Upper Tribunal
(Immigration and Asylum Chamber)

MH (Respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC)

THE IMMIGRATION ACTS

Heard at Glasgow

On 29 April 2010

Before

Mr C M G Ockelton, Vice President

Designated Immigration Judge Murray

Between

MH

Appellant

and

THE ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation :

For the Appellant: Mr Abdul Waheed (the sponsor)

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

Rule 13 of the First Tier Tribunal Rules requires an unpublished document to be supplied to the Tribunal if it is mentioned in the Notice of, or Reasons for Refusal or if the Respondent relies on it. Because the Notice of, or Reasons for Refusal form the statement of the Respondent's case, however, the Tribunal is likely to assume that a document mentioned in either, but not supplied to the Tribunal, is no longer relied on.

DETERMINATION AND REASONS

1.
The Appellant, a national of Pakistan born in 2007, appealed to the Asylum and Immigration Tribunal against the decision of the Respondent on 12 August 2008 refusing him entry clearance as the dependant of his father, who has leave in the United Kingdom as a student. Immigration Judge Cohen dismissed the Appellant's appeal. The Appellant sought and obtained an order for reconsideration. Following the abolition of The Asylum and Immigration Tribunal, the reconsideration continues as an appeal to this Tribunal.

2.
The refusal was on two grounds, which are closely linked. Under paragraph 79 of the Statement of Changes in Immigration Rules (HC 395), a person seeking entry clearance as the child of a student needs to establish amongst other things that he:

“(iv) can, and will, be maintained and accommodated adequately without recourse to public funds”.

Paragraph 320(7A) provides that entry clearance “is to be refused”:

“where false representations have been made, or false documents have been submitted (whether or not material to the application, and whether or not to the applicant’s knowledge) or material facts have not been disclosed, in relation to the application”

3.
When the appellant’s application was made, it was supported by documents said to be statements of the accounts of the sponsor’s father, with the United Bank Limited in Peshawar. The Entry Clearance Officer reached the conclusion that those documents were not genuine documents. In those circumstances refusal was mandatory under paragraph 320(7A); and, without those documents, the substantive requirements of paragraph 79(iv) could not be met.

4.
We need to set out the terms of the Notice of Refusal insofar as it relates to paragraph 320(7A):

“You are dependent on your sponsor who is presently a student. In support of his financial circumstances and his ability to maintain you in the UK, you have submitted a statement of account issued by United Bank Limited bank. However, bank management staff have verified that this statement is not genuine, as detailed in a document verification report. Statements are checked with the regional hubs and not the issuing branch as a protective measure against fraud. I consider this reliance on suspect documentation as an attempt to gain entry clearance by deception, an act that seriously undermines your credibility. As a false document has been submitted in relation to your application, it is refused under paragraph 320(7A) of the Immigration Rules.

5.
The Immigration Judge dealt with the matter without a hearing. The important part of his determination is paragraph 8:

“The Appellant is financially dependent upon the sponsor. His business and personal bank statements were submitted in support of the application. The Respondent undertook document verification and produced a report. The Respondent has made very serious allegations concerning the documentation relied upon by the Appellant. The Appellant has merely produced further documentation said to be from the branch. I find that the Appellant has not discharged the burden upon him. The Respondent has produced a document verification report, and the allegations therein have simply not been discharged. I therefore find that the Respondent’s refusal of the Appellant’s application under paragraph 320(7A) is one that was made correctly in all the circumstances and the Appellant’s appeal is bound to fail.

6.
An application for reconsideration was made by the Appellant’s father on his behalf. It asserts that no enquiries have been made in relation to the genuineness of the bank statements, and challenges the Judge’s conclusion on them. There is also on the file a letter from Mohammad Sarwar, MP for Glasgow

Central, demanding reconsideration and asserting of anyone who thought that the documents were forgeries that (apparently on Mr Sarwar's own knowledge) "I can assure you this opinion is wrong".

7.
Reconsideration was ordered. The reasons for the decision are given as follows:

"The Appellant seeks an order for reconsideration in respect of the decision of Immigration Judge Cohen sitting at Taylor House, issued on 3 August 2009 to dismiss the Appellant's appeal against the Respondent's decision to refuse leave to enter the UK as the minor dependent child of his father who is a student in the UK. It appears that the appellant's father, mother and sibling are in the UK and it is unclear how this very young child (born in 2007) comes to be alone in Pakistan. The respondent was not satisfied that the appellant would be maintained and accommodated without recourse to public funds, mainly because the sponsor had submitted a bank statement found not to be genuine on enquiry of the bank and the application was refused under para 320(7A) of HC395.

It is argued that there has been unfairness because the sponsoring father was not sent notice of hearing of the appeal. Examination of the file reveals that the appeal form indicates that the appellant wishes to have his appeal decided on the papers without an oral hearing and this is plainly the reason why no notice of oral hearing was served, although a letter sent on 19 December 2008 to the respondent and copied to the sponsor was potentially misleading. A later letter, dated 27 April 2009, does make clear that the request for the appeal to be determined on the papers without an oral hearing will be accepted and that any evidence/submission must be lodged by 22 June 2009. The judge took into account all the documentary evidence that was so lodged.

However, where there has been arguable unfairness is in failure by the respondent and the judge to consider whether the refusal under para 320(7A) is a disproportionate step given the extremely serious adverse effect it will have upon the immigration history of this very young child, when refusal under para 79 of the rules for failure to show the necessary funds would have more than sufficed."

8.
There are three comments we need to make on those reasons. The first is that, as the documents on file make absolutely clear, "this very young child" is not "alone in Pakistan". He is living with his grandparents, and that is the result of a deliberate choice made by his parents. Secondly, as we have already indicated, the two grounds for refusal are intimately related. It is difficult to see how there could have been refusal under paragraph 79 without a finding that the documents were false. If they are not false, there is evidence of the Appellant's ability to meet the requirements of paragraph 79(iv). Most crucially, however, there is no reference in the Reasons for Decision to the process by which the Immigration Judge reached the conclusion that refusal under paragraph 320(7A) was appropriate, bearing in mind that the Immigration Judge's comment that the burden of proof was on the Appellant, and his reference to a document verification report, when there is no such report on the file.

9.
At the beginning of the hearing before us, Mrs O'Brien readily acknowledged that the burden of proving the falsity of documents was on the Entry Clearance Officer. She told us that she had interrogated a database available to her in relation to the verification of the documents, had seen no document verification report in a form which suggested it had been before the Immigration Judge. We told her that we had found none on the file, and invited her to examine the Tribunal's file to see if she could find one. After an adjournment to enable her to do that, she told us that she had not been able to find a document verification report on the file.

10.
It appears to us that in dealing with this case without a hearing, the Immigration Judge may have placed rather too much reliance in what was said in the Notice of Decision. We do not know how he came to express his decision exactly in the way he did; but so far as we can see, there was no evidential basis for him to conclude that the bank statements were false. There was only an assertion by the Entry Clearance Officer, unsupported by any other documentation.

11.
There is a procedural reason why the absence of a document of this nature has a positive rather than a merely negative impact. Prior to the commencement of the appeals provisions of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, appeals were lodged with the Respondent, who had the duty of forwarding them to the Immigration Appellant Authority. An important reform, crucial to the independence of the immigration judiciary, was that appeals to the Asylum and Immigration Tribunal and to its successor, the Immigration and Asylum Chamber of the First-Tier Tribunal, are to be lodged with the Tribunal. A person appealing against a decision of an Entry Clearance Officer may serve the notice on the Entry Clearance Officer, but the latter is obliged by rule 6(6)(b) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230), which applied to the Notice of Appeal in this case when it was given, to forward the notice to the Tribunal within ten days.

12.
In conjunction with the new rules about lodging a Notice of Appeal, were rules about the documents to be provided by the Respondent to the Tribunal. Rule 13 requires the Respondent to serve on the Tribunal and on the Appellant:

“(1) …a copy of –

(a) the notice of the decision to which the Notice of Appeal relates, and any other document served on the Appellant giving reasons for that decision;

…

(c) any other unpublished document which is referred to in a document mentioned in subparagraph (a) or relied upon by the respondent”.

13.
The requirements of rule 13 are mandatory. Their intention is clear: it is to enable the Appellant to know the case he has to meet, and the Tribunal to have the material upon which the case can be judged. If there are documents relating to the detection of forgery which ought in the pubic interest not to be disclosed, the procedure under s. 108 of the 2002 Act is available, as also indicated by rule 51(7). The word “or” in rule 30(1)(c) is not unimportant, but it seems to us that, because the documents mentioned in subparagraph (a) are essentially the statement of the Respondent’s case, even in a case where the obligation to disclose a document arises from the fact that it is “referred to in a document mentioned in subparagraph (a)”, the Tribunal is entitled to conclude that a document not furnished under rule 13 is not a document upon which the Respondent relies; and that if there is reference to it in the Notice of, or Reasons for Refusal, the Tribunal is entitled to conclude that that reference no longer forms part of the Respondent’s case.

14.
The situation in the present case was that the Appellant’s application was supported by bank statements sufficient to show that the requirements of paragraph 79(iv) would be satisfied. The Entry

Clearance Officer evidently had suspicions about those statements, but the evidence before the Immigration Judge was wholly insufficient to enable him to make the finding he did. In those circumstances he should have allowed the appeal on the basis that the requirements of paragraph 79 were fulfilled, and this appeal to the Upper Tribunal is accordingly allowed on that basis.

15.
We make no direction. As we observed at the hearing, there are two reasons for that decision. First, the application was made on the basis of the Appellant's father's leave to remain as a student. His studies finished in December 2009. His leave was due to expire on the day following the hearing before us. He told us that he has applied for leave to remain as a Tier 1 (General) migrant. If he is successful, and if it is thought appropriate that the Appellant join him as a dependant of a person in the Untied Kingdom in that category, there will need to be a new application.

16.
Secondly, there is a passage in the Appellant's grounds of appeal to the Asylum and Immigration Tribunal which causes us considerable concern. The passage reads as follows:

"I the undersigned [….] do hereby solemnly and sincerely declare and affirm under oath that I will definitely follow the rules & regulation in the United Kingdom and seeking entry clearance to the United Kingdom only for my father higher studies. I also affirm that I will abide by all prevailing rules and regulations of the United Kingdom. Moreover, I will never extend my stay whether legally or illegally in the United Kingdom and will certainly comeback to my native country Pakistan with my parents after completion of my father projected studies. I further guarantee that I will not indulge myself into any unlawful or illegal activity in the United Kingdom."

17.
The sentiment is admirable: but we regard it as quite impossible that a Pakistani boy aged under 3 years at the date when that document was executed can have sworn or affirmed in English in those terms. The Appellant's father told us that he had no knowledge of the contents of that document. That may or may not be right, but there is no doubt that the document was intended to support the Appellant's appeal.

18.
Those are the reasons why we think a direction is not appropriate; but, as we indicated above, we allow the Appellant's appeal.

Signed

Mr C M G Ockelton

Vice President of the Upper Tribunal, Immigration and Asylum Chamber