



IAC-FH-AR-V1

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

Appeal Number: OA/09251/2014

THE IMMIGRATION ACTS

**Heard at Taylor House (Field Decision & Reasons Promulgated
House)
On 7 October 2015**

On 9 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

**MS SAMAR SHEIBA ELHAMD
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Heller, Counsel

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Egypt who was born on 6 November 1972. She appealed against the decision of the First-tier Tribunal (“FTT”) to dismiss her appeal against the respondent's dismissal of her application under the Immigration Rules.

Background

2. On 17 April 2012 the appellant applied to enter the UK under a visit visa. On 6 July 2014 her application was refused. The appellant appealed to the FTT by notice of appeal dated 6 August 2014. This resulted in a review being carried out by the Entry Clearance Manager (the ECM). The ECM maintained the decision on 12 October 2014.
3. The appellant subsequently appealed to the First-tier Tribunal (the FTT) stating that the ECO's decision was unlawful because he had misconstrued the facts. Secondly, the ECO had failed to establish that any of the alleged discrepancy on the part of the appellant was motivated by her intention to deceive. Thus, the requirements of paragraph 320(7A) of the Immigration Rules were not met. The appellant specifically relied on **AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773** saying that there needed to be a deliberate intention to deceive in order to qualify for mandatory refusal. On the evidence before the ECO, this high threshold was not met. There was nothing "dishonest" about the appellant's application.
4. The appeal came before Judge of the First-tier Tribunal Robinson (the Immigration Judge) on 19 February 2015.
5. Having set out the requirements of paragraph 320(7A) the Immigration Judge found that the appellant had used deception in order to obtain entry clearance. Ms Pickup, who appeared for the appellant at that hearing, submitted that she had not made any false representations but had not stated that she was employed when applying for entry clearance. This was an error because she had assumed that her husband's income and means would be sufficient to satisfy the ECO that she met the requirements of the Rules. Had she indicated that she was in employment it would have made it more likely that her application would have been granted as this would have increased her income level? Accordingly, the appellant had not used deception in any previous entry clearance application and paragraph 320(7B) should not apply. The respondent disagreed, pointing out that she had not declared her income truthfully in answer to questions 65 and 66 of her application for entry clearance.
6. Mr P. Duffy, who appeared for the respondent at the hearing, submitted that her income and salary were not apparent from the documentary evidence and invited the Tribunal to take into account only those documents pertaining to the circumstances at the date of the refusal.
7. The Immigration Judge concluded that on the basis of the information supplied the appellant appeared to have given false information about her circumstances which the respondent was entitled to take into account.
8. Accordingly, the respondent had correctly concluded that paragraph 7A had been engaged and this entitled him to refuse the application for entry clearance.

Proceedings before the Upper Tribunal

9. An application was made to the FTT for permission to appeal to the Upper Tribunal (the UT). The grounds state that there was no dishonesty in the application. The appellant's husband's income was more than sufficient to satisfy the requirements of funds in the Rules and had not secured any advantage to the appellant in immigration terms. Further, the ECO should have raised the issue of "non-genuine information" relating to the earlier application in 2012 with her in interview. This was not done. Furthermore, the Immigration Judge was criticised for not dealing adequately with Article 8 of the European Convention on Human Rights (the ECHR).
10. Upper Tribunal Judge Renton considered these grounds and concluded that they were at least arguable. On 23 June 2015 he noted that the Immigration Judge had made his decision solely on the basis of what the appellant had said in a previous application whereas in fact there had been no false statement.
11. At the hearing I heard submissions by both representatives. The respondent's representative, Mr Duffy, accepted that paragraph 320(7B) was satisfied. The problem was with the findings. The correct Rule was 320(7B) (previous breach of immigration laws by breaching conditions and or making an application to enter the UK on the basis of deception etc. in relation to an earlier application) and not paragraph 7A (false representations made or failure to disclose material facts in relation to the application before the ECO-i.e. in the current application).
12. Miss Heller pointed out that sub-paragraphs 7A and B of the Rule required separate consideration. The ECO should have dismissed the application under paragraph 320(7B) if he wished to do so but he had not done so here. Therefore, I should allow the appeal and substitute the decision of the UT to allow the appellant's appeal against the refusal by the respondent to grant entry clearance.
13. At the hearing I announced my decision which was to dismiss the appeal against the decision of the FTT for reasons which I will now explain.

Discussion

14. The appellant applied for entry clearance as a representative of an overseas business under paragraph 144 of the Immigration Rules. The basis of the refusal, however, was not under that Rule but on the basis that the appellant qualified for mandatory refusal under paragraph 7A of the Immigration Rules. The Immigration Judge considered that the appellant had submitted false information but, it is now conceded that, the information supplied was not such as was intended to deceive in that respect. As discussed during the hearing, however, the appellant had not mentioned in her application of 28 May 2014 that she had previously

stated in her 2012 application that she was in fact unemployed at that time, i.e. within her period of alleged employment which is said to have begun in 1998. She failed to mention the discrepancy between her application in 2012 and her application in 2014. The earlier statement would qualify as a previous breach of UK immigration law by using deception in relation to the earlier application and that deception would have clearly been material. This was a clear failure on the part of the appellant to accurately state the position and did amount to deception within paragraph 7B (d) of the Rule.

15. I note that the refusal of entry clearance specifically referred to paragraph 320(7B) in relation to future applications. It seems to me that the FTT would have been entitled to consider paragraph 320(7B) had it been drawn to its attention that the appellant had used deception in her application form in relation to the past application.
16. Therefore, although the primary basis on which the case has been argued was under 320(7A) in my view it cannot be said that the Immigration Judge materially erred in law if, as appears to be the case, he decided the case under the wrong Rule but would have been entitled to dismiss the appeal had he been referred to the correct Rule.
17. For this reason I have concluded that the ECO's decision was in accordance with the Immigration Rules and there was no material error of law on the part of the FTT.

Decision

18. The appeal to the Upper Tribunal is dismissed. I find no material error of law in the decision of the FTT. Accordingly, the respondent's decision to refuse entry clearance stands.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT **FEE AWARD**

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

Signed

Date

Deputy Upper Tribunal Judge Hanbury