Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/22289/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 November 2013	**On 2nd December 2013**
Prepared 13 November 2013	

Before

UPPER TRIBUNAL JUDGE O'CONNOR
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MOHAMMED KAMRANUL ISLAM

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:
For the Appellant: Mr Z Khan, Universal Solicitors
For the Respondent: Ms H. Horsely, Senior Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh born 22 August 1981. He applied for entry clearance as the dependent partner of a Tier 1 (Post Study Worker) pursuant to paragraph 319C of the Immigration Rules. This application was refused in a decision of 7 October 2012, pursuant to paragraphs 319C(g) and 320(7B) of the Immigration Rules, for the following reasons:

> "You have submitted a bank statement from export Import Bank of Bangladesh Ltd, but all bank statements must be on official bank headed paper containing the bank's logo, as required by the Immigration Rules. The statement that you have submitted does not bear the bank's logo as part of the original headed paper of the bank. The bank letter you have submitted

> from the same bank does not show any funds balance. These funds had not therefore been taken into account…
>
> In addition, your previous visa was cancelled and you were refused entry on arrival in the UK for using deception by making false representations in order to obtain your visa (see Dhaka/534448, submitted on 27/01/10). Your refusal notice was issued to you on 11/03/10 (see GAN/3138853) and you were removed on 18/06/10. I am therefore refusing entry clearance under paragraph 320(7B) of the immigration rules…"

2. In a document of the 2 April 2013, an Entry Clearance Manager clarified the reasons for reliance on paragraph 320(7B) in the following terms:

> "The appellant was refused at Port previously because of false representations made in relation to his student visa. It is submitted in the grounds of appeal that during the appellant's previous student visa application, the college did not require any English language course for his admission. However, as is clear from the summary of the case, detailed in the attached IS.125 document, the Appellant made false representations to his college regarding his English language level, and therefore in relation to his application, and was refused under paragraph 321(a) [sic]…"

3. The ECM conceded that the appellant met the substantive requirements of paragraph 319C of the Immigration Rules.

4. The appellant appealed the ECO's decision to the First-tier Tribunal but this appeal was dismissed by First-tier Tribunal Judge Wyman in a determination signed on the 26 July 2013. The only issue left for consideration before the tribunal had been that relating to paragraph 320(7B).

Error of Law

5. At paragraph 33 of her determination the First-tier Tribunal Judge found that the appellant had used deception in his current application for entry clearance as a consequence of his failure to mention in his visa application form that he had previously been refused entry clearance on two occasions [when he had applied as a working holidaymaker]. The judge therefore dismissed the appeal in reliance on paragraph 320 (7B) [37]. Permission to appeal to the Upper Tribunal was subsequently granted by First-tier Tribunal Judge Brunnen in a decision of 11 September 2013.

6. It is pertinent at this stage to set out the material terms of paragraph 320 (7A) and 320 (7B) of the Rules, which state as follows:

> "Grounds on which entry clearance or leave to enter the United Kingdom is to be refused"[That is a provision for a mandatory refusal]:-
>
> "(7A) where false representations have been made or false documents or information have been submitted (whether or not material to the application and whether or not to the applicant's knowledge) or material facts have not been disclosed, in relation to the application.

(7B) ... where the applicant has previously breached the UK's immigration laws by ...

(d) using Deception in an application for entry clearance leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not)

unless the applicant

(ii) used Deception in an application for entry clearance more than ten years ago."

7. In paragraph 6 of the Immigration Rules, which is the interpretation clause, Deception is expressly defined as follows: 'Deception' means making false representations or submitting false documents (whether or not material to the application) or failing to disclose material facts".

8. It is of some significance in the instant appeal that the ECO's decision was not made pursuant to paragraph 320(7A) of the Immigration Rules [a possibility that was clearly postulated and rejected by the Entry Clearance Manager], but rather pursuant to paragraph 320(7B). This distinction is important because paragraph 320(7A) acts upon circumstances arising in the current application, i.e. the application to which the refusal decision relates; whereas paragraph 320(7B) is dependent upon proof that there has been a previous relevant act by an applicant, as specified in the subparagraphs of the rule. By previous, the rule must mean that the specified act pre-dates the current application.

9. If the First-tier Tribunal's decision is considered in this context it is plain that the Judge misdirected herself and came to a conclusion that was not open to her. The Judge found that the appellant had, in his current application, dishonestly failed to refer to an earlier refusal of entry clearance. Whilst this finding is relevant to a consideration under paragraph 320(7A) it is not relevant to a consideration of whether paragraph 320(7B) is of application. The Judge gave no further reasons for dismissing the appeal.

10. Given that (i) paragraph 320(7A) was not raised by the ECO in the decision letter of the 7 October 2012 (ii) no application was made to amend the terms of the reasons for refusal and (iii) the First-tier Tribunal judge gave no other reasons as to why the appellant's application fell to be refused pursuant to paragraph 320(7B), it is clear that her determination contains an error on a point of law that requires it to be set aside. The fact that this is so was readily conceded by the Ms Horsley at the hearing before the Upper Tribunal.

Re-making of decision

11. The Entry Clearance Officer's decision notice relies upon the allegation that the appellant acted with deceit by making false representations in an application for entry clearance as a Tier 4 student in January 2010. This application initially led, on the 2 March 2010, to the appellant being granted entry clearance; however on 11 March 2010 he was refused leave to enter the United Kingdom and was subsequently removed from the country on 18 June 2010.

12. It is for the Entry Clearance Officer to prove the necessary precedents facts for the application of paragraph 320 (7B), and she must do so to the balance of probabilities. It is therefore necessary for the Entry Clearance Officer to demonstrate that the appellant used deception when obtaining his entry clearance in 2010. This deception must have been made for the purposes of securing an advantage in immigration terms (Ozhogina and Tarasova (deception within para 320(7B) – nannies) Russia [2011] UKUT 00197 (IAC).

13. In her submissions Ms Horsley relied, as the ECM had done, on the assertion that the appellant had made false representations to the London College of Accountancy in 2010 in order to secure a Confirmation of Acceptance of Studies which was necessary to obtain entry clearance as a Tier 4 migrant. Such false representations were said to consist of the provision of misleading information by the appellant to the college as to the level of his English proficiency.

14. We observe at this juncture, as we have done above, that despite having been granted entry clearance on 2 March 2010, the appellant was nevertheless refused leave to enter the United Kingdom on 11 March 2010. The decision notice of the 11 March records that upon his arrival in the United Kingdom it became apparent that the appellant had a very limited grasp of the English language and that as a consequence an Immigration Officer contacted a lecturer at his proposed college of study who, having spoken to the appellant over the telephone, immediately withdrew the college's sponsorship of the appellant [by which we take to mean that the college withdraw the CAS].

15. The Immigration Officer, in reliance on the fact that the appellant had presented a document showing a pass mark in English with his application, concluded that the appellant had made a false representation and consequently cancelled the appellant's entry clearance and thereafter refused him leave to enter.

16. The appellant appealed this decision to the First-tier Tribunal. By the time of this appeal the Secretary of State had changed her case entirely; no longer placing reliance on the appellant's claimed false representations, but rather on the fact that there had been a change of circumstances since the grant of entry clearance, namely that the college had withdrawn its sponsorship of the appellant. The First-tier Tribunal, for obvious reasons, accepted this was so and dismissed the appellant's appeal.

17. Turning back then to the instant appeal. Ms Horsley sought to place determinative reliance on a letter from the Academic Registrar at the London College of Accountancy dated 11 March 2010 i.e. the day after the appellant arrival in the United Kingdom in 2010. This letter, which was only presented for the first time in these proceedings during the course of the hearing before the Upper Tribunal, is addressed to an employee of the UK Border Agency and states as follows:

> "This is to confirm that after assessing Mr Mohammed Kamrul Islam's academic documentation, we enrolled him into our ACCA professional course.
>
> Based on the information given to us by you and also after a brief interview between Mr. Mohammed Kamrul Islam and one of our academic staff…, I understand that his English is not sufficient enough to carry out a simple English conversation.
>
> We as a college have made the following decision;
>
> I believe that false representations were employed by the student at the time of submitting his academic credentials as his HSC Mark Sheet shows a pass mark for English.
>
> The college has no other choice than to withdraw our sponsorship for the student."

18. This letter fails to identify with any clarity the false representations the college 'believe[d]' the appellant to have made. No evidence has been produced before us to support the contention that the college required the appellant to provide information to it as to the level of his English language abilities, neither has any evidence been provided that the appellant made any representations to the college about the level of his English language abilities, save with the possible exception of the production of his "HSC certificate", which we consider further below.

19. It is also relevant for us to observe at this stage that the Immigration Rules in force at the time of the appellant's application in 2010 did not impose an English language requirement and such matters were left to the college issuing the CAS documentation. We have been provided with no information as to the process by which the London College of Accountancy assessed an applicant's level of English or indeed on what basis it eventually decided to admit any individual student.

20. Without information regarding the abovementioned matters it is impossible to ascertain whether the appellant made false representations to the college. It is reasonable to expect that such evidence would have been produced before us. The college would no doubt have kept records of the appellant's application. From those records it could be ascertained exactly what information the college asked from the appellant in order to secure a CAS, and exactly what information the appellant provided in response. Not only do we not have the necessary records of the appellant's application to the college before us but, for reasons which are

entirely unexplained, the ECO has chosen not to call any employee of the London College of Accountancy to give evidence in support of her case before the tribunal. The appellant has therefore been denied the opportunity of having the evidence provided by the college tested in cross-examination.

21. The production by the appellant, to the college, of the HSC [Higher Secondary Certificate] does not assist the ECO one iota in this appeal without an additional context being provided. This is particularly so given that (i) the certificate relates to the appellant's High School studies in 2000 (i.e. 10 years prior to the application for entry clearance) and (ii) it does not provide any information as to the appellant's English language abilities in 2000, let alone those in 2010; but merely shows that in 2000 the appellant scored 82 marks out of 200 in "English" (i.e. 41%). It does not state what level of English was required in order for a person to score such a low mark in their HSC English examination in 2000, nor indeed is there even an indication that the appellant 'passed' this examination; although it does indicate that he obtained a Third Division pass in a combination of six subjects, only one of which was English.

22. We also find no assistance can be derived from a consideration of the CAS document issued by the London College of Accountancy to the appellant in 2010, save to note that it makes no reference to the appellant having made an assertion as to the level of his English language abilities and that, under the heading *"Documents Used to Assess Academic Requirements"* there is reference to the HSC referred to above.

23. In short in our conclusion, having considered the evidence before us in the round, and also having taken into account the terms of the Secretary of State's decision letters of March 2010 and the appeal determination of the same year, we find that the ECO has come nowhere near meeting the burden of proof placed upon her in this appeal to demonstrate the existence of the precedent facts necessary for the application of paragraph 320(7B).

24. Accordingly, and given that (i) the ECO has not relied upon the application of paragraph 320(7A) and (ii) it was conceded before the First-tier Tribunal that the appellant meets the substantive requirements of paragraph 319C of the Rules, we find that the decision of the ECO to refuse entry clearance was not in accordance with the Immigration Rules and the appellant's appeal must accordingly be allowed.

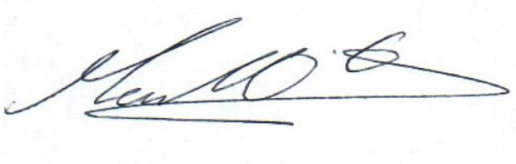
25. We finish this determination with a note of caution to the appellant. The First-tier Tribunal found that he dishonesty failed to disclose within his current application the fact of his refusal of entry clearance in 2008. Whilst we have set aside the First-tier Tribunal's determination, we have not been required ourselves to make a finding regarding this alleged dishonesty [the ECO/ECM, for reasons unknown, declining to take a point under paragraph 320(7A)]. The question of whether the appellant did act dishonestly in this respect therefore remains unresolved and it is not

beyond the realms of possibility that an ECO could take this point against the appellant, relying on paragraph 320(7B) of the Immigration Rules, should he make a future application for entry clearance.

Decision

For the reasons given above, the decision of the First-tier Tribunal contains an error of law requiring it to be set aside. Upon re-making the decision we allow the appellant's appeal on the basis that Entry Clearance Officer's decision to refuse entry clearance was not in accordance with the Immigration Rules.

Signed:



Upper Tribunal Judge O'Connor Dated: 13 November 2013