**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: VA/13861/2013

**THE IMMIGRATION ACTS**

| **Heard at Bradford** | **Determination Promulgated** |
|---|---|
| **On 10th July 2014** | **On 24th July 2014** |

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**SABINE WULINA KANIKA**

Respondent

**and**

**ENTRY CLEARANCE OFFICER - NAIROBI**

Appellant

**Representation:**

For the Appellant: Ms R Pettersen, Senior Presenting Officer
For the Respondent: Mr R O'Ryan, Counsel instructed by ILC Solicitors

**DECISION AND REASONS**

1. The appeal comes before me following the grant of permission to appeal to the Entry Clearance Officer by First-tier Tribunal Judge Kelly on 13th February 2014. For the ease of reference, I shall continue to refer to the Entry Clearance Officer as the Respondent and to Ms Kanika, a national of the DRC, as the Appellant. No anonymity order was made by the First-tier

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Tribunal and no request has been made of the Upper Tribunal in that respect.

2. The Appellant is a citizen of the DRC born on 3rd March 1975 who made an application for entry clearance as a family visitor which was refused by the Respondent in an immigration decision of 13th June 2013 under paragraph 320(7B) of HC 395 and also under paragraph 41 of the Immigration Rules HC 395 (as amended). The reasons for refusing the application made under paragraph 41 of the Immigration Rules were as follows. The Respondent made reference to the Appellant having used deception in an application for leave to enter on 12th September 2007 where she obtained a visa in the identity of Charlotte Benbow Dimuna born 7th June 1978 using a passport on 12th December 2007. It is stated that when in the UK she subsequently accepted that her identity was not as claimed and therefore the document was false and that the visa was in a false identity. The refusal went on to state that having been granted limited leave to remain in the UK, she subsequently left the UK and returned to the DRC obtaining employment working the president and holding a diplomatic passport. The Entry Clearance Officer went on to state –

> "I am therefore satisfied that the basis of your claim to remain in the UK was fraudulent; you have demonstrated both that you could return to the DRC and that you would suffer no ill consequences for returning. I am therefore satisfied you carried out deception in your application to remain in the UK. I am therefore refusing you entry clearance under paragraph 320(7B) of the Immigration Rules".

In respect of the purpose of the application to visit her family, it was recorded that her daughter was resident in the UK and married to a GB national and that her unmarried partner and three children held limited leave to remain as refugees. The Entry Clearance Officer went on to state "Given I am satisfied that the basis of your claim to remain in the UK was fraudulent it follows that your children's applications were also fraudulent.". The history is then set out including the Appellant travelling to the UK on 7th December 2012 and seeking entry presenting a travel document and the DRC passport. The decision went on to consider her employment and income and went on to record that as she had used deception to enter and reside in the UK, to obtain visas for her children and to obtain leave to remain for the children in the UK, she relied on public funds to support herself and her family, she had left the UK and returned to the Democratic Republic of Congo directly contradicting the terms of holding a travel document and contradicting the claimed reasons for seeking to remain in the UK, leaving the children in the UK. It was stated that –

> "You abandoned your children and were considered to have not been exercising appropriate responsibility for them or to have made appropriate arrangements for their care. Despite stating you have re-established yourself in the DRC without any ill consequences, you have continued to leave your children abandoned in the UK including in foster care, continuing

> their fraudulent claim to remain in the UK, rather than seeking to exercise appropriate care for them."

The Entry Clearance Officer concluded that in light of the above, he was not satisfied that he could rely on her account of her circumstances and intentions and therefore had not demonstrated sufficiently strong family, social or economic ties to the DRC to satisfy the claim of her intentions in the UK. He was not satisfied she was genuinely seeking entry as visitor and therefore refused the application under paragraph 320(7B) and also under paragraph 41(i) and (ii).

3. The Appellant appealed that decision and the appeal came before the First-tier Tribunal (Judge Balloch) at North Shields on 7th January 2014. The judge did not hear any oral evidence from the Sponsor but heard oral submissions from Counsel instructed on behalf of the Appellant and also a Presenting Officer on behalf of the Entry Clearance Officer.

4. The judge set out the basis of the application and the refusal at paragraphs [7]-[17]. The Appellant's circumstances were summarised at [18]-[20]. The submissions of the parties were also set out by the judge. At paragraphs [24]-[41] the judge set out her reasons for reaching the conclusion that the appeal should be allowed. She recorded at [28] that this was an "unusual case" and that it was not in dispute that the Appellant had entered the UK in 2007 with false documentation and using a false name however the Appellant's evidence that she was obliged to do this and that this had been fully explained at the time of her subsequent asylum claim. The judge recorded the Respondent's position as set out in the refusal letter that as the Appellant had been able to return to live in the DRC, her claim to have been at risk and entitled to refugee status was a fraudulent one and that this formed the basis under paragraph 320(7B) where the Appellant has previously breached the UK's immigration laws including "using deception in an application for entry clearance, leave to enter or remain (whether successful or not)." However the judge went on to consider the Appellant's evidence that the Appellant explained at the time of the asylum claim the reason for using a false identity and that that was not an unusual situation that such a deception would occur in a claim for asylum. Whilst the judge stated that she did not have any details regarding the asylum claim, she reached the conclusion that the Respondent must have been satisfied at the relevant time regarding the claim as the Appellant and her family were granted refugee status. As to her return to the DRC in December 2011, the judge accepted her explanation that there had been a change in the physical circumstances so that she was not only able to return but able to take a post herself in the government. She also appeared to accept that when she returned to the UK in December 2012 to attend her daughter's wedding and with a view to taking the children back to the DRC, she did not do so because it was decided that the situation was still a volatile one.

5. At [32] the judge recorded that the Appellant's family members still had status in the UK and that if the Entry Clearance Officer was raising

deception being used by the Appellant to obtain leave to remain, then it was open to the Respondent to look into it if it was believed that the claim for asylum was made on a false basis. However the judge recorded –

> "It is a fact that the Appellant returned to the DRC in December 2011, having spent some four years in the UK, thus foregoing any further right to remain in the UK. It is also a matter of fact that she did make a visa application to return to the UK in December 2012 which presumably was fully considered and granted. Any concern regarding whether or not the Appellant had been fraudulent in the application in 2007 it was apparently not then raised. The Appellant spent three weeks in the UK before returning to the DRC, all well within the conditions of a visit visa. She had therefore demonstrating as recently as December 2012/January 2013 that her stated intention for visiting the UK had been followed through and the conditions of a visit visa complied with."

6. The judge went on to state that if the ECO had been satisfied that she had used deception then the application of paragraph 320(7B) was mandatory however as the Appellant visited the UK with "necessary permission" in 2012/2013, and that her family members in the UK retained their current status and have not been challenged regarding the basis of their claims, the judge found that the second application by the Appellant should not have been refused under paragraph 320(7B) as the Appellant's circumstances were known to the Respondent at the time of the first application and were not challenged and her circumstances do not appear to have been materially changed in any way since that application. Thus the judge reached the conclusion that the application should not have been refused under paragraph 320(7B). At paragraph [35] the judge also found that as she left the UK in 2011 and left on a voluntary basis and at her own expense it will in any event constitute one of the exceptions to paragraph 320(7B)(iii).

7. The judge then went on to consider paragraph 41 finding that the Appellant had provided a credible reason as to why she wished to visit the UK again when she had made her application in June 2013 which was for a visit of 21 days, the period of time that she had previously entered the UK for. The judge placed weight upon her recent immigration history that she visited and returned after that visit and that there had been nothing to indicate that her circumstances in the DRC had changed since the time of the last visit. As to her intention she found that her recent visit to the UK and her return after three weeks supported her claim to be a genuine visitor seeking to make a short family visit to her family members. As to documentation provided in respect of her employment in the DRC and the money transfers, the judge recorded that none of that documentation had been specifically challenged and that the Appellant had been refused under paragraph 41(i) and (ii) which relate to being a genuine visitor with the intention to leave the UK at the end of the visit. Having considered that, the judge found on the balance of probabilities that she had demonstrated she had met the criteria and that she had wished to visit the UK again to visit family members before returning to the DRC. At paragraph [40] the judge dealt with the Entry Clearance Officer's query as

to whether she had sufficient funds for the trip but as the judge noted the application was not refused in respect of any of the financial criteria contained within paragraph 41. The judge raised some issues concerning that paragraph but found that as the application was not refused under one of the financial provisions of paragraph 41 and the matter was not pursued at the hearing, the judge did not consider the matter any further and therefore found that she had demonstrated she had met the criteria of paragraph 41(i) and (ii) of the Immigration Rules and did not uphold the refusal under paragraph 320(7B) of the Rules and thus allowed the appeal.

8. The Entry Clearance Officer sought permission to appeal that decision and permission was granted on 13th February 2014.

9. Before the Upper Tribunal the Secretary of State was represented by Ms Pettersen and the Appellant by Mr O'Ryan, neither of whom appeared in the court below. Mr O'Ryan on the morning of the hearing produced a Rule 24 a reply to the grounds. Whilst the reply was not sent to the Tribunal or the Secretary of State in accordance with the directions, Ms Pettersen had time to consider its contents and was asked if she was able to proceed. She confirmed that she was. I therefore heard submissions from each of the parties.

10. Ms Pettersen relied upon the grounds first of all submitting that the judge erred in the calculation of time when considering the judge's finding that the exception to 320(7B)(iii) applied. As she submitted, the exception required the Appellant left the UK over twelve months previously and at the date of decision namely 13th June 2013 she had not left the UK over twelve months previously because she had left in January 2013 and thus the judge had erred in finding that the exception applied. She also submitted that the judge erred in fact when she stated that her last entry to the United Kingdom was by way of a visit visa but that was a presumption made on the judge's made because she was admitted as a resident in consequence of her extant leave to enter as a refugee. Therefore there was no assessment of her credibility as a visitor and that the judge had erred in her finding [37] as to her current intentions. She further submitted as the grounds set out that the application for a visit visa was made in 2007 and made in a false identity and that this was the deception relied upon by the Entry Clearance Officer in support of a mandatory refusal under paragraph 320(7B).

11. As to the matters set out in the skeleton argument, and she submitted that it was open to the Entry Clearance Officer to apply the guidance but in any event the argument was not raised before the First-tier Tribunal. At best it should be remitted to the Entry Clearance Officer. There were no "compelling circumstances" in that the Appellant did not make a claim that there should be any "compelling circumstances" to take into account. As to the matters set out at paragraph 30 of the skeleton argument relating to "penalties" the Section 31 is a defence to criminal prosecution but that does not preclude the Secretary of State from taking into account the conduct of the Appellant.

12. Mr O'Ryan on behalf of the Appellant relied upon his detailed skeleton argument which appended to it copies of the guidance relating to the general grounds for refusal and paragraph 320(7B) and a copy of **JC (Part 9 HC 395: burden of proof) China [2007] UKAIT 00027**. The skeleton argument at paragraph 3 stated that there was no material error of law in the judge's determination and that the determination should stand but at paragraph 4, for the avoidance of doubt, it was stated that if there are errors of law in the determination they were not material to the outcome of the appeal. In his oral submissions he recognised that the judge did go wrong to a degree by reference to the Appellant's voluntary departure as the grounds set out but submitted that this was not material to the ultimate decision that the judge made and that his case was based on the fact that even if it had been demonstrated such errors had been made by the judge no other outcome could sensibly have been reached other than that made by the judge to allow the appeal. As to the other possible error, where the judge referred to the Appellant having made a visit visa application to re-enter in 2012/2013 he submitted that this was supposition on the part of the judge but there was no evidence either way of what had happened and thus was not a material error. In the skeleton argument at paragraph 5 it is said that arguments were advanced by the Appellant in the Grounds of Appeal and within her statement of reasons which were not considered by the judge and these relate to an abuse of discretion and at page 21, he invited the Tribunal to reach the conclusion that the Appellant had set out her immigration history and made reference to the entry clearance decision as an unlawful one. Thus the Upper Tribunal should consider the argument raised because the basis of it was before the First-tier Tribunal even if it could be said it was not argued before the judge.

13. He submitted further that the use of deception in this way by a genuine asylum seeker should not result in any penalties and made a reference to Article 31(1) of the Refugee Convention and the text of that Article making it clear that Contracting States shall not –

> "impose penalties, on account of their legal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

This was a statutory embodiment made also in the Immigration and Asylum Act 1999 at Section 31 which refers to "defences based on Article 31(1) of the Refugee Convention". He therefore submitted that it was a statutory defence for a criminal act of illegal entry of an asylum seeker.

14. As to the decision itself, much of the decision made reference to deception used to obtain leave to remain and that this had caused the reasoning to be obfuscated and distracted the Entry Clearance Officer as there was no evidence of deception in an application for leave to remain. As set out in the skeleton argument the only argument advanced by the Entry

Clearance Officer was that the Appellant had subsequently returned to the DRC and that this did not discharge the burden of proof upon the Entry Clearance Officer to demonstrate deception under paragraph 320(7B) and in any event the claim that it was a "fraudulent asylum claim" was not accepted by the Immigration Judge and the Entry Clearance Officer has not sought any challenge to the UT on that issue.

15. Mr O'Ryan further submitted in accordance with his skeleton argument at [28] that the decision made by the Entry Clearance Officer was made without reference to her published policies. Those were set out in the skeleton argument and appended to it. They made it clear that the Entry Clearance Officer could consider "exceptional, compelling circumstances" or alternatively where leave to remain has been granted by the Secretary of State in the knowledge of a breach of the Immigration Rules then in accordance with the published policy, the Entry Clearance Officer must not refuse such an application under paragraph 320(7B). The facts as set out in the policy directly applied to the Appellant as leave was granted by the Secretary of State in the knowledge of a breach of Immigration Rules. Whilst the decision was therefore not in accordance with the law, this was a case where the decision should not be remitted to the Entry Clearance Officer for a lawful decision but there were circumstances which meant that the appeal should be allowed outright. He submitted that in determining whether an error of law was material that the failure to apply the policy was such that the only sensible outcome on the facts of this case would be to not invoke paragraph 320(7B) and therefore whilst the judge did allow the appeal, may have done so for the wrong reasons, it has not been demonstrated that the appeal should be dismissed.

16. Furthermore he submitted that as a matter of construction, the definition of "deception" in paragraph 6 of the Immigration Rules needs to be read down so as to be compliant with the Secretary of State's obligations under the Refugee Convention so that it reads "Say that acts giving rise to offences for which a defence is available under Section 31 of the Immigration and Asylum Act 1999 shall not be treated as 'deception'". He therefore submitted that if paragraph 6 was so read, the Appellant has not engaged in deception and paragraph 320(7B) did not arise at all and thus the judge did not materially err in law in allowing the appeal.

17. I reserved my decision.

Discussion:

18. There are in my judgment two errors within the determination of the judge identified by the Secretary of State. The first error relates to paragraph 320(7B) and the judge's findings at paragraphs [35]-[36] of the determination where the judge found that when the Appellant left in 2011 she left voluntarily and at her own expense and this would constitute one of the exceptions of paragraph 320(7B) namely 320(7B)(iii). However the exception requires that the Appellant has left the UK over twelve months previously but at the date of decision (13th June 2013) the Appellant had

not left the UK over twelve months previously because she left in 2013. Thus the judge misunderstood that the exception applied and also misunderstood the length of time that she had been absent from the UK.

19. The second error is a factual one but relates to the findings made by the judge at [32] where the judge said this:-

> "It is also a matter of fact that she did make a visa application to return to the UK in December 2012 which presumably was fully considered and granted. Any concern regarding whether or not the Appellant had been fraudulent in the application in 2007 was apparently not then raised. The Appellant spent three weeks in the UK before returning to the DRC, all well within the conditions of a visit visa."

Thus the judge appeared to find that she had made a visa application to return to the United Kingdom in or about December 2012. Whilst Mr O'Ryan submits that this was not an error on the basis that there was no evidence either way as to how she had entered, I do not agree. The factual background before me demonstrates that she entered the UK on 12th December 2007 and was granted leave to remain having been granted refugee status which would have been valid for five years at that time. She left the UK in December 2011 after having lived in the UK for four years. However she did not forego any further right to remain and was able to re-enter the UK and did so in 2012. It was not necessary for her to apply for a visa to re-enter the United Kingdom as she would have been admitted as a returning resident as she still had extant leave to enter as a refugee. Therefore it was not necessary for her to apply for a visa given the timing or the length of her leave which was to expire in June 2013. To this extent it is an error of fact made by the judge. However I do not consider that the Secretary of State's grounds are made out when considering the effect of this error. The grounds submit that the judge made a factual error as it affected her findings subsequently that the Appellant had stated an intention to visit and that the conditions of her visit had been complied with and therefore she was a genuine visitor (see [37] and the grounds). Whatever the factual error made by the judge, it seems to me that the point made by the judge at [37] is a valid one namely that she came to the UK on the basis of what she had described in the evidence as a "family visit" for a limited stay of 21 days and then she returned to the DRC where she had been living since 2011. There was no attempt to stay any longer than the period she had originally said but returned after what was a short family visit. The judge therefore, whilst making a factual error as to the means in which she entered, it was open to her to find that her intentions to return relevant to this visit had been demonstrated and thus was a relevant consideration under paragraph 41 (see [37] of the determination). That said, it does have the effect of nullifying the finding in paragraph [32] where the judge found that the fact that she had made a visa application in 2012 which was considered and granted by the Entry Clearance Officer meant that any concerns regarding a deception in 2007 was not raised. As the Appellant had not in fact made a visa application it could not be said that the entry clearance had in effect

disregarded the deception that he now sought to rely on. However that is a different matter than that found by the judge when she also found that at the relevant time, that is at the time of the asylum claim, the Respondent was satisfied that whilst she had used deception, that she should be granted leave to remain (see paragraph [30]). That finding it seems to me is a relevant one and is not affected by any error of fact.

20. The question for this Tribunal is the effect then of those errors. The Secretary of State submits the judge should have found that paragraph 320(7B) was a mandatory refusal and that as the Appellant herself accepted that she had entered by deception in 2007 that paragraph 320(7B)(d) applied. That section reads as follows:-

> "Grounds on which entry clearance or leave to enter the United Kingdom is to be refused
>
> ...
>
> ...(7B) where the applicant has previously breached the UK's immigration laws (and was 18 or over at the time of his most recent breach) by:
>
> (a) overstaying:
>
> (b) breaching a condition attached to his visa;
>
> (c) being an illegal entrant;
>
> (d) using Deception in an application for entry clearance, leave to enter or remain, or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not):
>
> (e) unless the applicant:"

21. Mr O'Ryan by way of response submits that notwithstanding the two errors of law identified, the judge reached the right outcome by allowing the appeal but in effect did so for the wrong reasons relying on the matters amply set out in his skeleton argument and relying on the guidance when properly applied to the Appellant's circumstances.

22. I have carefully considered the submissions that I have heard. The validity of an application under paragraph 320(7B) is dependent upon proof that there has been a previous relevant act by an applicant and that the previous act predated the application. The Entry Clearance Officer therefore must prove the precedent facts relied on and that the deception must have been used for the purpose of securing an advantage in immigration terms (see **Ozhogina and Tarasova (Deception within paragraph 320(7B) – nannies) Russia [2011] UKUT 00197**.

23. A careful consideration of the Entry Clearance Officer's refusal demonstrates that the body of the refusal related to what the Entry Clearance Officer referred to as deception utilised by the Appellant to

obtain leave to remain. Whilst the Entry Clearance Officer began by making a reference to deception in an application for leave to enter namely that used in 2007, he then went on to make a number of references in a decision concerning obtaining leave to remain by deception. The decision reads at the relevant parts as follows:-

> "You were granted limited leave to remain in the UK. You subsequently left the UK and returned to the Democratic Republic of Congo where you state that you have obtained employment working for the president and you currently hold a diplomatic passport. I am therefore satisfied that the basic [sic] of your claim to remain in the UK was fraudulent; you have demonstrated both that you could return to the Democratic Republic of Congo and that you would suffer no ill consequences for returning. I am therefore satisfied you carried out deception in your application to remain in the UK. I am therefore refusing you entry clearance under paragraph 320(7B) of the Immigration Rules. You state you seek entry to visit your family. Your daughter is resident in the UK and married to a GBR national. Your unmarried partner and three children hold limited leave to remain in the UK as refugees. Given I am satisfied that the basis of your claim to remain in the UK was fraudulent it follows that your children's applications were also fraudulent."

The decision went on to state –

> "You have used deception to enter and reside in the UK, to obtain visas for your children and to obtain leave to remain for your children in the UK. You relied on public funds in the UK to support yourself and your family."

The decision goes on to refer to the Appellant and the children "continuing their fraudulent claim to remain in the UK, ...".

24. It seems to me that this is relevant in the decision-making process as the Entry Clearance Officer does go on to state –

> "I am therefore satisfied that you carried out deception in your application to remain in the UK. I am therefore refusing you entry clearance under paragraph 320(7B) of the Immigration Rules."

The Entry Clearance Officer also concludes that:-

> "In the light of all of the above I am not satisfied that I can rely on your account of your circumstances and intentions."

It is therefore plain that the Entry Clearance Officer's view was that the current application was set against the background and his view that she had deceived the UK authorities by a fraudulent claim for refugee status based solely on the fact that she had left the UK and returned to the DRC. In my judgment that was wholly erroneous and was not supported by evidence to the standard necessary to prove such a deception (see **JC** and (paragraph 9) as cited). If the Entry Clearance Officer sought to rely on any alleged deception used to obtain leave to remain under paragraph 320(7B) (it is plain from reading the third paragraph of the refusal and

indeed the whole tenor of the refusal), then it was necessary for the Entry Clearance Officer to provide evidence and support to prove that precedent fact. These unsubstantiated allegations came nowhere near to discharging the burden or the standard of proof that was firmly based on the Respondent.

25. The factual background made it clear that the Appellant, whilst having used a false document to enter the United Kingdom, applied for asylum along with her partner and children and had told the UK authorities when making her claim that she had used the false passport in order to flee persecutory treatment and the reasons for using the false passport were accepted by the Secretary of State who then granted the family refugee status based on her circumstances at that time. The Secretary of State was therefore aware at the time of granting that refugee status and subsequent limited leave to remain that she had used a false passport in a different name when granting her status in her own name.

26. Even after she had left the DRC on the basis that the political circumstances had changed and therefore was not subject of risk of harm, there had been no attempt by the UK authorities to either seek to take from her her refugee status prior to her departure in 2011 nor to take any action against her remaining family members in the UK at any time thereafter. They still remain in the UK as refugees. On those facts, the Entry Clearance Officer had no basis upon which to make a case that the Appellant had used deception in an application for leave to remain and I consider that flawed view went on to affect the decision as a whole. To that end the judge was right in the finding reached [30] that the Appellant did explain at the relevant time (at the time of the asylum claim) the reason for using a false identity; such was not an unusual situation when a deception of that type occurs in a claim for asylum and that the Respondent must have been satisfied at the relevant time regarding the claim as the Appellant and her family were then granted refugee status.

27. The finding at [32] is also valid that where the judge stated:-

> "32. It is the case that the Appellant's family members still have status in the UK and this is something that is open to the Respondent to look into if it is believed that the claims for asylum were made on a false basis."

At [33] the judge gave two reasons for refusing to uphold the refusal under paragraph 320(7B). Firstly that the Appellant visited in 2012 with the necessary permission (which was a mistake of fact) but found that the family members in the UK retained their current status and that that had not been challenged regarding the basis of their claim for asylum. Therefore the judge made the point that any refusal under paragraph 320(7B) on the basis of a deception by obtaining leave to remain was therefore not made out. The second point made was that the circumstances were known to the Respondent at the time of the first application and were not challenged and her circumstances do not appear

to have materially changed. That appears to be a reference, I think to the application the judge presumed she must have made in 2012 to enter the UK, which in fact was wrong.

28. This leaves the deception used to enter the United Kingdom which is accepted was made by the applicant. As set out in the preceding paragraphs I consider that the issue of deception used to obtain leave to enter was elided by the Entry Clearance Officer with a deception used to obtain leave to remain and that that view was formed without evidence sufficient to discharge the burden of proof and this affected the conclusions reached regarding the proper application of paragraph 320(7B) of the Immigration Rules.

29. Furthermore, I consider there is force in the argument that the Secretary of State granted the Appellant refugee status in the knowledge of her use of deception. It is plain from the evidence that the grant of refugee status was given in her real name of Sabine Wulina Kanika and not in the name that she used to enter the United Kingdom of Charlotte Benbow Dimuana. Furthermore Ms Pettersen confirmed that the Appellant had told the Respondent in her interview that she had used a false name to enter the United Kingdom and therefore it was clearly known that such a deception was used before refugee status was granted. That was the point made by the judge at paragraph [30].

30. Whilst the grounds refer to paragraph 320(7B) as a mandatory refusal the judge recognised this in the determination at [33]. However there is no reference in the grounds or indeed the decision as to the circumstances where paragraph 320(7B) should not apply. The Rules themselves have exceptions to them which arose due to the concessions made to encourage those who had entered illegally to return on a voluntary basis. However, none of those exceptions can be said to apply to the Appellant. However the published policies do provide exceptions to the application of paragraph 320(7B) if a case on its facts arises under those provisions.

31. The terms of those policies are set out in the documents appended to the Appellant's skeleton argument. Whilst it is submitted that such arguments were raised in the papers before the First-tier Tribunal and the judge did not deal with them, careful consideration of the documents demonstrate that they were set out in broad terms without any particularisation and no reference as far as I can see from the Record of Proceedings or the determination make any reference to submissions being made concerning the Respondent's policies. Nonetheless, they are relevant and I have considered them. The relevant guidance is set out in

> "General grounds for refusals RFLO3 ...
>
> RFL3.3 What if there are exceptional, compelling circumstances?
>
> Out of any application, an ECO needs to consider if there are any human rights grounds (in particular the right to family life under Article 8), or any exceptional, compelling circumstances which would justify the issue of entry

clearance. If there are exceptional, compelling circumstances the application must be referred to the Referred Cases Unit for a decision to be made outside of the Rules."

As to Immigration Offender RFL05, paragraph 320(7B) and A320 it reads as follows:-

"1.4RFL5.4 When does Rule 320(7b) not apply? Rule A320

Under paragraph A320 of the Immigration Rules, you must not refuse an applicant under 320(7B) if they are applying for settlement as a family member under Appendix FM but you may consider whether the applicant falls to be refused under the suitability requirements namely S-EC.1.8 ...

In, addition, as concessions outside the Rules, you should also not refuse an applicant under 320(7B) if:

The applicant has been accepted by UKVI as a victim of trafficking (see RFL5.8)

The applicant was in the UK illegally on or after 17th March 2008 and left the UK voluntarily before 1st October 2008 (see RFL5.7)

In addition you must not refuse an applicant under 320(7B) if:

False documents or false representations were used in a previous visa or leave to enter or remain application, and the applicant was not aware that the documents or representations were false;

The period specified for automatically refusing the application has expired; or

Following their breach of UK immigration laws, UKVI issued a visa or leave to enter or remain in the knowledge of that breach, for example, a student who has overstayed but was granted LTE following an out of time application."

32. Whilst Mr O'Ryan refers to "exceptional compelling circumstances" that is in relation to human rights grounds and it has not been asserted what the "exceptional compelling circumstances" are. In any event even if it could be said to refer to "exceptional compelling circumstances" in the sense that someone had been granted leave after the deception had been used and in the knowledge of that deception, it does not make any difference because the case falls within the exception at RFL5.4 where leave to remain was granted by the Secretary of State in the knowledge of a breach of the Immigration Rules.

33. The Entry Clearance Officer did not direct himself to the terms of the policies identified above which would demonstrate, as the judge found (albeit not on the basis of the policies) that leave was granted in the knowledge of her deception and that in that sense whilst the judge did not make reference to the policies, the finding in that regard was correct. In that sense, I am satisfied that the decision was not "in accordance with

the law". Ms Pettersen did not demure from that proposition. However Mr O'Ryan submits that it is unnecessary to remit the decision to the Entry Clearance Officer for a lawful decision to be made because the terms of the policy are such that it could be said that the only sensible outcome would be that paragraph 320(7B) should not be applied.

34. I have considered that submission and have done so in the light of the facts taken as a whole and also the published policies. The relevant policy outlined above is in mandatory terms; "you must not refuse an applicant under 320(7B) if ...".

In those circumstances I consider that this is a case from which a finding a decision "is not in accordance with the law" on the ground of the failure to apply a policy should lead to a substantive decision in the applicant's favour. Whilst such cases are unusual, they are those where firstly the Appellant provides the precise terms of the policy which creates a presumption on the facts of her case in her favour and that there is nothing at all to displace that presumption, or nothing that, under the terms of the policy, fall for consideration (see **AG and Others** **(Kosovo) [2007] UKAIT 82**). That properly can be said to apply to the circumstances of the Appellant's case and that if it had been applied to the facts as they are known to be (not relying on any erroneous basis that there was any deception used to obtain leave to remain) that paragraph 320(7B) would not have been raised as a ground for refusal. I am therefore persuaded by Mr O'Ryan that the right course is not to remit the matter to the Entry Clearance Officer for a lawful decision but to reach the conclusion that the Appellant was entitled to succeed and that the judge's decision to allow the appeal should stand. Whilst two errors have been identified, it has not been demonstrated that they, on the basis of the matters set out above that they would have led to any other outcome.

35. That leaves the decision under paragraph 41. It is plain from reading the determination of the judge to which there is no substantive challenge by the Secretary of State that the judge also found that the Appellant met paragraph 41(i) and (ii) and gave sustainable reasons for reaching those conclusions within the determination. Whilst at paragraph [40] she raised some concern concerning the financial documentation, it was open to the judge to find in that paragraph that as the application was not refused under one of the financial provisions of paragraph 41 and as the matter was not pursued at the hearing by the Presenting Officer and the Respondent that it was not necessary for that matter to be taken any further. Indeed the grounds before the Upper Tribunal do not challenge that finding.

36. Whilst Mr O'Ryan submits that Article 31(1) applies as an additional ground, I do not find that that is made out. The Refugee Convention Article 31(1) reads as follows:-

"Article 31 – Refugees unlawfully in the country of refuge

(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom is threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

37. It seems to me that this paragraph relates to criminal sanctions when making a reference to Contracting States imposing "penalties". Indeed Section 31 of the Immigration and Asylum Act 1999 reads as follows:-

"31. Defence is based on Article 31(1) of the Refugee Convention

(1) It is a defence for a refugee charged with an offence to which this Section applies to show that, having come to the United Kingdom directly from a country where his life or freedom is threatened (in the meaning of the Refugee Convention), he –

(a) has presented himself to the authorities in the United Kingdom without delay;

(b) showed good cause for his illegal entry or presence; and

(c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom."

Therefore the UK's legislation under the Immigration and Asylum Act 1999 makes specific reference to Article 31(1) of the Refugee Convention by construing "penalties" as criminal sanctions arising from any possible criminal offences which would accrue from how they entered the United Kingdom. No submissions have been made by reference to any Strasbourg jurisprudence as to how the term "penalties" has been defined nor any distinctions made between the "civil" or "criminal" spheres. In any event, given my conclusions earlier in the determination, it is not necessary for me to reach any view on this argument.

## **Decision**

38. For reasons set out, it has not been demonstrated that the decision of the First-tier Tribunal should be set aside for error of law. The decision of the First-tier Tribunal shall stand.

Signed Date

Upper Tribunal Judge Reeds