IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/38825/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7th October 2014	**On 22nd October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MRS SHAHIDA LATIF

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs H Price, Counsel, Direct Access
For the Respondent: Ms S Vidyadharan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant's appeal against a decision to refuse her entry clearance as a visitor, brought on the limited grounds of appeal, was dismissed by First-tier Tribunal Judge Gordon ("the judge") in a determination promulgated on 20th August 2013. The Entry Clearance Officer ("ECO") refused the

application under paragraph 320(7B) of the Immigration Rules ("the rules"). This decision followed an earlier one, some months beforehand, in which entry clearance was refused under paragraph 320(7A), the ECO finding on that earlier occasion that bank statements from Santander provided in support were not genuine.

2. In the present appeal, the respondent relied upon the notice of decision but provided no supporting evidence in relation to the earlier adverse finding regarding the bank statements. The appellant's case was advanced before the First-tier Tribunal on the basis that more evidence was required and that the respondent could not discharge the burden of proof simply by relying upon the notice of decision, which referred to the earlier decision. The judge found, however, that the appellant could not rely upon what she described as "the absence of proof in this appeal" as the issue of the false documents ought to have been addressed in an appeal against the earlier decision to refuse entry clearance. The judge concluded that the respondent's decision regarding the documents stood unchallenged and that the ECO was entitled to rely upon the earlier finding in refusing the application under paragraph 320(7B) of the rules.

3. The judge dismissed the appeal.

4. In an application for permission to appeal, it was contended on the appellant's behalf that evidence was required in support of the finding that the ground of refusal under paragraph 320(7B) was made out. No document verification report or other evidence was before the First-tier Tribunal and the judge erred in dismissing the appeal for the reasons given. Permission to appeal was initially refused but, following a renewed application, granted by an Upper Tribunal Judge on 16th January 20134. In a brief rule 24 response from the Secretary of State, made on 5th February 2014, the appeal was opposed. The author of the response stated that the judge was entitled to conclude that the respondent had discharged the burden of proof.

Submissions on Error of Law

5. Mrs Price said that the judge acknowledged, correctly, that the respondent bore the burden of proof. She went on to find that the appellant could not rely on an "absence of proof" and that an appeal ought to have been brought against the earlier refusal of entry clearance. There was, however, no evidence regarding deception or false documents before her and only a bare assertion in the notice of decision, which referred to the earlier decision. The judge erred in concluding that no evidence was required to discharge the burden of proof falling on the respondent. The issue was critical for the appellant because if paragraph 320(7B) were made out, she would be prevented from applying for entry clearance for a period of some ten years.

6. Ms Vidyadharan said that in relation to the appeal itself, the Immigration Appeals (Family Visitor) Regulations 2012 fell to be applied. The appellant's sponsor was unable to show that he fell within regulation 3 as he was not settled here and had not been granted asylum or humanitarian protection. The sponsor only had limited leave. It followed that there was no valid appeal, substantively, before the judge. So far as the adverse finding under paragraph 320(7B) was concerned, guidance had been given by the Upper Tribunal in SD (India) [2010] UKUT 276. This decision put the Secretary of State in difficulties, in relation to the judge's finding that the mandatory ground of refusal was made out.

7. In a brief response, Mrs Price said that she was only instructed in relation to paragraph 320(7B). She did not disagree with Ms Vidyadharan's submission regarding the validity of the appeal.

Conclusion on Error of Law

8. The Upper Tribunal's decision in SD [2010] UKUT 276 is directly on point, in relation to the adverse decision made on 7th October 20112. No appeal was brought following the earlier refusal of entry clearance, on 12th March that year, when the ECO concluded that paragraph 320(7A) of the rules applied. The notice of decision giving rise to the present appeal merely recorded the earlier refusal in March 2012 and, as noted by the judge, no supporting evidence regarding the bank statements from Santander was adduced by the respondent in the First-tier Tribunal.

9. Paragraph 10 of the determination in SD reads as follows:

> "If it is to be asserted in an appeal relating to a second application that documents in relation to a previous application were forged, the burden of proof remains on the Entry Clearance Officer. Of course, if there has previously been a judicial decision, or an admission, of forgery, the burden may be readily discharged. But in the present case there was, as has been accepted, no direct evidence that the documents were forged. All that there was before the Immigration Judge was the Entry Clearance Officer's assertion that a previous application had been refused for that reason. In these circumstances, that is to say where there is no evidence, the person with the burden of proof loses on that point. It is thus clear that the Immigration Judge was not lawfully in a position to find that there had been forged documents submitted on the previous application."

10. Applying that guidance, I conclude that the judge erred in finding that the ground of refusal under paragraph 320(7B) was made out on the basis of the earlier adverse decision, in the absence of supporting evidence sufficient to show that the burden of proof falling on the respondent was discharged. The error of law is plainly material, not least because of the consequences for the appellant herself.

11. The decision of the First-tier Tribunal is set aside and must be remade.

Remaking the Decision

12. Ms Vidyadharan drew attention to regulation 3 of the Immigration Appeals (Family Visitor) Regulations 2012. The regulations came into force on 9th July 2012, some weeks before the decision giving rise to the appeal. Mrs Price did not seek to challenge Ms Vidyadharan's submission regarding the appellant's sponsor. He does not fall within the scope of regulation 3 ("circumstances of the person to be visited") and so the appellant was not entitled to appeal under section 82(1) of the 2002 Act, by virtue of section 88A(1)(a) of the same Act.

13. In these circumstances, having made a clear finding of fact that the ground of refusal under paragraph 320(7B) was not made out, there being no supporting evidence regarding the earlier finding in March 2012 that bank statements relied upon on that occasion were false, there is before me no valid or subsisting appeal as the appellant's sponsor does not fall within regulation 3 of the Immigration Appeals (Family Visitor) Regulations 2012.

DECISION

14. The decision of the First-tier Tribunal having been set aside by reason of material error of law, the decision is remade as follows: there is no valid or subsisting appeal.

Signed Dated

Deputy Upper Tribunal Judge R C Campbell 21/10/2014

ANONYMITY

There has been no application for anonymity and I make no direction on this occasion.

Signed Dated

Deputy Upper Tribunal Judge R C Campbell 21/10/2014

FEE AWARD

As there is no valid or subsisting appeal, no fee award may be made.

Signed Dated

Deputy Upper Tribunal Judge R C Campbell 21/10/2014