UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) APPEAL NUMBER: OA/08420/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 2 July 2014
Prepared: 19 July 2014

Determination Promulgated
On: 25 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ENTRY CLEARANCE OFFICER: CHENNAI

Appellant

and

MS JUVERIA ARIF

Respondent

Representation

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr A Jafar, counsel (instructed by Lee Valley Solicitors)

DETERMINATION AND REASONS

1. I shall refer to the appellant as the Entry Clearance Officer and to the respondent as "the claimant."

2. The claimant is a national of India, who appealed against the decision of the respondent refusing to grant her entry clearance to the UK as the wife of Mr Abdul Mohammad, who has leave to remain in the UK as a Tier 2 migrant.

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3. The claimant's application was refused on 28th February 2013 on the basis that she had previously been refused entry clearance in August 2012 pursuant to paragraph 320(7A) of the Immigration Rules as a false and forged employment letter had been submitted as part of her application.

4. The respondent asserted that as a consequence, her current application fell to be refused under paragraph 320(7B) of the Immigration Rules.

5. Before the First-tier Tribunal Judge, the claimant contended that in submitting her earlier application, she had relied on the services of an immigration consultant who, unbeknown to her, and without her knowledge, had submitted a false document.

6. The First-tier Tribunal Judge had regard to the evidence of her sponsor. The claimant had not appealed the initial refusal of entry clearance as he was about to apply for a further Tier 2 visa and was informed that the appeal would in any event take between six months and a year to be heard. When the sponsor was granted a further visa, he returned to India to help the claimant make a further application for entry clearance.

7. He had appointed an immigration consultant in making the original application. He was subsequently informed by that consultant that he had thought that the letter from his previous employer “was a little old” and as there was no time to contact the sponsor, he “updated it himself.”

8. It was on the basis of those facts that the Home Office Presenting Officer submitted to the First-tier Tribunal Judge that the sponsor had accepted that the letter in question was a forgery. He also asserted that the claimant would have appealed the first decision if she was not implicated in this forgery. Accordingly, paragraph 320(7B) had been properly applied.

9. On behalf of the claimant it was submitted that the sponsor had given a reasonable explanation as to why the initial decision had not been appealed. In any event, there had been nothing to be gained by the submission of the false letter and that it appeared that the consultant had felt under pressure owing to his previous delay in making the application. It was also submitted that paragraph 320(7B) required the Entry Clearance Officer to show that the claimant herself had used deception.

10. In the findings and conclusions, the Judge noted that the claimant had now made a further application for entry clearance and it is not asserted that she has relied on any false documents or representations in support of her current application. In order to show that paragraph 320(7B) can lawfully be applied to the claimant's current application, the entry

clearance officer had to show that the claimant herself had used deception in relation to the previous application.

11. The claimant in her evidence had stated that she signed the application form without noticing the alteration to the letter from the sponsor's employer.

12. There were other letters from the employer, none of which had been forgeries. That confirmed that the sponsor was employed by that firm until 17th August 2012, as asserted. Accordingly, the Judge found that there was no basis for the claimant or the sponsor to have submitted a further forged letter.

13. There was also a declaration by a Mr Mirza Baig who stated that he provided the claimant with a visa service to assist her in her application to join her husband. He admitted that he had “manipulated the letter” from the employer by changing the date. His sole intention was to submit documents which were no more than 28 days old. Neither the claimant nor the sponsor had been aware that he had done this.

14. In his oral evidence, the sponsor explained that he gave the agent the letter from the employer dated 25th January 2012 when he first instructed him. This must have been the letter that he “manipulated.” There was also a further letter from the employer dated 14th December 2012, confirming that he would have been happy to provide an updated letter if he had been asked to do so.

15. In the event, the First-tier Tribunal Judge found that the Entry Clearance Officer had not established that the claimant herself had used deception as required by paragraph 320(7B) of the Immigration Rules.

16. The Entry Clearance Officer was granted permission to appeal against that decision by First-tier Tribunal Judge J M Holmes, dated 22nd May 2014. In setting out the factual history at paragraph 2, Judge Holmes stated that “the sponsor admitted to the Judge that the previous application for entry clearance had been refused by reference to paragraph 320(7A) because a forged letter, which the sponsor had forged” had been submitted in support of it.

17. Clearly, that is not correct. As already noted, the First-tier Tribunal Judge stated at paragraph 10 of the determination that the claimant had not denied that the consultant had been used and that he had submitted a forged letter. There had been no finding that the sponsor himself had been aware of such forgery, let alone that he had forged it.

18. Judge Holmes then goes on to state at paragraph 3 of the grant of permission decision that the Judge found that the first application had

been properly refused by reference to paragraph 320(7A) but nevertheless went on to find that "since it was the sponsor and not the appellant who had forged the letter" paragraph 320(7B) did not apply to the current application. Judge Holmes stated that that approach was arguably wrong. "....Dishonesty by at least the sponsor was now established by admission, and the current application therefore fell to be refused by reference to paragraph 320(7B) unless one of the seven specified exceptions applied, which they did not."

19. Again, it is evident that Judge Holmes incorrectly stated that the First-tier Tribunal Judge had found that it was the sponsor who had forged the letter.

20. In the Entry Clearance Officer's reasons for appealing, it was noted at paragraph 5 that the Judge was correct in stating that paragraph 320(7B) does not, unlike 320(7A), include a requirement for the claimant herself to have used deception. He failed to have regard to **AA (Nigeria) v SSHD [2010] EWCA Civ 773** that dishonesty or deception is needed, albeit not necessarily that of the applicant himself, to render a "false representation" a ground for mandatory refusal.

21. The deception relied on by the Entry Clearance Officer was that perpetrated by the agent who admitted having changed the date of the employment letter. Accordingly although the appellant herself may not have been aware that the letter had been changed, there was nevertheless a mandatory refusal required under paragraph 320(7B) that "must still apply."

22. It has accordingly never been asserted by the Entry Clearance Officer that the appellant's husband had in any way been a party himself to the forgery.

23. At the hearing on 3rd July 2014, Mr Tufan relied on the reasons for permission. He submitted that the deception need not have been that of the claimant herself to render a "false representation" a ground for mandatory refusal. Her knowledge was accordingly immaterial.

24. On behalf of the appellant, Mr Jafar submitted that **AA, supra,** did not assist the entry clearance officer's argument. He referred to paragraphs 26 and 27 of **AA**, where the word "deception" is given a capital letter because it is a defined term in paragraph 6 of the rules. It is provided as follows: "in paragraph 320(7B) and 320(11) of these rules: 'Deception' means making false representations or submitting false documents (whether or not material to the application) or failing to disclose material facts."

25. The Court of Appeal went on to observe that in the definition referred to, the parenthesis “whether or not material to the application” does not include the reference to the applicant's knowledge contained in both the rule at paragraph 322(1A) and 320(7A) where the parenthesis reads “whether or not material to the application, and *whether or not to the applicant's knowledge*”.

26. It follows that if “deception” required dishonesty as it prima facie does, then paragraph 320(7B) contains nothing to say about how an applicant who may have previously breached immigration rules by making false representations other than dishonestly, for instance because the false representations were false *without* the applicant's (or anyone's) knowledge, should be treated, where he falls within none of the conditions (A2-B) referred to.

27. The Court went on to state that although paragraph 320(7B) is relevant to the consequences for re-entry of a breach of immigration rules involving “deception” it is only paragraph 322 which deals with what amounts to a ground for *refusing* leave to remain. Thus paragraph 322 is headed “refusal of variation of leave to enter or remain or curtailment of leave”.

28. From paragraph 65 onwards of **AA**, the Court discussed whether “false” in paragraph 320(7A) meant simply “incorrect” or had the meaning of “dishonest.” From the ensuing analysis, the Court preferred the meaning of “dishonest.”

29. At paragraph 76, the Court concluded that whether as a matter of interpretation solely of the relevant rules in paragraphs 320(7A), 320(7B) and 322(1A) as well as assurances given in the Lords debate as supplemented by the Minister's letter to ILPA, the answer becomes plain, and in essence is all of a piece. Dishonesty or deception is needed, albeit not necessarily that of the applicant himself, to render a “false representation” a ground for mandatory refusal.

30. At paragraph 77, the Court had regard to the consequences for an applicant whose false representation was in no way dishonest and who would then suffer not only mandatory refusal but would also be barred from re-entry for ten years if removed or deported.

31. Most seriously was the possibility on the respondent's interpretation, that an applicant for entry clearance who had made an entirely innocent misrepresentation, innocent not only so far as his personal honesty is concerned but also in its origins, would be barred from re-entry under paragraph 320(7B)(ii) for ten years, even if he left the UK voluntarily.

<u>Assessment</u>

32. From that analysis, I am satisfied that there is a significant difference in the wording relating to paragraph 320(7A) of the rules from that contained in paragraph 320(7B).

33. I am accordingly satisfied that the respondent has the burden of showing on the balance of probabilities that the claimant herself had the necessary mens rea. Insofar as paragraph 320(7A) is concerned, her mens rea would not be relevant. The agent in her case clearly had the necessary intention to deceive which, following the wording of paragraph 320(7A) meant that the appellant's application had to be refused. That wording however is not repeated or incorporated into paragraph 320(7B).

34. I have also had regard to a decision of the Upper Tribunal which was not referred to by either party: **Ozhogina and Tarasova (Deception within paragraph 320(7B) – Nannies) Russia [2011] UKUT 00197 (IAC)**. There, Mr Justice Burton concluded at paragraph 18, when referring to **AA (Nigeria)**, supra, that the inclusion of the words in paragraph (7A) “whether or not to the applicant's knowledge” suggested that dishonesty or knowledge of falsity was not required for the purpose of a justified refusal of entry clearance pursuant to paragraph (7A).

35. By the Court of Appeal's consideration of the equivalent paragraph in the rules (paragraph 322(1A)), that dishonesty was required in order for that paragraph to apply, the decision they proposed to make in relation to 320(7B) is a fortiori, because they would have been minded to distinguish between the two paragraphs.

36. The court also stated at paragraph 21 that whatever the conclusion might have been in relation to paragraph 320(7A) in that case, the Tribunal had to consider the Judge's conclusion in relation to paragraph 320(7B) which they were satisfied on its wording imposes a different test.

37. There is no proviso as is contained in paragraph 320(7A), namely, that it applies whether or not it had been submitted to the claimant's knowledge. There is not that proviso contained in 320(7B) that deception as defined can arise whether or not the falsity, and indeed its materiality, was to the applicant's knowledge.

38. Further, by incorporating into paragraph 320(7B) by using the word “Deception”, the definition of “Deception” in Rule 6, there was once again the omission of the caveat as to the materiality of the applicant's knowledge of the falsity.

39. The Court had regard at paragraph 23 to the drastic consequence to paragraph 320(7B) which is not present in paragraph 320(7A). There would be a continued bar for a further ten years since the last deception. That raises the bar for a construction of paragraph 320(7B) so that the

Tribunal would on that basis have distinguished between the two paragraphs.

40. Finally, at paragraph 25, for the purpose of qualifying for the ten year treatment under paragraph 320(7B) the nannies must be shown to have made the false statements with the deliberate intention of securing advantage in immigration terms.

41. The Tribunal was therefore satisfied that the appellants in that case did not “use deception” which is the final basis upon which the Tribunal distinguished paragraph 7B from paragraph 7A in the application for entry clearance. If “used” simply meant “supplied documents” then of course those appellants did, but given the high level of requirement for satisfaction for finding the applicability of paragraph 7B, the Tribunal was satisfied that the use of deception must have been, as the Judge said, with the deliberate intent of securing advantage in immigration terms by the use of a false document, known to be false. That had not been the case.

42. I accordingly find that the approach of the First tier Judge had been correct in the circumstances.

Decision

The decision of the First-tier Tribunal Judge did not involve the making of any error on a point of law. The decision shall accordingly stand.

Signed Date 19/7/2014

Deputy Upper Tribunal Judge Mailer