Upper Tribunal
(Immigration and Asylum Chamber)

SD (paragraph 320(11): Forgery) India [2010] UKUT 276 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 29 June 2010

Before

Mr C M G Ockelton, Vice President
Senior Immigration Judge Roberts

Between

SD

Appellant

and

ENTRY CLEARANCE OFFICER, CHENNAI

Respondent

Representation:

For the Appellant: Mr Karim, instructed by MA Consultants
For the Respondent: Mr Nate, Home Office Presenting Officer

If an application for entry clearance is refused on the ground of forged documents in a previous application, the Entry Clearance Officer has the burden of proof. If there was (in relation to the previous application) no judicial determination of the issue, and no relevant admission, there will need to be

evidence to establish that the documents used in the previous application were forged.

DETERMINATION AND REASONS

1. The Appellant is a national of India. She appealed to the First-Tier Tribunal, or the Asylum and Immigration Tribunal as it then was, against the decision of the Respondent Entry Clearance Officer on 4 June 2009 refusing her application for entry clearance as the spouse of the sponsor. The Immigration Judge dismissed her appeal, but she succeeded in her application for permission to appeal to the Upper Tribunal.

2. The Appellant's application for entry clearance was not her first. A previous application had been refused on 5 December 2008. The ground for refusal in that case was that false bank statements had been submitted in support of the application. There was no appeal against that decision but instead a new application was made, which was refused as we have indicated.

3. The Entry Clearance Officer in refusing the application indicated that he was satisfied that the parties were formally married to one another. He reached no clear conclusion on the other requirements of paragraph 281 of the Statement of Changes in Immigration Rules, HC 395, but concluded his notice of refusal with the following words:

> "At section 2.6 of your application form you have clearly stated that the passport provided for this application is your first passport. However I am aware that you were recently refused entry clearance with a different passport. You have offered no credible explanation as to why you have not declared your previous passport. I am therefore satisfied that you have made a false declaration on your application form.
>
> I further note that your previous application for entry clearance was refused, as the Entry Clearance Officer was satisfied that bank documents provided by you were not genuine. The submission of such documents seriously damages the credibility of your application. Given that you have today made a false declaration on your application form and that you have previously submitted forged documents I am satisfied that you have previously contrived in a significant way to frustrate the intentions of the Immigration Rules. Any future application will automatically be refused for a period of 10 years since your last application, unless a concession applies.
>
> I therefore refuse your application."

4. That refusal was perceived by those representing the Appellant as principally under paragraph 320(11) of the Immigration Rules which permit entry clearance to be refused (the precise phrase is "grounds on which entry clearance or leave to enter the United Kingdom should normally be refused") as a matter of the Entry Clearance Officer's discretion:

> "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."

5. In presenting the case before the Immigration Judge those representing the Appellant recognised that it would not be sufficient to deal with paragraph 320 but that it would also be necessary to show that the Appellant met at the date of the decision the substantive requirements of paragraph 281. The Immigration Judge accordingly heard oral evidence from the sponsor and considered written evidence relating to the sponsor's circumstances and income and to his marriage. There was also a witness statement from the Appellant herself.

6. It is perhaps not surprising, in view of the way in which the case was evidently put before the Immigration Judge, that he devoted a considerable amount of attention to paragraph 320(11). He concluded that the Appellant had indeed submitted false documents on the previous occasion, and that the discretion implicit in paragraph 320(11) was rightly exercised against her. He went on to consider the substantive requirements of paragraph 281, and concluded that he was not satisfied that at the relevant date the relationship between the Appellant and the sponsor was correctly described a subsisting marriage, or that the Appellant could meet the maintenance and accommodation requirements of that paragraph. He accordingly dismissed the appeal.

7. The grounds of appeal to the Upper Tribunal raise two discrete matters. The first is that the Immigration Judge erred in law in his conclusions on the evidence relating to the substantive requirements of paragraph 281. As presented before us today by Mr Karim, the arguments are that the Immigration Judge firstly failed to make findings on relevant issues on which he was obliged to make findings, and secondly allowed his opinion on the matters relating to paragraph 320 wrongly to infect his views as to the credibility of the sponsor who gave oral evidence before him.

8. The second ground is that paragraph 320(11) was wrongly found by the Immigration Judge to apply to this appeal in any event. We deal with that point first.

Paragraph 320(11)

9. The substance of paragraph 320(11) depends on an applicant's previous history. The reference to a previous application, or to contriving in a significant way to frustrate the intentions of the rules, necessarily refers to an event other than one connected with the present application. In this appeal the previous event referred to was by way of an assertion that forged documents had been presented in the earlier application. Mr Nate,

who represents the Entry Clearance Officer before us, accepts, and in our view entirely properly accepts, that the burden of proof that documents are forged rests on the Entry Clearance Officer. If there had been an appeal against the earlier refusal, there is no doubt at all that it would have been for the Entry Clearance Officer to establish, if he asserted it, that the bank statements were forged. But there was no appeal: and, as a result, the Entry Clearance Officer was never put to proof on that matter, and there was no judicial decision on it.

10. That history does not affect the burden of proof in relation to this appeal. If it is to be asserted in an appeal relating to a second application that documents in relation to a previous application were forged, the burden of proof remains on the Entry Clearance Officer. Of course, if there has previously been a judicial decision, or an admission, of forgery, the burden may be readily discharged. But in the present case there was, as has been accepted, no direct evidence that the documents were forged. All that there was before the Immigration Judge was the Entry Clearance Officer's assertion that a previous application had been refused for that reason. In these circumstances, that is to say where there is no evidence, the person with the burden of proof loses on that point. It is thus clear that the Immigration Judge was not lawfully in a position to find that there had been forged documents submitted on the previous application. His finding that paragraph 320(11) applied to the case was an error in law. There was simply no evidence upon which he could make that finding.

11. We turn then to the substantive issues. The Immigration Judge records some of the oral evidence that he heard in his determination. It is no doubt unfortunate that when assessing the evidence as a whole he refers to there having been "no evidence" of issues on which he had indisputably heard oral evidence. What he clearly meant was that he did not believe the oral evidence that he had heard and that there was no written evidence supporting it. The vagueness or imprecision of his terminology is certainly regrettable. But the burden of Mr Karim's submission is that the Immigration Judge's finding on paragraph 320(11) wrongly infected his judgement as to the credibility of the sponsor. Mr Karim's submission is that, having found, as he did, that the sponsor and the Appellant together had in the terms of paragraph 320(11) contrived in a significant way to frustrate the intentions of the Rules, he could not come in a proper way to the assessment of the credibility of the oral evidence before him, because his conclusion on paragraph 320(11) was itself flawed.

12. That is a submission that we do not accept. Although as we have indicated it was for the Entry Clearance Officer to establish that the documents were forged if he relied on that assertion, it was for the Immigration Judge to reach a conclusion about the credibility of the evidence before him. That is a different issue, even if the evidence related to the same fact. The Immigration Judge heard what the sponsor had to say about the previous application, as well as on some other

matters which we shall come to. Whether or not he was entitled to find that the documents were forged (and we have concluded that he was not entitled so to find), he was entitled to reach a conclusion as to whether the sponsor, who was giving evidence before him was a person who was being frank and telling the truth. It is quite clear from his determination that, for reasons given in it, he did not conclude that the sponsor was being frank and telling the truth, and it is that, rather than his flawed conclusion on paragraph 320(11) which informs (rather than infects) his conclusions on the evidence as a whole. If the case had turned on it, therefore, we should have concluded that his assessment of the evidence relating to the substantive requirements of paragraph 281 shows no material error of law.

13. It is true, as we have indicated, that his language is unfortunately imprecise in some areas, but it is undoubtedly the case that the sponsor's evidence as to contact with the Appellant herself was very incomplete in areas where one might have expected formal documentary support. For example, as we noted during the course of the hearing, the Immigration Judge points out that although the sponsor said that he had been to India some six or seven months before the hearing, and had spent two to two-and-a-half weeks there, he did not at the hearing provide his passport in support of that assertion; there was no evidence that any time he had spent in India had been spent with the Appellant or pursuing married life; and in addition there was, as it happens, before the Immigration Judge, a letter dated six or seven months before the hearing in which the sponsor said that he had not been able to go to India or to take any leave from his job in order to do so.

14. So far as maintenance and accommodation are concerned, what was before the Immigration Judge was a selection of payslips, an employer's letter, and part of a lease. We say "part of a lease" because the Immigration Judge had, as we understand it, pages 1, 2, 3 and 7 of that document, thus omitting many of the conditions under which the lease was granted. The lease was for premises in Hounslow at £925 per month, payable by way of rent, apparently jointly as well as individually by the two individuals named as tenant, one of whom is the sponsor. Mr Karim indicated that the Immigration Judge was not told anything about any amounts payable by way of council tax. Mr Karim asserted to us that each of the tenants had to pay only half the rent. That appears to be contrary to what the agreement says. So far as income is concerned, the Immigration Judge's view was that he was not prepared to believe the sponsor for the reasons that he had given in general, and that he was therefore not prepared to accept that the documentary evidence before him showed that the sponsor could meet, for the purposes of himself and the Appellant, the maintenance requirements of the rules.

15. The documents as we have looked at them this morning clearly do not tell a consistent story. We are concerned with any error of law by the Immigration Judge before we attempt to make any decision ourselves. Suffice it to say that looking at the evidence as a whole, we would find it

extraordinarily difficult to identify any good reason why it should be said that the Immigration Judge was not entitled to conclude, as he did, that the evidence simply did not establish substantive compliance with paragraph 281.

Paragraph 320(7A)

16. As we have hinted, however, the appeal does not in the end turn on that point. The Entry Clearance Officer refused on two specific grounds. Only one of them was that there had been deception in a previous application. The other ground was a false statement made in the present application. In question 2.6 of the application form, the Appellant, asked the question: "Is this your first passport?" replied: "Yes". There is no doubt that that statement was untrue. Indeed, as we understand it, although the Entry Clearance Officer noted that there was no explanation of the untruth of that statement, largely no doubt because he had not sought any explanation, the position before the Immigration Judge was that it was accepted that that statement was not a true statement. Various explanations for it were given, but it is notable that the Immigration Judge, having listened to the oral evidence before him, did not accept the truth of the explanations given.

17. Explanations are, however, not entirely relevant in the circumstances. It might be possible to show by way of explanation that what appeared to be a false statement was in fact a true one, but the position here is that the statement was false. Paragraph 320(7A) is in a section of paragraph 320 headed "Grounds on which entry clearance or leave to enter the United Kingdom is to be refused". There is no discretion. Paragraph 320(7A) gives the following basis for refusal:

> "Where false representations have been made or false documents have been submitted, whether or not material to the application, and whether or not to the applicant's knowledge, or material facts have not been disclosed in relation to the application".

18. This is a case in which a false representation had been made in relation to the application. In the application form the Appellant falsely stated that passport was her first passport. It was therefore a case which fell for mandatory refusal. As we pointed out to Mr Karim in the course of argument, if the paragraph relating to paragraph 320(11) of the Immigration Rules had been deleted from the notice of refusal, the last sentence refusing the application would have necessarily followed from the previous paragraph dealing with the false representation.

19. The Immigration Judge erred in his conclusions relating to paragraph 320(11) but we are not persuaded that he erred in law in finding that the substantive requirements of paragraph 281 were not complied with. In any event, however, he was obliged to dismiss the appeal as the Entry Clearance Officer was obliged to refuse the application, because this was a case where paragraph 320(7A) made refusal of the application mandatory. Despite having found an error of

law by the Immigration Judge, therefore, we dismiss the appeal to this Tribunal.

C M G OCKELTON
Vice President of the Upper Tribunal,
Immigration and Asylum Chamber