Upper Tribunal
(Immigration and Asylum Chamber)

Ara (successful appeal – no entry clearance) Bangladesh [2011] UKUT 00376 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 July 2011	.....

Before

UPPER TRIBUNAL JUDGE PERKINS

UPPER TRIBUNAL JUDGE COKER

Between

NAZMUM ARA

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation :

For the Appellant: Mr M Biggs , Counsel instructed by Universal Solicitors

For the Respondent: Mr K Norton, Home Office Presenting Officer

An appellant who succeeds in an appeal against the refusal of entry clearance is not entitled automatically to entry clearance.

An entry clearance officer considering whether to grant entry clearance following a successful appeal must decide “in the light of the circumstances existing at the time of the decision” if the appellant satisfies the requirements of the rules (paragraph 27 of HC 395). The entry clearance officer must make a decision on all the relevant evidence including evidence that could have been but was not put before the Tribunal at the appeal. An Immigration Judge does not err by considering such evidence and dismissing the appeal.

DETERMINATION AND REASONS

1.
The appellant is a citizen of Bangladesh. She was born on 5 February 1979 and so is now 32 years old. She appeals a decision of Immigration Judge P-J White dated 17 January 2011 dismissing her appeal against a decision of the respondent on 7 July 2010 to refuse her entry clearance to the United

Kingdom as a student. The application was refused solely because the respondent was satisfied that the application had to be refused under paragraph 320(7B) of HC 395. Regrettably the Notice of Immigration decision does not identify expressly which part of paragraph 320(7B) is thought to be relevant but it is apparent from the reasons for refusal that the respondent must have had regard to paragraph 320(7B)(d). This applies where an appellant has previously used deception in an application for entry clearance. It is the respondent's case that the appellant used deception in an application for entry clearance in October 2008 by relying on a forged bank statement and degree certificate.

2.
Immigration Judge P-J White considered evidence and at paragraph 39 of his determination said that he was satisfied that the application refused in October 2008 was supported by a forged bank statement and an unreliable degree certificate. If paragraph 39 is read as a whole it must mean that the Immigration Judge was satisfied that the appellant had used deceit in presenting her degree certificate.

3.
These findings are not criticised in the grounds before us. It follows that this is a case where an Immigration Judge who has heard evidence in a properly argued case has, like the respondent, concluded that the appellant has used deceit in an application for entry clearance not more than ten years ago and has dismissed the appeal.

4.
If this was all that there was to be said then one would wonder why the appeal ever came before the Upper Tribunal.

5.
There is a very significant additional element in this case. The chronology is as follows. An application for entry clearance was refused on 27 October 2008 with reference to paragraph 320(7A) (false representations or false documents) and paragraph 57 of HC 395. There was no appeal against that decision.

6.
The appellant made another application in early 2009 and that was refused on 2 March 2009 with reference to paragraph 57 and paragraph 320(7B) (this applies where there has been a previous breach of immigration laws). The "deception" for the purposes of 320(7B) were the reliance on "false representations" or "false documents" that led to the refusal under paragraph 320(7A) in October 2008. The appellant appealed and the appeal was heard by Immigration Judge Morgan who allowed the appeal under paragraph 57 and paragraph 320. Although the burden of proving that the appellant had previously breached the United Kingdom's immigration laws by deception was on the respondent the respondent was not represented before the immigration judge and had not produced any evidence whatsoever to justify the refusal under paragraph 320(7A) in October 2008 or under 320(7B) in March 2009.

7.
Although Immigration Judge Morgan's determination is quite short it is plain that he considered carefully the evidence that was before him. He did not fall into the error of dismissing the appeal just because the respondent had not attended to present and prove his case. It was, of course, the appellant's case that she had not used deception. She had produced some evidence to support her contentions and the respondent had produced nothing whatsoever to support his. Immigration Judge

Morgan's determination appears to be wholly consistent with the evidence before him and was not the subject of any challenge. Indeed we have seen a letter from Mr R Hopkin at the Specialist Appeals Team dated 27 May 2010 expressing the view that there was no error of law in Immigration Judge Morgan's decision and we have seen a letter dated 10 June 2010 to the respondent from one Sulekha Sathiadas of the Presenting Officers' Unit enclosing Immigration Judge Morgan's determination and saying: "I would be grateful if you could now act in accordance with any directions given by the Immigration Judge or, if none have been given in spirit of the determination, and in the light of the Application's(sic) present circumstances." No directions had been given.

8.
Notwithstanding the letter the respondent refused to grant entry clearance when the appellant asked for it in reliance on Immigration Judge Morgan's determination. The respondent gave the following reasons:

"● From your application and documents provided I note that you previously applied for entry clearance as a student in October 2008. This application was refused (VAF:467094) on 27/10/08 because you had submitted a non-genuine Agrani bank statement and a Masters Certificate and transcript from National Board.

● You then reapplied as a student in February 2009 (VAF:478440) which was refused on 02/03/09 under paragraph 320(7B) and 57. You appealed against this decision which was subsequently allowed by the Immigration Judge on 14/05/2010. However I note from the determination (ref: OA/34402/2009) that your previous refusal and document verification report was not present at the time of this hearing. However these documents are available and therefore I am satisfied that paragraph 320(7B) of the Immigration Rules still applies to you. Any further application will also be automatically refused for the same reason, under paragraph 320(7B) of the Immigration Rules until 27/10/2018."

9.
The refusal of entry clearance made it clear that the application was refused solely because of paragraph 320(7B) and the application would have been allowed but for that paragraph.

10.
As would be apparent to any lawyer, and was certainly apparent to Immigration Judge P-J White, there is an unfortunate dichotomy in this case. It is undesirable for the appellant to succeed in an application that should be the subject of mandatory refusal because the appellant had used deception in an earlier application but to dismiss the appeal would endorse the decision of the Entry Clearance Officer to refuse an application for a reason which the Entry Clearance Officer had failed to justify on appeal. Immigration Judge P-J White specifically noted that the Presenting Officer before him conceded that Immigration Judge Morgan's decision was unappealable and "that the only way to deal with the matter was by a fresh decision".

11.
Immigration Judge P-J White referred to "conflicting principles of public policy" and he looked particularly at the decision of the Asylum and Immigration Tribunal in MM (Allowed appeal: further refusal) Pakistan [2008] UKAIT 00040 and the decision of Newman J sitting in the Administrative Court in R (on the application of Rahman) [2006] EWHC 1755 (Admin). Immigration Judge P-J White then decided to dismiss the appeal.

12.

We consider first the decision in MM . As the head note makes clear it is the view of the Tribunal that "an executive officer is generally speaking obliged to act in accordance with the decision of the Tribunal allowing an appeal."

13.
The facts in MM have to be considered to understand the case. There the appellant's appeal against a decision refusing him entry clearance as a visitor had succeeded. He sought entry clearance in accordance with the immigration judge's decision but it was refused. The appellant had applied for entry clearance in June 2005 and his application had been refused for many reasons under paragraph 41 of HC 395 and also because the Entry Clearance Officer was satisfied that the appellant had forged or counterfeit entries in his passport. Nevertheless the application was refused solely with reference to paragraph 41.

14.
It has to be said that the immigration judge in that case had not produced a distinguished determination. The immigration judge was criticised sharply by the Tribunal in MM and one of the more important reasons for that criticism was his finding that the appellant had not placed any counterfeit stamps in his passport. This finding was criticised because it was based solely on the appellant's say so and was reached without any explained regard for contrary evidence in the papers before him. The Tribunal noted that the immigration judge was "simply wrong" to say that there was no reason to doubt the authenticity of the stamps in the passport when there were several reasons which the immigration judge had not troubled to consider.

15.
Nevertheless the Entry Clearance Officer had not challenged the decision. When the appellant asked for entry clearance in pursuance of the determination the Entry Clearance Officer refused the application again but this time relied expressly on paragraph 320(21) of HC 395. That was a discretionary paragraph then in force saying that applications should normally be refused when they have been supported by a false document. The appellant appealed that decision and the immigration judge in the second appeal dismissed the appeal.

16.
Paragraph 15 of the decision in MM is particularly important. There the Tribunal said:

"There is no issue estoppel in immigration law, but it must be in general right to say that Entry Clearance Officers are not entitled to ignore the effects of a judicial decision. If the first Immigration Judge's decision had been a proper, professional and comprehensive assessment of the matters before him, there could have been no doubt that the Entry Clearance Officer was bound to honour it. On the other hand, the fact that the first Immigration Judge's determination did not have these characteristics makes it less easy to understand why, if the Entry Clearance Officer did not wish to honour it, he did not seek reconsideration of it. We would not wish to be in a position of giving what would amount to formal approval of the determination of the first Immigration Judge, because of the concerns that we have about it. On the other hand, we would not wish to give any approval to a practice of not honouring unchallenged judicial decisions."

17.
The Tribunal in MM then found two features of that case which assisted in "resolving this difficult question". The first was that although the application almost certainly could have been refused with reference to paragraph 320 when it was first presented it was not refused under paragraph 320. The Tribunal was satisfied that the Entry Clearance Officer dealing with the application after the

Immigration Judge's determination could, even should, consider paragraph 320 when the evidence pointed to its relevance and there had been no judicial finding on the point. The second feature was that the case concerned the genuineness of a passport and the Tribunal hypothesised that "the genuineness of passports and the entries in them ought to have a special status." The point is that the judgment of the Tribunal concerning the validity of an immigration document "has effect almost as a judgment in rem ". Although there are obvious parallels between MM and the present case the reasons given by the Tribunal for upholding the second immigration judge's decision to dismiss the appeal are not comparable. In the appeal that we have to decide there was nothing to criticise in the first immigration judge's determination. He reached the only conclusion that could be reached on the evidence before him. The responsibility for getting better evidence before him was with the present respondent. Secondly, this decision concerns communications from a bank and a purported degree certificate. It is not about the genuineness of a public document such as a passport and the entries in it. The main point in MM is that decisions of the Tribunal should be followed unless there are good and proper reasons for taking a different course.

18.
In this case the respondent had to prove that the appellant had previously breached the UK's immigration laws using deception in an application for entry clearance. The fact that a previous application had been refused because the respondent decided that deception had been used is not proof that deception was used.

19.
It should not surprise anyone that the immigration judge found against a party to an appeal before him who made the contentious assertion that the other party had behaved disgracefully but produced no evidence at all to support it. Immigration Judge Morgan said at paragraph 6 of his determination:

"The difficulty for the Respondent is that whilst the Respondent asserts that these documents were false the Respondent did not provide either the previous refusal or the documentary verification report on which these conclusions were based. In the light of this I find there is no evidence before me that would justify the conclusion that the documents relied upon in the previous application were forged and I find that they were not".

20.
Immigration Judge Morgan did not, and could not, for example, decide to grant the appellant entry clearance. The most that he could have done would have been to have given directions under section 87(2) of the Nationality, Immigration and Asylum Act 2002. In this case he could, for example, have directed that his decision that his finding that the challenged documents used to support the 2008 application were not forged should be binding against the respondent in any future application that the appellant might make. He did not do that. Maybe he did not consider it. There is no suggestion that he was asked to make such an order. Maybe he did not want to make such an order in a case where he had heard no evidence from the respondent.

21.
Be that as it may, it is quite clear from section 87(2) (and probably other sources too) that, notwithstanding the appellant succeeding in this appeal, the appellant was not entitled to enter the United Kingdom by reason of that decision. The respondent needed to make a further decision either to grant or refuse entry clearance which further decision could be the subject of an appeal to the Tribunal. In the absence of directions that decision was unfettered by statute. It must, of course, be a lawful decision and to be lawful it must have regard to decided cases and published policy but a

person who appeals successfully to the Tribunal is not necessarily entitled to the entry clearance that he or she seeks and certainly not just because the appeal succeeded.

22.
The decision in Rahman begins with a consideration of the Diplomatic Service Procedures which lay down for Entry Clearance Officers instructions on how to proceed when an immigration judge has determined an appeal but has not given directions. As is explained above, section 87 provides that a person making an immigration decision shall act in accordance with any relevant direction but it is well understood that immigration judges should not normally give directions with a determination (see for example SP (Allowed appeal: Directions) South Africa [2011] UKUT 00188 (IAC)). This is for the very good reason, inter alia, that appeals against refusal of entry clearance are often not decided until so long after the initial decision that there is inherently a reasonable chance that the appellant's circumstances will have changed so that they no longer satisfy the requirements of the rules.

23.
The Diplomatic Service Procedures considered in Rahman anticipate two circumstances where it will be appropriate not to give effect to the immigration judge's decision. The first is where there has been a significant and material change in circumstances and the second is where "a material deception has come to light of which the Adjudicator would be unaware". Neither of these circumstances apply here but it is not suggested that the two circumstances that are identified are the only circumstances where it will not be appropriate to grant entry clearance.

24.
In Rahman an appellant's appeal against a decision of an Entry Clearance Officer refusing him entry clearance as a working holidaymaker succeeded before an Adjudicator who did not give directions when he allowed the appeal. The Entry Clearance Officer re-refused entry clearance because, having inspected the file, he found evidence that the appellant had relied on forged documents. The documents had always been part of the appellant's case but the Entry Clearance Officer had not challenged them until he was looking at the file after the appeal had been allowed and the appellant asked again for entry clearance. It was argued before Newman J. that the Entry Clearance Officer should be ordered to give effect to the Tribunal's decision. However, Newman J. decided that the appellant's remedy lay in an appeal to an Adjudicator. There was nothing unlawful in an Entry Clearance Officer in such circumstances raising a point for the first time.

25.
In reaching his decision Newman J considered carefully the judgment of Rose J in ex parte Yousuf [1989] Imm App R 554. At paragraph 25 of his judgement he drew five propositions from the decision in Yousuf , the first two are particularly relevant to this appeal but we set out all of them out below:

"1. If following a successful appeal, there is a change of circumstances in relation to the application for entry, that is something which the Entry Clearance Officer is not only entitled to consider, but which he must consider in determining whether or not to issue an entry clearance (that is in a case where there is no direction from the Adjudicator).

2. The performance of his duty is to be distinguished from any wholly improper attempt made by an Entry Clearance Officer to circumvent an Adjudicator's decision by pursuing further enquiries with a view to denying entry on a different basis.

3. If in the course of reviewing the up-to-date circumstances in connection with an application, which has been successful on appeal (an Entry Clearance Officer discovers deception), that may constitute

circumstances which are sufficient to justify the Entry Clearance Officer taking a different view from the adjudicator, who has acted in ignorance of the deception.

4. The existence of a right of appeal against the adjudicator's decision does not limit the ECO to that course. Later in this judgement I shall come back to the nature and content of any right of appeal that they may be against the adjudicator's decision.

5. An applicant may pursue an appeal against a re-refusal decision, and that is an appropriate forum for resolution of a disputed factual question. I have already adverted to the fact that, in this case, there is an appeal in being by way of a notice of appeal having been issued, and the fact that that will be the proper forum for the resolution of the factual issues."

26.
He then said at paragraph 26:

"In my judgment, close examination of the decision in ex parte Yousuf makes it clear that what will not be permitted is conduct on the part of the Entry Clearance Officer, which simply amounts to a deliberate attempt to circumvent an adverse decision which has been reached by the Adjudicator, by simply carrying out further investigations with a view to coming up with a new basis for refusing entry clearance. What the judge decided on the material before him was that he was not persuaded that the Entry Clearance Officer was seeking to side step the Adjudicator's decision."

27.
The judgment in Rahman goes on to show that Newman J considered the judgment of the Court of Appeal in R v SSHD ex parte Linda Boafo [2002] 1WLR 1919. According to Newman J this decision in Boafo expressly proved the reasoning of Rose J in Yousuf .

28.
The case of Boafo concerned a person living in the United Kingdom who had overstayed her leave. She applied to remain on the basis of her marriage and her application was refused by the Secretary of State on 30 April 2007. The Secretary of State was not satisfied that the appellant and her husband intended to live together permanently. The appeal was allowed by an Adjudicator on 7 January 1999, bizarrely, because the appellant was not claiming benefits. Regrettably the adjudicator had failed to consider the only point of contention between the parties. However the Secretary of State did not appeal the decision. Rather he simply decided on 13 June 2000 not to give her indefinite leave to remain. He supported his decision with reference to the deficiencies in the determination and his reliance on evidence that the appellant and her husband were engaged in divorce proceedings at the time of the hearing before the adjudicator. The Court of Appeal rejected the Secretary of State's contention that he was allowed to take this course because the adjudicator had not given any directions. The Court upheld the principle that the unappealed decision of an adjudicator is binding on the parties. The Court made an order quashing the decision of the Secretary of State and directing that the appellant be given indefinite leave to remain.

29.
However the judgement suggests that the outcome may have been different in a case where an appellant was seeking entry clearance rather than the benefits of leave to remain (see paragraph 29 of Boafo). This is not because decisions of the Tribunal in entry clearances cases are worthy of less respect. Rather it reflects paragraph 27 of HC 395 which requires a decision "in the light of the circumstances existing at the time of the decision" and the appeal process not leading directly to entry clearance being granted.

30.
We drew the attention of the representatives to the decision of the Court of Appeal in SSHD v TB (Jamaica) [2008] EWCA Civ 977. The appellant there was the Home Secretary who appealed the judgment of Bean J. who found it unlawful for the Secretary of State to refuse to recognise the respondent as a refugee on the ground that he constituted a danger to the community within the meaning of Article 33 of the 1951 Convention relating to the Status of Refugees and section 72 of the Nationality, Immigration and Asylum Act 2002.

31.
The Appellant was a citizen of Jamaica who had convictions for serious offences involving the supply of Class A drugs. The Secretary of State resolved to make the respondent the subject of a deportation order and the respondent appealed that decision on the grounds that he was a refugee and that removing him would be contrary to his human rights. According to paragraph 16 of the judgment of Stanley Burnton LJ:

“On 6 April 2005 the Secretary of State refused both claims. The decision letter did not refer to Section 72 and did not contend that TB was a danger to the community’ it did not contend that by virtue of his criminal conduct he was excluded from the benefit of Article 33.1 of the Asylum Convention. It rejected the claim for asylum and the human rights claim on the grounds that his claims were not credible, and that in any event there would be no real risk to him on return, and the interference with his private and family life was justified under Article 8.2.”

32.
The immigration judge allowed the appeal. The Secretary of State did not challenge that decision. However, on 25 January 2006 the Secretary of State wrote to the claimant’s solicitors and said that he was excluded from the protection of the Refugee Convention by reason of Article 33(2). This case was heard by Bean J who held that the decision of the Secretary of State was an abuse of process. Stanley Burnton LJ saying as follows:

“27. “… The principles requiring finality in litigation, and that a party should not be vexed twice, exemplified by Henderson v Henderson [1843] 3 Hare 100 and Johnson v Gore Wood [2002] 2AC1, are applicable in public law as in private law. Just as applicants in asylum and immigration cases are required to put forward all the matters on which they rely by the ‘1- stop warning’ which they are given, so must the Secretary of State bring forward his entire case when an applicant appeals to the AIT. Otherwise, the applicant is relegated to seeking judicial review of the Secretary of State’s decision to invoke Article 33.2 and Section 72, which, as Mr Jay (who appeared before the Judge as he appeared before this Court) realistically accepted was a less advantageous remedy which could make it more difficult for him to succeed. Accordingly, the judge held that the Secretary of State’s decision had been unlawful.”

33.
He also said at paragraph 32:

“As a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by administrative decision. If she could do so, the statutory appeal system would be undermined; indeed, in a case such as the present, the decision of the Immigration Judge on the application of the Refugee Convention would be made irrelevant. That would be inconsistent with the statutory scheme.”

34.

However, as is apparent from the facts, the appellant in TB is not outside the United Kingdom and there is no obligation under the rules to re-decide his case after an appeal and, if considered appropriate, to issue a fresh immigration decision which can be subject to appeal.

35.
We similarly drew the attention of the parties to a decision of the Outer House of the Court of Session in AJA (AP) v Advocate General of Scotland as representing the Secretary of State for the Home Department [2011] CSOH 17.

36.
The petitioner there was a Nigerian citizen who had been given leave to enter as a visitor in December 2006. He was entitled to stay for six months but continued to reside in the United Kingdom after his visa expired. He formed a close relationship with someone who lived in Scotland and, having obtained advice, he returned to Nigeria to make an application to enter the United Kingdom. That subsequent application for leave to enter was refused. He appealed the decision to the Tribunal who allowed his appeal. However, on 27 May 2010 the Entry Clearance Officer again refused the appellant entry clearance. The appellant made a fresh appeal to the Tribunal and also brought proceedings for a judicial review in Scotland. Immediately before the case was heard by the Outer House the Secretary of State withdrew the decision of 27 May 2010 to re-refuse the application but immediately revoked entry clearance (we must assume that she had first granted it) and the revocation was based on a re-evaluation of the application. The decision to re-refuse the application revisited two matters considered by the Immigration Judge and additionally relied on paragraph 320(11) and (19) of HC 395. Paragraph 320(11) applies where an applicant has previously contrived in a significant way to frustrate the intention of the Rules and paragraph 320(19) applies where from information available to the Immigration Officer it seems right to refuse leave to enter the United Kingdom on the grounds that exclusion is conducive to the public good. Both the sub-paragraphs of 320 are grounds on which entry clearance should normally be refused. The Entry Clearance Officer then gave the matter more thought and issued a decision dated 9 November 2010. This told the appellant that he had been issued with a visa in accordance with the Tribunal's decision but then told him immediately that because the Entry Clearance Officer had considered evidence not available to the Immigration Judge at the time of the hearing the Entry Clearance Officer had cancelled the visa that he just granted with reference to paragraph 30A of HC 395. This applies where false representations were employed or material facts not disclosed or there had been a change of circumstances since entry clearance was issued or exclusion would be conducive to the public good. The decision was not explained in great detail but in the concluding paragraph the Entry Clearance Officer said:

"Whilst I have complied with the ruling of IJ Reid, on the evidence I now have I cannot be satisfied she was made aware of the discrepancies in your statements, the multiplicity of accounts and the obvious credibility issues surrounding your version of events. As such, I cannot be satisfied that you intend to marry Miss W or that you intend to live permanently with her after marriage and I refuse your application in accordance with paragraph 209(1)(3) and (7) of the Immigration Rules."

37.
It was the petitioner's contention that the decision to revoke entry clearance was unlawful and unreasonable because the material facts were in front of the Immigration Judge, they should have been challenged then and the procedure adopted by the Secretary of State would be to undermine the rule of law by allowing the Entry Clearance Officer to subvert the Immigration Judge's decision. Lord Woolman found that the Entry Clearance Officer had acted unreasonably and he reduced the decision to revoke.

38.
However he did not reach this conclusion without first looking at the merits of the Entry Clearance Officer's case. He disagreed with the Entry Clearance Officer's finding that the appellant had acted deceitfully. He said at paragraph 46 "… in my view the petitioner did not provide inaccurate or deceptive information to the Tribunal." In short Lord Woolman's decision was illuminated by the finding that the Entry Clearance Officer had taken a wrong point. Whilst undoubtedly right on its own facts (if we may respectfully say so) it does not state definitively that appeals against re-refusals must be allowed by the Tribunal.

39.
In short it comes to this. A person seeking entry clearance to the United Kingdom is not entitled to it simply by reason of his having won an appeal before an Immigration Judge. The Entry Clearance Officer can and indeed must look at the application again and make a fresh decision. This obligation is created by paragraph 27 of HC 395 which we set out below:

"An application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused entry clearance where entry is sought in one of the categories contained in paragraphs 296-316 solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it."

40.
Plainly the entry clearance officer is entitled to look at new material but the entry clearance officer is also entitled to consider evidence and take points that could have been taken before the Tribunal but, for what ever reason, were not raised. In the event of an appellant appealing such a decision the First-tier Tribunal will have regard to the well established principals set out in Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702 * (formerly known as Devaseelan). Appropriate weight should be given to the earlier decision but it may be that not much weight is appropriate if that case was decided on very different evidence.

41.
In his determination Immigration Judge P-J White set out with some care details of the reasoning in Rahman and particularly relied on paragraph 27 of the judgement in that case which referred to the obligation on the Entry Clearance Officer to "fully investigate matters". Immigration Judge P-J White was dealing with an entry clearance case. Paragraph 27 of HC 395 did apply and Immigration Judge P-J White was not bound to follow an earlier decision of the Tribunal based on evidence that was different to the evidence before him.

42.
Putting all these things together it is clear to us that the Immigration Judge was entitled to dismiss the appeal against the re-refusal. The matters relied on by the Entry Clearance Officer were not new material but old material that should have been placed before the Immigration Judge but were not. When Immigration Judge P-J White determined the appeal he correctly acknowledged the different earlier decision but noted that it was made on different evidence. He made a rational decision on the evidence before him. He did not err in law.

43.
We do not know why the respondent failed to attend or produce evidence at the first appeal. We imagine this was the result of poor administration which has featured very commonly in appeals against decisions of Entry Clearance Officers but, we are happy to record, according to the advocates who appeared to us, has improved very significantly over the last few months. The simple fact is that

the Entry Clearance Officer chose to make a grave allegation against the claimant. The claimant challenged it in the appropriate Tribunal and the respondent wholly failed to discharge the burden on him of proving that the allegations were well-founded. Immigration Judge Morgan decided in the appellant's favour in a determination that is very hard to criticise and certainly was not the subject of appeal.

44.
The second Immigration Judge (Immigration Judge P-J White), understandably, was impressed by the (different) evidence that was before him and did not feel inclined to allow the appeal of someone who had acted improperly. We are very aware of the desirability of finality and certainty in decision making. We take no satisfaction in deciding in favour of a party that neglected to take part in the appeals process. Nevertheless we acknowledge that successful appeals against a refusal of entry clearance do not lead directly to entry clearance being given. The second Immigration Judge received evidence that could have been but was not produced at the first appeal. He made a rational decision on that evidence with the result that the appellant has not benefitted from her fraud.

45.
We do not think that the Tribunal erred in law and we dismiss this appeal.

Signed

Senior Immigration Judge Perkins

(Judge of the Upper Tribunal)