Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14154/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 19 September 2013	**On 30 October 2013**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ANNETTE MUKUZA

Appellant

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellant: Mr R Mukuza (sponsor)
For the Respondent: Mrs Brewer, a Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Annette Mukuza, was born on 13 November 1987 and is a female citizen of Uganda. The appellant had applied for entry clearance to enter the United Kingdom for settlement as the spouse of Richard Mukuza (hereafter referred to as the sponsor). That application was refused by the respondent on 28 June 2012 and the appellant appealed to the First-tier Tribunal (Judge Fox, determining the appeal

on the papers) which, in a determination promulgated on 15 May 2013, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. At the Upper Tribunal hearing at Bradford on 19 September 2013, the sponsor attended in person. Mrs Brewer, a Home Office Presenting Officer, appeared for the respondent.

3. Granting permission, Judge Blandy considered it arguable that (i) the judge had failed to give adequate reasons for his determination of the appeal on Article 8 ECHR grounds and; (ii) appeared to have overlooked the exercise of discretion required under paragraph 320 of HC 395.

4. I was careful to give the sponsor every opportunity to address me on the question of the appeal. I have had regard to the letter which the sponsor wrote following the dismissal of the appeal in the First-tier Tribunal.

5. The notice of refusal issued by the Entry Clearance Officer indicates that the application was refused under paragraph 281(i) and (iii). Further, the application was dismissed under paragraph 320(11) and (22). Mrs Brewer acknowledged that the judge had failed to indicate in his determination that the paragraph 302 grounds were discretionary. Regarding paragraph 320(11), Judge Fox wrote:

> On the evidence before me to day and not disputed by either appellant or sponsor, I am satisfied the appellant had previously contrived in a significant way to frustrate the intention of the Immigration Rules by overstaying and breaching her conditions attached to her leave to enter, originally. She entered the country in 2008 on a holiday visa, overstayed and clearly ran across the UKBA who had raided her sponsor's premises. She made no attempt to introduce herself to the UKBA between 2008 and February 2011 and I am therefore satisfied that it was appropriate to refuse her application for entry clearance in those circumstances.

6. It is certainly the case that the judge did not refer to the discretionary nature of the refusal under paragraph 320 in terms. The grounds of appeal submit that the respondent's entry clearance policy advised of the need to consider "compelling compassionate circumstances". I do not consider that the judge has erred in law. If there were compelling compassionate circumstances in the appellant's immigration history which she asserts at [3] it is quite unclear to me what they may have been. The appellant's immigration history in the United Kingdom has been poor indeed. Further, on the facts of the case which the appellant and sponsor appear to have agreed before the First-tier Tribunal, were paragraph 320(11) a mandatory ground for refusal, it is difficult to see why the judge should have considered it necessary to set out the particulars of the appellant's immigration history which I have quoted above. It is clear to me that the judge has indicated at [17] the reasons why it had been "appropriate" for the respondent to refuse entry clearance under paragraph 320(11). Best practice may have indicated that the judge should have referred in terms to the discretionary nature of the paragraph but I am satisfied that he has had in mind the exercise of discretion because he clearly considered it necessary to justify his decision

by reference to the appellant's immigration history . By doing so has avoided any error in approach.

7. The position is even more straightforward in relation to the refusal under paragraph 320(22). That sub-paragraph provides that entry clearance should normally be refused where:

> One or more relevant NHS body has notified the Secretary of State that the person seeking entry or leave to enter has failed to pay a charge or charges with a total value of at least £1,000 in accordance with the relevant NHS Regulations on charges to overseas visitors.

8. The notice of refusal records that just such a notification had been made to the Secretary of State indicating that while the appellant was "not legally in the United Kingdom [she] obtained NHS treatment amounting to £1,843.31 which to date is outstanding." Neither the appellant nor the sponsor disputed that the sum claimed remained owing at the date of the decision although the sponsor submits that, by the time of the appeal to the Upper Tribunal, the outstanding balance was less than £1,000. Since this is an out of country appeal, the facts which the First-tier Tribunal had to consider were those appertaining as at the date of the decision to refuse; there was no indication that the balance of the fees had fallen below £1,000 at the date of the immigration decision. Indeed, the judge noted at [18] that it had been "appropriate to refuse entry clearance under paragraph 320(22)." The judge's use of the word "appropriate" in that paragraph is, in my opinion, a clear indication that he was aware of the discretionary nature of the ground; had the ground been mandatory, then I consider it likely that the judge would have used words to the effect that the Entry Clearance Officer had no alternative but to refuse in the light of the sum owing. Again, I find that the judge has not erred in law. I find that the judge was aware of the discretionary nature of the ground of refusal and his decision that the Entry Clearance Officer had exercised his discretion correctly in refusing entry clearance was correct.

9. As regards paragraph 281, the determination says little. The Entry Clearance Officer had refused the application under paragraph 281(i) because she had not been satisfied the sponsor had been free to marry the appellant and under paragraph 281(iii) that there was insufficient evidence of an ongoing relationship between the sponsor and appellant. Whilst dealing with the refusal under paragraph 320(22), the judge noted at [15] "while the account [owing to the NHS] remains undischarged [the appellant] cannot meet all the criteria of paragraph 281 of the Immigration Rules." It is possible the judge is here referring to paragraph 281(vii) *("the applicant does not fall for refusal under the general grounds for refusal."*). Again, best practice would suggest that the judge should have dealt with paragraph 281(i) and (iii) as those had been specific grounds cited by the ECO in the refusal. However, I do not consider that the judge's failure to deal with paragraph 281 at greater detail disturbs his conclusion. For the reasons I have given above, the consideration of paragraph 281 was nugatory because the application fell to be dismissed under paragraph 320.

10. As regards Article 8, Judge Fox wrote at [19]:

> I have considered the appellant's claim under the Human Right Act 1998, Article 8 (sic). I find that the UK government, in its exercise of a fair and firm immigration policy has not acted disproportionately in refusing a visa for entry. There has been family life which could be interfered with but only in an entirely proportionate manner.

11. The brief dismissal of the Article 8 ECHR appeal may be open to criticism but one should remember that Judge Fox was here dealing with a paper appeal of an out of country appellant and that the main thrust of her grounds of appeal concerned the refusals under the Immigration Rules. The parties do not dispute that the Article 8 ECHR appeal should be considered on the basis of proportionality. Although the judge found that there was family life between the sponsor and his wife, the absence of compelling reasons indicating that their family life could only be continued in the United Kingdom together with the appellant's own very poor immigration history amply justified the dismissal of the appeal on human rights grounds. The judge could have dealt with the circumstances of the appellant and sponsor as regards Article 8 ECHR at greater length but, had he done so, the outcome would have been the same. In the circumstances, I do not intend to disturb his determination.

DECISION

This appeal is dismissed.

Signed Date 28 October 2013

Upper Tribunal Judge Clive Lane