Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05720/2016

THE IMMIGRATION ACTS

Heard at Field House	**Oral Decision & Reasons Promulgated**
On 14 November 2018	**On 7 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR VALTER PEPNIKA
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr A Tinsley, Counsel instructed by Central Law Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the determination of First-tier Tribunal Judge Iqbal promulgated on 7 June 2017 in which she allowed the appeal of Valter Pepnika against the decision of the Entry Clearance Officer refusing him entry clearance to join his partner in the United Kingdom. The determination was made and promulgated on 6 March 2018. For the sake of continuity, Mr Pepnika will continue to be referred to as 'the appellant'.

2. I have earlier made a decision that, in reaching the conclusion that she did, the judge materially erred in law such as to necessitate the

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determination being set aside. The basis for that decision was that one of the requirements of the Immigration Rules permitting a person to enter the United Kingdom was that the applicant had passed an English language test with a provider approved by the Secretary of State and that simply had not been done, as far as the judge knew, because there was no test certificate. The sponsor's evidence had been that a test was booked for 27 May 2017 and that they had previously tried to get an earlier test date on a number of occasions but had failed. In finding that there was an error of law, I determined that it was not open to the judge to set aside the requirements of the Rules, in effect waiving those requirements, when there was no reason why such a test could not have been provided.

3. I need not repeat what I said in directing that the decision be remade. Suffice it to say nothing has been submitted to me during the course of today to indicate that, as a matter of principle, I was wrong in that.

4. However, things took a rather unusual turn. When the matter came before me on 8 June 2018, when I anticipated remaking the decision afresh, Mr Tinsley, who appeared on behalf of the appellant then, as now, said on instructions that there was a test certificate. The test had been taken on 27 May 2017 and the test certificate had been issued on 30 May 2017. It was duly forwarded to the Tribunal on 30 May 2017. That was particularly material in that the decision of First-tier Tribunal Judge Iqbal followed a hearing that took place on 23 May 2017, in other words predating the certificate, but the decision was not promulgated until 7 June 2017 by which time the certificate had been issued and, not only that, forwarded to the Tribunal. Since a determination speaks from the date that the decision is promulgated the fact that the judge operated on the basis that there was no certificate, when there was a valid certificate, clearly undermined the process that she adopted and greatly affects the approach adopted by her which sought to circumvent the requirement to meet the Rules when in fact there was no such need because that certificate had been provided.

5. The issues that concerned me was whether the appellant was entitled to rely upon evidence which postdated the decision by the Entry Clearance Officer but predated the determination of the First-tier Tribunal Judge. I am satisfied that my original reservations were based on established case-law involving entry clearance applications and whether it was permissible to examine on appeal material that was not before the Entry Clearance Officer. Reliance could have been placed upon such cases as *SSHD v SS (Congo)* [2015] EWCA Civ 387 and *AS (Somalia) v Secretary of State* [2009] UKHL 32 in which very different considerations applied because of the way that the legislation was then couched. In such circumstances, and in particular upon consideration of s.85 of the Nationality, Immigration and Asylum Act 2002 as it then was, there was a statutory ban upon a subsequent Tribunal taking into account material which post-dated the decision under appeal.

6. That situation now appears to be changed by what are the new provisions of s.85 introduced by amendment contained in s.15 of the Immigration Act 2014. The right of appeal to the Tribunal is now permitted where the

Secretary of State has decided to refuse a human rights claim. The grounds of appeal must be brought on the ground that the decision is unlawful under s. 6 of the Human Rights Act 1998. That places a requirement necessitating a new look on the old s. 85. That now provides at (4)

> On an appeal under section 82(1) … against the decision [the Tribunal] may consider...any matter which [it] thinks relevant to the substance of the decision including…a matter arising after the date of the decision.

7. Accordingly, there does not seem to be any limitation as there formerly was on dealing with evidence which postdates the decision. That is probably understandable in the context of an Article 8 claim. Article 8 is always concerned about whether removal would violate an individual's human rights and therefore always speaks not from the date of the decision but from the date of the hearing. It is therefore logical to see that s. 85(4), as it is now drafted, does not contain the same limitation on the admission of evidence that it formerly contained.

8. In the course of the hearing this morning I was invited to grant permission to admit the evidence of the certificate that was submitted to the Tribunal on 31 May 2017. It seems to me that it would have been wholly illogical in the knowledge that there was such a certificate and that this certificate complied with the requirements of the Immigration Rules to refuse to admit it. No challenge is made to the authenticity of the certificate by the Secretary of State. In consequence we have a situation where the requirements laid down by the Secretary of State were met at the date of decision insofar as the certificate was concerned.

9. There then follows a consideration of whether there were any other matters that might properly have been raised. This itself hinges upon the general refusal grounds on the basis of suitability. At the material time these were contained in paragraph 320(11) of the Immigration Rules. They provide grounds on which entry clearance or leave to enter the United Kingdom is to be refused. That is set in ss. (11) that includes

> … where the applicant has previously contrived in any significant way to frustrate the intentions of the Rules by breaching a condition attached to his leave or by being an illegal entrant.

10. However, it is not that requirement, alone, that render the applicant unsuitable for further leave to remain or entry clearance. There has to be aggravating circumstances. Those aggravating circumstances are set out in the Rule as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the redocumentation process.

11. In the context of this case it was accepted by the appellant that he had entered the United Kingdom illegally. Consequently, that he came within the initial requirement of paragraph 320(11). He did not however breach a condition attached to his leave because, by its very nature, no leave had been granted. As far as the aggravating circumstances are concerned,

however, there was no evidence of him meeting any of the specified examples of aggravating circumstances. The evidence that was potentially open to the Secretary of State was that the appellant entered the United Kingdom and thereafter worked illegally. The British High Commission, according to a witness statement made by the appellant's wife Miss Bregu, rang the appellant in connection with the application asking him about how he entered the country and whether he had worked in the UK. He told them that he had come into the country illegally and that he had been working 'here and there':

> "Cash in hand. In fact this was at a carwash. In a year he would do about two months in total. Because his English was poor he misunderstood and told them he had been working a few days. I was the one who was working and supporting us both."

12. The non-aggravating factors, if I can put it in that way, were that he departed voluntarily and did so some two and a half years before. As such, he was intending to make his application properly. In addition, he himself is the one who volunteered to the British High Commission that he had been working. He was obviously being entirely frank. Clearly these matters go into the balance. It was for this reason that, at the hearing before the First-tier Tribunal Judge, no attempt was made to rely upon paragraph 320(11). In those circumstances it seems to me that it would be improper for me to rely upon paragraph 320(11) even if I were permitted to do so. But, on a close examination of those requirements, it appears that the appellant does not fit into the specified criteria. Although it is true he is and was an illegal entrant, he does not fall within the category of a person whose circumstances are to be treated as aggravating circumstances to the point of considering that a mandatory refusal of entry clearance was permissible under the Rules.

13. For these reasons I have come to the conclusion that since the appellant is able to rely upon the certificate which the judge at First-tier Tribunal level considered was lacking, he is able to satisfy the requirements of the Immigration Rules bearing in mind the amended provisions of s. 85 of the 2002 Act. Once that is established then there is no public interest in requiring the refusal of entry clearance, he having met the requirements of the Rules. Furthermore, although I have given consideration to whether this was a case where the fact that he entered illegally and worked unlawfully might in certain circumstances amount to a reason for refusing the appellant entry clearance under paragraph 320, in the circumstances of this case they fail to do so because they cannot be construed as aggravating circumstances. For these reasons, in re-making the decision, I substitute my own decision allowing the appellant's appeal.

DECISION

Having set aside the decision of the First-tier Tribunal, I re-make the decision allowing the appeal of Mr Pepnika.

ANDREW JORDAN

DEPUTY JUDGE OF THE UPPER TRIBUNAL