



R (on the application of Agha v Secretary of State for the Home Department (False document) [2017] UKUT 00121(IAC)

IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

Field House,
Breams Buildings
London
EC4A 1WR

4th January 2017

BEFORE

UPPER TRIBUNAL JUDGE LINDSLEY

BETWEEN

THE QUEEN

(ON THE APPLICATION OF ALI AHMED AGHA)

Applicant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr D Sills, instructed by Lawise Solicitors appeared on behalf of the Applicant.

Ms N Parsons, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT
- - - - -

For a document to be a false document under the Immigration Rules there must have been an element of dishonesty in its creation and if this is not immediately obvious in a case of an inaccurate document then that element must be engaged with in any refusal.

JUDGE LINDSLEY: This is an application for judicial review by Mr Ali Ahmed Agha. The decision under challenge is that of the Entry Clearance Officer in Abu Dhabi who refused a visit visa on 6th September 2015. A pre-action Protocol letter was sent on 5th November 2015 and the respondent replied on 23rd November 2015 maintaining the original decision to refuse the visit visa. Judicial review proceedings were commenced in time on 4th December 2015 and an acknowledgement of service was filed on 19th January 2016.

2. Permission for judicial review was initially refused on the papers by Upper Tribunal Judge Perkins in a decision dated 27th January 2016 but then granted after an oral hearing on 19th April 2016 by Upper Tribunal Judge McGeachy on the basis that there was a lack of information that the entry stamp was forged which arguably meant that the decision was unlawful.
3. Upper Tribunal Judge Kekić extended time for the respondent to supply detailed grounds of defence until 8th July 2016 and on this date the respondent provided these and a bundle. The applicant provided a skeleton argument on 15th December 2016 and a bundle on 23rd December 2016 for the full judicial review hearing. On 23rd December 2016 the respondent supplied a schedule of costs to the Tribunal and the applicant, and today the applicant provided a schedule to the respondent and the Tribunal.

4. The surrounding circumstances of the case are as follows. The applicant is a citizen of Pakistan who was born on 4th November 1991, and so is now 25 years old. He visited the United Kingdom as a tourist in 2007, 2008 and 2009 and, on the information before the Tribunal, complied with his visa restrictions. On 3rd September 2010 he entered the UK with entry clearance as a student valid until 15th September 2012. His leave was then extended in the same capacity until 30th November 2015.
5. However, on 16th April 2014 the applicant's leave was curtailed as he had ceased to attend his course at Middlesex University and his sponsorship was withdrawn. He was required by the respondent to leave the United Kingdom by 30th November 2014. Both parties accept that the applicant left the United Kingdom before this date and thus that he has never overstayed in the UK nor broken the conditions of his leave.
6. On 28th November 2014 the applicant left the United Kingdom on an evening flight to Pakistan which arrived in the morning of 29th November 2014. The applicant maintains on receipt of the decision under challenge that he realised at that point (and not previously) that his passport had been incorrectly stamped on arrival in Pakistan with a stamp dated 29th October 2014. Both parties accept that the applicant in fact arrived in Pakistan on 29th November 2014.
7. The applicant applied for entry clearance to visit his brother in the United Kingdom for a visit on 20th August 2015. In this application he wrongly stated that he had re-entered Pakistan on 29th October 2014. He has explained this as follows: he says that this happened because the agent who completed the application form on his behalf took the date of his entry into Pakistan from the stamp in his passport and that he, the applicant, did not notice the error before he signed and submitted the application form.

8. The respondent refused the application on 6th September 2015 under paragraph V3.6 of Appendix V of the Immigration Rules on the basis that the applicant had used a false document as a document verification report verified the entry stamp as false to a high degree of probability.
9. As a result of the nature of the decision to refuse the applicant entry clearance it is stated in the refusal that the applicant faces a possible ten year period of automatic refusal of any future applications.
10. On 5th November 2015 the applicant sent the respondent evidence that he had returned to Pakistan on 29th November 2015 in the form of flight bookings, boarding pass and luggage tag, a letter from the FIA and arrival footage and requested a review of the decision. The Entry Clearance Manager reviewed the refusal and upheld it on 23rd November 2015.
11. It is the decision of 6th September 2015 supplemented by the entry clearance manager's review of 23rd November 2015 that is the subject of this judicial review.
12. In summary, the grounds of challenge are as follows. It is first contended that the decision of the respondent is unlawful and irrational because there is a failure to consider whether the wrong Pakistani arrival stamp was simply given in error given the lack of any possible purpose behind any attempt to amend it as the applicant had not overstayed in the United Kingdom even if he was recorded as returning to Pakistan on the correct date.
13. It is, as I have already stated, accepted by all that the applicant in fact returned to Pakistan on 29th November 2014. As this was prior to the date when his leave to remain as a student was curtailed to, whether he went back on that date or on the date in the passport, 29th October 2014, he was not an overstayer. The so-called "rolling back" of the date of his

arrival would therefore serve no immigration purpose whatsoever. The applicant had complied with immigration control at all other times and was leaving the United Kingdom voluntarily in line with an arrangement made with the respondent, and so, it is argued, it should have been appreciated he had no propensity to violate immigration laws or a history of so doing.

14. It is submitted that the respondent therefore erred as there was an unlawful failure to consider whether the stamp was obtained erroneously rather than improperly. The definition of false document, it is contended by the applicant, requires dishonesty at some stage, even with a document, and this element of dishonesty had not been entertained and engaged with by the respondent in the refusal.
15. Secondly the applicant contends that the decision is unlawful for want of giving any reasons in relation to this issue of attempted deception. It is simply asserted in the decision and in the Entry Clearance Manager review that the date stamp is incorrect and therefore it is obtained by fraud. This is not logical or sufficient reasoning if the full meaning of "false" as set out above is appreciated.
16. Thirdly the applicant contends that the decision is in breach of the respondent's policy. The respondent's policy on false documents requires "positive evidence" of dishonesty. The wrong stamp could simply be an innocent mistake caused by one dial on the stamp being inadvertently moved, and thus not obtained by dishonesty. According to the policy, factual errors and not being satisfied the applicant is telling the truth are not enough to find dishonesty or deception, and this policy has, it is argued, therefore not been applied.
17. The evidence of Mr Martin Banks (an Immigration Liaison Manager based in Islamabad) obtained by the respondent in the course of these proceedings is said by the applicant not to be

relevant as it was not available at the time of the decision-making and so cannot be used to rationally support the validity of that decision-making in retrospect.

18. It is further contended by the applicant that the decision is procedurally unfair. It is noted that the applicant has no right of appeal. It is said in this context that an applicant must be given an opportunity to provide any innocent explanations he may have for what may be prima facie false documents, in an interview before a decision is made. It is contended that an Entry Clearance Manager review after the event of a refusal is not a sufficient remedy because material that was not before the original officer at the time of decision cannot be properly considered if the matter is to proceed to a judicial review.
19. Finally, the applicant contends that the decision is unlawful because the wrong standard of proof has been applied. It is contended that the criminal standard is appropriate given the draconian consequences of a fraud allegation. In the alternative it is also argued even if the civil standard is the appropriate standard robust evidence is required and in these circumstances there was no such robust evidence before the respondent to properly and lawfully conclude the applicant had submitted a dishonest false document.
20. In response, in summary, the respondent says that the passport is a false document because it contains information which is not correct and that the definition of a false document is simply one that is incorrect and does not involve a contention of dishonesty.
21. In submissions, however, Ms Parsons, whilst not conceding this point, accepted that that might be a difficult argument in the light of what is set out in AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773. If the definition of false document goes beyond one which simply

contains a statement of factually wrong information then it is argued for the respondent that it was rationally open to her to refuse the applicant on the basis of the information contained in the witness statement of Mr Martin Banks, an Immigration Liaison Manager based in Islamabad.

22. Mr Banks notes that given the way in which Pakistani arrival stamps are physically constructed it is unlikely that there would be an inadvertent stamping of a wrong date. He also notes that there is a second security check at which a senior Immigration Officer checks that date stamps do not contain errors. He points out that Pakistani Immigration Officers are known to take bribes to "roll back" stamps (sometimes for sums as little as the equivalent of £3.50), and that UK officials had provided evidence of some 185 such cases of "roll back" stamps to Pakistan's Federal Investigations Agency in 2016 alone.
23. It has been argued today by Ms Parsons that it was not an obligation of the respondent to set out this material in a refusal notice and that to require this to be done would be an over-onerous obligation. She has argued that whilst there was not a lot of information about the improper obtaining of the stamp in the decision the use of the word "falsify" on the second page of the refusal suggests some element of human agency as does the use of the term "non-genuine" in the entry clearance manager's review letter.
24. Ultimately it is argued for the respondent that the refusal contains sufficient material in terms of reasoning for the decision to be lawful, particularly as there was no evidence of an innocent mistake by the Pakistani authorities in the context of the applicant having put the wrong date on his application form and in the context of it being immaterial as to whether the falsification was in any sense advantageous to

him or material to the application according to the wording of paragraph V3.6 of Appendix V to the Immigration Rules.

25. Ms Parsons has also defended the system of a decision without an interview as being perfectly lawful and argued that the entry clearance manager's review can provide an acceptable remedy for the applicant. She argued that it is open to the entry clearance manager to change a decision made on receipt of further evidence submitted by an applicant after a decision contending a false document has been used is communicated to that applicant.
26. Ms Parsons argued that to require the respondent to interview all those who are to be refused where an allegation of deception is made would be extremely onerous on the respondent and the evidence of Mr Banks gives some small indication even in this narrow field of the numbers that might be involved. There is no legal authority which suggests that deception refusals where there was no interview prior to the issuing of a decision are insufficient. There is no authority which suggests that the respondent is not entitled to make a decision on the material before her in cases involving deception, and it is clear that the respondent acts lawfully so long as all such material is properly considered applying the correct standard of proof.
27. Ms Parsons submits that the evidential burden for showing deception was met by the material before the respondent at the time of decision, and that the legal burden could also be seen as being met when all the material before the respondent in this case is considered.
28. My conclusions are as follows.
29. It is first necessary to consider whether a false document is one which requires any element of dishonesty. In reaching my conclusions on this issue I have been guided by what was said

by the Court of Appeal in the case of AA (Nigeria). I note that in that case, which was one primarily concerning the definition of a false representation, the court found that they should align the definition of false representation with that of false document.

30. At paragraph 67 it is said that:

"It is plain that a false document is one that tells a lie about itself. Of course it is possible for a person to make use of a false document (for instance a counterfeit currency note, but that example, used for its clarity, is rather distant from the context of this discussion) in total ignorance of its falsity and in perfect honesty. But the document itself is dishonest. It is highly likely therefore that where an applicant uses in all innocence a false document for the purpose of obtaining entry clearance, or leave to enter or to remain, it is because some other party, it might be a parent, or sponsor, or agent, has dishonestly promoted the use of that document. The response of a requirement of mandatory refusal is entirely understandable in such a situation. The mere fact that a dishonest document has been used for such an important application is understandably a sufficient reason for a mandatory refusal. That is why the Rule expressly emphasises that it applies 'whether or not to the applicant's knowledge'."

31. I conclude that it is contemplated in the above paragraph by the Court of Appeal that there had been dishonesty in the creating of the false document at some point although not necessarily to the knowledge of the applicant. I find that this position as to the meaning of false document is supported by further statements later in the judgment in AA (Nigeria).

32. At paragraph 71, citing debates in Parliament prior to the passing of the legislation, it is recorded that Lord Bassam

said as follows: "We mean a document that is forged or has been altered to give false information. If people submit such documents, our belief is that they should be refused..."

33. Again, at paragraph 73 it is said as follows:

"It is abundantly clear from that, in my judgment, that 'false' in relation to both 'representations' and 'documents' is being used in the same way and as requiring dishonesty, although not necessarily in the applicant himself."

34. For a document to be a false document under the provision of the Immigration Rules at V3.6(a) of Appendix V I find, relying on AA (Nigeria), there must have been an element of dishonesty in its creation and if this is not immediately obvious in a case of an inaccurate document then that element must be engaged with in any refusal.

35. Applying these conclusions from AA (Nigeria) in the Court of Appeal to the facts of this case I start from the position that a wrong date in a passport does not necessarily arise due to an element of dishonesty or due to it having been altered by someone, and therefore I find that it does not immediately of itself reveal dishonesty. This is because it can arise due to the accidental changing of the wheel on the date stamp and human error in the checking processes.

36. It is clear the respondent understands and knows that date stamps can inadvertently be turned to the wrong point on the dial. This is why Mr Banks in his statement engages with the likelihood of that happening. It is clear also from the statement of Mr Banks that stamps have been redesigned to make this less likely to happen since this applicant returned to Pakistan.

37. There is a second check by another immigration officer on entry to Pakistan, and whilst this makes it unlikely that a

stamp which has inadvertently been wrongly endorsed would pass through immigration control it clearly does not make it impossible. Human error may always occur. Thus in this factual scenario, in order to properly refuse under this provision of the Immigration Rules, I find there needed to be some consideration as to whether there was dishonest conduct by someone in relation to the wrong date endorsement.

38. The decision made by the respondent I find did not contemplate that there was a need for such engagement with whether there had been dishonest conduct by someone. The decision reflects a position where if the date was incorrect then that sufficed for it to be false. In a simple linguistic sense this is of course correct but it is not the sense which I have found to be the relevant one for determining whether a refusal of this type based on submission of a false document can be lawfully made under paragraph V3.6 of Appendix V of the Immigration Rules.
39. I find nothing in what is said either in the refusal of 6th September 2016 or in the Entry Clearance Manager's review letter which indicates consideration or explanation of dishonesty. The documents simply recount the fact that the applicant did not enter on the date which is endorsed in his passport. This is of course agreed by everyone to be correct but there is no consideration of whether the date was dishonestly incorrectly endorsed, and thus of this vital further element in whether the passport thereby properly amounted to a false document.
40. As such I find that the applicant was not given even the gist of the respondent's understanding as to why he had been dishonest or why it was believed by the respondent someone else had been dishonest.
41. Perhaps if the document verification report had been appended to the decision or the Entry Clearance Manager's review (which

it was not) this might have provided some reasoning on this issue as in very short form in this document there is an engagement with the issue of dishonesty. In that document it says the applicant "had improperly obtained Pakistan entry endorsement in his passport in order to deceive UK immigration and hide his travel history". However, as I have said, the document verification report does not form part of the decision and was not provided to the applicant until after he had commenced judicial review proceedings. I also observe that even if this reasoning had been included in the decision, to be lawfully sufficient it ought to have been explained how the changed endorsement would have hidden the applicant's travel history or deceived UK immigration control when his arrangements for return had been made with and were known to the respondent.

42. As such I find that the decision under challenge is unlawful in refusing the applicant under V3.6 of Appendix V of the Immigration Rules for want of reasons engaging with the essential requirement that the document could only be false if an element of dishonesty at some point in the creation of the inaccurate date endorsement, as opposed to simple mistake, was identified.
43. In relation to the other issues raised by the applicant I do not find that the respondent acted unlawfully in failing to interview the applicant prior to making a decision and I am satisfied that an Entry Clearance Manager review properly conducted rationally considering further evidence can provide a proper remedy. I do not find it necessary to go into issues of standards and burdens of proof as I have found the respondent has not engaged with the full definition of a false document in the refusal, and has therefore failed to give lawful reasons for her decision and this suffices for me grant the applicant the remedy he seeks. If I had done I would not,

however, have found that a criminal standard of proof would have been relevant in this case.

44. I therefore find it appropriate to grant judicial review in this case due to the decision lacking proper and sufficient reasoning on the issue of whether the applicant had submitted a falsely endorsed passport. It goes without saying that allegations of use of false documents are serious ones and it is to be expected therefore that some reasons, sometimes referred to as the gist of the case, should be given for the conclusion that the document is false. As set out in the refusal notice under challenge, future applications may be refused under paragraph 320(7B) and paragraph V3.7 of Appendix V of the Immigration Rules if an applicant has submitted a false document. Indeed, the word "may" in that context might be considered an understatement as the refusal would in fact be mandatory if deception had been used. I do not regard the giving of such` simple reasons as an onerous requirement on the respondent.

IT IS ORDERED THAT:

45. **The respondent's decision of 6th September 2015 supplemented by that of 23rd November 2015 is quashed.**

Costs

46. In relation to costs the respondent will pay the applicant's costs which I have summarily assessed as amounting to £12,218 of which £5,540 are Counsel's fees and court fees.

Appeal to the Court of Appeal

MS PARSONS:

47. Can I ask for seven days to review the position? I am not going to make an application now.

JUDGE LINDSLEY:

48. In that circumstance I will refuse and you can approach the Court of Appeal. I think this is more likely to be successful in speeding things along. In the absence of an immediate application for permission to appeal to the Court of Appeal I refuse permission as I do not assess the case raises any questions of law of major significance or believe that I have erred in law in granting judicial review in this application.

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