied that it did not do so in this instance.

DECISION

9. Finally, I am satisfied that there was no unfairness in the adjournment Refusal, as I have found to be legally sustainable the FtT's key finding of a fairytale. On the grounds and for the reasons elaborated above I dismiss the Appellant's appeal. The decision of the FtT is hereby affirmed.

Seamus McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 13 November 2014