Upper Tribunal
(Immigration and Asylum Chamber)

Butt (para 245AA(b) – "specified documents" – judicial verification) Pakistan [2011] UKUT 00353(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 July 2011	**09 September 2011**

Before

Mr C M G Ockelton, Vice President

Upper Tribunal Judge Southern

Between

REHMAN MANSOOR BUTT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Z Malik , Counsel instructed by Malik Law Chambers

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

Paragraph 245AA(b) of HC 395 does not require an adjournment for verification checks by the Secretary of State where what are said to be "specified documents", called into question, are produced at the hearing or served so soon before the hearing as to provide no opportunity for the Secretary of State to take the reasonable steps to verify those documents contemplated by that paragraph.

DETERMINATION AND REASONS

1.
The issue in this appeal is a narrow one: where the Secretary of State calls into question the genuineness of documents produced for the first time at the hearing by an appellant in support of his application for leave to remain in a category falling within the points based system, or so soon before the hearing that there has been no opportunity for the respondent to take the reasonable steps to verify those documents required by paragraph 245AA(b) of HC 395, is it open to the immigration judge to do otherwise than to accept those documents at face value, if they appear to qualify as

“specified documents” or to grant an adjournment so that the respondent can carry out a review of those documents as contemplated by paragraph 245AA?

2.
As will be seen from what follows, the answer to that question, despite the vigour with which counsel for the appellant asserted the contrary, is that the immigration judge is indeed entitled, perhaps required, to carry out an assessment of such evidence as part of the ordinary judicial process by which evidence that the parties choose to put before the Tribunal is to be weighed.

3.
The appellant, who was born on 1 February 1980 and so is now 30 years old, is a citizen of Pakistan. He arrived in the United Kingdom in December 2003 with entry clearance as a student. That leave was progressively extended until 2008 when he was granted further leave to remain, first under the International Graduates Scheme and then as a Tier 1 (Post-Study Work) Migrant until 24 July 2010. A few days before that leave expired he submitted an application for further leave to remain as a Tier 1 (General) Migrant. It will be seen from this summary of his immigration history that he has substantial experience of the process of making such applications.

4.
The application was refused by the respondent on 3 September 2010. That was because in order to qualify for leave in this capacity the appellant needed to secure 75 points under Appendix A of the Immigration Rules (“Attributes”) but, because the evidence he offered in support was not accepted as sufficient, he was awarded no points at all for previous earnings and, as a consequence, no points either for “UK experience”. This meant that he failed to score the required points and so failed to qualify for the grant of leave.

5.
In the refusal letter, the following explanation was given for that outcome:

“You have claimed 30 points for earnings of £51,217.

As evidence of your earnings you have provided two Public Carriage Licences, 1 letter from ASM Business Services, 1 set of accounts, 1 letter from One 2 One Cars, bank statements from two different Halifax bank accounts and bank statements from Barclays.

Paragraph 142 of the Tier 1 (General) guidance states that in addition to demonstrating their earnings, self-employed applicants must also provide two different forms of evidence listed under this paragraph in order to demonstrate their self-employment. Two forms of additional evidence stated in paragraph 142 for self-employment have not been included in the application.

The Tier 1 guidance states self-employed applicants must provide contact details of all their clients. No details of clients have been included in the application.

Evidence corroborating individual payments has not been provided. Although bank statements have been provided, a second form of evidence has not been included in the application to corroborate them.

We have therefore been unable to award points, in line with published guidance."

6.
Before examining the reasons given by the immigration judge for dismissing the appeal, and the grounds for challenging that decision, it is helpful to set out the relevant legal framework.

7.
Paragraph 245C provides that to qualify for leave to remain, the applicant must meet the requirements that are then set out. If the applicant does so, then leave to remain will be granted. If he does not then his application will be refused. The requirement with which we are concerned is that the appellant secure 75 points under Appendix A. To do this he needed 30 points in respect of previous earnings which he would have achieved had his claimed earnings of £51,217 during the relevant period had been accepted.

8.
Paragraph 4 of Appendix A to HC 395 requires that “Specified documents must be provided as evidence of previous earnings”.

9.
Paragraph 245AA(a) of HC 395 provides that “specified documents” means:

“… documents specified by the Secretary of State in the Points Based System Policy Guidance as being specified documents for the route under which the applicant is applying. If the specified documents are not provided, the applicant will not meet the requirements for which the specified documents are required as evidence."

10.
Paragraph 245AA(b), which is of particular significance in this appeal, provides as follows:

“If the Entry Clearance Officer or Secretary of State has reasonable cause to doubt the genuineness of any document submitted by an applicant which is, or which purports to be, a specified document under part 6A or Appendices A to C, or E of these Rules and, having taken reasonable steps to verify the document, is unable to verify that it is genuine, the document will be discounted for the purposes of this application.”

11.
It was plain that the appellant’s claimed earnings had not been established by the documentary material submitted with the application and considered at the point of refusal of it. At the hearing, the appellant’s representative produced a bundle of documents upon which it was sought to rely. The immigration judge noted that these documents had not been served upon the respondent although there was no objection from the respondent’s representatives to those documents being admitted in evidence.

12.
At paragraph 10 of his determination the immigration judge summarised the content of that new bundle of documentary material:

“This bundle of documents contained the Appellant's witness statement dated 2 December 2010, correspondence from HMRC confirming registration for tax purposes and a receipt for National Insurance contributions for the period July to October 2010. There was also a Policy of Insurance for a small business operating out of the appellant's home address effective from 29th of November 2010. A letter from the Appellant's accountants and tax advisers ASM business Services dated 30 th November 2010 confirms that he was a client of theirs and that his business activities included minicab driving and business consultancy. The combined revenue from the two activities totalled £64,980.96 with a net profit before tax of £51,217. Accompanying this bundle were several documents supporting the appellant's contentions that he was earning the said income. A series of monthly work reports from

One-to-One Cars purportedly setting out in sequence the fares which the appellant had been allocated as a private hire driver in any one month. The earliest of these reports was in April 2010. There was also a summary or an analysis of cash deposits into the appellant's bank accounts. A summary of income from the appellant's consultancy services contain several invoices from May through to July showing consultancy work undertaken for various named individuals."

13.
The oral evidence given by the appellant before the immigration judge did not add to the cogency of that documentary evidence but rather served to undermine it. The appellant was asked about the evidence of the fares allocated to him as a mini cab driver. The immigration judge said:

"When it was pointed out to him that the sequence number running from 1 to 11 for the monthly work reports of June 2010 appeared to repeat itself in exactly the same sequence several times throughout that month the appellant was unable to provide an explanation. .... [the appellant] denied that this was a report which had been manufactured in order to bolster his application. He believed that it was no more than a coincidence in the sequencing rather than anything else."

The immigration judge noted a similar pattern emerged from an examination of the documents relating to April 2010.

14.
The oral evidence of the appellant concerning his consultancy work also raised more questions than it answered. The Immigration Judge noted the position adopted by the respondent's representative in his submissions:

"When turning to consider the consultancy work purportedly undertaken and producing an income of £29,000 many questions were raised and not answered. There was no supporting evidence of what services were being provided by the Appellant or any indication on the face of the documents (who) the clients were and what the nature of their business was. In the circumstances, these invoices too raised issues of credibility and in the absence of supporting evidence they should not be considered genuine. The decision not to award points under this attribute for previous earnings should stand."

15.
The immigration judge set out his findings in some detail. He said that he found it "surprising" that the documents now relied upon were produced only at the hearing, which meant that the respondent had no opportunity "to carry out the necessary assessment and checks to ensure that they were genuine". The immigration judge reminded himself that:

"As Paragraph 245AA of the Immigration Rules makes plain, points can only be awarded when an applicant provides specified evidence that he meets the requirements for this category."

16.
The Immigration judge then set out the approach he proposed to take to the documentary evidence submitted at the hearing and it is this approach with which Mr Malik, counsel for the appellant, takes issue. The immigration judge said this:

"By necessity I have to undertake an assessment of their genuineness and, in effect, conduct the same exercise the Respondent would have undertaken if the documents had been made available at the date of the application."

17.

As Mr Malik did not suggest that the assessment was itself flawed, his complaint being that it was carried out by the judge at all, we can set out shortly what the judge made of this evidence. As for the appellant's claimed earnings from mini cab driving the judge said:

"As regards the documents purportedly evidencing income from private hire I do not find them genuine. I find the Appellant is not a credible witness because his explanation for the repeat fares on the One-to-One Cars monthly work reports as being mere coincidence or repeat clients was disingenuous to say the least and certainly not credible in my judgement".

18.
The immigration judge was equally unimpressed with the appellant's evidence relating to the claimed consultancy work:

"…. I find that the Appellant has not provided a cogent and consistent explanation of the nature of those consultancies. The Appellant could not explain what the precise nature of the consultancy was. I found his account of the work he did for clients was vague and uncertain. He did not fully explain what the precise nature of the consultancy was. I found his account of the work he did for clients was vague and uncertain. He did not explain who these individual clients were and why they were being invoiced in their own names rather than (their) businesses. …….. In the circumstances I find that the documents submitted by the Appellant at the hearing give rise to a doubt that they are genuine such as to discount them for the purposes of the application.

I discount the documents submitted before me and on that basis the Applicant has not (been) able to demonstrate that he meets the criteria for the award of points as claimed for previous earnings."

19.
Finally, to make clear unambiguously that he had in mind the process that would have been applied by the respondent had the documents been submitted earlier, the immigration judge said this:

"I have no doubt that if these documents had been submitted in accordance with the Respondent's Policy Guidance as required by Paragraph 245AA of the Rules and the Respondent had been provided with an opportunity to check or verify these records there would have been reasonable cause to doubt the genuineness of the documents submitted."

20.
Mr Malik's submissions may be summarised as follows:

a.
The points based system is, and is intended to be, a "tick box system". If you tick the box then you succeed.

b.
Documents that, on their face, qualify as specified documents should be accepted as such by the immigration judge. Paragraph 245AA is there to deal with documents that are not genuine.

c.
The immigration judge has neither the experience nor the resources to carry out the assessment required by Paragraph 245AA. Therefore, where documents are produced at the hearing that appear to be specified documents then, unless he excludes those documents under rule 51(7) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 ("the Procedure Rules"), the judge must either

accept them as such or, if there is any issue raised about their genuineness, grant an adjournment so that the respondent can take reasonable steps to verify those documents.

d.
Therefore, having decided to admit the documents the judge should either have adjourned the appeal to enable the respondent to take reasonable steps to verify the documents or he should have allowed the appeal on the basis that specified documents had been provided and then direct the respondent to grant leave unless the documents could not be verified as genuine after reasonable steps had been taken to do so.

21.
These submissions are, in our judgement, misconceived for two reasons. First, because they are based upon a misunderstanding of paragraph 245AA. That provision is about the respondent's decision making process when considering an application and the evidence that had been submitted with it. The time for that had passed. The appellant had chosen not to provide the documentary evidence upon which he sought to rely until the hearing itself so that he chose not to call upon the respondent to carry out the assessment provided for. There was nothing wrong with the judge doing his best to see that the same process was followed in his approach to his assessment of the evidence. In any event, it is plain from a reading of the determination as a whole that the judge considered and assessed this evidence in the context of the evidence as a whole and his approach in doing so cannot be criticised.

22.
Secondly, part of the adjudicative task performed by the judge is to make findings about the evidence. A document is not a "specified document" unless it is accepted by the judge to be what it purports to be.

23.
Nor should that evidence have been excluded under rule 50(7) of the Procedure Rules: the evidence had been "made available to all the parties" when it was produced at a hearing at which the respondent was represented. Of course, if the immigration judge had excluded this evidence under rule 50(7), as Mr Malik appeared to be suggesting, or under rule 50(4), then the appeal would have been dismissed in any event.

24.
It was certainly not appropriate for the immigration judge to adjourn the hearing for the respondent to consider the material or to take reasonable steps to verify the documents. Both parties were represented and neither sought an adjournment. It would be absurd if the Tribunal were considered to be disqualified from proceeding to determine an appeal because an appellant chose to submit at the last moment documents that lacked apparent authenticity. We do not accept that to be the position. If that submission were accepted it would mean that an unmeritorious in-country appellant could always secure further time in the United Kingdom by producing false documents to a judge. To appreciate that is to realise why that proposition cannot be sound.

25.
Even if, which we do not find to be the case, paragraph 245AA(2) did somehow require the assessment to be carried out in accordance with its terms, then the "reasonable steps" that would need to be taken would be limited to what could be done at the hearing. That was to give the appellant an opportunity of giving evidence, his representative an opportunity of making submissions and the judge making of that whatever he did. That was precisely what did occur.

26.
Mr Malik developed his submission by saying that, following RP , it was not open to the judge to find that the documents were not genuine when no evidence was put forward by the respondent to support that assertion. That presumably is a reference to RP (proof of forgery) Nigeria [2006] UKAIT 00086 which establishes that an allegation of forgery needs to be proved by the person making it and that a bare assertion of forgery will carry no weight. At paragraph 14 of RP the Tribunal said this:

“In judicial proceedings an allegation of forgery needs to be established to a high degree of proof, by the person making the allegation. This is therefore a matter on which the respondent bears the burden of proof. Immigration Judges decide cases on evidence, and in the absence of any concession by the appellant, an Immigration Judge is not entitled to find or assume that a document is a forgery, or to treat it as a forgery for the purposes of his determination, save on the basis of evidence before him. In the present case the evidence was limited to the Entry Clearance Officer's assertion of his own view and the defect in the document identified in the notes on the application form – that is to say, the mismatch between the run date and the date stamp on one of the remittance documents. That evidence is wholly insufficient to establish that that document is a forgery….”

27.
It is important to recognise that the scheme under the rules is not about forgery. Documents are to be rejected if there are reasons to doubt their genuineness and it is not possible to verify that they are in fact genuine. A document that contains false information may not be a forgery but may still be one in respect of which there is good reason to doubt its genuineness. There is no reason to require any different process at the hearing and there is certainly no reason to require more of the Secretary of State so that advantage is secured by an appellant who saves dubious documents for the hearing.

28.
Here it was on the basis of the evidence the parties chose to put before the immigration judge that he found he could not rely upon the documentary evidence as to the truth of its contents. This was not a finding based upon a bare assertion of forgery by the respondent but upon a careful assessment of the evidence as a whole. And, as Mr Malik conceded, there is nothing further before us to demonstrate that the immigration judge was wrong to reach the conclusions he did.

29.
Drawing all this together we conclude that the immigration judge carried out a careful assessment of the evidence put before him and gave clear and sufficient reasons for reaching conclusions that were plainly open to him on the evidence. He was under no obligation to afford the appellant a further opportunity to have documents verified by the respondent. His approach cannot be faulted and the determination discloses no error of law.

30.
The appeal before the Upper Tribunal is dismissed and the decision of the First-tier Tribunal will stand.

Signed

Senior Immigration Judge Southern

Judge of the Upper Tribunal

Immigration and Asylum Chamber