Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19933/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 17 February 2014	**On : 27 February 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MOHAMMED JAKIR HUSSAIN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, instructed by Zahra & Co Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh born on 26 December 1981. He has been given permission to appeal against the determination of Judge Brenells dismissing his appeal

against the respondent's decision to refuse his application for entry clearance to the United Kingdom as a spouse.

2. The appellant applied for settlement in an application form dated 17 June 2012. He gave details of his previous illegal stay and departure from the United Kingdom and his previous unsuccessful applications made in the UK and in Bangladesh. He stated that he married his wife, his current sponsor, in Bangladesh on 11 August 2009 and had lived with her for a few weeks after their marriage. They had a son together, born on 28 December 2011.

3. The appellant's application was refused on 3 October 2012. In the refusal decision, the respondent referred to the appellant's failure to advise the immigration and appeal authorities of his change of circumstances, following a previous application and appeal as the fiancé of a woman who was not the sponsor, but which took place around the same time as his marriage to the sponsor. The respondent also referred to the refusal of a previous application made on the same basis in which the respondent had been satisfied, in light of the appellant's immigration history, that paragraph 320(11) of the immigration rules applied to him on the grounds that he had sought to frustrate significantly the intentions of the immigration rules. Reference was made in that refusal decision to the fact that he had remained as an overstayer after entering as a visitor in 1996; that after being served with papers as an overstayer on 10 May 2008 he had failed to comply with the conditions of his temporary release and was listed as an absconder on 7 April 2008; that he had produced a British passport which was found to contain a counterfeit bio data page; and that he had made a voluntary departure from the United Kingdom and returned to Bangladesh on 15 August 2008.

4. In refusing the current application, the respondent noted that the appellant had only elected to make a voluntary departure after being encountered by the police on 14 July 2008 with a forged UK driving licence identifying him as a British national and after being detained and released on the condition that he left the United Kingdom. The respondent was also aware that the appellant had been encountered at Dhaka Airport on 12 May 2009 with a UK passport in a different identity which contained a counterfeit bio-data page and which he had been using for identity purposes in the United Kingdom and in Bangladesh. The respondent was accordingly satisfied that the appellant had significantly contrived to frustrate the intentions of the immigration rules and that there were aggravating factors and accordingly refused the application under paragraph 320(11). The respondent went on to raise concerns about the validity of the appellant's marriage and his ability to accommodate and maintain himself in the UK and found that he was also unable to meet the requirements of paragraph 281 of HC 395.

5. Following a review by the Entry Clearance Manager, it was conceded that the appellant's marriage was valid, although the refusal under paragraph 281 (iv) and (v) on grounds of maintenance and accommodation was maintained. The respondent maintained the refusal under paragraph 320(11) and concluded that the decision did not breach the appellant's Article 8 human rights.

6. The appellant's appeal was heard in the First-tier Tribunal by Judge Brenells on 1 November 2013. Judge Brenells noted that the respondent had conceded the issue of maintenance and he found himself that the accommodation provisions of the rules had been satisfied. The only issue before him, therefore, was the application of paragraph 320(11). In that respect, the judge referred to the fact that the appellant had had two previous immigration appeals dismissed by the Tribunal in determinations promulgated on 11 March 2009 and 8 March 2011. He rejected the submission that the appellant's earlier history should be ignored since it occurred before his earlier appeals and found that paragraph 320(11) was still applicable to him. He dismissed the appeal on that basis and also on Article 8 human rights grounds.

7. Permission to appeal to the Upper Tribunal was sought on the ground that the judge had erred by failing to conclude that the respondent's decision was unlawful for two reasons. Firstly, there had been a failure by the Entry Clearance Officer (ECO) to obtain authorisation from the Entry Clearance Manager (ECM) for refusing the application, contrary to the UKBA guidance. Secondly, there had been a failure to follow the guidance to the effect that it was only aggravating circumstances occurring after any previous appeal determinations that should be considered.

8. Permission to appeal was granted on 13 January 2014 on the grounds raised.

Appeal hearing and submissions

9. At the hearing Mr Bramble acknowledged that the judge had erred in law in his consideration of the UKBA guidance with respect to both matters raised in the grounds. He submitted that the appeal ought therefore to be allowed to the limited extent that the decision was unlawful and that the matter had to be remitted to the ECO for reconsideration.

10. Mr Coleman, however, considered that the appeal ought to be allowed outright on the grounds that there were no aggravating circumstances since the most recent appeal determination and that the refusal under paragraph 320(11) therefore fell away. The appellant had a two year old British child who was being separated from his father.

Consideration and findings

11. The relevant UKBA guidance is to be found in the internal guidance for entry clearance staff, entitled "RFL07 – Frustrating the intentions of the Immigration Rules – paragraph 320(11)".

12. The sections of that guidance that are particularly relevant to the appellant's case are as follows:

jl"RFL7.4 Aggravating circumstances and appeal determinations

Full consideration must be given to an applicant's UK immigration history, including any appeal determinations, since it is aggravating circumstances which have occurred after the appeal determination which should be considered.

RFL7.5 Will I need to refer the case to an ECM?

Yes. ECOs will need to obtain ECM authorisation for all refusals under Paragraph 320(11)."

13. It was conceded by Mr Bramble that the ECO's decision did not indicate that such authorisation was obtained prior to refusal and on that basis the decision was plainly unlawful. Had that been the only issue, Mr Coleman agreed that the correct course would be for the appeal to be allowed only on that limited basis.

14. However, it was also conceded by Mr Bramble that the decision was unlawful on the basis that the respondent had failed to follow the guidance in RFL7.4. It was Mr Coleman's submission that that was sufficient in itself for the appeal to be allowed outright. Accordingly, the issue before me is whether that failure ought to result in the matter going back to the ECO or in the appeal being allowed outright.

15. It seems to me that the appeal has to be allowed outright, for the following reasons.

16. Paragraph 320(11) provides that entry clearance or leave to enter should normally be refused:

"(11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:
(i) overstaying; or
(ii) breaching a condition attached to his leave; or
(iii) being an illegal entrant; or
(iv) 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); and
there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process."

17. The relevant guidance states at section RFL7.1:

"RFL7.1 When can I refuse under 320 (11)?

This is a discretionary refusal where an applicant has:

- been an immigration offender or in breach of UK immigration or other law; and / or
- received services or support to which they were not entitled;

and where there are aggravating circumstances.

> It is not sufficient to have been in breach of immigration law or to be an immigration offender. There must be aggravating circumstances as well."

18. It is thus clear from the guidance that there have to be aggravating circumstances in order for the discretion under paragraph 320(11) to be exercised. That is a mandatory requirement under the guidance. Section RFL7.4, as set above, also includes what appears to be a mandatory requirement, namely that it is only the aggravating circumstances occurring after previous appeal determinations which should be considered. In the appellant's case, it was accepted by Judge Brenells, at paragraph 20 of his determination, that there had been no recent attempts by the appellant to circumvent the immigration rules. Clearly, the aggravating circumstances upon which he relied in refusing the appeal were those that had occurred prior to the determination promulgated on 8 March 2011. It is relevant to note that that determination related to an application made on the same basis as that currently made, namely for entry clearance as the spouse of the current sponsor. Not only has there been no question of any further aggravating circumstances since that time, but it is also relevant to note that circumstances have moved on since then as the appellant and his spouse have had a child, born in December 2011.

19. Accordingly, it seems to me that the respondent has failed to discharge the burden of proving that paragraph 320(11) was applicable to the appellant and that that part of the reasons for refusal has therefore to fall away. Significantly, that was the only basis upon which the appellant's appeal failed before Judge Brenells since it was otherwise accepted that he met all the requirements of paragraph 281 of HC 395. In the circumstances the appellant's appeal falls to be allowed under the immigration rules.

DECISION

20. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside. I re-make the decision in the appeal by allowing it under the immigration rules.

Signed Date

Upper Tribunal Judge Kebede