



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: VA/03047/2015

THE IMMIGRATION ACTS

Heard at Field House
On 10 November 2017

Decision & Reasons Promulgated
On 19 December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR. MD MOHSIN MIAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. A. Melvin, Home Office Presenting Officer
For the Respondent: Mr. S. Karim, counsel instructed by Kalam solicitors

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Bangladesh, born on 17 January 1960. On 30 January 2013, he applied for entry clearance for 1 month as a visitor. This application was refused in a decision dated 6 March 2013. The Claimant appealed and on 8 September 2014 the Entry Clearance Officer withdrew the decision. On 12 June 2015, the Entry Clearance Officer made a further refusal decision and the Claimant appealed against this.

2. The basis of the Entry Clearance Officer's decision was that the Claimant was fingerprinted at Heathrow airport on 18 January 2008 and refused entry to the UK on the basis that the passport [] containing a Canadian permanent resident visa contained a substituted bio-data page and in his subsequent

application for entry clearance he made false representations and failed to disclose material facts in that he declared he had never been refused entry on arrival to the UK or had been otherwise required to leave the UK in the last ten years. The application for a visit visa was consequently refused with reference to paragraph 320(7A) and 320(7B) of the Immigration Rules. It was further asserted that this seriously damaged the credibility of his application for entry clearance and the application was further refused with reference to paragraph 41 of the Rules

3. His appeal came before First tier Tribunal Judge Pears for hearing on 30 November 2016. At the hearing, the Presenting Officer sought to file material which had not previously been served on the Claimant or the Tribunal, despite the fact that three notices had been sent requiring the ECO to file evidence in advance. The Judge also refused a request by the Presenting Officer for an adjournment, for the same reason and given that the Claimant made his application in January 2013 and the appeal had been pending since mid 2015.

4. In a decision promulgated on 8 December 2016, the Judge allowed the appeal, on the basis that the Entry Clearance Officer failed to provide a document verification report or any evidence to show that the passport [] was not genuine and the Claimant had produced evidence from the Bangladeshi High Commission stating that it was genuine [27]. The Judge found on the balance of probabilities that the Claimant had not used a document with a false date of birth [28]. The Claimant denied being refused entry to the UK and stated that he was a transit passenger and was never refused entry and therefore had not made any false declaration which, the Judge accepted [29]. The Judge found that the Entry Clearance Officer had failed to discharge the legal or evidential burden of proof and that paragraphs 320(7A) and (7B) were not applicable [31] and went on to find that the Claimant met the requirements of paragraph 41 of the Immigration Rules [32].

5. The Entry Clearance Officer sought permission to appeal to the Upper Tribunal on the basis that there had been procedural unfairness in that their bundle had been sent to HMCTS on 18 November 2016 and had been received on Arnhem House on 22 November 2016 but had not been placed on the Tribunal's file for consideration at the hearing. Permission to appeal was granted by First tier Tribunal Grant-Hutchison in a decision dated 20 September 2017 on the basis that it was arguable that had the Entry Clearance Officer's bundle been received it may have made a material difference to the outcome or to the fairness of the proceedings.

Hearing

6. At the hearing before me, neither party were in possession of the bundle that had been served by the Entry Clearance Officer in advance of the hearing before the First tier Tribunal. However, a copy of this bundle was on the Tribunal file, therefore, I had it copied for the parties and gave Mr Melvin the opportunity to consider it.

7. In his submissions, Mr Melvin asserted that clearly the documents missing from the First tier Tribunal hearing were capable of making a significant difference to the outcome of the appeal. He submitted that there was extensive evidence of circumstances in which the Claimant should have been removed to Malaysia, including the flight number and the IS 125 and the Judge would have needed significant answers to that evidence, including the fact the Claimant had been refused boarding by Air Canada as they believed he was travelling on a forged document. The Judge's findings from [27] on are based on fact the Entry Clearance Officer has not produced any documents relating to this evidence, which was why the appeal was allowed.

8. In his submissions, Mr Karim stated that there was no DVR before the Judge and that, in any event, the issuing authority have confirmed that it is a genuine document: page 16 of the Appellant's bundle, which also notes that the passport number tallies with the passport number given in the refusal letter. He submitted that this finding can be left intact. In respect of the fact that the Claimant was apparently refused entry to the United Kingdom in 2008, Mr Karim submitted that the evidence pertaining to that is, at best, confusing. The IS128A refers to the Claimant with an incorrect date of birth (19.1.60) rather than 17.1.60 and this is confirmed by the refusal decisions. The Claimant's name as there recorded *viz* Mohd Mohsin Miah, is also wrong. Mr Karim also pointed out that the IS 128A refers to arrival on 17.1.08 and refusal 18.1.08 but the IS 125 (refusal/cancellation of leave to enter/remain) is dated 7.4.08 so post dates the refusal of leave to enter by some months and so clearly could not have been handed to the Claimant on the day of the refusal. It was Mr Karim's case that it was a different person and not the Claimant who was refused entry to the United Kingdom in 2008.

9. Mr Karim submitted that the second issue in the refusal is that the Claimant deliberately deceived the authorities by not mentioned that he had been refused entry into the UK, however, this was not the case. On any view the Claimant, if it was him, was a transit passenger and was not served with the refusal in any event. He had a 10 year multiple entry visit visa. The only reason he was refused was because of his bio-data page which has subsequently been confirmed as genuine thus this issue is extinguished by letter from the High Commission. In respect of the context, Mr Karim submitted that the Claimant was seeking to transit the UK en route to Canada and had visited the UK 6 times and stayed for no more than 28 days on any of those occasions. He earns the equivalent of £16k a month in Bangladesh and has invested £2 million in Canada and is Mayor of his local area in Bangladesh. He submitted that it was difficult to see how a reasonable Tribunal could have reached a different conclusion and there would have been no material difference had the Judge considered this evidence. There was an explanation set out in the Claimant's affidavit and this was before the Judge and the Claimant's sponsor and her husband gave evidence.

10. In the alternative, if this was not accepted then there has to be a resumed hearing because this evidence has never been seen by his lay or professional client.

11. In his reply, Mr Melvin asserted in respect of the letter purportedly from the Bangladeshi High Commission in Kuala Lumpur, that the issue was that the bio-data was incorrect and this is not addressed. He submitted that the Claimant's representative was trying to muddy the waters and it is clear that it is the same person, despite the difference in spelling of names and slightly different date of birth. Mr Melvin submitted that the reasons given in the refusal decision have not been addressed by the Claimant at all: there is no denial by the Claimant but simply a statement that the reasons advanced by the Entry Clearance Officer are not sufficient to justify the refusal. These reasons must have been put to the Claimant as this was the issue under appeal. As for the point in respect of the Immigration Officer's letter dated 7.4.08 [IS125] he failed to see how this is significant or relevant. Mr Melvin submitted that the reasons provided had not been addressed and that the documents could have made a significant difference and the appeal should be heard by the First tier Tribunal.

Decision

12. The basis of the application for permission to appeal by the Entry Clearance Officer is that the decision of the First tier Tribunal was procedurally unfair, in light of the fact that the evidence upon which she sought to rely had, in fact, been served on the First tier Tribunal but due to administrative error, was not before the First tier Tribunal Judge at the time of the hearing.

13. I accept that the decision of the First tier Tribunal Judge is potentially vitiated by procedural unfairness. The question is whether the evidence upon which the Entry Clearance Officer wished to rely would have made a material difference to the outcome of the appeal. On that basis I have given close consideration to that evidence. Of particular note is a witness statement from John Roberts, a fingerprint expert for 36 years, dated 15 November 2016 in which he states that the fingerprints taken from the Claimant in Dhaka on 30 January 2013 and those taken from Miah M Mohsin (DOB 19.1.60) on 18 January 2008 at Heathrow left him in no doubt that they were made by the same person. Consequently, I find that the Claimant's fingerprints were taken at Heathrow on 18 January 2008 and he was refused entry as a transit passenger on that date as the IS128A, IS 125 and IS 83 make clear. The basis for that refusal was that he was refused boarding by Air Canada as they believed he was travelling on a forged document and when his passport was examined by the duty forgery officer it was confirmed that his passport had contained a substituted bio data page. When interviewed, the Claimant insisted that the passport was genuinely issued to him in Bangladesh.

14. Notably, there is no DVR or evidence from the duty forgery officer containing his findings and reasons as to why it was considered that the bio data page had been substituted. Thus the Upper Tribunal is no better position than the First tier Tribunal in this respect and there is no reason to overturn the finding by the First

tier Tribunal Judge at [27], having heard from the Sponsor and considered the evidence in the Appellant's bundle, that the Claimant's passport was genuine.

15. At [29] of his decision, the First tier Tribunal Judge relied upon the absence of supporting evidence from the Entry Clearance Officer and the evidence of the Claimant that he was a transit passenger and was never refused entry and therefore has not made any false declaration. The evidence now before the Upper Tribunal shows that the Claimant was refused leave to enter the United Kingdom as a transit passenger on 18 January 2008. The Judge went on at [30] to find that given that the Respondent had the passport at the material time and it was declared to the immigration authorities, there was no dishonesty and consequently the Respondent failed to discharge the burden of proof in respect of paragraphs 320(7A) and (7B) of the Rules [31].

16. These paragraphs provide *inter alia*:

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

(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 attached to 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 successful or not)..."

17. In *AA (Nigeria)* [2010] EWCA Civ 773, the Court of Appeal per Lord Justice Rix held at [65]-[66] that the representations needed not only to be false ie. incorrect, but to be dishonest.

18. The Claimant's explanation for his failure to disclose what had happened at Heathrow on 18 January 2008 is set out in his attested witness statement dated 28 August 2014, at pages 4-5 of the Appellant's bundle, in which he states *inter alia*:

"My flight to London Heathrow was a transit and I did not have the intention to go into the UK, so there is no explanation for the claim that I was refused entry or deported from the UK. I was never refused entry or deported from any country in the world including Canada. The Entry Clearance Officer claimed that my passport [] was forged and a substituted bio data page was found. However, I did not provide any false information in my passports or my visa application. The certification of my passport that was given by the Bangladesh Embassy in Malaysia proves that I did not provide any wrong information. Therefore, the allegation that was imposed on me

regarding substituted bio data is not correct because it was already proved that my passport and information including my date of birth (17.1.60) were genuine. I did not mention about this passport at 2.7 of visa application because I do not presently hold passport and it was kept at London Heathrow immigration. I filled out the visa application by myself and I did not get a professional person to fill it out. The probably there might have been a few mistakes that had made in visa application. As far as my knowledge, I did not provide any false information."

19. Whilst it is now clear that the Claimant was, in fact, refused entry to the United Kingdom and, in effect, refused entry to Canada as Air Canada refused to board him, it is also clear by virtue of the fact that the IS125 is dated 7 April 2008 that this was not served upon him contemporaneously and thus I find that the First tier Tribunal Judge did not err in finding an absence of dishonesty on the part of the Claimant. There was clearly room for doubt in the Claimant's mind as to the events that had taken place, given that he was not seeking entry to the United Kingdom but simply to transit en route to Canada. Clearly it would have been desirable for the Claimant to have mentioned at 2.7 of the visa application form that he had also been the holder of passport number [] that had been retained by the UK Immigration Service on 18 January 2008. However, I find that the First tier Tribunal Judge, having considered all the evidence before him in the round, including the fact that the Claimant has been granted a number of visas to the UK in the past and that he possesses businesses and assets both in Canada, where he has permanent residence and Bangladesh, did not err in finding that the Entry Clearance Officer had failed to discharge the evidential and legal burden of proof, following his previous finding that there was no dishonesty on the part of the Claimant.

20. Further, it would appear when all the evidence is considered in the round, that in the absence of any evidence to the contrary, and given the statement by the Bangladeshi authorities that the Claimant's passport [] was genuinely issued, as they affirm at page 16 of the Appellant's bundle, that it did not contain a substituted bio data page. Consequently, there was no valid reason for the Claimant to have been refused entry as a transit passenger to the UK nor for Air Canada to have refused to board him in respect of his ongoing flight to Canada.

21. It follows that whilst the First tier Tribunal Judge did not have the benefit of the evidence upon which the Entry Clearance Officer sought to rely, I find that evidence would have made no difference to the outcome of the appeal and thus any procedural unfairness was not material. I find no material error of law in the decision of First tier Tribunal Judge Pears and that decision and his finding that the Claimant meets the requirements of paragraph 41 of the Rules, is upheld.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

18 December 2017