



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/40051/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 8th July 2016**

**Decision and Reasons Promulgated
On 18th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**RIZWAN ALI
(Anonymity Direction not made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Victor-Mazeli (counsel) Instructed by Law Lane, solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Cary promulgated on 16 November 2015, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 25 October 1980 and is a national of Pakistan.
4. On 25 October 2014 the Appellant arrived at Heathrow Airport in possession of a residence permit conferring leave to remain as a spouse until 3 March 2016. After interviewing the appellant, an Immigration Officer cancelled the grant of leave to remain (relying on paragraph 321A(2) of the Immigration Rules) and refused entry to the UK.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Cary ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 25 May 2016 Judge Nicholson gave permission to appeal stating *inter alia*

"6. This was a thorough decision by the Judge. Nonetheless, paragraph 321A(2) specifically includes the words "*in relation to the application for leave*" and implicitly refers to the leave that is to be cancelled. Although the appellant might not have been in a position to make an application for leave as a spouse if he had not previously secured further leave as a student, it is arguable that, unless the false document was submitted in relation to the application for leave as a spouse, paragraph 321A(2) did not apply.

7. Permission to appeal is accordingly granted on this ground. I do not refuse permission on the remaining grounds although some have relatively little merit."

The Hearing

6. (a) Ms Victor-Mazeli moved the three grounds of appeal. He told me that the Judge relied on paragraph 321A of the immigration rules and reminded me of the precise terms of 321A(2) of the rules. She referred to the case of Khaliq (entry clearance – para 321) Pakistan [2011] UKUT 00350(IAC) and told me that the Judge had failed to correctly apply the ratio of that case.

(b) Ms Victor-Mazeli moved to the second ground of appeal and told me that even if the Judge was correct in his interpretation of paragraph 321A rules, the Judge should not have reached the conclusion he has reached because no evidence of deception was placed before the Judge. She reminded me of the burden and standard of proof relied on the cases of In R(on the application of Gazi) v SSHD (ETS-JR) 2015 UKUT 00327 and SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUAT .

(c) Ms Victor-Mazeli came to the third ground of appeal, and told me that the Judge's proportionality assessment of the article 8 ECHR grounds is fatally flawed. She told me that the appellant's wife is a British Citizen who has never been to

Pakistan, and has family in the UK, and plans for a future career in the UK. She told me that the Judge had failed to take account of factors which (she told me) amount to exceptional circumstances when considering article 8 ECHR grounds of appeal. She urged me to set the Judge's decision aside and to substitute my own decision allowing the appeal.

7. Mr Walker, for the respondent, told me that he could see strength in the submissions made in relation to paragraph 321A of the immigration rules. He reminded me that SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUAT was decided after the Judge's decision was promulgated. He told me that there is sufficient evidence before this tribunal to enable me to substitute my own decision if I am persuaded that the Judge's decision contains a material error of law.

Analysis

8. In Khaliq (entry clearance - para 321) Pakistan [2011] UKUT 00350(IAC) the Tribunal held that for a person who has entry clearance that, under the provisions of the Immigration (Leave to Enter and Remain) Order 2000, takes effect as leave to enter, does not on arrival in the United Kingdom "seek" leave to enter, and paragraph 321 therefore does not apply to him. Paragraph 321A does, but only if the circumstances set out in that paragraph can be shown to exist in his case. In Khaliq the Appellant was found on arrival to have poor English and a purchased qualification. The Immigration Officer decided that the appellant should not be admitted on the strength of his visa. The Tribunal held that, because, under the structure of section 3A of the 1971 Act, and article 4 of the Immigration (Leave to Enter and Remain) Order, entry clearance takes effect as leave to enter, the application for entry clearance is the application for leave to enter. The respondent's decision in that case was clearly based on his examination of the appellant at Gatwick. As that was not an application for leave to enter, the facts he discovered could not of themselves justify refusal under paragraph 321A(2). If the appellant could be shown to have produced to the Entry Clearance Officer a false document in connection with his application for entry clearance, there might be little doubt that paragraph 321A applied. But, as the printout of the Entry Clearance Officer's log shows, the English certificate was not produced to the Entry Clearance Officer: indeed, the Entry Clearance Officer apparently had no interest in it.

9. In SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUAT the Tribunal identified "*multiple frailties and shortcomings*" in the generic evidence of the Respondent but added "*we have substantial reservations about the strength and quality of the Secretary of State's evidence. Its shortcomings are manifest. On the other hand, while bearing in mind that the context is one of alleged deception, we must be mindful of the comparatively modest threshold which an evidential burden entails. The calls for an evaluative assessment on the part of the tribunal. By an admittedly narrow margin we are satisfied that the Secretary of State has discharged this burden. The effect of this is that there is a burden, again an evidential one, on the*

Appellants of raising an innocent explanation". The Tribunal added that "every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties".

10. It is common ground that the respondent's decision is based on an allegation that the appellant's original grant of leave to enter may be tainted by dishonesty. (That dishonesty is denied by the appellant). It is also common ground that there was no dishonesty employed in the application which lead to the grant of leave to remain as the spouse of a British Citizen.

11. The decision against which the appellant appeals is the respondent's decision to cancel leave to remain as the spouse of a British Citizen. That decision relies entirely on paragraph 321A of the rules. Paragraph 321A(2) of the rules specifically includes the words "*in relation to the application for leave*" and implicitly refers to the leave that is cancelled. Even if the appellant's English-language certificate had been fraudulently obtained, it is not a document submitted in relation to the application. It is a document which was submitted in 2012 in relation to a separate application. The leave which was cancelled was granted on 3 December 2013.

12. At [29] the Judge sets out the provisions of paragraphs 321 & 321A of the Immigration Rules. At [32] the Judge correctly identifies the grant of leave to remain made on 3 December 2013 as the leave which was cancelled by the decision under appeal. Between [31] & [34], the Judge clearly finds that because, in her view, the appellant's grant of leave to remain as a student is tainted by dishonesty, then his in country application for leave to remain, granted on 3 December 2013 is equally tainted.

13. In the first sentence of [33] the Judge says

It is my view that the respondent is entitled to cancel the Appellant's leave to remain as a spouse on 25 October 2014 if the appellant had submitted false documents in respect of his earlier application for leave to remain.....

14. That finding is clearly a material error of law. That finding flies in the face of the Dicta in Khaliq, and misinterprets the wording of 321A of the rules.

15. Because the decision contains a material error of law, I must set it aside. There is sufficient material before me to substitute my own decision.

16. The relevant facts in this case are that the appellant entered the UK as a student. In 2012 the appellant submitted an application for leave to remain in the UK as a student. In July 2012 the appellant obtained an ETS test certificate which he relied on to support that application.

17. The respondent granted the appellant leave to remain in the UK as a student until 16 December 2013. The respondent now believes that the ETS certificate relied on by the appellant dated 15 July 2012 cannot be relied on.

18. On 3 December 2013 the respondent granted the appellant leave to remain in the UK as the spouse of a British citizen. Leave to remain was granted until 3 March 2016.

19. On 25 October 2014 the appellant arrived at Heathrow airport and tried to re-enter the UK relying on his leave to remain until 3 March 2016. The respondent cancelled leave to remain because the respondent believed the appellant had employed dishonesty in his 2012 application.

My Decision

20. In line with the decision in Khaliq (entry clearance – para 321) Pakistan [2011] UKUT 00350(IAC), on the undisputed facts in this case paragraph 321A of the Immigration rules does not apply to the appellant.

21. The appellant's appeal against the respondent's decision of 25 October 2014 to cancel leave to remain in the UK is allowed.

Decision

22. The decision of First-tier Tribunal Judge Cary promulgated on 16 November 2015 is tainted by a material error of law. I must set the decision aside.

23. I substitute the following decision.

24. The appeal against the Respondent's decision dated 25 October 2014 is allowed.

Signed

Date 18th July 2016

Deputy Upper Tribunal Judge Doyle