



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: VA/00733/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 29th October 2014**

**Decision & Reasons
Promulgated
17th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

**MR DEEPAKKUMAR CHAMANLAL KAMANI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Fransman QC and Mr Sadat Sayeed, instructed by Wesley Gryk Solicitors

For the Respondent: Ms R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This Kenyan Appellant, born on 3rd July 1953, appeals with permission, a decision of the First-tier Tribunal (Judge Kempton), promulgated on 30th June 2014, dismissing his appeal against a refusal by an Entry Clearance Officer in Nairobi, dated 2nd January 2014, refusing him leave to enter the United Kingdom as a general visitor. The Appellant had invited a paper disposal of his appeal.

2. Judge Kempton dismissed the Appellant's appeal with reference to the Immigration Rules at Paragraph 320(7B), Articles 6 and 8 of the ECHR.
3. Permission was granted at the First-tier on the basis that in dismissing the appeal under Rule 320 the judge had failed to have regard to the issue of dishonesty.

Background

4. There is an immigration history. The Appellant was first issued a multi entry visit visa in 1996 which was valid for five years until 2004. The Appellant was issued with a second such visa in 2004, valid until 2009.
5. In 2006 the Kenyan authorities withdrew the Appellant's passport facilities, in the context of an investigation into an allegation of fraud. In 2006 the UK authorities cancelled his multi entry visa because of this change of circumstance.
6. On 04 July 2007 the cancellation of the Appellant's passport was ordered unlawful following successful legal action in Kenya. The Appellant's Kenyan passport was reinstated. In 2009 the Appellant's said Kenyan passport expired. On 25th May 2010 the Appellant was issued with Kenyan passport number C012341 valid until 23rd May 2020.
7. On 15 July 2010 the Appellant applied for a visa using Kenyan passport no C012341. On 08 December 2010 the application for a visa was refused on the basis that he had failed to mention the cancellation of his 5 year multi entry visit visa in 2006. The Appellant did not appeal. In his statement for the First-tier tribunal in the instant appeal he asserted he did not know his visa had been cancelled as he had had no direct notification of that position. He could not declare what he did not know. He thought an appeal pointless because, as the Kenyan authorities considered him a flight risk and had impounded and cancelled his passport, he assumed the UK authorities would not accept that he genuinely only intended to visit the UK, and would not seek to stay, so that even if he established that he had no knowledge of the cancellation he would not win his appeal. The Appellant went on to say that in 2011 the investigations into the allegation of fraudulent dealings had continued and he had co operated and had attended interviews in Kenya. No charges have ever been forthcoming.
8. On 11th October 2011 a second, contemporaneously valid Kenyan passport: C020409 was issued in Nairobi. This second passport is valid until 9th October 2021. The Appellant says, in his statement for the First-tier Tribunal in the instant appeal, that he was forced by the Respondent's failure to deal with his earlier applications in a timely manner to get this second passport, so that he would not be prevented from travelling whilst the Respondent was holding his passport to process a future visit visa application.

9. On 31 August 2012 the Appellant made a fresh application on C012341 passport. In that application the Appellant made no reference to the second Kenyan passport C020409. In January 2013 the Appellant withdrew that application, because he says in his statement to the First-tier Tribunal, he needed the passport to travel.
10. In May 2013 the Appellant applied for a visa through solicitors in the United Kingdom. In this application the Appellant applied with the later issued valid Kenyan passport C020409, and failed to reveal that he had the earlier issued, and still valid Kenyan passport.
11. On 07 July 2013 the ECO refused the visa application with reference to paragraph 320(7A). The Entry Clearance Officer had been satisfied that there had been a purposeful withholding of relevant information in order to obtain an immigration benefit namely the undisclosed Kenyan passport number C012341. On its face there was a failure to disclose. The ECO found it adverse because:
 - (i) The VAF form asked that all passports be listed. The answer at VAF 21 omitted the passport.
 - (ii) The VAF form asked for confirmation that earlier issued passports had been cancelled and the Appellant's answer was "All previous passports held have now expired".
 - (iii) Additionally it was notable the Appellant had, consistent with a deliberate intention not to disclose, in the four page document that he had attached to his application listing his historical overseas travel with reference to the passport used, failed to mention trips using the omitted passport number C012341.
12. The refusal notice indicated that future applications would automatically be refused under paragraph 320(7B) for a period of ten years, i.e. until 7th May 2023. The Appellant did not appeal the refusal of 07 May 2013.
13. In December 2013 the Appellant made the application the subject of this appeal, and in this application he referred to both passports. The Appellant applied for a fifteen day visit so as to accompany his wife who already had a visa, for the purposes of "general visit and meet friends". On his application form VAF, at 85 and 86 he was asked to list any friends or family in the United Kingdom, and he set down the details of one friend.
14. On 24 January 2014 the Appellant's application was refused under the general grounds of refusal set out at HC 395 paragraph 320(7B), the terms of which are that if an earlier refusal has been made with reference to 320(7A) future applications are to be refused for a period of 10 years. The decision additionally refused the application with reference to the substantive visit visa rules set out at paragraph 41(i) and (ii), finding that the adverse disclosure point above resulted in the Appellant failing to meet the burden on him of establishing on balance that he was genuinely

seeking entry as a general visitor for a limited period not exceeding six months.

Discussion

15. The first challenge to the judge's decision upon which permission was granted is that the judge fell into error on the application of the substantive rule. Mr Fransman submitted that once an appeal has been brought with reference to race relations/discrimination/human rights, then all the statutory grounds, including that the decision is not in accordance with the immigration rules, are before the judge, so that the Judge should have considered if there was evidence of actual dishonesty, with the burden falling on the respondent. The judge had failed to make a finding on the issue of dishonesty, and so the decision under the rules was flawed.
16. I find no merit in that position. By virtue of Section 88A(3)(a) of the Nationality, Immigration and Asylum Act 2002, the Appellant's grounds are limited to human rights and race relations as set out at s 84(1)(b), (c). The judge had no jurisdiction to determine the substantive issue as to whether or not the Respondent's refusal of January 2014 was correct under the rules so as to allow an appeal on the basis that the decision was not in accordance with the Immigration Rules.
17. The next point taken for the Appellant is that the ECHR consideration is flawed for failure to appreciate the position under the rules vis a vis dishonesty relevant to the 07 July 2014 refusal, and for failure to factor in private life in the context of impact of the decision on reputation and the ability to travel to the UK, and more widely.
18. The question arises as to what if any convention grounds were before the judge.
19. Mr Fransman in the grounds seeking permission argues that there was "implicit" reliance on Articles 6 and 8 of ECHR".
20. I am satisfied that there whilst Article 6 the right to a fair hearing was expressly raised, no Article 8 convention point was raised in the grounds of appeal.
21. The Appellant's Grounds of Appeal to the First-tier Tribunal were set out over four pages, and in summary were:
 - (1) "Abridgement of my fundamental Convention rights with reference to Article 2 of the UN Covenant on Civil and Political Rights and Article 2 of the United Nations universal declaration of human rights particularised as being a right to be presumed innocent until proven guilty if charged with any offence."

- (2) Bias and personal discrimination particularised as the Entry Clearance Officer having a predisposition to refuse the Appellant because since 2010 he had been refused three visit visas and there had been delay in processing his applications.
- (3) Unfair hearing particularised as arising from an inability to have a hearing to dispute the dishonesty of the earlier failure to disclose because all future visa applications will be automatically refused until 2023. The matter was explained as innocent because as a result of the Entry Clearance Officer keeping his passport from July 2010 until December 2010 he was forced to make an exceptional application to the Kenyan authorities to be permitted to have a second and concurrently valid Kenyan passport. Further, as a result of the ECO's unfair treatment of his applications resulting in a refusal of the July 2010 application in December 2010, a delay in processing the application made on 31st August 2012, causing him to withdraw it in January 2013 because of the need to travel abroad on business on a visa endorsed on the passport that he had made the 2012 application on, and the refusal in July 2013 (of the application made in May 2013) for the failure to declare the concurrently valid passport, and then the refusal of the application made on 3rd December and the subject of this appeal, he had been unable to accompany his wife and daughter on their previous visits to the United Kingdom, and so had been deprived the opportunity of being with his daughter when she had given birth in the UK.
- (4) Bad faith particularised as the ECO taking against the Appellant on the basis that he had been investigated by the Kenyan authorities for fraudulent dealings, when the reality was that those investigations had resulted in no proceedings being brought against him.
- (5) Irrelevancy, particularised as the Entry Clearance Officer actively looking for reasons to refuse his application as opposed to considering his position holistically including the positive factors of his financial and economic status and his having been issued in January 1999 and again in 2004 entry clearance visas valid for five years at a time. Albeit that the second visa issued in 2004 had been cancelled on the basis that when conducting their investigations the Kenyan authorities had initially impounded his passport, that was a change of circumstance which in the event was proven irrelevant because the Kenyan authorities in 2008 reinstated his passport following a judicial conclusion that the impounding of the passport was not constitutional. Although his entry clearance endorsement had been stamped "cancelled" there had been no formal notification of that cancellation as a result of which he had failed to declare it in his first subsequent visit visa application which had led to the refusal of that application.

(6) Irrationality, particularised as a self-evident failure because any reasonable person would have not acted as the Entry Clearance Officer had, because overall he was the same person as he was when he had been granted his long-term visas.

22. At [9] the judge correctly identifies the limited grounds of appeal available to the Appellant. The Appellant had made explicit reference to the convention: that the decision infringed Article 6 ECHR because the Appellant had not had a fair hearing in respect of the refusal of 7th July 2013. The judge directed herself that the Appellant, having failed to appeal the original 320(7A) decision could not argue that he had not had a fair hearing in respect of that refusal. The time had long past for the Appellant to appeal that decision, and she correctly resisted his efforts to appeal it before her. There was no attempt before me to bring forward any merit from the Article 6 fair hearing point.
23. I am satisfied that the judge did not think there was any express or arguable Article 8 convention point here either.
24. No Article 8 ground is explicitly raised in the grounds of appeal. The judge makes a generalised reference to the Appellant having family in the United Kingdom, and so it is said, found Article 8 engaged, so that a full Article 8 exercise should have followed. I find that the submission is without merit. At [9]

“In addition the Appellant may consider that he has a right in terms of Article 8 of ECHR to family life in the UK as he has family living in the UK. However, it would be very simple for family life to continue by his family travelling to Kenya to visit him there. The refusal of the appellant does not breach family life. It is not disproportionate to the need for immigration control.”

25. There is no finding that the Appellant has a family life in the UK which engages the article. Nor is what the judge says above a reflection of a Ground of Appeal, but merely a comment that the Appellant “may” consider he has family life rights engaged. The reality is that as at the date of decision there is no evidence of his having a relevant family life. Elsewhere in the appeal grounds and submissions the Appellant had complained that the absence of a visa had prevented him previously accompanying wife and daughter on visits from Kenya, including when his daughter had come here to have a baby, but there was no evidence that he had family living here, and he had not asserted that he had. In his earlier applications he had mentioned an Uncle living here, but in this application he had said that that he had no family living here, he had applied to travel with his wife, herself a visitor, and he only mentioned one friend here. In short there is no evidential basis that “implicitly” established an Article 8 Ground of Appeal.
26. Although not before the judge as a ground of appeal any Robinson obvious convention points i.e. obvious on the evidence and arguments put before

the judge, and one capable of bringing the Appellant's appeal home, need to be considered.

27. The extract above shows the judge did not find that the Appellant had any Robinson obvious Article 8 arguments.
28. The judge was not required to consider Article 8 further. The judge none the less looks at the position in the alternative, and considers the effect or interference that the decision has on the Appellant's family life. At [10]:

“Notwithstanding that, I do not accept that the appellant has a valid right of appeal in terms of ECHR, I have considered in a little more detail than I might otherwise have done the reason why the appeal fails on the merits, even if he had a right of appeal on the merits. “

29. In the context of the judge's reasoning at [9] it is plain that at [10], what the judge is expressing is in the alternative. It is in that context that the judge comes to consider the Appellant's explanations of innocent misrepresentation to the point that the failure was inadvertent, the result of negligent solicitors, rather than any deceit on his part. The judge then goes on to a substantive consideration of the credibility of the Appellant's explanations concerning his failure to disclose the Kenyan passport the substance of the July 2013 decision. The judge clearly did not give much weight to the assertions of negligence against the solicitor, and noted that in any event any omission by the agent was the responsibility of the Appellant who signed the application. The judge found that in light of the history of the Appellant's applications and refusals, in particular having already had an application in 2010 refused for a failure to reveal the cancellation of 2006, she would have expected the Appellant to have exercised extreme caution, to the point that any discretion associated with inadvertence of erroneous information being put forward would not be exercised in his favour. So it is that, even if she would have been wrong in the carrying out of the Article 8 assessment if it had been properly before her to say that the Appellant's explanations were made too late to be considered, she does consider them, and explains why they do not carry weight.
30. Had the Article 8 ground been explicitly raised, or properly before her as a Robinson obvious point, then the correctness of the decision under 320(7B) would be a factor relevant at least to the context of proportionality, and likely to carry significant, albeit not necessarily determinative, weight. However any error in her consideration in the alternative cannot result in a material error of law. Accordingly, whatever the rights and wrongs of the judge's consideration of 320(7B), and the impact that a correct understanding of the Rules may have had in a relevant and proper proportionality exercise, no error can arise in the context of this appeal because such consideration that occurred was in the alternative, and on a proper consideration of the grounds and evidence, no such exercise was necessary.

31. For all the reasons set out above, whilst it is apparent that the judge's determination is in some respects flawed, no material error of law requiring the decision to be set aside is revealed.
32. Turning to the private life challenge, Mr Fransman submitted that, in any event, a Robinson obvious point in respect of private life arises because of the inability to travel to the UK in the context of the mandatory subsequent refusals, and because the impact that a visa refusal from the United Kingdom may have on other countries' admission processes. That is not a ground which was before the First-tier Tribunal Judge, and there was no evidential foundation before her upon which she could have properly concluded that it was a matter which she needed to deal with. It is outwith the Robinson obvious criterion, and does not give rise to an error of law.

Decision

33. The decision of the First-tier Tribunal reveals no material error of law requiring it to be set aside and the decision dismissing the Appellant's appeal stands.

Signed

Date **17th December 2014**

Deputy Upper Tribunal Judge Davidge

TO THE RESPONDENT **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date **17th December 2014**

Deputy Upper Tribunal Judge Davidge