



IAC-AH-KRL-V1

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

Appeal Number: OA/21796/2013

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 23 March 2016**

**Decision & Reasons Promulgated  
On 13 April 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**ENTRY CLEARANCE OFFICER - DHAKA**

Appellant

**and**

**MR ABDUL MUKIT  
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

**Representation:**

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer  
For the Respondent/Claimant: Mr M Hossain, Counsel

**DECISION AND REASONS**

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer (post reference Dhaka/645389) from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision to refuse him entry clearance as a spouse on

the grounds, inter alia, that there had been a failure to disclose material facts in relation to his application in breach of S-EC.2.2 of Appendix FM, and that his application also fell for refusal pursuant to paragraph 320(11). The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

### **The Entry Clearance Officer's Reasons for Appealing**

2. A member of the Specialist Appeals Team settled the Entry Clearance Officer's application for permission to appeal to the Upper Tribunal.
3. If the claimant did not refute the allegations made by the Entry Clearance Officer, then the clear inference was that the claimant accepted the allegations were correct. It was therefore perverse for the First-tier Tribunal Judge to decide on behalf of the claimant that he did not deceive the immigration authorities regarding his immigration history, when the claimant himself had seemingly made no such claim. It was further submitted that the judge had failed to provide adequate reasons why the witness and the appellant were both found to be credible at paragraph [12] of the decision. For the judge simply to state that they were credible fell far short of providing adequate reasons. The judge had failed to consider in assessing credibility that the claimant had been an immigration offender in the United Kingdom. The judge failed to provide adequate reasons why it was that the Entry Clearance Officer had to provide supporting evidence for his allegations, yet the judge accepted the word of the sponsor and the claimant without hesitation and without the requirement of supporting evidence, as was clearly apparent from paragraph [44] of the decision.

### **The Reasons for the Grant of Permission to Appeal**

4. On 29 May 2015 Upper Tribunal Judge Kebede granted the Entry Clearance Officer permission to appeal on a renewed application to the Upper Tribunal, permission having previously been refused by a First-tier Tribunal Judge:

There is some arguable merit in the renewed grounds, that the judge, in concluding that the [Entry Clearance Officer] had failed to discharge the burden of proof, arguably erred by rejecting the [Entry Clearance Officer's] unchallenged allegation of deception, as appears at paragraph [25] of his decision, which in turn arguably infected his overall findings.

### **The Hearing in the Upper Tribunal**

5. At the hearing before me, I received extensive submissions from both Mr Wilding and Mr Hossain on the question of whether an error of law was made out and, if so, how the decision should be remade.

## **Relevant Background**

6. In his application form, the claimant left blank question 3 which asked him about other names, including any names that he was known by and/or other names that he had been known by.
7. In the refusal decision, the Entry Clearance Officer set out the claimant's adverse immigration history. He was issued with a work permit for one year for the period 8 June 2006 to 8 June 2007 in the name of Abdul Mukit with a date of birth of 28 June 1977. He did not leave the UK when required to do so on expiry of his visa. UK records of biometric fingerprints showed that on 19 January 2011 he was encountered by UK Immigration and found to be working illegally for Seagull International Foods. The Entry Clearance Officer gave a Home Office reference of M1438547. The identity and date of birth given by him at that time was Abdul Malik (d.o.b. 16 June 1980). He stated that he had entered the UK illegally with the aid of an agent who had arranged a passport and identity for him.
8. On 14 January 2011 he was granted temporary admission and requested to report on a regular basis to Loughborough Reporting Centre. He did not report as requested and he was recorded as an absconder in March 2011.
9. According to UK records and by his own admission, he had applied for leave to remain as a spouse in November 2012, having undertaken an Islamic marriage ceremony in July 2012. The application was refused both initially and also on reconsideration. The second refusal decision was issued on 19 March 2013. He was again subject to removal. The Entry Clearance Officer gave a different Home Office reference for this.
10. The claimant left the UK voluntarily on 9 June 2013 using a Bangladesh travel document, claiming that his original passport had been lost. His spouse travelled with him to Bangladesh and they had entered into a civil ceremony in Bangladesh on 17 June 2013.
11. His Counsel, Mr Hossain, settled lengthy grounds of appeal. At paragraph 9, he said that his lay client had disclosed all material information about his identity when applying for leave to remain on 8 November 2012. The Home Office had been informed that while the claimant's name was recorded as being Abdul Malik, in fact his name was Abdul Mukit. He was also known as Abdul Malik and Malik was his nickname. His friends and relatives called him Malik. His lay client asserted that his name and date of birth were not recorded correctly when he was encountered by UKBA.
12. In the ECM appeal review, the Entry Clearance Manager noted the solicitor's explanation that the claimant's nickname was Abdul Malik, and that this was what his friends and family called him, instead of his real name, Abdul Mukit:

It is unclear why the claimant would give a government official his nickname instead of his real name. Furthermore, it is clearly asked on the Visa Application Form if you are known by any other names, and the claimant left this blank.

13. The Entry Clearance Manager also noted that the solicitor had been selective about the parts of the claimant's immigration history that he mentioned. He did not mention the overstaying, the fact that he was caught working illegally in 2011, and that he lied to the officer, telling them that he had entered the UK illegally through an agent. He did not mention that the claimant was then given reporting conditions which he disobeyed, and was thus recorded as an absconder when he failed to report.

### **The Hearing Before, and the Decision of, the First-tier Tribunal**

14. The claimant's appeal came before Judge Malone sitting at Taylor House on 31 October 2014. Mr Hossain appeared on behalf of the claimant, and there was no appearance on behalf of the Entry Clearance Officer.
15. In his subsequent decision, the judge noted at paragraph [11] that the issues before him included the question of whether the marriage between the claimant and the sponsor Ms Bibi was genuine and subsisting, and that they intended to live together permanently as husband and wife.
16. The judge began his findings at paragraph [12]. His first finding was that Ms Bibi was an honest and reliable witness. He accepted her oral and written evidence, as he did the written evidence of the claimant contained in his witness statement of 28 October 2014.
17. The judge went on to make findings about the claimant's immigration history. He accepted that the claimant was encountered while working illegally on 19 January 2011, having overstayed from 8 June 2007. He also found that he had been given temporary admission on 14 February 2011. On the question of whether the claimant had absconded, he merely found that this is what the Entry Clearance Officer had alleged.
18. At Paragraph [23] he addressed the allegation made in the refusal decision that the claimant had given the name Abdul Malik when encountered working illegally. He observed that it was clear from paragraph 13 of his witness statement that the claimant denied ever having given a name other than Abdul Mukit or a date of birth other than 28 June 1997, when he was apprehended in January 2011. He continued in paragraph [24] that the only evidence he had in support of the ECO's decision was the decision itself. As the claimant denied the allegation which the ECO had made, he found that the ECO had failed to discharge the burden of proving on the balance of probabilities that the claimant had provided the immigration authorities in the United Kingdom with a false name and date of birth.
19. At paragraph [25] the judge found that although the claimant did not expressly refute the allegation that he told the immigration authorities that he had entered

illegally with the help of an agent, he found that there was no adequate evidence to support that allegation either. Again, all he had to go on was an unsigned notice of refusal containing the allegation. There was therefore no properly evidenced allegation that the claimant was obliged to deny.

20. At paragraph [28] the judge addressed the claimant's failure to answer question 3 of his VAF. He disagreed that the claimant should have recorded his nickname in answer to this question. His reading of question 3 was that it did not require an applicant to record a nickname that he or she had acquired over the years. At paragraph [30] he found that the ECO had failed to prove the allegation that in March 2011 the claimant had absconded. There was nothing other than the unsigned notice of refusal to support the allegation.

### **Reasons for Finding an Error of Law**

21. The evidence given by the claimant in his witness statement mirrored the case which had been advanced by Mr Hossain in the grounds of appeal. Accordingly, the claimant did not deny most of the details of the adverse immigration history attributed to him by the Entry Clearance Officer in the refusal decision. The claimant's silence on these matters was particularly significant in the light of the fact that in the ECM appeal review the Entry Clearance Manager had drawn attention to the fact that most aspects of the asserted adverse immigration history of the claimant were not disputed in the grounds of appeal. Since the claimant had not disputed most of his adverse immigration history by way of appeal, the judge should have treated the Entry Clearance Officer as having discharged the burden of proof on these matters. Effectively, the claimant's case was one of confession and avoidance. It was not a case of denial. Apart from what he was alleged to have said when encountered working illegally, he did not dispute the Entry Clearance Officer's account of his adverse immigration history. What he heavily relied on was the fact that he had eventually decided to go back voluntarily, and therefore (he contended) he did not come within the scope of paragraph 320(11).
22. On the topic of the alleged false information which he had given when encountered working illegally, the judge misunderstood the claimant's evidence and also failed to engage with the fact that there was a fundamental inconsistency in his case which inevitably undermined his general credibility.
23. The claimant's evidence fell into two parts. In the first part, he effectively confessed to having given the "alternative" name of Abdul Malik when encountered in January 2011. But he relied in mitigation on the fact that he had come clean about this in his application of November 2012. The thrust of his evidence was that he had explained in the November 2012 application that although the Home Office believed him to be Abdul Malik (because that was the name he had given when encountered), his real name was Abdul Mukit. The other mitigating factor that he sought to rely upon was the proposition that Abdul Malik was not a false name, but a nickname which was used by friends and relatives.

24. The Entry Clearance Manager did not find this to be a credible explanation, and the judge wholly failed to engage with his concerns in this regard.
25. The second part of the claimant's evidence in his witness statement contradicted the first part. The second part of his evidence was simply that his name and date of birth had been wrongly recorded by the Home Office when he was encountered. But if, as he previously claimed, Abdul Malik was a true nickname by which he was genuinely known, it followed that his name had not been incorrectly recorded by the Home Office when he was encountered working illegally.
26. The judge's finding at the end of paragraph [23] that it was "clear" from paragraph 13 of the witness statement that the claimant denied having given a name other than Abdul Mukit, or a date of birth other than 28 June 1977, when he was apprehended in January 2011 is perverse. The claimant's evidence was manifestly incoherent and self-contradictory.
27. In light of the claimant's evidence that he was known by the nickname Abdul Malik, it was perverse of the judge to find that there was no material non-disclosure in the claimant leaving blank the answer to question 3 of his VAF. As it was the claimant's case that he was genuinely known by the name of Abdul Malik, there was no conceivable excuse for him not inserting the name Abdul Malik in answer to question 3 of his VAF. On the claimant's case, it was an alternative name by which he was known by.
28. Accordingly, the judge's findings on paragraph 320(11) and on the suitability requirement in Appendix FM are vitiated by a material error of law, such that the decision appealed against must be set aside and remade.
29. Before moving on to considering how this appeal should be disposed of, it is necessary to consider whether ground 2 is also made out. The judge had the benefit of receiving oral evidence from the sponsor. Her evidence was, it appears, wholly directed at the question of whether the marriage was genuine and subsisting at the date of the refusal decision. So the adverse credibility implications of the claimant's adverse immigration history, and also the incoherent and inconsistent evidence which he had given on the topic of what he had told Immigration Officers when encountered, did not necessarily impact on the probative value of the sponsor's evidence. Although the judge's finding at paragraph [12] is wholly unreasoned, later on in his decision, at paragraphs [37] to [44], he supports this finding by reference to external evidence such as a utility bill dated 20 May 2013 with the claimant's name on it, which was addressed to him at Ms Bibi's address. He also referred to a tenancy agreement which recorded the tenants of the property as being the claimant, Ms Bibi and Ms Bibi's mother. As was observed by the judge, it was not disputed that Ms Bibi had travelled out to Bangladesh in order to marry the claimant. In oral evidence, Ms Bibi told the judge that she spoke to the claimant every day on the telephone and also spoke to him on WhatsApp.

30. I consider that it was open to the judge to find, for the reasons that he gave, that, from her perspective, Ms Bibi was in a genuine and subsisting marital relationship with the claimant, and that she genuinely wished him to join her in the United Kingdom so they could live together permanently here as husband and wife while she carried on being a carer for her mother.
31. But in the light of the judge's flawed acceptance of the claimant's general credibility, the judge did not give adequate reasons for finding that the marriage was genuine and subsisting from the perspective of both parties to the marriage.

### The Remaking of the Decision

32. In the light of my reasons for finding an error of law, I find that the Entry Clearance Officer has discharged the burden of proving that the application for entry clearance fell to be refused on the mandatory ground that the claimant had knowingly failed to make material disclosure of the fact that, according to him, he was also known by friends by the name Abdul Malik, and indeed he had given this name to the Home Office in January 2011.
33. The Entry Clearance Officer has also discharged the burden of proving that it was a reasonable exercise of discretion to refuse the application under paragraph 320(11). The claimant was an overstayer, as he admits, and there were aggravating circumstances in his immigration offending. It is likely that as well as giving the name Abdul Malik, rather than his real name of Abdul Mukit, when encountered working illegally in January 2011, he also gave a false date of birth and a false account of his true immigration history. It is also likely that he did not report as requested, and that he was recorded as an absconder in March 2011 making him subject to removal from the UK as an absconder. I find that the claimant has previously significantly contrived to frustrate the intentions of the Immigration Rules, and so paragraph 320(11) applies to him. I take into account **PS (India) [2010]**, but I do not consider that the claimant's voluntary return to Bangladesh sufficiently mitigated his disregard for the UK Immigration Rules so as to make it inappropriate for the Entry Clearance Officer to exercise his discretion other than in the normal way by refusing the application on 11 November 2013. At that time, the claimant had only been in Bangladesh some six months, since June 2013. His application for entry clearance as a spouse was made on 21 August 2013. In light of his adverse immigration history, he did not have a legitimate expectation of being granted entry clearance so soon after his voluntary departure. Having regard to paragraph 320(7B) of the Rules, the claimant needed to wait for at least one year before applying for entry clearance, and even then he could only expect to be admitted if he was treated as an ordinary overstayer with no aggravating circumstances.
34. It is regrettable that nearly two and a half years have elapsed since the refusal decision, and so the effective period of the claimant's exclusion is now some three years. But I must assess the circumstances as they appertained at the date of the refusal decision.

35. Accordingly, the claimant's appeal fails under the Rules. Turning to an alternative claim under Article 8, I accept that questions 1 and 2 of the **Razgar** test should be answered in the claimant's favour. Questions 3 and 4 of the **Razgar** test should be answered in favour of the respondent. On the crucial question of proportionality, I take into account the relevant considerations of Section 117B of the 2002 Act. It is a point in the claimant's favour that there is no appeal from the finding of the First-tier Tribunal Judge that he is going to be adequately maintained and accommodated in the United Kingdom without recourse to public funds. It is also likely that the claimant speaks English with reasonable fluency, having lived in the UK for seven years. Even assuming in the claimant's favour that the marriage was, and continues to be, genuine and subsisting from the perspective of both parties to the marriage, the refusal of entry clearance was proportionate in November 2013 having regard to the claimant's non-compliance with a mandatory suitability requirement in Appendix FM and also the fact that his application fell for refusal under paragraph 320(11). The interference with family and private life was proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls. It is open to the claimant to re-apply in what will now be more propitious circumstances, as the public interest in excluding him as a serious immigration offender is diminished, and arguably assuaged, by the lengthy period of exclusion which he has now served.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal against refusal of entry clearance is dismissed under the Rules and also under Article 8, ECHR.

I make no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson

### **TO THE RESPONDENT** **FEE AWARD**

As I have dismissed this appeal, there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Monson