



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

Appeal Numbers: IA/19043/2014
& IA/19048/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 14th April 2015**

**Determination Promulgated
On 17th April 2015**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

**MR AMANVIR SINGH BAL (1)
MS MALA KAUR OBHOO (2)
(ANONYMITY ORDER NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, instructed by Uzma Law Ltd

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The first appellant is a citizen of India born on 4th April 1986. The second appellant is his spouse, and is a citizen of India born on 3rd December 1985. The first appellant arrived in the UK on 28th September 2004 with

leave to enter as a student. He had leave in this capacity and then as a Tier 4 student migrant until 31st October 2009. He then obtained leave as a Tier 1 post-study work migrant until 30th October 2011. He then had leave as a Tier 1 general migrant until 21st February 2014. On 17th February 2014 he applied for further leave as a Tier 1 general migrant. The second appellant had leave as the first appellant's dependent from 17th September 2013 to 21st February 2014, and applied to extend her leave in this capacity on 17th February 2014..

2. These applications were refused on 3rd April 2014 as the first appellant failed to get sufficient points under Appendix A as the respondent was not satisfied that the first appellant's claimed earnings from Amanvir Singh Bal T/A Bal Catering and Consultancy were from genuine employment. The first appellant raised a new basis for allowing the appeal under paragraph 276B of the Immigration Rules in his s.120 notice and in his grounds of appeal, and also argued that the appeals should be allowed under Article 8 ECHR.
3. The appeals against the decisions to refuse further leave were dismissed on all grounds by First-tier Tribunal Judge CJ Woolley after a hearing on the 26th November 2014.
4. Permission to appeal was granted by Judge of the First-tier Tribunal Shimmin on 23rd February 2015 on the basis that it was arguable that the First-tier judge had erred in law in dealing with paragraph 322 of his own volition when it had not been raised by the Secretary of State in the refusal letter and because the burden of proof was on the Secretary of State and insufficient evidence had been provided to satisfy this burden of proof. There were also arguments that the findings under paragraph 276B of the Immigration Rules were unsafe; that factual errors were made in the determination; and that the Article 8 ECHR determination was not properly made with respect to proportionality.
5. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions

6. In summary Mr Karim argued that it had been wrong for Judge Woolley to have raised paragraph 322(2) of the Immigration Rules of his own volition when it had not been raised by the Secretary of State. This was procedurally unfair as the appellant did not know the case he had to meet until the matter was raised in the submissions of the presenting officer as the first appellant was not on notice he was alleged to have committed a deception. The First-tier judge had not clarified the issue at the start of the hearing and there was no cross-examination from the presenting officer on the issue. The respondent refusing the first appellant's application as not credible was not the same thing as finding he had used deception. Paragraph 322(2) and the general grounds of refusal had not been applied to the first appellant in the refusal of his

Tier 1 general migrant application: if it had been relevant it would have been raised at this stage by the Secretary of State. Judge Woolley had also shifted the burden of proof onto the first appellant. Further there was insufficiently cogent evidence that supported a finding of deception. According to Home Office Guidance on paragraph 322(2) of the Immigration Rules a document needed to be independently verified as false and this had not been done. The respondent had stated in the refusal letter that full verification checks had not been carried out on the documents.

7. He also argued that Judge Woolley could not properly find that a grant of indefinite leave to remain was undesirable under paragraph 276B(ii) of the Immigration Rules as the alleged deception by the first appellant had not been proven with objective evidence. The burden of proof to show undesirability was on the respondent not the appellant as the public interest was a matter for the respondent and there was no conclusive objective evidence, such as police evidence or a conviction, to show that the first appellant was undesirable. There was no criminal activity by this appellant, and further weight had wrongly been attached to the way in which the appellant had accumulated ten years leave to remain in the UK. The delays in allocating a hearing date were not of his doing.
8. Mr Karim indicated that the evidence which would have been put forward if the appellants had been on notice of issues of deception would have been oral explanations by the first appellant.
9. The determination under Article 8 ECHR was flawed as no weight was attached to the appellant having been in the UK lawfully for ten years. This is clearly relevant, see Patel v SSHD [2013] UKSC 72 at paragraph 56. Also there was reference to entry clearance and family life, which were clearly not relevant to this appellant's case, at paragraph 41 of the determination which showed that Judge Woolley had not understood the case before him. The determination of the Article 8 issue was also infected by the findings on deception which should not have been made.
10. At the hearing Mr Karim accepted that small factual errors argued in the grounds of appeal did not amount to errors of law.
11. Ms Isherwood argued that the genuineness and credibility of the Tier 1 application and thus the first appellant's self-employed work had clearly been put in issue in the refusal of that application. There were many references to doubts over genuineness of earnings and the authenticity of the application in the refusal letter. The first appellant had not addressed this in any way or sought to argue that it was wrong in his appeal either in his statement or by oral evidence given in examination in chief. Further if paragraphs 12 and 13 of the determination are examined then it can be seen that the Home Office Presenting Officer had made submissions on the basis of the lack of credibility of the Tier 1 application being material relevant to a finding of deception, and there

is no evidence that the representative of the appellants indicated that he wanted an adjournment or to adduce further evidence when it must have been explicitly clear (at this point if not before) that these matters were in issue in the appeal. It was therefore open to the First-tier Tribunal to bring this material into the consideration as to whether the first appellant met the requirements of paragraph 276B of the Immigration Rules, which specifically required the Judge to look at whether the appellant fell to be refused under the general grounds of refusal and at whether his presence was undesirable. Judge Woolley had used the evidence before him appropriately, and given explanations as to why he had done so in his determination. The appeals were also appropriately dismissed under Article 8 ECHR. It was accepted that the appellants could not meet the Immigration Rules and the extent of the appellants' private life had been considered at paragraph 41 of the determination.

12. At the end of the hearing I informed the parties that I did not find that Judge Woolley had erred in law but that I would set out my full reasons in writing.

Conclusions

13. I do not find that the first appellant can properly argue that they were taken by surprise that Judge Woolley took the issue of his lack of credibility in connection with the first appellant's Tier 1 application into consideration in determination of the appeal, which arose out of the refusal of that application.
14. The nature of the concerns of the respondent were set out in considerable detail in the refusal letter, which details the reasons why the respondent did not find the first appellant was authentically or credibly self-employed as he had claimed in his Tier 1 application, and that the respondent was concerned that money was simply being circulated to give the impression of self-employed earnings. Judge Woolley did not take into consideration any potential issues of deception or undesirability which were not set out in that letter. I find therefore that there is no procedural unfairness in the sense that all factual matters used by Judge Woolley in dismissing the appeal had been put to the appellants via the refusal letter and relied upon documents submitted by the first appellant.
15. Further paragraph 276B of the Immigration Rules is put forward by the first appellant in the one stop notice and thus prior to the hearing by the first appellant who was fully aware that the respondent had not considered the matter and thus that each aspect of the Rule would have to be shown by him as met before the Tribunal. He was therefore fully aware that he would have to show both that he did not fall to be refused under the general grounds of refusal (which of course include paragraph 322(2) of the Immigration Rules regarding false representations made in a previous application) in accordance with paragraph 276B(iii) and that

it would not be undesirable for him to be granted indefinite leave to remain under paragraph 276B(ii) of the Immigration Rules.

16. Further, as Ms Isherwood has argued, there was no application to the First-tier Tribunal by the appellant's representative to recall the first appellant to give further oral evidence responding to the allegations of deception made by the Home Office Presenting Officer in his submissions which would have been expected if the representative had felt taken by surprise that the issue was being raised and there was further evidence that he would have wanted to present and rely upon in submissions for the appellants.
17. I find that Judge Woolley dealt with whether the first appellant fell to be refused in accordance with paragraph 322(2) of the Immigration Rules in a precise and careful fashion. He directed himself in accordance with AA (Nigeria) v SSH [2010] EWCA Civ 773. He looked at the evidence submitted by the appellant in relation to his Tier 1 application in detail at paragraphs 19 to 23 of the determination. It is not argued that he has made factual mistakes in his analysis. He concludes that "Bal Catering was a fiction designed to assist in the Tier One application", and thus that the false representations made were dishonest and thus could form the basis of a refusal under paragraph 322(2) of the Immigration Rules (see paragraphs 27 and 28 of the determination). He is careful to note however that a refusal under paragraph 322(2) of the Immigration Rules is not mandatory, and thus to look for reasons as to why this normal course should not be followed. He finds however that the first appellant has not put any forward as he had not addressed the reasons for refusal letter in any way.
18. I accept that Judge Woolley did not explicitly direct himself that the burden of proof was on the Secretary of State in this matter, however he has looked at the evidence before him and has not based his findings on empty allegations by the respondent but on specific matters such as payments in and out of the HSBC bank account for the first appellant which lead him to the conclusion of deception. Judge Woolley did not find that any document was a forgery, but that the appellant had put together the documentation so as to deliberately deceive the respondent. In such circumstances there would be no relevance of any document verification reports. I find that Judge Woolley followed the guidance in NA & Others (Cambridge College of Learning) Pakistan [2009] UKAIT 00031 in subjecting the evidence to critical, anxious and heightened scrutiny, and therefore applied the appropriate standard and burden of proof.
19. I also find that Judge Woolley has properly applied the test at paragraph 276B(ii) of the Immigration Rules. At paragraph 29 of his determination he sets out reasons why it would be undesirable in the public interest to allow the appellant to stay. He finds that fabricating earnings for a Tier 1 application and thus attempting to deceive the Home Office are matters that reflected on the first appellant's character and conduct and thus

made it undesirable for him to be granted indefinite leave to remain. I find that Judge Woolley has approached this issue appropriately and made a decision based on clear findings of fact drawn from the evidence before him, and which showed that the appellant fell to be refused in this way.

20. It follows that I find that Judge Woolley did not err in law in dismissing the appeal under paragraph 276B of the Immigration Rules.
21. I am also satisfied that he dealt with the appeal under Article 8 ECHR lawfully. At paragraph 33, when dealing with Article 8 ECHR under the Immigration Rules at paragraph 276ADE, it is clear that he has in mind the precise dates on which the appellants entered the UK and thus their period of lawful residence. In looking at the matter outside of the Immigration Rules he notes that they have private life in the UK at paragraph 37 which includes some work and a house purchased with a mortgage. His consideration of proportionality properly places the false representations made by the first appellant along with their ability to reintegrate in India into the balance against the appellants.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. The decision of the First-tier Tribunal dismissing the appeals is upheld.

Signed:

Date: 14th April 2015

Upper Tribunal Judge Lindsley

Fee Award

Note: this is **not** part of the determination.

As I have dismissed the appeal there can be no fee award.

Signed:

Date: 14th April 2015

Upper Tribunal Judge Lindsley