IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/17246/2013

THE IMMIGRATION ACTS

Heard at UT (IAC) Birmingham Employment Centre On 13th March 2015	**Determination Promulgated On 25th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS MOYMUNA KHATUN KOLSUM BIBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – DHAKA

Respondent

Representation:
For the Appellant: Mr Tony Muman (Counsel)
For the Respondent: Mr David Mills (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge T Thorne, promulgated on 10th June 2014, following a hearing at Nottingham on 28th May 2014. In the determination, the judge dismissed the appeal of Ms Moymuna Khatun Kolsum Bibi. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Bangladesh, who was born on 4th June 1942. She appealed against the refusal of entry clearance for the purposes of making a three week visit to see her son, Mr Abu Saleh Sattar, in the UK under paragraph 41 of HC 395, in a decision dated 11th November 2010. This decision letter states that,

> "I note that you made an application for entry clearance on 16th May 2006. This was refused on 17th May 2006. You have failed to disclose this on your application form. I also note that in 2006 you gave your mother's name as Saleha Begum. On this occasion your passport states that your mother is Mulluk Chan Bibi. Your current passport was issued on 29th June 2010. I am therefore satisfied that you have withheld a fact material to your application and have used deception in an attempt to disguise your previous refusal. As such I have refused your application under paragraph 320(7A) of the Immigration Rules."

The Judge's Findings

3. The judge recorded evidence from Mr Abu Saleh Sattar, the Appellant's sponsoring son in the UK, who "explained that the Appellant's mother was (supposedly like many people in Bangladesh) known by two names. She was called both Mulluk Chan Bibi and as Saleha Begum" (paragraph 21).

4. The judge held, however, that the Appellant had never appealed the previous refusals, which were based upon the Appellant's alleged deception, and therefore they must implicitly amount to a recognition and acceptance by the Appellant that she had indeed set out to deceive. But more importantly, the judge also held that,

> "In 2010 the ECO made clear and unambiguous allegations that the Appellant had committed a deception by not declaring the previous refusal of her previous application. I have seen no evidence to rebut the allegation that you failed to declare the previous refusal. I have seen no witness statement from her denying that she failed to make such a declaration and the Sponsor is not in a position to deny it either. In those circumstances I am satisfied that it has been proved to the standard required that no such declaration was made." (Paragraph 28)

5. The judge held that the requirements of deception as set out in **AA (Nigeria)** were satisfied. The judge did then go on, independently, to consider paragraph 41 (from paragraphs 30 to 34) and dismissed the appeal on this basis as well.

Grounds of Application

6. The grounds of application state that the fact that the previous refusals were not appealed does not mean that the Appellant had accepted the alleged deception having been made by her.

7. On 15th December 2014, permission to appeal was granted on the basis that the failure to challenge a previous allegation could not amount to an acceptance of that for the purposes of paragraph 320. Moreover, the Tribunal also came to an irrational conclusion if you took the view that there were no declarations made by either the Appellant or her sponsoring son in the UK to depart from what was being said. Furthermore, the Tribunal failed to take into account material evidence, from Abu Saleh Sattar, about the reasons for the two different names. If the Tribunal's findings in relation to the issue of deception were flawed, then these arguably affected the separate findings that the Tribunal made from paragraph 30 onwards in relation to paragraph 41 of HC 395.

8. A Rule 24 response was entered on 8th January 2015, where it was accepted that the Tribunal had plainly been wrong in stating that the failure to challenge previous decisions amounted to an acceptance of those decisions. Nevertheless, the fact that the Appellant was 72 years old, a widow, and lived in a house not owned by her, entitled the judge to come to the conclusions that he did.

Submissions

9. At the hearing before me on 13th March 2015, Mr David Mills, appearing on behalf of the Respondent, stated that he would have to accept that a failure to challenge a previous decision did not amount to an acceptance of deception given what was said under paragraph 320(a) of HC 395. The problem, submitted Mr Mills, was that this 2010 application was not on file. It was not before the First-tier Tribunal Judge and it was not before the Upper Tribunal today either. It was probably somewhere online. If an adjournment could be granted, then it could probably be traced.

10. Second, however, Mr Mills also wisely accepted, that even in the event of this 2010 application being traced, it was unlikely that, without clear intention to deceive the authorities, the burden of which lay upon the Respondent authority, the Appellant could not be said to be guilty of exercising deception.

11. For his part, Mr Muman submitted that he could not accept the application for an adjournment. This is because on 10th June 2013 an application was filed. There were two further hearings. The second hearing came up before Judge Thorne. He did not have the 2010 application. The Home Office had notice of the appeal. The Appellant expected the 2010 application to have been produced today. His primary witness, Mr Abu Saleh Sattar, ran a dental practice, and it was very difficult for him to take time out to attend hearings, and it simply was not acceptable to adjourn on an issue that was relevant to the Respondent authority.

12. Mr Muman referred to his latest six page bundle, which sets out the nature of the alleged deception, because there are three refusals. The first refusal was in 2005, the second refusal was on 17th May 2006, and the third refusal was on 11th November 2010. There was nothing there that could be said to indicate that the Appellant was proven to have exercised deception. The alleged deception, in any event, is based upon confusion over the use of two names, that of Saleha Begum and that of Mulluk Chan Bibi. The Appellant's son had given an explanation before Judge Thorne, and if that explanation was not accepted, it was for the Respondent authority to show that there was deception. For today, the Appellant herself had furnished an affidavit to explain that the use of two names in this way was entirely plausible and the affidavit came from Bangladesh.

Error of Law

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. The error of law is clear for reasons given in the grant of permission. Both paragraph 27 and paragraph 28 are misconceived in the determination. At paragraph 27, the judge states that the 2010 decision was never appealed and that "in those circumstances I conclude that the Appellant cannot go behind the decision and seek to re-litigate the finding by the ECO that deception was used" (paragraph 27).

14. Even the Rule 24 response accepts this to be plainly wrong. At paragraph 28, it is said that "in 2010 the ECO made clear and unambiguous allegations that the Appellant had committed a deception by not declaring the previous refusal of a previous application" (paragraph 28).

15. It is, however, under **AA (Nigeria)**, for the Respondent authority to show how this amounted to a deception that was deliberate and intended. This has not been done. There is no reason why the explanation given with respect to the use of two names is not, on the face of it, entirely plausible.

Remaking the Decision

16. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the evidence and submissions that I have heard today. The evidence that I heard today was from Mr Abu Saleh Sattar, who adopted his witness statement of 23rd April 2013 and of 23rd May 2014 (see pages 1 to 3). In cross-examination, he explained that the purpose of his mother's visit to the UK is to see his grandchildren because he and his wife are both working full-time in the dental practice and it is not easy for them to go and visit the mother there.

17. As to her position in Bangladesh, he explained that she had two brothers and three sisters living around her. She was in good health. He would not want her to remain in the UK any longer than was necessary because he knows that he would not be able to provide her with day-to-day care, in

the way that she has in Bangladesh because both he and his wife work. He explained that he had actually built up his own home, which was a three-storey building, in Bangladesh in 1996, with the works extending into 2003. It is in this house that his mother lives. She attends to the house. It is important for the Appellant to have his mother living there where she stays in luxury.

18. In re-examination he explained that he has a cook who comes and cooks for her, and she has a maid that cleans the house. He also explained that his mother had a large number of brothers and sisters all of whom live in the area and control much of the village life where she lives. He was absolutely categorical that she would not want to stay, was in good health, and was not going to allege a change of circumstance after arrival here, because she had to return back to Bangladesh. He said that she had been widow for fifteen years but it was only from 2005 that she had first attempted to come to the UK to visit her son. She would return. It was important for her to return. On this basis, I am satisfied that this is both a genuine visit and a visit for a genuine purpose and that the requirements of paragraph 41 of HC 395 are satisfied.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

20. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 23rd March 2015