Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/11106/2014

THE IMMIGRATION ACTS

Heard at Field House
On 03 June 2015

Decision and Reasons Promulgated
On 10 June 2015

Before

UPPER TRIBUNAL JUDGE ESHUN
UPPER TRIBUNAL JUDGE BLUM

Between

MLMI
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Jones, counsel, instructed by Jein Solicitors
For the Respondent: Mr Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

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Background

2. This is an appeal against the decision of Judge of the First-tier Tribunal A M Black who, in a decision promulgated on 13/11/2014, dismissed the appeal of the appellant, a national of Sri Lanka, against a decision of the respondent to refuse to grant him further leave to remain as a Tier 1 (Entrepreneur) Migrant and to remove him from the United Kingdom (UK) by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The appellant had made an in-time application for further leave to remain on 02/02/2013 as a Tier 1 (Entrepreneur) Migrant. He applied on the basis that he had access to £50,000 from two 3rd party financial sponsors. These sponsors were based in Sri Lanka. In order to meet the requirements of paragraph 41-SD(c)(i)(6) of Appendix FM he had to provide letters from the financial institutions that held the 3rd parties' funds naming him, thereby indicating that funds were available to the appellant. The appellant was unable to meet this requirement and the application was refused on 18/03/2013. The appellant appealed to the First-tier Tribunal. The appellant produced three bank letters from the banks holding the 3rd parties' funds. These indicated that the banks were, as a result of Sri Lankan banking rules and regulations, unable to comply with the requirements of paragraph 41-SD. In a determination promulgated on 04/09/2013 Judge of the First-tier Tribunal Griffiths allowed the appeal. Judge Griffiths considered the 3 letters from the Sri Lankan banks. Judge Griffiths noted the submissions made on the appellant's behalf that it was impossible for him to comply with the requirements of the immigration rules. Judge Griffiths stated,

> "I find that the decision is not in accordance with the law as it cannot be lawful for the respondent to impose conditions which are impossible to be complied with."

4. Judge Griffiths directed that the decision be remitted back to the respondent to make a lawful decision. On 20/02/2014 the respondent remade the decision refusing the application. The respondent noted that although the three letters from the NDB Bank, the Pan Asia Bank and the People's Bank contained sufficient funds, the letters did not confirm that the funds were accessible by the appellant. Under 'flexibility arrangements' the respondent had again requested the documents to be in the required format but the appellant's representative conformed that documents in the form required were not available. The reconsidered application was therefore refused on exactly the same basis as it had originally been.

The decision under appeal

5. The appellant once again appealed the respondent's decision. The appeal was heard by Judge of the First-tier Tribunal A M Black. It was submitted before Judge Black that the respondent was not entitled to refuse the application on the same basis and relying on the same evidence as her earlier decision (relying

on *Chomanga (binding effect of unappealed decisions) Zimbabwe* [2011] UKUT 312 (IAC)). In a decision promulgated on 13/11/2014 Judge Black dismissed the appeal. Judge Black stated that since the previous determination of Judge Griffiths the Upper Tribunal had issued guidance in respect of the issue under appeal. Judge Black considered the authority of *Durrani (Entrepreneurs: bank letters: evidential flexibility)* [2014] UKUT 295 (IAC) and concluded that there was no evidence to support the assertions contained in the three bank letters. She found it was unlikely that the Sri Lankan banks would have difficulty in reporting on the availability of the funds to the appellant if instructed to do so. Judge Black also relied on the authority of *VK v SSHD* [2009] EWCA Civ 1435 in finding that the inferences drawn by Judge Griffiths from her findings could no longer be sustained in light of *Durrani*.

6. Judge Black then went on to consider, *inter alia*, the relevance of paragraph 245AA(d). This provision enabled the respondent to grant an application exceptionally, even if a specified document had missing information, provided that the missing information was verifiable from, amongst others, other documents submitted with the application. Judge Black considered two Financial Sponsorship Declarations dated 21/01/2013 from the financial sponsors. She was not however satisfied that the missing information was verifiable from these Declarations.

The grant of permission to appeal

7. In granting permission to appeal Upper Tribunal Judge Rintoul found it arguable that the First-tier Judge had erred in her approach to the findings of Judge Griffiths that it would be impossible for banks in Sri Lanka to provide the assurances needed by paragraph 41-SD, and in her approach to the letters from the three Sri Lankan banks.

The hearing before the Upper Tribunal

8. Ms Jones submitted that it was clear from the letters from the three Sri Lankan banks that the rules and regulations of the Sri Lankan Central Bank prevented them from issuing letters containing the information required by paragraph 41-SD(c)(i)(6). Ms Jones noted that Judge Griffiths findings were not appealed. It was submitted that *Durrani* related to banks in the UK. It was submitted that the instant appeal was a paradigm case for the application of paragraph 245AA(d). In response to an observation from us it was accepted by Ms Jones that the respondent had not considered exercising her discretion under paragraph 245AA(d). Mr Duffy very fairly indicated that the *Chomanga* point presented him with the most difficulty. He had considered the respondent's file and found there had been consideration of the decision of Judge Griffiths but that no potential error of law had been identified. Mr Duffy noted that the Sri Lankan bank letters referred to their inability to state that funds were 'accessible' by the appellant, although this was in contrast to paragraph 41-SD which required the letters to indicate the funds were 'available' to the appellant.

Mr Duffy accepted that this point had not been argued before Judge Black, nor had it been considered by her. Mr Duffy accepted that the respondent's decision made no mention or reference to the possibility of exercising discretion under paragraph 245AA(d). We reserved our decision.

Discussion

9. We are satisfied, for the following reasons, that Judge Black materially erred in her decision. Judge Griffiths found that it "*…cannot be lawful for the respondent to impose conditions which are impossible to be complied with.*" Judge Griffiths could only have reached this conclusion based on the three letters from the Sri Lankan banks. These letters in turn indicated that, as a result of rules and regulations of the Central Bank of Sri Lanka, they were unable to issue letters indicating that the funds held in their customers' accounts were accessible to a third party. Although the particular rules and regulations were not identified Judge Griffiths was entitled to rely on letters issued by three financial institutions regulated by Sri Lankan banking law and whose reliability was not challenged before her. The respondent did not seek to appeal this decision. Following *Chomanga* the respondent was bound by the unappealed findings of fact. This was indeed accepted by Judge Black in her determination (at paragraph 16). Judge Black however relied on the case of *Duranni* which was promulgated on 13/06/2014, after the respondent's decision.

10. *Durrani* concerned an appellant from Pakistan who was relying on 3rd party financial sponsorship from sponsors whose funds were held in two UK based banks. The headnote in *Durrani* reads,

> *"The requirements listed in paragraph 41-SD(a)(i) of the Rules are to be construed reasonably and sensibly, in their full context. Approached in this way, the letters required from banks or other financial institutions are not designed to provide, and do not commit them to, any form of guarantee or assurance to any party. Rather, the function of the prescribed letters is to attest to the state of the relevant bank account on the date when they are written and to provide certain other items of information designed to confirm the authenticity of the application for entrepreneurial migrant status and its economic viability. There is no difficulty in the third party bank, with its customer's consent, expressing its understanding, based on the customer's instructions, that the use of specified funds in the customer's bank account/s is contemplated or proposed by the customer for the purpose of financing the applicant's proposed business venture. Accordingly, there is no substance in the argument that the relevant requirements contained in paragraph 41-SD(a)(i) produce an absurd result and must, therefore, be interpreted in some other manner."*

11. There was no consideration given in *Durrani* to the banking rules or regulations in Sri Lanka. The appellant in the present appeal had produced three letters from Sri Lankan banks that were, *prima facie*, reliable. The respondent had not produced any evidence to rebut the assertions contained in the letters from the banks. The findings of the UT in *Durrani* are not dispositive of the appellant's assertion, supported as it was by the bank letters, that Sri Lankan banking regulations prevented him from meeting the requirements of paragraph 41-SD.

Judge Black stated that there was no evidence to support the assertions contained in the bank letters. There was however no reason to doubt the assertions contained in official bank letters, certainly in the absence of any contrary evidence.

12. We note that, subsequent to Judge Black's decision, the Court of Appeal has considered the issue under appeal in *Iqbal & Dependants v Secretary of State for the Home Department* [2015] EWCA Civ 169. A First-tier Judge had allowed an appeal on the basis that banking regulations in Pakistan prevented compliance with paragraph 41-SD. However, on appeal to the Upper Tribunal, it found there was no clear evidence that the requirements were contrary to the law of Pakistan or contrary to the regulations of the banking industry. The appeal proceeded in the Court of Appeal on the basis that the Upper Tribunal's conclusion was correct. In the present appeal the appellant had produced letters from three different banks suggesting that rules and regulations of the central bank of Sri Lanka prevented them from complying with the requirements in paragraph 41-SD. Once again, in the absence of any contrary evidence from the respondent, and in light of the decision not to appeal the determination of Judge Griffiths, we find the letters constituted clear evidence as to understanding of the Sri Lankan banks of Sri Lankan banking regulations. We are consequently satisfied there has been no material change or clarification in the law since the decision of Judge Griffiths that would, following *Chomanga*, entitle the respondent or Judge Black to depart from the findings of Judge Griffiths.

13. Judge Black additionally relied on the authority of *VK*. This Court of Appeal decision concerned the distinction between findings of fact and inferences drawn from those findings by an earlier judge. Judge Black found that, in light of the authority of *Durrani*, it could no longer be inferred from the facts as found by Judge Griffiths that the appellant's sponsors' banks could not provide the confirmation of availability of funds, as required (paragraph 21). We have already found that Judge Black erred in her reliance on the decision in *Durrani* given that *Durrani* concerned English banks, made no assessment of the laws of other countries, and was a case where there was no reliable evidence that rules or regulations prevented compliance. In the earlier appeal Judge Griffiths made a direct finding based on seemingly reliable documentary evidence about the impossibility of banks in Sri Lanka, as a result of banking regulations, to provide letters in the required form. This was not an 'inference' but a primary finding of fact, one that was not challenged, countered or undermined by any evidence produced by the respondent or decision of the Upper Tribunal or Court of Appeal. In these circumstances we find Judge Black erred in her reliance on *VK*.

14. Judge Black went on to exercise the discretion contained in paragraph 245AA(d). this states,

    (d) If the applicant has submitted a specified document:

(i) in the wrong format; or

(ii) which is a copy and not an original document; or

(iii) which does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) the website of the organisation which issued the document, or

(3) the website of the appropriate regulatory body;

the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements.

15. According to the Reasons For Refusal Letter the respondent requested the appellant, in reconsidering the application, to provide the financial institutions documents in the required format. There is no indication that the respondent was aware of, or ever considered exercising, her discretion to grant the application exceptionally under 245AA(d)(iii). Dr Duffy accepted that the RFRL did not indicate that consideration had been given to the possibility of exercising discretion under 245AA(d). Given the potential applicability of paragraph 245AA(d)(iii) in light of the letters written by the banks and the declarations produced by the two 3rd party financial sponsors, we are satisfied the respondent failed to consider her discretion. Judge Black proceeded to exercise this discretion (paragraphs 24 & 25) and concluded, for reasons given at paragraph 24(a) to (c), that the application should not be granted exceptionally.

16. The difficulty with this approach is that the respondent never considered exercising her own discretion first under paragraph 245AA(d). Headnote 2 of *Ukus (discretion: when reviewable)* [2012] UKUT 00307 (IAC) states,

> "Where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (s 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in SSHD v Abdi [1996] Imm AR 148."

17. This authority was followed in *Bhimani (Student: Switching Institution: Requirements)* [2014] UKUT 00516 (IAC). We are satisfied, and it was not disputed by the parties, that Judge Black materially erred in law by proceeding to consider the discretion under paragraph 245AA(d) without the respondent

first considering whether to exercise her own discretion. We therefore remit the matter back to the respondent to enable her to lawfully exercise her discretion under paragraph 245AA(d).

Decision:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision of the First-tier Tribunal. We remake it by remitting the respondent's decision back to her on the basis that the procedure by which it was reached was not in accordance with the law. The appellant's application remains outstanding until a lawful decision in made.

08 June 2015

Signed: Date:
Upper Tribunal Judge Blum