IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/14077/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 3rd November 2014	**On 20th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

MRS XIAOLI GONG
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - MANILA

Respondent

Representation:
For the Appellant: Mr Timson, Counsel, instructed by Sandbrook Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, Mrs Xiaoli Gong, date of birth 8th August 1951 is a citizen of China. Having considered all the circumstances I do not make an anonymity direction.

2. This is an appeal by the Respondent against the determination of First-tier Tribunal Judge Harris promulgated on 23rd May 2014. I have for the purposes of the present proceedings kept the designation of the parties as they originally appeared before the First-tier Tribunal.

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3. However I am mindful that this is an appeal by the Respondent against the decision of First-tier Tribunal Judge Harris.

4. The Appellant was seeking to come to the United Kingdom as a visitor to visit family members. The issue that was raised before the First-tier Tribunal was that the Appellant had made previous applications for visas and those applications had been refused. At the time of making the previous applications the Appellant appears to have been living in mainland China and had a passport from mainland China. It appears that the Appellant moved to Hong Kong and obtained a new passport issued from Hong Kong.

5. In a refusal letter dated 21 June 2012 in respect of the last of those previous applications it was noted that the appellant had failed to disclose two previous applications for visit visas and had stated that this was her first passport. That application had been refused at that stage under paragraph 320 (7A), where a person has dishonestly produced false documents or provided false information. The refusal letter also referred to any future application been refused under paragraph 320 (7B). However that refusal and the assertion that the appellant had acted dishonestly had never been the subject of an appeal.

6. In refusing the present application the Respondent had refused the Appellant's application in accordance with paragraph 320(7A) on the basis that having previously been refused because of providing false information this application was automatically being refused under paragraph 320(7B).

7. Judge Harris specifically looked at those issues and made findings with regard to whether the Appellant had in the past used deception. The judge came to the conclusion that the Appellant had not used deception and in effect had not been dishonest.

8. The Grounds of Appeal assert that the two previous refusals referred to in the present refusal were not before the Tribunal. Therefore the refusals on the basis, that the Appellant had in previous applications dishonestly provided false information or false documents, was not an issue open to the judge to adjudicate upon. Accordingly the judge's finding that the Appellant had a new passport and that her previous passport had been cancelled and that the Appellant was not dishonest in failing to disclose her previous refusals or the details of the previous passport was not open to the judge in the circumstances. It was submitted that the refusal under paragraph 320(7B) was a mandatory refusal and the judge had failed to deal with conflicts of fact on material matters.

9. In essence the Respondent is alleging that it is not open to the judge to review the allegations made by a previous Entry Clearance Officer in a previous letter of refusal. That previous letter of refusal was produced to the judge.

10. I drew to the attention of the parties in the proceedings the case of Soyemi v SSHD [VA/36056/2009] which deals specifically with this issue.

11. The first time that the issue of the Appellant having used deception needed to be proved was before First-tier Tribunal Judge Harris. A decision by an Entry Clearance Officer is not a binding finding of fact. Where it is alleged that on a previous occasion the Appellant has produced false documents and the Appellant asserts that he has not, it is for the Respondent to substantiate that false documents have been used. There is no principle whereby if the Appellant fails to appeal against a previous decision the facts alleged within that decision are not subsequently challengeable.

12. Rather the contrary it is for the respective parties to prove the facts relied upon. In the present situation the Respondent bears the responsibility of proving that false information was provided and that the Appellant acted dishonestly in order to substantiate the refusal under paragraph 320(7B).

13. The judge was entitled to consider whether or not false documents had been used on a previous occasion. The judge considered the appropriate case law specifically AA [2010] EWCA Civ 713. Having considered the appropriate case law the judge made specific findings with regard to the circumstances in which the Appellant had failed to disclose on a subsequent application the fact that she had been refused on two previous applications and the fact that she had had a previous passport. The judge was entitled to find on the basis of the evidence that he was satisfied that the Appellant and the Sponsor had given very detailed and plausible explanations as to why the previous history had not been disclosed. The judge has assessed the previous applications giving reasons for finding that they had been dismissed on the basis of extremely flimsy evidence. The first had been refused because the payslips required to prove the Sponsor's income had been produced a day late and the second application had been refused because it was noted that there had been a first refusal.

14. In light of the full explanation given by the Sponsor the judge was satisfied that the Appellant had not provided false information dishonestly. That was a finding of fact that the judge was entitled to make on the evidence before him. Further that was an issue that was before the judge that he was obliged to consider and make findings upon.

15. Accordingly taking all the evidence into account the judge was entitled to come to the conclusions that he did. There is no material error of law within the determination by the judge. The decision to allow this appeal under the Immigration Rules stands.

Signed   Date **20th November 2014**

Deputy Upper Tribunal Judge McClure