Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/26775/2013
IA/26777/2013
IA/26786/2013
& IA/26791/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 May 2014	**On 11 February 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LALITH ANURA UDUWELA
KUMARI THANUJA UDUWELA
NISALI THISARA UDUWELA
VIHINI THEVINKA UDUWELA

Respondents

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondents: Ms N Hashimi, Counsel instructed by Law Direct Immigration Advisors

DECISION AND REASONS

1. Although this decision does touch on the welfare of minors their circumstances are not such that I see any need for any order restraining publication and I make no order in this case.

2. The respondents to this appeal, hereinafter "the claimants" are members of one family and are citizens of Sri Lanka. The first and second claimants are married to each other and the third and fourth claimants are their daughters. The third claimant was born in 1997 and the fourth claimant was born in 2002. They entered the United Kingdom lawfully on 9 October 2006 and have remained, with permission, since then.

3. On 2 August 2012 the first claimant applied for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points-based system and for a biometric residence permit. The other three claimants made similar applications as dependants of the first claimant.

4. The application of the First Claimant was refused with reference to paragraph 322(1A) of HC 395. This provides that applications for leave to remain or variation of leave to enter or remain are to be refused:

> "(1A) Where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts had not been disclosed, in relation to the application, or in order to obtain documents from the Secretary of State or a third party required in support of the application."

5. The reason given for this decision was clear. The Decision and Reasons under the heading "General Grounds Reasons for Refusal" says:

> "In your application, you submitted two letters from Bank of Ceylon dated 9 July 2012, the first relating to account numbers 70190253(F/D) and 73100510(F/D) held by Mr A N Liyanage and the second relating to account number 73249601(F/D) held by S Jayawardana.
>
> I am satisfied that the documents were false because Bank of Ceylon have confirmed that they did not issue these letters, and that the letters are not genuine."

6. The Secretary of State in each case also made a removal decision and both decisions were the subject of an appeal. They were prepared by solicitors and dated 27 June 2013. Point 1 raises five specific grounds of appeal including that the decision "is not in accordance with the law" and that the "decision is unlawful because it is incompatible with the claimants' rights under the European Convention on Human Rights."

7. The grounds set out the claimants' immigration history and challenge in some detail the contention that the first claimant relied on a false document. Under the heading "4. Statement of Additional Grounds" the claimants develop their contention that the decision is contrary to the United Kingdom's obligations under the European Convention on Human Rights and stated:

> "The [claimants] seek to be allowed to remain in the UK and continue to exercise their family and private life here as a family unit as it will now prove extremely difficult to relocate in Sri Lanka, having spent a significant number of years in the UK having built a strong private and family life under Article 8 of the ECHR with a positive stable future."

8. The First-tier Tribunal Judge noted that, although the burden of proof in immigration appeals was generally on the person making the application where, the Secretary of State chooses to rely on deception under paragraph 322(1A), or at all, then she must prove her case. However, at paragraph 8 the judge said:

> "In order to establish such an allegation the [Secretary of State] has to prove it to a high degree of probability."

9. He then decided that the evidence could not prove the case to the high degree of probability required by law and purported to "allow the appeals to the extent that they are remitted to the SSHD for full consideration under Paragraph 245DD".

10. The Secretary of State sought permission to appeal this decision. Firstly the Secretary of State complained that the judge required a "high degree of probability" and secondly that the judge does not explain in any event why the reasons were deficient."

11. I have no hesitation in saying that the First-tier Tribunal Judge's approach was wrong in several respects. If the judge was not satisfied that the respondent had proved that the first claimant had relied on false documents then he should resolve that point in his favour and decide the rest of the appeal.

12. The judge was clearly wrong to refer to a "high degree of probability". This was once thought to be the position. It may be that it never was the true position. It is sometimes said that all that was intended was that a decision maker remember that fraud or rank dishonesty is inherently less likely that careless error and the decision maker should reflect carefully before deciding that a dishonest act has been established.

13. Be that as it may, I agree with the Secretary of State that it is absolutely clear from the decision of the House of Lords in **Re B** [2008] 3 WLR 1 that the ordinary civil standard of the balance of probabilities is the guidance standard and should have been applied.

14. Ms Hashimi was well aware of the decision in **Re B** but suggested there was something distinctive about this case that required a different approach. She had produced a UK Border Agency Guidance Note headed "General Grounds for Refusal" said to be valid from 21 March 2013. It will be recalled that the decision complained of here was made in June 2013. On page 9 of 55 under the heading "Standard of Evidence" the guidance says:

> "To refuse under paragraph 322(1A) or 322(2), you must have positive evidence to prove the applicant has lied or submitted a false document. The burden of proof is to a "higher standard of probabilities", which means it must be more likely than not that the applicant has made false representations or given forged documents to get leave. It is not appropriate to refuse a current application under paragraph 322(1A) simply because you are not satisfied that the applicant is telling the truth."

15. Ms Hashimi seized on the words "the burden of proof is to a 'higher standard of probabilities'". If that is *all* that the guidance said I would have found it very difficult to understand quite what the decision maker was supposed to do. I think that applicants, broadly, are entitled to have their decisions made in accordance with published guidance and it is perfectly open to the Secretary of State to operate a regime more generous to applicants than the Rules strictly require. If the Secretary of State announces that she is going to do something then she must do as she said she was going to do or see her decisions challenged on the grounds that they are not in accordance with the law.

16. However I must also remind myself that guidance is just what it purports to be. It is not to be construed as if it had regulatory, still less statutory, force. As well as the phrase relied on by the claimants the guidance says, as is set out above, that the decision maker "must have positive evidence to prove that the applicant had lied or submitted a false document" and the contentious phrase was explained so that "it must be more likely than not that the applicant has made false representations or given forged documents to get leave". That is a straightforward explanation of the balance of probabilities standard and is wholly unobjectionable. What the Secretary of State is saying in a rather clumsy way is that a decision maker must not describe a document as false just because the decision maker for some unexplained reason is not satisfied that it is genuine. I am quite satisfied that the Secretary of State has not announced a policy that is more generous to applicants than the Rules require. What has happened is that the Guidance Note has been rather written rather badly and Ms Hashimi, as she is perfectly entitled to do, has endeavoured to use the Secretary of State's clumsiness to the advantage of the claimants. She has not succeeded.

17. I am quite satisfied the First-tier Tribunal erred in law and I must now decide how to advance the case.

18. The case was decided without hearing oral evidence from those most directly concerned. This is remarkable. The Rules do not require the first claimant to know that he relied on false documents. It is possible (this is not a finding, merely a reflection of the requirements of the Rules) that he was unaware that his backers could not produce the evidence needed.

19. I will decide if the Secretary of State's assertion is made out.

20. The Secretary of State corresponded by email with an official at the Bank of Ceylon. According to the copy email in my bundle "the attached documents are in the name of two sponsors who hold bank account's with your bank." It is not clear from the bundle what documents were attached. It is probable that they were documents purporting to come from the Bank of Ceylon personal branch at the head office building in Colombo. I say that because there are copies of such documents in my bundle which comply with the description in the email to which I have referred. However, it really would have been a whole lot better if the Secretary of State, who bears the burden of proof in this case, had organised things so that it was absolutely plain what had been scanned and sent.

21. The letters relied upon by the claimants allegedly from the Bank of Ceylon are in exactly similar form and purported to be signed, or at least initialled, by the manager, a Mrs S N Gunarathna and a second officer, a Mrs W P S P Rajapaksa. They are each dated 9 July 2012 and are addressed to the Visa Officer, and purport to be the "confirmation of balance in bank accounts". One of them purports to refer to a Mr S Jayawardana and identifies an account by its account number and the date opened and the other letter purports to refer to a Mr A N Liyanage and identifies two bank accounts by their different numbers and the dates on which they were opened. The material part of the email states:

> "Mr A N Liyanage FD A/C's 70190253, 73100510 and Mr S Jayawardana FD A/C – 73249601 'We wish to inform you that our Personal Branch has confirmed that they have not issued the said balance confirmation letter to the above customer. Therefore the letter seems to be **not genuine**.
>
> Since customer's has not authorised to divulge the details and the balance to other party, we regret that we are unable to give the account balance'."

22. It will be noted that this refers to the letter in the singular rather than letters and the customer in the singular rather than customers.

23. Nevertheless I think it extremely likely that the enquiry has indeed been made of the Bank of Ceylon and the grammatical difficulties have to be read with the clear reference to the two accounts attributed to Mr Liyanage and the one account attributed to Mr Jayawardana. The Bank of Ceylon is under no obligation to answer enquiries of this kind but I would expect it to take some care if it chose to answer and the author of the email had some reasons for saying that the personal branch had confirmed that the letters were not issued as claimed.

24. I appreciate that the first claimant has put in evidence against this conclusion but it is in the form essentially of statements from Mr Liyanage and Mr Jayawardana. I realise this contains hearsay assertions from the identified manager and/or second officer but it is not very satisfactory when as person said to have produced a false document produces a

further, similar, letter saying that the disputed letter it is not a false document.

25. I find it entirely possible that the Bank of Ceylon could have made a silly mistake but that would be unlikely. On the working assumption that the Bank of Ceylon is a serious business organisation with reasonable standards it can be expected to keep copy correspondence in electronic or paper form in an accessible way and the appropriate records would be checked before saying that disputed documents were not known. If a silly mistake had happened then I would have expected the manager or second officer who had sent the letter to have contacted the head office of the bank and explained the position. I cannot attach any significant weight to the documents described as confirmation letters issued by this bank dated 5 February 2014. These are as inherently unreliable as the disputed letter.

26. It follows that although the Secretary of State has not made things as easy as she might have done she has proved her case and I am satisfied that the first claimant did rely on false documents then the application should have been refused as it was under paragraph 322(1A) of HC 395.

27. It follows that I have no hesitation dismissing the appeal under the Rules. The other claimants' appeals must be dismissed because they cannot rely on the first claimant to support their case.

28. The claimants also rely on human rights grounds and particularly Article 8 of the European Convention on Human Rights. I must immediately recognise the position of the third and fourth claimants. The third claimant is now 17 years old and the fourth claimant is now 13 years old. They have both lived in the United Kingdom, with their parents, since 2006. That is now more than eight years ago.

29. Although the claimants rely on human rights grounds, as far as I can they made no attempt to substantiate their cases. The grounds make much of the disappointment to the claimants in not being allowed to remain in the United Kingdom and there is an assertion that it would be "extremely difficult to relocate in Sri Lanka". These things are wholly unexplained.

30. In the absence of contrary evidence I accept that it would be in the best interests of the children to remain with their parents in the United Kingdom. That would have the advantages of certainty and stability. The children cannot always have their best interests satisfied. The first claimant cannot satisfy the requirements of the Immigration Rules and, I am quite satisfied, has relied on false documents. Even if he did not know which documents were false there must be a strong policy imperative in removing a person when he fails to satisfy the requirements of the Rules for permission to remain and relies on dishonest documentation to show that he can.

31. I have considered the Rules relating to Article 8, and particularly EX.1 of Appendix FM. In the case of the second claimant I cannot begin to see how there could be insurmountable obstacles to family life with the husband continuing outside the United Kingdom. The implication clearly is that they would go back together.

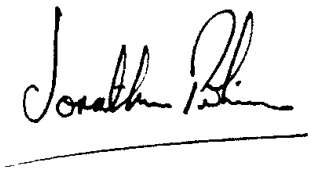
32. I am more concerned about whether it would be reasonable to expect the children to leave the United Kingdom. On reflection I have decided that it would. Family unity generally is important and although I am quite satisfied, because such things are to be expected and there is no contravening evidence, that they have established some sort of private and family life in the United Kingdom I can see no reason why they should not be expected reasonably to leave with their parents. There is nothing to suggest that they have a strong reason to remain in the United Kingdom beyond it familiar to them.

33. In the circumstances they are not going to be able to satisfy the Article 8 requirements of the Rules. I do make the point that I have skimpy evidence in front of me. It is for the claimants to prove their cases before the First-tier Tribunal and if they choose not to produce their best evidence there they can make an application to produce better evidence later. No such application was made and would not necessarily have succeeded.

34. I must ask myself if there is any point in considering the claim without reference to the Rules but I cannot see that there is. I appreciate the children have spent a lot of time in the United Kingdom but their father has relied on cheating and that must not normally be seen as a successful route to settlement.

35. It follows therefore that although I set aside the decision of the First-tier Tribunal I substitute a decision dismissing all grounds of appeal by the claimants.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 11 February 2015