IN THE UPPER TRIBUNAL

R (on the application of Zhang) v Secretary of State for the Home Department IJR [2015] UKUT 00138(IAC)

Field House
London

THE QUEEN
(ON THE APPLICATION OF)
LEI ZHANG

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE O'CONNOR

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Mr D Cheung, Solicitor Advocate, instructed by Maxwell Alves Solicitors appeared on behalf of the Applicant.

Ms L D'Cruz, Counsel, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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Handed down 26 February 2015

JUDGE O'CONNOR:

1. This application for judicial review was lodged on 18 November 2013 and permission to bring these proceedings was granted by Upper Tribunal Judge Rintoul in a decision dated the 14 April 2014.

2. On 9 April 2013 the Applicant made an application for entry clearance as a Tier 1 (Entrepreneur). This application was refused by an Entry Clearance Officer ("ECO") pursuant to paragraph 245DB(f) of the Immigration Rules, in a decision dated the 3 June 2013.

3. The reasons given for such refusal are lengthy. It is not, though, necessary for me to recite them herein. The following paragraphs of the decision letter are, however, of relevance:

> "If you believe that the decision made by the Entry Clearance Officer was incorrect you may apply for an administrative review of your case. You may request one administrative review of this decision...
>
> The review of this decision will be a full reconsideration of your application. This may lead to the reviewer upholding or overturning the original refusal decision."

4. The Applicant sought an administrative review of her case by way of a letter dated 27 June 2013. The grounds upon which she did so can be summarised as follows:

   (i) The ECO erred in law by failing to refer to paragraph 320(7B) of the Immigration Rules;

   (ii) The Applicant denies that she acted deceptively in any way and the ECO was incorrect in coming to such conclusion;

   (iii) The ECO erred in failing to consider and apply paragraph 320(11) of the Immigration Rules or the guidance relevant thereto;

   (iv) The ECO failed to take into account the fact that the Applicant's mother lives in the United Kingdom.

5. Having reviewed the Applicant's case an Entry Clearance Manager ("ECM") maintained the decision to refuse entry clearance, the reasons for doing so being set out in the following terms a decision letter of the 27 July 2013:

> "...The ECO has refused because of your previous failure to comply with the conditions of your leave and your

previous use of deception in order to obtain entry to the UK. The ECO has only refused under paragraph 245DB(f) of the Immigration Rules and has not applied paragraph 320(7B) or 320(11) as is intimated in your legal representative's grounds for review.

You were interviewed on 14 May 2013 and asked very specific questions about your proposed business venture in the UK, knowledge and experience of this field of business, your circumstances in China, your circumstances surrounding your previous stay in the UK and your finances. The answers you gave did not demonstrate sufficiently that you were a genuine Tier 1 (Entrepreneur). You have failed to satisfy the ECO in these areas of questioning. You first entered the UK as a student in 2003. On 19 February 2009 you were issued a biometric residence permit as a Tier 4 Student due to your studies at Kingston University. This permit was valid until 31 October 2011. At interview you stated that you withdrew from your course at Kingston University after completing the second year in 2009 due to ill-health. Other than a short period back in China from January 2011 until April 2011 you remained in the UK until 17 September 2011 (refusal notice stated 2013 which is incorrect) when you returned to China. You entered the UK on 19 December 2009 and you informed that Immigration Officer that you were entering the UK in order to continue your studying. Checks with Kingston University have revealed the following:

- You enrolled on 17/09/2007 on BA Media & Cultural Studies but were withdrawn for academic failure on 04/07/2008.

- You then enrolled on 22/9/2008 on BSc Geography and was also withdrawn for academic failure 10/07/2009.

- You were not reported to the UKBA as you attended prior to the Tier 4 requirements.

The over-riding factor is that you re-entered the UK on 19 December 2011 knowing that you were not a student at Kingston University and no longer studying at all in the UK. The ECO is therefore correct to state you had been withdrawn from your previous course of study for a period of approximately 5 months and you could therefore not be intending to enter the UK in order to continue this study. Whilst I accept that you did not overstay your visa you then stayed in the UK for a period of over 18 months with leave as a Tier 4 Student, despite the fact that you were not enrolled on any courses of study. During this period you also made no attempt to inform the Home Office of the change in your circumstances and given all of the above.

You have spent approximately 8 years in the UK as a student and have failed to obtain any noteworthy qualifications and have failed two separate degree courses. I acknowledge that you have submitted further documents concerning your business venture but taking into consideration your previous failure to comply with the conditions of your leave, approximately 8 years of study in the UK without any noteworthy qualifications I am not satisfied that you genuinely intend to establish or take over a business or businesses in the UK and that you genuinely intend to invest your money in the business or businesses."

6. Paragraph 245DB of the Immigration Rules reads, relevantly for the purposes of this application, as follows:

"**245DB. Requirements for entry clearance**

To qualify for entry clearance as a Tier 1 (Entrepreneur) Migrant, an applicant must meet the requirements listed below. If the applicant meets those requirements, entry clearance will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements

(a)-(e)…

(f) Except where the applicant has had entry clearance, leave to enter or leave to remain as a Tier 1 (Entrepreneur) Migrant, a businessperson or an innovator in the twelve months immediately before the date of application and is being assessed under table 5 of Appendix A, the Entry Clearance Officer must be satisfied that:

(i) the applicant genuinely intends and is able to establish, take over or become a director of one or more businesses in the UK within the next six months;

(ii) the applicant genuinely intends to invest the money referred to in table 4 of Appendix A in the business or businesses referred to in (i);

(iii) that the money referred to in table 4 of Appendix A is genuinely available to the applicant and will remain available to him until such time as it is spent for the purposes of his business or businesses;

(iv) that the applicant does not intend to take employment in the UK other than under the terms of paragraph 245DC;

(g) In making the assessment in (f), the Entry Clearance Officer will assess the balance of probabilities. The Entry Clearance Officer may take into account the following:

…

(v) the applicant's immigration history and previous activity in the UK."

7. Part 9 of the Immigration Rules sets out general grounds of refusal of entry clearance or leave to enter, paragraph 320(7B) thereof reading:

"Grounds on which entry clearance or leave to enter the United Kingdom is to be refused:

…

(7B) Where the applicant has previously breached the UK's immigration laws (and was 18 or over at the time of his most recent breach) by:

(a) overstaying;

(b) breaching a condition of his leave;

(c) being an illegal entrant;

(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 it is successful or not);

Unless the applicant:

(i) overstayed for 90 days or less and left the UK voluntarily, not at the expense of the Secretary of State;

(ii) used deception in an application for entry clearance more than ten years ago;

(iii) left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State, more than twelve months ago;...".

8. Paragraph 320(11) of the Rules is to be found under the heading:

"**Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused**", and reads as follows:

> "(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 in order to obtain documents from the Secretary of State or a third party required in support of the application; 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."

9. In the grounds originally pleaded in support of the application for judicial review it was submitted that refusal of the British Embassy in Beijing to provide Maxwell Alves solicitors with a copy of the administrative review decision of 27 July 2013 was perverse, given that the Applicant had at all material times been represented by this firm.

10. This ground was rooted in an e-mail sent by the Embassy to the Applicant's solicitors on 8 November 2013, in response to the solicitors having made a request for a copy of the administrative review decision by way of e-mails dated 10 October, 25 October and 6 November; the e-mail of the 25 October 2013 also indicating that the Applicant had not received the copy of the review decision that had been sent to her by post on 19 August 2013.

11. The email from the British Embassy, dated 8 November 2013, stated as follows:

> "Thank you for your email
>
> Due to the Data Protection and Freedom of Information Act, we cannot comment on individual applications of any sort. This is personal information that we cannot divulge or discuss with a third party."

12. It was on the basis of the continuing refusal of the Embassy to provide the Applicant's solicitors with a copy of the administrative review decision of 27 July 2013, in

circumstances where the Applicant herself had not received the copy purportedly sent to her, that Upper Tribunal Judge Rintoul granted permission. He made no observations when doing so as to the merits of the other pleaded grounds but, nevertheless, did not refuse permission for them to be argued.

13. The aforementioned ground is no longer a live issue before me because the Applicant's solicitors accept that they received a copy of the administrative review decision on 13 May 2014. I pause at this stage to observe that whilst the Respondent asserts that this decision was also sent to the Applicant's solicitors on 26 November 2013 and 19 December 2013 I have been provided with no evidence in support of such contention.

14. I move on to consider the grounds that are in issue. First, the Applicant submits, both in the grounds of application for judicial review and in the skeleton argument drawn for the purposes of the substantive hearing, that the ECO's decision of 3 June 2013 is flawed by legal error.

15. However, the challenge brought to the decision of 3 June 2013 must fail irrespective of the merits of the grounds, because the Applicant had a suitable alternative remedy against such decision, which she exercised i.e. the request for an administrative review. As explained in the decision of 3 June 2013 itself (paragraph 3 above), such review consists of "a full reconsideration" of the Applicant's case. The fact that the conclusion on this review was ultimately adverse to the Applicant is not a matter to be weighed in the consideration of whether the review process itself amounted to a suitable alternative remedy. I find that it did.

16. The core of this application, as it now stands, is a challenge brought to the administrative review decision of 27 July 2013. Despite the Applicant not knowing the contents of such decision when she lodged the application for judicial review, she did plead an unparticularised challenge to it in the Claim Form. This challenge was subsequently particularised on 22 December 2014, the grounds ostensibly being the same as those pleaded in support of the challenge brought to the ECO's decision. It is not said that the Respondent has suffered any prejudice as a consequence of the delay in the challenge to the decision of 27 July 2013 being particularised.

17. Insofar as it is submitted that the ECM was required to make a reasoned decision as to the application of paragraph 320(7B) of the Rules to the Applicant's case, this is misconceived.

18. Paragraph 320(7B) provides that it is not of application in circumstances where a person left the United Kingdom voluntarily, not at the expense of the Secretary of State, "more than twelve months ago" (paragraph 320(7B)(iii)). On the

Applicant's own chronology she left the United Kingdom voluntarily prior to the expiry of her leave on 14 September 2011 i.e. well over a year prior to the ECO's decision of 3 June 2013. Paragraph 320(7B) is therefore not of application in the instant case. In such circumstances I can see no rational basis for requiring the ECM to set out reasons in her review decision as to why paragraph 320(7B) is not of relevance.

19. As to paragraph 320(11) of the Rules, if an Applicant falls foul of the requirements therein an ECO nevertheless retains a discretion not to refuse such a person's application in reliance upon such provision. In the instant case neither the ECO nor the ECM relied upon paragraph 320(11) when refusing the Applicant's application. The decision not to rely on this paragraph of the Rules operated to the benefit of the Applicant, not to her detriment. In such circumstances it is difficult to comprehend how it can be successfully argued that the failure of the ECM to make reference in her decision to paragraph 320(11) of Rules, or the relevant guidance drawn in relation to such Rule, could be unlawful and I find that it is not.

20. At the hearing Mr Cheung submitted that the ECM took into account an irrelevant consideration when refusing the Applicant's application in reliance on paragraph 245DB(f) of the Rules, that being the Applicant's immigration history. In particular it was asserted that it was irrational or otherwise unlawful for the ECM to consider, when determining whether the requirements of paragraph 245DB(f) had been met, those features of the Applicant's history which are also relevant to a consideration under paragraphs 320(7B) and 320(11) of the Immigration Rules. In summary, it was submitted that the ECM implicitly relied upon paragraphs 320(7B) and 320(11) to refuse the Applicant's application in circumstances where neither provision applies to the Applicant's case.

21. I reject this submission for the following reasons.

22. Paragraph 245DB(g)(v) of the Rules identifies that an Applicant's immigration history and previous activity in the United Kingdom are factors which an ECO may take into account when determining whether the requirements of paragraph 245DB(f) of the Rules have been met. That is exactly what the ECO and ECM did in the instant case.

23. Had Parliament intended that an ECO considering paragraph 245DB(f) of the Rules could only take into account features of an Applicant's immigration history and previous activity in the UK that had no bearing on the application of the provisions in Part 9 of the Rules I have no doubt it would have said so in explicit terms in the Rule. It did not. Mr Cheung's submission

requires words to be read into paragraph 245DB of Rules in circumstances where the terms of this Rule are already clear and precise. I can see no justifiable legal basis for doing so.

24. Furthermore, as a matter of commonsense, when an ECO is assessing whether an Applicant genuinely intends to establish, and invest money in, a business in the United Kingdom, all of the relevant circumstances pertinent to such a consideration should be assessed in the round. I can find no rational reason for adopting an interpretation of the paragraph 245DB which leads to the possibility of highly relevant circumstances being excluding from an assessment of Applicant's case made pursuant to it.

25. In the instant matter I have no doubt that the Applicant's immigration history is relevant to an assessment of both whether she intends to establish a business in the United Kingdom and whether she intends to invest the money referred to in table 4 of Appendix A in such business. The weight to be attached to those features of the Applicant's circumstances was a matter for the ECO and thereafter the ECM. Contrary to Mr Cheung's submissions these were not matters which were treated by either decision-maker as being determinative of the Applicant's application, they were rationally considered as part of the overall factual matrix of the Applicant's case.

26. In my conclusion the ECM gave clear and careful reasons for her decision and such decision was rational. I do not accept that the decision lacks a lawful adequacy of reasoning and I find that the ECM took full account of all, and only, the relevant circumstances of the Applicant's case. A decision maker is not required to set out each and every feature of an Applicant's case and explain its relevance to their decision, it is sufficient that relevant matters are taken into account and sufficient reasons are given such that the losing party can understand why they lost. That is the case with both the decision of the ECO of 3 June 2013 and the subsequent decision of the ECM dated 27 July 2013.

27. For these reasons I dismiss this application for Judicial Review.