Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12945/2016**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 15th January 2018 **On 8th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

MR KHAWAJA FARHAN QAYUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Lemer, Counsel, instructed by SAJ Law Chambers
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. This matter was originally listed for hearing before Upper Tribunal Judge Gill on 6th October 2017. After hearing the parties, the learned Judge concluded that the matter needed to be adjourned and the Respondent Secretary of State was directed to serve certain evidence. It was said in her directions as follows:

> "1. There was insufficient material before the Upper Tribunal at the hearing on 6th October 2017 for it to decide whether Judge of the First-tier Tribunal Mays made a mistake as to fact, as contended in the grounds. Having regard to the overriding objective, it was necessary for the hearing to be adjourned and for the

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Respondent to be redirected to serve the documents described at paragraphs 2(ii) – (v) below.

2. The Respondent is directed to serve the following as soon as reasonably practicable and, in any event, no later than the date which is six calendar weeks from the date on which these directions are sent to the parties:

(i) A full copy of the decision letter that was subject to this appeal, together with written confirmation as to whether the said decision was dated 18th April 2016 or 21st April 2016.

(ii) A copy of the Appellant's application dated 23rd December 2008 for leave to remain.

(iii) A copy of the decision letter dated 16th November 2009.

(iv) A clean copy of the decision of Immigration Judge Entwistle promulgated on 28th April 2010.

(v) In relation to the Appellant's previous conviction, a copy of the MG11 or sentencing remarks or such other document(s) as makes clear the facts of the offence, in particular, whether the offence that was the subject of the conviction was committed in connection with an application for leave to remain or an attempt to open a bank account."

2. Mr Duffy, who appeared before Upper Tribunal Judge Gill and indeed appears today, responded to that order for directions by way of a letter of 14th November 2017 and he said in part as follows:

> "Unfortunately, I have only been able to locate the ECO's refusal decision, dated 18th April 2016, and the RFRL [reasons for refusal letter] dated 17th November 2009; (directions (i) & (iii)).
>
> The other documents identified are not on any of the Home Office files that I have access to.
>
> The determination of Judge of the First-tier Tribunal Entwistle is also not available on Home Office systems, as determinations were not stored electronically until 2011."

3. Mr Duffy also referred to a part of the refusal letter when he said: "However the following passage in the refusal letter seems to imply that the 322(1A) refusal was on the basis that the Appellant failed to disclose his conviction rather than the use of a false document in the application. …"

4. Following that correspondence from Mr Duffy the Appellant's solicitors, SAJ Law Chambers, sent a letter to the Tribunal dated 10th January 2018 and there it is said that there were other documents that the Secretary of

State was not able to provide. It says in that letter amongst other things the following:

> "4. The UKVI in their letter dated 14/11/2017 has argued that since the Appellant failed to disclose his conviction rather than the use of a false document in the application dated 23/12/2008, hence, the refusal was justified under paragraph 322(1A).
>
> In this regard, it is respectfully submitted that the offence of possessing a false/improperly obtained/another's identity document to open a bank account was committed on 03/09/2009, as also recorded by the Home Office in one of their supplementary UKBA's bundle apparently served on 19/08/2011, as exhibited on pages 21 – 23 of the Appellant's bundle already submitted to the Upper Tribunal as part of his current appeal.
>
> …
>
> The above said chronology of evens makes it clear that the application in question was made on 23/12/2008 as also recorded by the Home Office in their RFRL dated 17/11/2009, whereas the actual offence was committed on 03/09/2009 or on 04/09/2009.
>
> In the circumstances, in our respectful submissions this is bizarre to say that the Appellant failed to disclose his conviction (which was months after the application) rather than the use of a false document in the application dated 23/12/2008, and that the refusal was justified under paragraph 322(1A)."

5. During oral submissions today it has been very clearly and eloquently argued on behalf of the Appellant that, really, there are two aspects that cannot be ignored. Firstly, that the First-tier Tribunal Judge did clearly make an error of fact in relation to whether or not there was the use of false documents for an application for leave to remain. There was no such use of false documents, as has been made clear by the failure of presentation of any documents, but, more importantly, by the chronology itself. Secondly, it is said that, in any event, the judge at paragraph 38 of her decision also erred. It was submitted that it was not inevitable that the judge would have come to the same decision if she had not made those errors. It was submitted that the error of law was material and that the First-tier Tribunal Judge's decision has to be set aside.

6. Mr Duffy in his submissions, no less eloquently explained that on the last occasion when the matter was before Upper Tribunal Judge Gill he provided the guidance for Entry Clearance Officers in relation to paragraph 320(11) of the Rules and he explained the aggravating circumstances aspect and Mr Duffy said that even if the decision was wrong to say that deception had been used in a previous application and even though it may be harsh to take a point against the Appellant in terms of the date of conviction and the date of application, the Appellant had overstayed since 2010 and that he has used an assumed identity and the criminal court had

found that to be the case. The use of false documents undermines the good order of society and it would be in effect perverse for such use of documents and the criminal manner to be seen as lesser offence when the documents are submitted to the Secretary of State for the Home Department or indeed to the Entry Clearance Officer.

7. It was clear that on the facts it was the Appellant's own accepted behaviour which had led to the decision having been made against the Appellant. Here it was clear that the mistake of fact was not material and thereby I should uphold the judge's decision.

8. When I look at the judge's decision itself, I firstly observe that there are various other aspects in respect of the Entry Clearance Officer's refusal which the judge did accept but it was almost immediately within her decision that the judge considered the case on the wrong basis. That is because the judge said at paragraph 2:

> "… In particular, the ECO was not satisfied that the Appellant met the suitability requirements of the Immigration Rules. This was on the basis that the ECO was of the view that the Appellant had previously used false documents in support of an application seeking leave to remain in the UK …",

and then at subsequent paragraphs the judge had said as follows:

> "47. … In using false documents in an application for leave to remain the Appellant's conduct is conduct which strikes at the very heart of the system of immigration control in the United Kingdom …",

and at paragraph 53:

> "… The Appellant does not, however, meet the requirements of the Immigration Rules as I have found that his application should be refused having regard to paragraph 320(11) of the Immigration Rules. The Appellant has committed an offence which strikes at the heart of the system of immigration control in seeking to use false documents to obtain leave to remain in the United Kingdom."

9. There is no doubt that the judge made a mistake of fact because the Appellant had not used false documents to obtain leave to remain in the United Kingdom. He had used false documents to open a bank account here. The Appellant's behaviour in that regard is inexcusable, is reprehensible and I clearly see that such behaviour has to be deplored in the clearest way. The point being though that the deceit was nothing to do with using false documents to seek leave in the UK.

10. The question for me, however, is whether in the circumstances that mistake of fact was such that the judge erred in the ultimate conclusion that she reached. Coupled with that is the consideration of paragraph 38 of the judge's decision where the judge said at paragraph 38 in part as follows: "… *The Appellant does not therefore in his application form*

appear to have accepted that he used the false documentation in an application for leave to remain in the United Kingdom", the point being that it was simply not possible for the Appellant to put in his application form such details but in any event there was reference to these matters when he undertook an interview.

11. Mr Duffy in effect seeks to rely on the general guidance to Entry Clearance Officers to say that there is an all-encompassing catch-all provision which requires the utmost honesty from applicants but also a continuing disclosure from applicants. Although I have sympathy with that, in the particular circumstances of this case though, the Entry Clearance Officer's decision is not nuanced in the way in which Mr Duffy now seeks to submit. In my judgment, Appellants are entitled to know the basis on which a decision against them has come to be refused. That then enables such Appellants to respond to the refusal and to make appropriate applications. Therefore although I imagine that at a different stage Mr Duffy or an Entry Clearance Officer would seek to raise the points now being raised that was never the basis of the Respondent's decision.

12. Having reflected on the matter, I do conclude that the error of fact made by the judge in this case is such that it amounts to a material error of law. It is more than likely, in my judgment, that the judge would have come to a different decision had she not made the error of fact.

13. Having reflected as to the appropriate course as to what ought to occur now that I have found a material error of law, namely whether the matter should remain here at the Upper Tribunal before me or a different judge or whether the matter ought to be remitted to the First-tier Tribunal, in my judgment, it is appropriate for the case to be remitted to the First-tier Tribunal. There will be a rehearing in relation to the paragraph 320(11) aspect only. The other favourable findings which were made in respect of the Appellant meeting the other aspects of the Immigration Rules shall remain. There is no error in respect of those aspects. It will give the Appellant and the Respondent an opportunity to present their cases.

14. I do not make any further directions. That will be a matter for the First-tier Tribunal. For today's purposes I find that there is a material error of law in the judge's decision. The issue in respect of paragraph 320(11) is remitted for rehearing to the First-tier Tribunal.

<u>Notice of Decision</u>

The decision of the First-tier Tribunal contains a material error of law.
There shall be a re-hearing of the matter at the First-tier Tribunal on the basis referred to above.

No anonymity direction is made.

Signed: A Mahmood   Date: 15 January 2018
Deputy Upper Tribunal Judge Mahmood