Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02976/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 November 2013	**On 13 November 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

MR MOHAMMAD LUTHFUR RAHMAN

Respondent

Representation:

For the Appellant: Mr E Tufan a Senior Home Office Presenting Officer
For the Respondent: Mr J Khan of counsel instructed by Taj solicitors

DETERMINATION AND REASONS

1. The appellant is the Entry Clearance Officer in Dhaka ("the Entry Clearance Officer"). The respondent is a citizen of Bangladesh who was born on 1 March 1986 ("the claimant"). The Entry Clearance Officer has been given permission to appeal the determination of First-Tier Tribunal Judge Elson MBE ("the FTTJ") who allowed the claimant's appeal against the Entry Clearance Officer's decision to refuse him entry clearance to the UK as the dependent spouse of a Points-based System migrant under the provisions of paragraph 319C of the Immigration Rules.

2. The Entry Clearance Officer also concluded that the claimant had knowingly sought to mislead during his interview and refused the application under the provisions of paragraph 320 (7A) of the Immigration Rules because he had employed deception by making false representations. Furthermore, the Entry Clearance Officer was not satisfied that the claimant's marriage was subsisting and that he intended to live together permanently with his sponsor, that the marriage had not been entered into for the sole purpose of facilitating re-entry to the UK or that he did not intend to stay in the UK beyond any period of leave granted to him.

3. The claimant appealed and the FTTJ heard the appeal on 6 September 2013. The claimant was represented by counsel but the Entry Clearance Officer was not represented. The FTTJ heard oral evidence from the claimant's spouse and sponsor ("the sponsor"). The FTTJ found the sponsor to be a credible witness. In relation to the record of the claimant's interview she found that it; "clearly does not set out the whole of the interview" and "I have to conclude that the entry clearance officer has been selective as to what was included in the written record". As a result she found that the report "is of limited value and I do not give it full evidential weight."

4. The FTTJ concluded found that the marriage was genuine and subsisting, that the claimant came to the UK with the intention of studying but that he had difficulties with his studies and that his command of the English language was unlikely to be at the highest level. She found that the claimant made mistakes and did not deliberately seek to mislead the Entry Clearance Officer. She concluded that the claimant had established that he met the requirements of paragraph 319 and allowed the appeal under the Immigration Rules.

5. The respondent sought and was granted permission to appeal submitting that the FTTJ erred in law in her reasons for concluding that the claimant had not deliberately sought to mislead the Entry Clearance Officer. She had failed to consider that the claimant had admitted that he had been working in excess of the permitted 20 hours per week in breach of his student visa conditions. On the evidence it was not open to her to accept the claim that the interview had lasted for two and a half hours which was more likely to refer to the total time the claimant spent in the High Commission. There was no evidence to support the claim that the lack of an interpreter would have made the claimant anxious and his answers to the standard questions in the interview indicated otherwise and that he could have but did not ask for an interpreter. As the Entry Clearance Officer having to prove that the claimant had deliberately used a falsehood it is submitted that he admitted, in terms, that he had lied.

6. Mr Tufan relied on the grounds of appeal and submitted that the FTTJ's decision was either perverse or unsupported by proper reasoning which justified the conclusion. Mr Khan submitted that at worst the interview record showed that the appellant did not understand the questions and that there were language difficulties. It was for the Entry Clearance Officer to prove the very serious allegation that the claimant had employed deception by making

false representations. It had to be shown that the claimant knowingly used deception. A false representation was not enough; it had to have been made deliberately and knowingly not inadvertently or mistakenly. I was asked to find that it was open to the FTTJ to come to the conclusion that the claimant had not employed deception by making false representations.

7. In reply to my question Mr Khan confirmed that there has been no witness statement from the claimant. The evidence as to what happened at the interview was given by the sponsor at second-hand on the basis of what the claimant told her.

8. I find that the FTTJ erred in law. On the evidence it was not open to her to come to the conclusion that the report did not set out the whole of the interview or, put another way, that the Entry Clearance Officer had been selective as to what was included in the written report. These are very serious allegations. They amount to a conclusion either that not all that was said at the interview was recorded or that it was edited afterwards to delete some of what was said, or both. There is no first-hand evidence of what was said at the interview. There is no evidence as to what might have been said but was either excluded from the record at the time or subsequently deleted. Most of the evidence comes from what the sponsor said the claimant had told her. I find it surprising that there is no witness statement from the claimant. I also have difficulty with the FTTJ's reasoning in paragraph 44 in which she said; "in view of the short record of the interview, which I accept lasted for two and a half hours not only because that was what the appellant reported to his wife in the United Kingdom but also because of the number of questions that were asked". On the one hand the FTTJ seems to be saying that the record would be longer for an interview lasting two and a half hours and on the other that the number of questions and answers actually recorded (41) are likely to have taken two and a half hours.

9. I find that it was not open to the FTTJ to make these findings in relation to the interview report or to conclude that it was of limited value such that she should not give it full evidential weight. The error is compounded because the FTTJ then went on to examine the report as the basis for her conclusion that the claimant made mistakes and did not deliberately seek to mislead the entry clearance officer.

10. I find that the FTTJ erred in law and I set aside her decision. However, the Entry Clearance Officer has not sought to dispute the FTTJ's findings except in relation to the interview report and I preserve her other findings of fact including the finding that the sponsor was a credible witness.

11. I said that I would re-determine the appeal without adjournment which is what, after taking instructions, Mr Khan asked me to do. He asked that the sponsor be allowed to give further brief oral evidence. Mr Tufan submitted that I should send the appeal back for rehearing before the First-Tier Tribunal. I do not consider it necessary to do so. I have not set aside the decision of the

FTTJ in its entirety or come to the conclusion that the decision is so flawed that in effect there has been no proper hearing of the appeal.

12. I heard oral evidence from the sponsor in English. She was cross-examined and re-examined and I asked some questions for the purpose of clarification. Her evidence is set out in my record of proceedings.

13. Mr Tufan submitted that what the claimant said at his interview clearly brought him within the provisions of paragraph 320 (7A). After the time he had spent in the UK and his studies here he should not have had any difficulty using the English language. It was not that he did not know the answers to the questions but he had been caught out and in the circumstances did not know what to say. Mr Tufan accepted that the decision under paragraph 320 (7A) was the only surviving issue. I was asked to dismiss the appeal.

14. Mr Khan relied on his earlier submissions in relation to the question of the error of law. He emphasised that the threshold for the Entry Clearance Officer to establish that the claimant had fallen foul of paragraph 320 (7A) was a high one. He accepted that the claimant had made mistakes but said that they were not lies. The questions to which he failed to give a response were consistent with his claims to be tired, surprised at being interviewed and nervous. Having said that the arrangements for sending him money in the UK were made by his brother it was understandable that he did not know the answers to these questions. I was asked to find that the Entry Clearance Officer had not established that the claimant had employed deception by making false representations and to allow the appeal.

15. I reserved my determination.

16. I share the view of the FTTJ that the sponsor is a credible witness. I believe that she gave evidence to me to the best of her knowledge and recollection. I accept that the claimant had to travel for six or seven hours during the night to reach the High Commission in time. He arrived at approximately 7 am local time and waited outside in a queue. The sponsor was speaking to the claimant on his mobile phone until he had to turn it off to go inside at about 9 am. She next spoke to him at about 11:30 am which was very soon after he left the High Commission. He told her that he had had his fingerprints taken after which the interview started. He also said that he had been asked a lot of questions and that all the time had been taken up with the interview. He did not tell her the precise time at which the interview started or finished. The sponsor said that the claimant did not have a watch and the only way he was able to tell the time was from the time on his mobile phone which was switched off whilst he was in the High Commission. It is not surprising that if the claimant was not expecting to be interviewed what was clearly, to put it in neutral terms, a difficult interview would have seemed to him to have lasted a long time with a lot of questions. I find that the sponsor's honest recollection of what the claimant said to her provides no sufficient evidential basis for a conclusion that the interview record is incorrect or incomplete or that it lasted

for two and a half hours. On such an important issue, going to the heart of the reasons for refusal I am surprised that there is no witness statement from the claimant. I have not been told why this has not been provided and there is no obvious or good reason for the lack of one.

17. The head note to the interview record form directs the interviewer to ensure that all of the standard questions are asked, that a record is made if the interviewee cannot answer a question or the question has to be repeated and finally, whether it becomes necessary to switch into a language other than English. The opening standard questions ("are you fit and well?", "do you understand English?" and "are you fit and well and happy to be interviewed in English?") are all answered in the affirmative. There are a number of indications that questions had to be repeated (for example "x3"). Four questions were repeated once or more. There is no indication that the interviewer switched to a language other than English or that the claimant asked that this be done. There are 41 questions and answers. Many of the questions are answered clearly and relevantly. For example when the claimant was asked where he lived after he got married he gave the number of the house and the name of the road in London and how it could be reached by bus. There are a number of questions to which he made no response. At question 37 he was asked; "why did you tell me you last studied in June 2012?" To which he replied "sorry it was a lie". At question 39 he was asked; "you lied when you said you were studying at Apex College until June 2012?" To which he replied; "yes". At the end of the interview the claimant agreed that he was happy with the way the interview had been conducted, he had understood all the questions and had no questions to ask or anything to add.

18. The claimant has not provided a witness statement to set out what is put forward on his behalf by way of explanation for what he said at the interview. It is said that he was tired, having had to travel through the night to get to the High Commission and surprised, nervous and anxious because he was not expecting to be interviewed. It is argued on his behalf that he was confused, that any false representations were genuine mistakes and that he had no intention to deceive.

19. In an appeal arising from the refusal of an application under paragraph 320(7A) of the Immigration Rules, the burden of proof is upon the Entry Clearance Officer to establish on a balance of probabilities that the requirements of that paragraph are made out. AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773 makes it clear that there has to be dishonesty or deception. This is not a case where it is suggested that there was dishonesty on the part of anyone other than the claimant. If dishonesty is to be established it must be his and he must have known that he was using dishonesty or deception.

20. Bearing in mind where the burden of proof lies, the standard of proof and the very serious consequences for the claimant of a conclusion that the requirements of paragraph 320(7A) are made out I have examined the interview record in

the light of all the evidence before me. The clear and logical answers which the claimant gave to most of the questions point towards a proper understanding of the questions and an ability to express his answers in English. At no stage did the claimant ask to switch from English to his first language. Whilst I accept that the claimant might not have expected to be interviewed and he could have been tired he did say that he was fit and well to be interviewed at the beginning and, at the end, that he had no complaints about the way in which it had been conducted. He also said that he had understood all the questions and had nothing to add. I have considered whether, for example between questions 22 and 26 he did not respond because he did not understand the question or know the answer. However, if either of these was the reason he could have but did not say so. In his answer to question 37 he volunteered the answer "sorry it was a lie". The word was not suggested to him. There could have been no error in translation because he was using English. The context gives no support for his contention that he meant something else, perhaps "mistake". Question 36 was; "you lied when you said you were studying at Apex College until June 2012?" To which he replied "yes".

21. Looking at all the evidence in the round I conclude that the Entry Clearance Officer has established to the standards of the balance of probabilities that the claimant has employed deception by making false representations. He has been knowingly dishonest.

22. I have not been asked to anonymise this determination and I see no good reason to do so.

23. Having set aside the decision of the FTTJ I remake it and dismiss the claimant's appeal.

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Signed Date 8 November 2013

Upper Tribunal Judge Moulden