ASYLUM AND IMMIGRATION TRIBUNAL

RM (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039

THE IMMIGRATION ACTS

Heard at: Field House
Date of Hearing: 28 February 2006

Date of Promulgation: 18 April 2006

Before:

Mr C M G Ockelton (Deputy President)
Mr J Barnes (Senior Immigration Judge)
Mr A Jordan (Senior Immigration Judge)

Between

Appellant

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation:
For the Appellant: Mr J Gillespie, instructed by Kidd Rapinet
For the Respondent: Miss R Brown, Home Office Presenting Officer

Kwok On Tong is still good law and an Immigration Judge cannot allow an appeal on the ground that the decision was not in accordance with the Immigration Rules unless satisfied that the requirements of the Immigration Rules were (or are, as appropriate) met. An appeal is not limited to the issues raised in the Notice of Refusal. In the particular case of paragraph 320, however, only the first seven subparagraphs prevent the claimant succeeding. An Immigration Judge is therefore entitled to allow an appeal even if he considers that one (or more) of the other subparagraphs apply to the case. See also CP (Section 86(3) and (5); wrong immigration rule) Dominica [2006] UKAIT 00040.

DETERMINATION AND REASONS

1. The Appellant is a citizen of India. On 4 August 2004, she applied for entry clearance to the United Kingdom for work permit employment. She proposed to be employed as a general nurse with London Residential Healthcare Limited (LRH) at a home approved for such a

placement by the Nursing and Midwifery Council. She was interviewed on 12 August 2004 and her application was refused. The reason for the refusal was that the Respondent was not satisfied that she met the requirements of paragraph 128, in particular that he was not satisfied that the Appellant did not intend to take employment except as specified in her work permit. That reason is further expanded in the notice of refusal as follows:

> "**Because**
> You applied for an entry clearance on 4th December 2002. At that stage you sought entry as a family visitor. You stated that you wished to visit your aunt for a period of two months. The ECO was not satisfied that you would leave the UK at the end of a short stay, as claimed. This was due to the fact that at the time you were unemployed and had resigned from your job in India purely in order to take a holiday in the UK. The ECO considered this wholly implausible and concluded that, on the balance of probabilities, you were not likely to leave the UK at the end of a short stay.
>
> You appealed against the above decision and your appeal was allowed on 10th April 2003. You were duly issued with an entry clearance in line with the adjudicator's directions at that time. Your visa was therefore restricted and valid for two months only. As such, the conditions attached to your stay expired on 16th September 2003.
>
> You travelled to the UK in July 2003 and state that you returned in September 2003. At interview today, you have stated that you travelled to the UK in order to attend a job interview. You obtained your current work permit as a direct result of that interview. I note that at the time of your initial application you stated that the sole reason for your visit had been to visit your aunt. No mention was made of your intention to seek employment in the UK. The ECO suspected that this was your motivation in seeking entry at that time and this is why your application was refused. It is highly likely that had the adjudicator been aware of your intention to seek employment within the UK, your appeal would not have been allowed. I can only conclude that you have sought to wilfully mislead this office in order to obtain your initial entry clearance and thereby seek work in the UK. I consider this highly damaging to your overall credibility.
>
> You state that upon your return to India you lost your passport in Kerala and that a report was duly filed recording this. You subsequently obtained your current passport on 29th July 2004.
>
> You have stated that you were interviewed in connection with this position in September 2003. You have stated that a Mr Jaag conducted your interview. However, we have contacted the director of LRH Homes, a Mr Jas Grewal. He has stated that he interviewed you in connection with your position. He obtained your personal file notes and stated that the interview took place on 3rd April 2004. It therefore follows that you were in the UK at that time. This means that you overstayed in the UK by a period of at least 7½ months. I can only conclude that you have simply lost your passport in order to disguise the corresponding Indian immigration arrivals stamp, which would have demonstrated the true period of your stay. You have therefore not only overstayed, but obtained a new passport in order to disguise this fact.
>
> I consider that you have demonstrated a palpable disregard for the provisions of the Immigration Rules. You have wilfully practised deception on no less than three occasions (including to an adjudicator by the use of false representations) in order to secure your entry to the UK. I therefore consider

> that your credibility has been seriously compromised. Given your repeated misrepresentations, it is no longer possible to be satisfied as to the veracity of your remarks. I am not therefore satisfied that having secured your long-term entry to the UK, you would not simply seek to take up employment elsewhere. As such, I am not satisfied that you intend to take employment exclusively as specified in your work permit."

2. The Appellant appealed, and in connection with her appeal she asserted in her grounds that there was a public interest in allowing qualified registered nurses to come to the United Kingdom to work and that any previous misconduct by the Appellant was as a result of her receiving bad advice. The Respondent's response to that in the explanatory statement is as follows:

> "The reasons set out in my refusal notice are clear and I am not persuaded to retract them now. I acknowledge the public interest arguments put forward by the representatives however, I consider that there are good grounds for maintaining this decision. I find the representatives' suggestion that the appellant denies having wilfully sought to practice deception remarkable. The appellant had 'lost' her first passport, which would have demonstrated that she had overstayed. She then sought to compound that deception by maintaining that she had returned within time and that her interview for the position in question had taken place in India. The appellant knew full well that none of the above was correct. I do not accept that the appellant is the victim of poor advice. This office issues many hundreds of entry clearances for nurses, many of whom secure their positions in the UK legitimately and with the entire process taking place in India. The appellant would have had little reason to doubt that she could have acquired a work permit and entry clearance in the same manner. I consider that, far from being an innocent party, the appellant has persistently sought to abuse the provisions of the Immigration Rules and subsequently deceive the relevant authorities in pursuance of her goals. I am of the opinion that her credibility has been seriously compromised by her own actions. It is subsequently difficult to be satisfied as to the veracity of her remarks and therefore her future intentions."

3. The Appellant's appeal was heard by an Immigration Judge, Mr M B Hussain, on 24 October 2005. He heard no oral evidence. He had before him a statement signed by the Appellant asserting that her earlier arrival in the United Kingdom was indeed as a visitor, that it was only after her arrival that she decided to look for a job, that she was advised then to apply for a student visa and did so, but was refused, that she was further advised by a "*lawyer*" that she should remain and seek employment and that she would be lawfully in the United Kingdom while she did so, and that having obtained a work permit she discovered that she had to leave the United Kingdom and did so. The statement went on to say that she was "*extremely apologetic*" and "*regret that I gave the impression to the Entry Clearance Officer that I have not overstayed in the United Kingdom*". Further, "*I obviously regret the advice that I followed previously*".

4. The Immigration Judge heard submissions from representatives of the Appellant and the Respondent. During the course of the hearing he appears to have said that he knew the Appellant's representative, who had "*taught me all I know*". In response to the Respondent's

representatives request that the hearing be conducted by another Immigration Judge, he took advice and decided to continue to hear the appeal. No objection to that course of action has been raised before us.

5. The Immigration Judge noted the admissions made by the Appellant in her witness statement and in addition found as a fact that when the Appellant came to the United Kingdom in 2003 her intention was not exclusively for the purpose of a holiday. He went on to decide, for reasons which are not very clear, that "*that finding does not necessarily follow that she has deliberately mislead the Entry Clearance Officer*" [sic]. The Immigration Judge continued:

> "For the purpose of this determination, however, I am prepared to assume that the Appellant was deceitful when she entered the United Kingdom. The Appellant readily admits that whilst here, she overstayed in this country. She also admits that she obtained a fresh Indian passport in order to conceal that fact. The Appellant denies, and I accept, that at her interview she mislead the Entry Clearance Officer with regards to the person who interviewed her."

6. Whatever her history, the Immigration Judge went on to say that his task was to decide whether at the date of the decision she met the requirements of paragraph 128. The refusal had been solely on the basis that the Entry Clearance Officer was not satisfied that she intended to take employment only in accordance with her work permit. The Immigration Judge considered the material going to that issue and found that there was no reason at all to suppose that she had any other intention. On the evidence before him, he decided that the Appellant met the requirements of paragraph 128 and so allowed the appeal.

7. The grounds for review, on the basis of which reconsideration was ordered at the Respondent's instance, are that the Immigration Judge should not have allowed the appeal, because paragraph 320(11) and (12) provide that entry clearance or leave to enter the United Kingdom should normally be refused where there has been:

> "(11) Failure to observe the time limit or conditions attached to any grant of leave to enter or remain in the United Kingdom; [or]
> (12) The obtaining of a previous leave to enter or remain by deception."

8. For that reason it was said that, given the Immigration Judge's findings as to the Appellant's history, he should have dismissed the appeal. Reference was made to R v IAT and another ex parte Kwok On Tong [1981] Imm AR 214. We heard submissions from the representatives of both parties.

9. Under s19 of the 1971 Act, an Adjudicator was to allow an appeal if he was satisfied that the decision against which the appeal was brought was one which was "*not in accordance with the law or with any Immigration Rules applicable to the case*". The equivalent provision in the 2002 Act is s86(3)(a):

> "The Tribunal must allow the appeal in so far as it thinks that:
> (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules)."

10. In Kwok On Tong (and also in R v IAT ex parte Hubbard [1985] Imm AR 110) the Court had to consider what the position was if a refusal of entry clearance was based on one element of the Rules, but by the time of the hearing it became apparent that there was some other requirement of the Rules which the appellant could not meet. Both those cases decide that the notice of refusal is not equivalent to a pleading; if new elements of the Immigration Rules come into play they are to be dealt with on the appeal, and the parties must be allowed any appropriate adjournment in order to avoid the injustice of being taken by surprise. The reason is the wording of s19. Even if the appellant shows that he met a particular requirement of the Immigration Rules that had been in issue at the appeal, the decision to refuse him is not a decision that was "*not in accordance with the law including any applicable Immigration Rules*" unless, at the time of the decision, he met the requirements of the Immigration Rules applicable to his case. To put it another way, an appellant can lose his appeal by failing to meet just one requirement of the Rules (whether specified or not in the notice of refusal), but he can win only by meeting all the requirements of the Immigration Rules (whether specified or not in the notice of refusal).

11. As at present advised, we can see no material difference in this respect between the formulation of s19 of the 1971 Act and s86 of the 2002 Act. In an appeal which depends on the Immigration Rules, an Immigration Judge is not entitled to allow it outright unless all the requirements of the Immigration Rules are satisfied. The difference in the new formulation is the phrase "*in so far as*", which had no equivalent in the 1971 Act, and which also appears in subsection (5), giving the basis on which an appeal is to be dismissed. The precise implications of that phrase can be considered elsewhere. Suffice it to say for the present purposes that if the position before the Immigration Judge is that only some of the requirements of the Rules are or can be dealt with, it may well be right for him to look at only those requirements and to make findings on them: if his findings are all in favour of the appellant, he will allow the appeal to that extent, and the Entry Clearance Officer, Immigration Officer or Secretary of State as appropriate should be directed to continue his consideration of the application or case in accordance with the findings made by the Immigration Judge.

12. The foregoing does not, however, necessarily assist the Respondent in the present case. Paragraph 320 of the Immigration Rules, upon which the grounds for review relies, is divided into two parts. It is headed "*Refusal of entry clearance or leave to enter the United Kingdom*", and begins as follows:

> "320. In addition to the grounds for refusal of entry clearance or leave to enter set out in parts 2-8 of these rules, and subject to paragraph 321 below, the following grounds for the refusal of entry clearance or leave to enter apply:"

13. There is then a heading "*Grounds on which entry clearance or leave to enter the United Kingdom is to be refused*", governing subparagraphs (1) to (7); that is followed by another heading "*Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused*", governing subparagraphs (8) to (21). As is acknowledged on behalf of the Respondent, the Appellant's immigration history in this case raises questions in the second, not the first, part of paragraph 320.

14. It seems to us that if the Immigration Judge had concluded that any of subparagraphs (1) to (7) of paragraph 320 applied to this appeal, he should have dismissed the appeal. The reason for that is that he could not consider that the decision was not in accordance with the Immigration Rules if, on the basis of the facts as he found them, "*entry clearance … is to be refused*". In those circumstances, a grant of entry clearance would necessarily not be one which was in accordance with the Rules.

15. Where, however, the facts as found by the Immigration Judge indicates an application of one of the later subparagraphs of paragraph 320, the position is quite different. Under those paragraphs, although the resumption is clearly against entry clearance, there is no bar on a grant of entry clearance. A grant of entry clearance would not therefore conflict with the Rules, and an Immigration Judge's finding that circumstances apply to the case does not prevent him allowing an appeal.

16. The second part of paragraph 320 gives the government official dealing with the case a power to decide whether to take the points specified against the applicant. If he does so he will give them in the reasons for refusal as his ground, or as a further ground, for the refusal itself. If the relevant facts were known to the decision-maker and there is no reference to paragraph 320 in the documents before the Immigration Judge, the latter is no doubt entitled to take the view that matters arising under paragraph 320 are not in issue. In those circumstances, although perhaps entry clearance or leave to enter should normally be refused, he can perfectly properly take the view that he is dealing with a case which is not regarded as normal. If, then, he is satisfied that the requirements of the specific Immigration Rules applicable to the case are satisfied, he will allow the appeal.

17. If, on the other hand, the person who made the decision against which the appeal is brought has taken a point under paragraph 320(8) to (21), there can be no doubt that he has exercised a discretion in refusing entry clearance or leave to enter. In those circumstances, the

Immigration Judge has jurisdiction under s86(3)(b) to allow the appeal if and in so far as he thinks the discretion should have been exercised differently.

18. A difficulty may arise if facts relevant to paragraph 320 become apparent only during the course of the hearing. As we have already indicated, if the Immigration Judge finds that paragraph 320(1) to (7) applies, the appeal must be dismissed. If he takes the view that other elements of paragraph 320 may apply to the case, it may be right to give the Presenting Officer time to consider whether he wishes to take any point on paragraph 320, if the Respondent has had no earlier opportunity to do so. If, in these circumstances, the Presenting Officer seeks to take a point under the second part of paragraph 320, it follows that (as events have transpired) there is a discretion that could have been exercised and, not through any fault of the Respondent, has not been. The appeal will have to be allowed to the extent only of deciding that the decision was unlawful for that reason. The Respondent is required to exercise the discretion in whichever way he considers appropriate, and make a new decision, which will carry a new right of appeal.

19. So far as the present case is concerned, the position is that the Immigration Judge dealt with paragraph 128 and found in the Appellant's favour on that. He was not asked to look at any of the requirements of paragraph 320, although the issues relating to paragraph 320(11) and (12) were well known to the Entry Clearance Officer. It had not previously been suggested that this was a case where entry clearance should have been refused under paragraph 320, and for that reason alone the Immigration Judge was entitled to ignore paragraph 320(11) and (12). In any event, because of the wording of the heading of the second part of paragraph 320, the grant of entry clearance to the Appellant is not one which would be contrary to the Immigration Rules, despite her history.

20. For the foregoing reasons, we find no material error of law in the Immigration Judge's determination, which we therefore order shall stand.

C M G OCKELTON
DEPUTY PRESIDENT
Date: