Upper Tribunal
(Immigration and Asylum Chamber)

Mumu (paragraph 320; Article 8; scope) [2012] UKUT 00143(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 April 2012	

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Before

UPPER TRIBUNAL JUDGE STOREY

UPPER TRIBUNAL JUDGE PETER LANE

Between

TRISHITA FARJANA GOFFAR MUMU

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation :

For the Appellant: Mr A. Miah, Counsel, instructed by Sony Sadaf Haroon Solicitors

For the Respondent: Mr J. Parkinson, Senior Home Office Presenting Officer

(1) The weight to be given to the Secretary of State's interests in conducting the proportionality balancing exercise under Article 8(2) of the ECHR is not to be automatically diminished by reference to the consideration –

(a) that a person may be able to take advantage of an exception in paragraph 320(7C) in any future application for entry clearance; or, conversely

(b) that there is a danger the person may be refused under paragraph 320(11) by reference to conduct that has led to his or her current application being refused under paragraph 320(7A).

The principle in Chikwamba [2008] UKHL 40 has no bearing on these scenarios.

(2) Although paragraph 320(7A) applies only where someone has been dishonest, the dishonesty does not need to be that of the applicant for entry clearance or leave to enter (AA (Nigeria) [2010] EWCA Civ 773). For paragraph 320(11) to apply, however, it needs to be shown that the applicant (as opposed to someone acting without his or her knowledge) has contrived in a significant way to frustrate the intentions of the immigration rules.

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh whose claimed date of birth is 16 November 1987. On 27 August 2009, the appellant applied for entry clearance to the United Kingdom as the spouse of a person present and settled in this country. On 22 April 2010, the respondent refused the appellant's application. The reasons for the refusal were that the respondent noted that the appellant had previously applied for entry clearance to the United Kingdom as a visitor, which application had been refused and an appeal against that refusal subsequently withdrawn. In connection with that application, the appellant gave a date of birth of 16 November 1990, which was confirmed by her passport. In the present refusal, the respondent noted that the appellant claimed now to have lost that passport and that her date of birth was 16 November 1987. She submitted an education certificate with the new date of birth but, the respondent noted, this would have involved the appellant's taking her secondary school certificate examination at the age of 19, when that examination was usually taken at the age of 16. Moreover, according to a document verification report headed "For Disclosure", examination of the education certificate and verification checks revealed that the certificate was not genuine.

2. In the light of these conclusions, the respondent refused the appellant's application on two bases. First, the respondent considered that, on the premise the appellant was born on 16 November 1990, she failed to satisfy the requirements of paragraph 277 of the Immigration Rules, which required her not to be under the age of 21 on the date of arrival in the United Kingdom. Secondly, the respondent refused the application by reference to paragraph 320(7A) of the Immigration Rules, which requires entry clearance to be refused:-

" (7A) Where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts had not been disclosed, in relation to the application ."

The appeal to the First-tier Tribunal

3. The appellant appealed against the decision of the respondent. Her appeal was determined at North Shields on 14 December 2010 by a judge of the First-tier Tribunal. The judge concluded that the appellant had submitted a false education certificate, as contended by the respondent, and that the appellant had done so in order to make her appear older than her true age. The judge also noted that the appellant's previous application had given her date of birth as 16 November 1990.

4. The judge concluded that the appellant failed to satisfy the requirements of paragraph 277 of the Immigration Rules, by reason of her age, and that she had provided a false document in support of her application, thereby attracting refusal under paragraph 320(7A). Finally, the judge noted that although the appellant had not raised human rights in her grounds of appeal, these had been referred to by the respondent in the refusal decision. The judge found that there was no evidence before her to show that the appellant and her sponsor husband had established a family life together or that the marriage was genuine and subsisting. She dismissed the appeal.

5. Permission to appeal against the judge's decision was sought by the appellant, who contended that the judge had failed to appreciate that the burden of proving that paragraph 320(7A) applied in her case lay on the respondent and that the requirement to be 21 or over in order to satisfy paragraph

277 of the Rules was incompatible with the judgment of the Court of Appeal in Quila and Bibi [2010] EWCA Civ 1482.

Proceedings in the Upper Tribunal

6. Permission to appeal to the Upper Tribunal was granted by that Tribunal on 6 May 2011. Upper Tribunal Judge Storey considered that the First-tier Tribunal judge had been "clearly wrong about paragraph 277" and had arguably applied the wrong burden of proof in relation to paragraph 320(7A). In her response under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent stated that she did not oppose the appellant's grounds, which alleged that the judge materially erred in law; but the respondent contended that the decision in the appeal should be re-made by dismissing it, as regards both paragraph 277 and paragraph 320(7A). On 2 November 2011, the Upper Tribunal decided, without a hearing pursuant to rule 34, to set aside the decision of the First-tier Tribunal judge. In doing so it noted that the age issue in paragraph 277 had now been finally settled against the respondent by the judgments of the Supreme Court in Quila and Bibi [2011] UKSC 45.

7. Applying the procedures set out in section 108 of the Nationality, Immigration and Asylum Act, 2002, in the absence of Mr Miah we probed the respondent's reasons for contending that the full document verification report contained material, the disclosure of which to the appellant would be contrary to the public interest. Having done so, and by agreement with Mr Parkinson, we informed Mr Miah that we could disclose to him the fact that the full document verification report made reference to the relevant officer of the respondent having carried out an online verification of the education certificate, which disclosed the appellant's age as being given as 16 November 1990. Indeed, amongst the materials which appear to have been disclosed to the appellant there is a printout from www.educationboardresults.gov.bd/arch /result.php , regarding the 2006 secondary school certificate examination in respect of the appellant. This bears the same names of the appellant as in the disputed certificate, together with the same father's name and school and roll number. However, it clearly gives the appellant's date of birth as 16-11-90.

8. Mr Miah submitted that his instructions were that, although there had been a previous application for entry clearance as a visitor, giving that date of birth, what the appellant said regarding her date of birth in the present application was "all true and no false documents have been used".

9. We are in no doubt that the respondent has satisfied the burden of proof to show, on the balance of probabilities, that paragraph 320(7A) applies in the present case. In so finding, we have had regard to the totality of the evidence, except that the only matter to which we have had regard in the restricted document verification report is that concerning the online verification of the education certificate. We have not had regard to any other matter contained in that report, which has not been the subject of disclosure to the appellant.

10. It has not been disputed that the appellant made an application for entry clearance as a visitor, giving exactly the same date of birth as was disclosed on the online verification report. These matters fully persuade us that deception had been sought to be practised on the respondent in relation to the current application, where the appellant's date of birth has been falsely given as 16 November 1987.

11. It has been suggested on behalf of the appellant that others, including her father, may have been responsible for this attempted deception and that she is innocent of it. We have grave doubts as to this; but, in any event, paragraph 320(7A) does not require the appellant even to have been aware of the false representations or false documents submitted. Whoever put forward the false materials plainly did so dishonestly. The motivation was obvious: to pretend that the appellant was over the age

of 21, so as not to fall foul of paragraph 277 of the Immigration Rules. It matters not that the appellant was not herself dishonest, although she would have to have been extraordinarily supine not to have been aware of what was being done on her behalf. The judgments in AA (Nigeria) [2010] EWCA Civ 773 make it plain that, although dishonesty is required, it need not necessarily be that of the applicant.

12. The irony is, of course, that, in retrospect, the appellant and/or those acting on her behalf need not have falsified her age. The requirement in paragraph 277 to be 21 or over has been struck down by the Court of Appeal and the Supreme Court; with the result that paragraph 277 has now been amended to substitute a reference to being under 18. That does not, however, in any way operate so as retrospectively to expunge the dishonesty that was employed in the present case.

The appellant's Article 8 submissions

13. Mr Parkinson did not take issue with the contention on behalf of the appellant, were an application to be made at the present time, that she would satisfy the requirements of paragraph 277, and would have done so at the date of decision, reading down the reference to 21 years of age in paragraph 277, as it then was.

14. For the appellant, Mr Miah submitted that, notwithstanding an adverse finding in relation to paragraph 320(7A), the appellant's appeal should be allowed under Article 8 of the ECHR. We set out below the essence of Mr Miah's submissions. The relevant provisions of the Rules are reproduced in the Appendix to this determination.

15. If the appellant were to make a fresh application for entry clearance as a spouse, she would meet all the requirements of paragraph 277. Assuming that the appellant herself had not been actively involved in using deception in connection with the present application, the fact that paragraph 320(7A) had operated so as to cause the present application to be refused could not be held against her by the respondent, in considering the fresh application. Indeed, even if the appellant had been actively involved in that deception, paragraph 320(7B)(d)(ii), which would require the fresh application to be refused until ten years had elapsed since the original application for entry clearance, would not apply. As a person applying as a spouse, the appellant would be excluded from the operation of paragraph 320(7B) by reason of paragraph 320(7C)(a)(i).

16. The result of all this, according to Mr Miah, was that it would be a disproportionate interference with the rights of the appellant and the sponsor under Article 8 of the ECHR to require the appellant to go to the trouble of making a fresh application for entry clearance. In this respect, Mr Miah sought to rely upon the judgments of the House of Lords in Chikwamba [2008] UKHL 40.

17. In Chikwamba , the issue was the proportionality of requiring a person to go abroad in order to make an application for entry clearance to the United Kingdom as a spouse. On the particular facts of that case, the House of Lords found that it would be a disproportionate interference with the Article 8 rights of the appellant and her family in order to require her to do that. The precise extent of the principle in Chikwamba is a matter of some debate (see eg Hayat (nature of Chikwamba principle) [2011] UKUT 00444 (IAC)). However, we are in no doubt that the principle cannot successfully be invoked in a case of the present kind. There are clear, cogent policy reasons why an application tainted by dishonest representation etc should be refused. The same is true of paragraph 320(7B), which deals, in a graduated way, with the effect of such dishonesty on future applications for entry clearance. The fact that paragraph 320(7B) is subject to the exceptions set out in paragraph 320(7C) cannot rationally be used, in conjunction with Chikwamba , in order to destroy the efficacy of

paragraph 320(7A). The fact that someone cannot have past dishonesty held against them in their next application for entry clearance does not mean that it must necessarily be regarded as disproportionate in Article 8 terms to refuse their present application, on the basis of that dishonesty.

18. Nothing in what we have just said should be taken to amount to a finding that it will never be disproportionate in Article 8 terms to uphold a decision under paragraph 320(7A). Each case ultimately turns on its own facts. There may well be cases where, despite the public policy issues inherent in paragraph 320(7A), it would nevertheless be disproportionate to refuse entry clearance. The point we wish to make, however, is that the effect of 320(7B) and 7(C) is not such as to cause paragraph 320(7A) to be "read down" in a general way.

19. Mr Miah's final submission was almost an inversion of the one we have just considered. He drew attention to paragraph 320(11), whereby entry clearance is normally to be refused, where an applicant "has previously contrived in a significant way to frustrate the intentions of these Rules". Paragraph 320(11) refers to published guidance giving examples of circumstances in which, amongst other things, an applicant who has previously used deception in an application for entry clearance is likely to be considered as having contrived in a significant way to frustrate the intentions of the Rules. Mr Miah did not draw our attention to any such guidance. He nevertheless contended that there was a prospect that the present appellant would fall foul of paragraph 320(11), were she to make a fresh application for entry clearance. Given that she had her spouse waiting for her in the United Kingdom and that she could satisfy the requirements of paragraph 277, the prospect of a fresh refusal under paragraph 320(11) meant that it would be disproportionate to dismiss the present appeal.

20. We do not consider that this submission has any merit. Once again, it represents an attempt to mount a generalised attack on the policy of Part 9 of the Immigration Rules, whereby actual or attempted abuses of the immigration controls of the United Kingdom carry consequences for future applications. We are not in any position to speculate as to whether the respondent, faced with a future application by the appellant, will seek to invoke paragraph 320(11). One obvious matter will be that the respondent will need to be satisfied that the applicant (as opposed to someone acting without her knowledge) has contrived in a significant way to frustrate the intentions of the Rules. Whatever guidance is in force at the relevant time will need to be properly applied. The respondent will, furthermore, need to consider the Article 8 rights of the appellant and the sponsor, according to the evidence put forward at the relevant time.

21. We therefore approach Article 8 in the present case on the basis that the weight to be given to the respondent's interests in conducting the proportionality balancing exercise under Article 8(2) is not to be automatically diminished by reference to the consideration -

(a) that a person may be able to take advantage of an exception in paragraph 320(7C) in any future application for entry clearance; or, conversely

(b) that there is a danger the person may be refused under paragraph 320(11) by reference to conduct that has led to his or her current application being refused under paragraph 320(7A).

22. We accept that the appellant meets the requirements of paragraph 277 for admission as a spouse. No evidence has been adduced which shows that it would be unreasonable for the sponsor to continue family life with the appellant in Bangladesh; but even if it had been so shown, we do not find that the decision under appeal – based on paragraph 320(7A) – represents a disproportionate interference with the Article 8 rights of the appellant or the sponsor. The application the appellant made to the respondent was marred by dishonesty. Those who engage, or who might be tempted to engage, in

dishonest attempts to deceive the United Kingdom authorities in relation to immigration control need to be aware that such actions will have disadvantageous consequences for those who are the intended beneficiaries of the dishonest conduct. In the present case, the appellant and the sponsor have chosen to marry against the backdrop that the appellant had no automatic entitlement to live in the United Kingdom. In all the circumstances, it is, we consider, not disproportionate for the respondent to refuse the application, on the basis of paragraph 320(7A).

Decision

23. The determination of the First-tier Tribunal having been set aside, we re-make the decision in the appeal as follows. The appeal is dismissed under the Immigration Rules and on human rights grounds.

Signed Date

Upper Tribunal Judge Peter Lane

APPENDIX

PART 9

GENERAL GROUNDS FOR THE REFUSAL OF ENTRY CLEARANCE, LEAVE TO ENTER OR VARIATION OF LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM

Refusal of entry clearance or leave to enter the United Kingdom

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:

Grounds on which entry clearance or leave to enter the United Kingdom is to be refused

.....

(7A) where false representations have been made or false documents [or information] 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.

(7B) subject to paragraph 320(7C), where the applicant has previously breached the UK's immigration laws by:

(a) Overstaying;

(b) breaching a condition attached to his leave;

(c) being an Illegal Entrant;

(d) using Deception in an application for entry clearance, leave to enter or remain (whether successful or not);

unless the applicant:

(i) Overstayed for 28 days or less and left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State;

(ii) used Deception in an application for entry clearance more than 10 years ago;

(iii) left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State, more than 12 months ago;

(iv) left the UK voluntarily, at the expense (directly or indirectly) of the Secretary of State, more than 5 years ago; or

(vi) was removed or deported from the UK more than 10 years ago.

Where more than one breach of the UK's immigration laws has occurred, only the breach which leads to the longest period of absence from the UK will be relevant under this paragraph.

(7C) Paragraph 320(7B) shall not apply in the following circumstances:

(a) where the applicant is applying as:

(i) a spouse, civil partner or unmarried or same-sex partner under
paragraphs 281 or 295A,

(ii) a fiancé(e) or proposed civil partner under paragraph 290,

(iii) a parent, grandparent or other dependent relative under paragraph 317,

(iv) a person exercising rights of access to a child under paragraph 246, or

(v) a spouse, civil partner, unmarried or same-sex partner of a refugee or person with Humanitarian Protection under paragraphs 352A, 352AA, 352FA or 352FD; or

(b) where the individual was under the age of 18 at the time of his most recent breach of the UK's immigration laws.

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.

.....".