Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/14344/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 3 October 2013	**On 5 December 2013**

Before

Mr C M G Ockelton, Vice President
Upper Tribunal Judge Macleman

Between

Poh Soon Lim

Appellant

and

THE ENTRY CLEARANCE OFFICER, MANILA

Respondent

Representation:

For the Appellant: Mr Duheric, of D. Duheric & Company Solicitors
For the Respondent: Mr M Matthews, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This appeal raises a short but interesting point on the interpretation of guidance given by the Secretary of State to caseworkers in relation to the

application of the refusal provisions in paragraph 320 of the Statement of Changes in Immigration Rules, HC395.

2. The appeal before us is against the determination of Judge Blair of the First-tier Tribunal, who dismissed the appellant's appeal against the decision of the respondent on or about the 7 July 2012 refusing him entry clearance to the United Kingdom as a spouse. Permission was granted on the basis that it was arguable that the judge failed to take into account the guidance, that he failed to take care in the exercise of his discretion and that his decision under Article 8 was inadequately reasoned.

3. The appellant's immigration history came to light when he made a previous application for entry clearance as a spouse in 2011. That application was refused, and on appeal to the First-tier Tribunal Judge McGavin investigated his claims that he had not, as was asserted, failed to disclose material facts in relation to his application, or previously contrived in a significant way to frustrate the intentions of the Rules. Judge McGavin found that before the application under examination, he had made four trips to the United Kingdom, in 1995, 2003, 2007 and 2008; he had overstayed on every occasion; he had worked on every occasion without a work permit; he had received medical treatment to which he was not entitled under the National Health Service and for which he had not paid. He had disclosed only one visit on his application form in answer to the question "Please provide details of all your trips to the UK over the last ten years".

4. The appellant had met his wife in Glasgow in 2009. She has many years of experience in managing a Chinese takeaway: the appellant has many years of work as a Chinese chef and has, illegally, worked in many restaurants in the United Kingdom. The appellant's wife knew in outline about his immigration history. She asserted that she did not want to live in Malaysia. Judge McGavin did not accept that there would be any difficulty in her doing so, bearing in mind that she is well educated, able to speak English and Cantonese, and had travelled regularly to Malaysia in order to visit and in due course marry the appellant. Despite the fact that she has British nationality, there appeared to be no good reason why the couple should not be expected to make their home in Malaysia. Thus, Judge McGavin found that the application of the refusal paragraphs of the Immigration Rules was justified in the appellant's case, and that there was no basis under Article 8 for him to be granted entry clearance despite the provisions of the Rules.

5. There was, so far as we are aware, no appeal against that decision. The present application was made on or about 26 June 2012. It is not said on this occasion that the application fails to disclose any material facts. Nor is it said that there are any substantive requirements of the rules relating to the admission of spouses (as they were at the date of the decision under appeal) which the appellant failed to meet. The application was refused solely on the basis of paragraph 320(11). Before setting out the terms of

that paragraph and the relevant guidance, we must set out the reasons for refusal:

> "You have applied for Entry Clearance to join your wife in the UK. You married your British wife in Malaysia in February 2011 after meeting previously in the UK.
>
> Whilst I am assessing your application on its merits, your previous immigration history is wholly relevant here and must be taken into account, since your circumstances now are largely the same as previously and your application is for the same purpose.
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> Your application for a settlement visa was refused a year ago in June 2011. You submitted an appeal but travelled to the UK anyway and sought leave to enter as a visitor instead, presumably as you had gained entry as a visitor in the past and simply remained there without permission to do so. However, being aware of your past conduct and refusal of EC, the Immigration Officer on arrival correctly refused you entry and removed you back to Malaysia.
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> Your appeal against refusal of EC was subsequently dismissed in a determination promulgated four months ago, on 17th February 2012. The Immigration Judge (IJ) upheld the refusal under both paragraph 320(7A) and 320(11) as well as concluding that the decision was entirely proportionate under Article 8 of HRA.
>
> Given this recent ruling, I am satisfied that his findings are pertinent and relevant to this application.
>
> I am satisfied that your application still falls to be refused under paragraph 320(11) in that you contrived in a significant way to frustrate the intentions of the Immigration Rules. The IJ found, as I do, that your previous conduct constituted aggravating factors grave enough to sustain refusal gaining entry each time as a visitor on a new passport and remaining in the UK for a number of years, entering with the specific intention of working and living there, only leaving briefly to visit Malaysia. You never once sought to regularise your stay in the UK but brazenly worked illegally and availed yourself of free medical treatment on a number of occasions, including surgery, which you have not paid for to-date and have no intention of paying for. The fact that you failed to give full disclosure in your previous settlement application (the IJ upheld refusal also under paragraph 320(7A)) and gained entry as a visitor several times by deceiving Immigration Officers on arrival of your real intentions demonstrates a determined and specific intent to deceive. Continual breaches were committed and knowingly over a considerable period and on several occasions. Even after refusal of EC you tried to gain entry again claiming to be a visitor only. UKBA guidelines by which 320(11) should be applied for your aggravating circumstances include actions such as:
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> - absconding;
> - not complying with temporary admission / temporary reporting conditions / bail conditions;
> - not complying with reporting restrictions;

- failing to comply with removal directions after port refusal of leave to enter;
- failing to comply with removal directions after illegal entry;
- previous working in breach on visitor conditions within short time of arrival in the UK (that is, pre-mediated intention to work);
- previous recourse to NHS treatment when not entitled;
- previous receipt of benefits (income, housing, child, incapacity or otherwise) or NASS benefits when not entitled;
- using an assumed identity or multiple identities
- previous use of a different identity or multiple identities for deceptive reasons;
- vexatious attempts to prevent removal from the UK, for example, feigning illness;
- active attempt to frustrate arrest or detention by UK Border Agency or police;
- escaping from UK Border Agency detention;
- switching of nationality;
- vexatious or frivolous applications

As you will freely acknowledge, several of the above apply to you. I acknowledge that your wife is now pregnant. However, as the IJ stated in his report, your wife has travelled frequently to Malaysia. English is the administrative language of the country and she speaks Cantonese, as do you. You both have experience in catering and there is no reason why you could not seek work there. Your wife has stated that she does not wish to live in Malaysia but her personal choice is simply that and not one of necessity; this does not mean you should therefore be granted entry clearance to reside in the UK or that I should be persuaded that any previous refusal under paragraph 320(11) is no longer proportionate. I am also satisfied, as was the IJ, that any potential breach of Article 8 by refusing this application is proportionate. There is nothing to prevent you and your wife pursuing family life in Malaysia.

I have therefore refused your application because I am not satisfied, on the balance of probabilities, that you meet all of the requirements of the relevant Paragraph of the United Kingdom Immigration Rules."

6. After the appellant had given notice of appeal against that decision, his file was reviewed by an entry clearance manager, who wrote as follows:

"The applicant has previously been to the UK as a visitor on four separate occasions, on different passports, and on each occasion has overstayed and worked illegally. He made a similar application last year which was refused with the appeal being dismissed by the Immigration Judge. The only argument put forward in the grounds is that there have been no further breaches but given that the applicant has been denied entry into the UK this is hardly surprising. In addition, I do not accept that Article 8 has been breached as the sponsor is a Malaysian national who could easily relocate to Malaysia and settle with the applicant if she wished to."

7. At the date of decision under appeal, paragraph 320(11) of the Immigration Rules was as follows:

> "**Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused**
> ...
> (11) Where the applicant has previously contrived in a significant way to frustrate the intentions of these Rules. Guidance will be published giving examples of circumstances in which an applicant who has previously overstayed, breached a condition attached to his leave, been an Illegal Entrant or used Deception in an application for entry clearance, leave to enter or remain (whether successful or not) is likely to be considered as having contrived in a significant way to frustrate the intentions of these Rules. "

8. Guidance was indeed published. The "examples" are set out in the notice of decision. The Guidance also included general remarks, which, we observe, were, at the date of the decision, substantially different from the remarks considered by the Tribunal in PS [2010] UKUT440 (IAC). The passage of particular relevance is as follows:

> "**RFL7.4 Aggravating Circumstances and Appeal Determinations**
> Full consideration must be given to an applicant's UK immigration history, including any appeal determinations, since it is aggravating circumstances which have occurred after the appeal determination which should be considered."

9. The simple submission which Mr Duheric makes in relation to paragraph 320(11) is that there was no occasion to apply it to this appellant. There had been no "aggravating circumstances" "after the appeal determination" of Judge McGavin. Whatever paragraph 320(11) and the substantive part of the associated guidance might say, the wording at RFL7.4 prevented the Entry Clearance Officer and the Entry Clearance manager from doing what they did, that is to say in taking into account the appellant's immigration history before his previous appeal.

10. Like the First-tier Tribunal Judge, we have no doubt that the appellant's submission is to be rejected.

11. First, this is not a case where the Guidance clearly and unambiguously carries the sense proposed by the appellant. In order for it to have the meaning proposed, the word "only" would have to be inserted before "aggravating", and the words up to and including "since" would have to be omitted or explained. The truth of the matter is that there is no "only", and the opening phrases of the Guidance show why: the reason is that "full consideration must be given to an applicant's UK immigration history".

12. Secondly, the interpretation proposed by the appellant would necessarily have an effect not otherwise foreshadowed in the Rules or the Guidance,

that is to say that an appeal, whether successful or not, would for all time prevent the Secretary of State from taking a previous immigration history, however bad, into account for the purposes of paragraph 320(11). In other words, any appeal decision would cast a veil of innocence over the darkest immigration crimes.

13. Thirdly, and as a consequence, if the Guidance bore the meaning proposed by the appellant, any individual with a bad immigration history could remove it from an officer's further consideration by the simple process of obtaining an adverse immigration decision and appealing against it. Thus, a person clearly subject to paragraph 320(11) could remove the effect of that sub-paragraph by the simple process of applying, being refused (probably under that sub-paragraph), appealing, losing, and applying again.

14. That cannot be right. If the Guidance clearly and unambiguously led to that conclusion we might be compelled to recognise it, but, as we have said, that is not the case here, and we see no good reason to interpret the Guidance in a way which requires modification of its wording, omission of nearly half the sentence in question, and would lead to absurd results. Whatever the part of RFL7.4 after the word "sense" means, it does not mean that.

15. No alternative meaning has been proposed, and as a result there is no further basis for an argument that the Entry Clearance Officer's decision is bad for failure to take into account applicable guidance. The first ground of appeal accordingly fails.

16. The second ground of appeal was that the First-tier Tribunal Judge failed to take proper account of the guidance given in PS. As we have already noted, the version of paragraph 320(11) considered in PS was not that under consideration here, and PS may also be distinguished because that was a case where there had been no consideration at all of the relevant paragraph by the officer who made the decision under appeal. In any event, it is perfectly clear that the First-tier Tribunal Judge took into account relevant factors and in addition appreciated that his task was to consider whether the discretion should be exercised differently. What he said was this:

> "In that regard it was noteworthy there are multiple breaches of immigration control in this case all of which Immigration Judge McGavin and I consider to be serious and only a short time has passed since her decision was promulgated. The respondent was plainly aware that there had been no breaches since the incidents in question but in my view the balance struck by the respondent was still open to the respondent given that the breaches were many, were aggravating and were relatively recent and also only relatively recently judicially established by Judge McGavin. I could see no basis for my exercising discretion differently."

17. That paragraph discloses no error of law.

18. The third ground was that the judge gave inadequate reasons for rejecting the claim under Article 8. In his submissions to us Mr Duheric attempted to formulate a claim that s.55 of the Borders, Citizenship and Immigration Act 2009 applied to the present appeal. That section is headed "Duty Regarding the Welfare of Children", and as this is an appeal against a decision refusing entry clearance, the relevant date is the date of the decision. At that date there was no relevant child in being: the daughter of the appellant and his wife was born on 20 November 2012. Section 55 imposes no duties in respect of unborn children.

19. In any event, there was little evidence upon which a finding in the appellant's favour under Article 8 could be made. It was clear that the appellant's wife did not want to live with him in Malaysia, although she had been prepared to travel there. There was, however, no evidence showing why the appellant's case was one in which, despite his immigration history, it would be disproportionate to expect this transnational couple to live in Malaysia rather than the United Kingdom. The judge clearly took into account the facts which were in evidence before him. His conclusion that he was not persuaded that the Entry Clearance Officer's decision was disproportionate was, in the circumstances, virtually inevitable. The reasons he gave amounted to a conclusion that the appellant had not made his case under Article 8, and, in the circumstances of this case, that was, in our judgement, a perfectly adequate way of dealing with that issue.

20. For these reasons we conclude that the First-tier Tribunal made no error of law. The appeal to this Tribunal is dismissed.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER
Date: 18 November 2013