



IAC-AH-KEW-V1

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

Appeal Number: IA/29168/2014

**THE IMMIGRATION ACTS**

**Heard at Birmingham City Centre Tower**

**Decision & Reasons  
Promulgated**

**On 23 March 2016**

**On 15 April 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**MR HARJINDER SINGH DHALIWAL  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms D Dhaliwal, Counsel, instructed by Charles Simmons  
Immigration Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal refusing to vary his leave to remain as the spouse of a person

present and settled here on the grounds, inter alia, that his application fell for refusal under paragraph 322(2) and paragraph S-LTR.2.2 of Appendix FM, and against the Secretary of State's concomitant decision to remove him pursuant to Section 47 of the 2006 Act. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

### **The Reasons for Granting Permission to Appeal**

2. On 17 December 2014 First-tier Tribunal Judge Mailer granted permission to appeal for the following reasons:
  1. The appellant is a national of India born on 2 May 1985. He appealed against the respondent's decision dated 26 June 2014 refusing his application to remain in the UK as a spouse. It was contended that he failed to meet the requirements under paragraph 287(a)(vi) and 322(2) of the Rules.
  2. In a determination promulgated on 4 November 2014, FTT Pickup dismissed the appeal under 322(2) finding that the respondent exercised her discretion properly [20-21]. The appeal was also dismissed under Article 8.
  3. The grounds assert that the Judge did not make it clear that the burden of proof was on the respondent. No issue was taken under paragraph 322(1A) and that '..... meant that paragraph 322(2) on its own could not possibly be satisfied.' There are also grounds relating to Article 8.
  4. This was an application for further leave to remain. Paragraph 322(2) provides a discretionary ground to refuse leave to remain, where false representations have been made or there has been a failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave.
  5. Arguably this did not apply in the circumstances as it does not appear that the case against him related to a false representation for the purpose of obtaining leave to enter or a previous variation of leave.
  5. Permission is granted on all grounds.

### **The Decision of the First-tier Tribunal**

3. The appellant's appeal was heard by Judge Pickup at Stoke on Trent on 22 October 2014. Both parties were legally represented.
4. In his subsequent decision, Judge Pickup observed there was an unusual history to the appeal, which was not assisted by the way in which the refusal decision was drafted. It relied on false representations without specifying exactly what those false representations were.
5. The judge went on to summarise the relevant background facts. The appellant had been granted probationary leave to remain as a spouse on 23 January 2012 until 23 January 2014. As he had been in the UK since

2009, the relevant Immigration Rules which governed his application for indefinite leave to remain as a spouse were those in paragraph 287, including paragraph 287(vi), which required him to demonstrate sufficient knowledge about life in the UK in accordance with Appendix KoLL.

6. In his application for ILR the appellant stated in answer to question 5.2 that he had passed the Life in the UK test. He indicated both in the application form and the covering letter that he was submitting a Life in the UK test pass notification letter. It was disputed by the respondent that he had done so, but the judge had accepted the appellant's evidence that he had indeed submitted a notification letter dated 10 December 2014 purporting to show that he had taken the Life in the UK test on that date at Exchange Group Coventry. The respondent's case was that this certificate was not produced until May 2014, but the judge was satisfied on a balance of probabilities that the appellant had submitted a notification letter dated 10 December 2013 with his application.
7. However, when checking the notification letter in May 2014, the respondent found that there was no independent record in the online accessible warehouse to confirm the certificate was genuine. This prompted further enquiries. Miss Griffiths on behalf of the Home Office adduced in evidence a redacted email thread setting out the enquiry and the response, which confirmed the notification letter dated 10 December 2013 was false. She stated that Learn Direct had never used the Exchange Group in Coventry to deliver tests and furthermore Exchange Group ceased being a life in the UK test provider in July 2013. It thus followed that not only was the notification letter false but that the appellant could never have taken the test with Exchange Group Coventry in December 2013, as the outfit had closed down in July 2013.
8. The enquiries of the Secretary of State had also revealed that the appellant had failed the test on four separate occasions: 7 October 2013, 26 November 2013, 14 November 2013 and 29 November 2013, all tests taken in Birmingham. The judge continued:

"18. When the application was refused on 26.6.14, it is significant that the appellant proceeded to take the test twice more before he finally passed it, with a notification letter dated 27.9.14. In his witness statement, and that of his wife, it is stated that he understood the only reason for refusal was that the 'certificate' sent with the application was not genuine and that he had used deception in the application. At no time did the Secretary of State communicate that to the appellant or his solicitors. Even more significant is that the appellant claims that he went to look for the centre but found it had closed down, and made a complaint to the police on 16.7.14, which is documented. For reasons set out herein, I am satisfied that the appellant panicked when he knew his application had been refused and in order to cover himself, made a complaint to the police. That he took this action without ever being told by the Secretary of State that the notification letter was false is strongly indicative that he knew he had submitted a false document with his application. The fact that he went on to take the

test 3 more times lends support to this conclusion. If the appellant was satisfied that the document he had submitted was genuine there would have been no reason to report the matter to the police or to go on to take the test again. It is interesting and significant that in taking the test again, he failed twice before finally passing in September 2014. That he failed twice more after 4 failed attempts in October and November 2013 rather suggests that the alleged pass in December 2013 was most unlikely.

19. In all the circumstances, I find that this behaviour strongly suggests that the appellant submitted the 10.12.13 document with his application in full knowledge that it was false. Apart from anything, else it is plain from the evidence now adduced by the Secretary of State that he could not have taken the test at Exchange Centre Coventry in December 2013, as they ceased operation in July 2013. It follows that the appellant must have known that the notification submitted with his application was false, and taking all the evidence together, in the round, as I must, I so find. To the extent that both the appellant and his wife gave oral evidence to the contrary, I am satisfied that they were entirely dishonest and not telling the truth, all of which entirely undermines the appellant's credibility. I am satisfied that the appellant has been entirely dishonest from the outset of his application and not only did he rely on a document which he knew could not be genuine, but also made a false representation by stating that he had passed the test. I am satisfied that at that stage he had not passed the test and that he knew that to be the case.
  20. I have reached this conclusion, as stated, by taking all the evidence together in the round, making an overall assessment. I acknowledge that a finding of dishonesty should not be made lightly and that cogent evidence should be required before such a finding ought to be made. I am satisfied that there is good evidence both in the information provided by the Secretary of State, but also in the evidence and history of the appellant. His behaviour subsequent to the refusal decision is entirely consistent with his personal knowledge on his part that the notification letter was false when submitted by him or on his behalf. The Secretary of State never notified the appellant or his solicitors that the document was false, the appellant could have only known that and taken steps to take the test again and cover himself by making a police complaint because he knew from the outset that the submitted document was false."
9. The judge went on to find that the Secretary of State had properly exercised her discretion, and she had been entirely justified in refusing the application under paragraph 322(2). At paragraph 22, he found that because of the appellant's dishonesty, at least his false representations and attempt to deceive the Home Office, he also failed the suitability requirements of Appendix FM. He accepted that his partner was a British citizen with all her family in the UK, but even if EX.1 was reached, the appellant had failed to demonstrate that there were very significant difficulties to be faced by him and his partner continuing family life together outside the UK. The appellant had family in India and he had been in the UK for a relatively short period. Whilst he had a relationship

with his partner, he had no relationship with any child in the UK and so that consideration did not arise.

### **The Hearing in the Upper Tribunal**

10. At the hearing before me to determine whether an error of law was made out, Ms Dhaliwal developed the appellant's case. The judge had materially misdirected himself in law in applying paragraph 322(2) of the Rules. The judge had also erred in failing to set out the correct legal burden and standard of proof in respect of an allegation of forgery and or false representations. The third error was the judge's failure to consider the impact of paragraph 320(7) of the Immigration Rules in his Article 8 assessment.
11. On behalf of the Secretary of State, Mr Wilding submitted that the judge had not made any material error. Both parties had gone into the hearing aware that the factual issue which was in dispute was whether the appellant had made a false representation in his current application and/or had provided a false notification letter. Everyone knew what the case was about, and so there was no procedural unfairness.

### **Discussion**

12. The decision letter was defective. The respondent's case in respect of the appellant's Life in the UK test notification certificate was not clearly set out when the respondent purported to explain why the appellant had not provided satisfactory evidence of knowledge about life in the United Kingdom and as such his application did not satisfy the criteria specified in Appendix KoLL; and furthermore that his application also fell for refusal under paragraph 322(2) on the ground that false representations had been made or false documents or information had been submitted.
13. The potential confusion was compounded by the fact that paragraph 322(2) applies only to a previous application of leave to remain, not to a current application.
14. On the other hand, paragraph S-LTR.2.2 of Appendix FM applies where false information, representations or documents have been submitted in relation to the (current) application. At page 3 of the decision letter the relevant provisions of this paragraph are set out. Moreover, when purporting to explain why the application fell for refusal under paragraph 322(2) at page 1, it is reasonably clear from the context that the allegation of falsity is in respect of the current application, and not in respect of some previous application.
15. In short, as submitted by Mr Wilding, the defects in the refusal letter did not generate procedural unfairness as the appellant and his legal representatives understood the case which they had to meet at the appeal hearing, namely that he had provided a false notification letter dated 10 December 2013 in support of his current application.

16. This is illuminated by the judge's finding at the end of paragraph [20]. Although the Secretary of State did not in terms in the refusal decision notify the appellant or his solicitors that the notification letter was false, the appellant's behaviour in response to the refusal decision was indicative of him knowing that it was false; and *a fortiori* being in no doubt as to the specific reason why the respondent was asserting in the refusal letter that his Life in the UK test result was unacceptable.
17. Judge Pickup should have directed himself that paragraph 322(2) was inapplicable, and the Rule which should have been invoked in the decision letter was paragraph 322(1A).
18. However, the judge's failure to make a finding by reference to paragraph 322(1A) in substitution for paragraph 322(2) is not material, as the wording of the two provisions is identical in terms of what the Secretary of State has to prove in order to make out the ground of refusal.
19. Indeed, it was potentially to the appellant's advantage for the matter to be considered under 322(2) as the refusal under this provision is discretionary, whereas the refusal under paragraph 322(1A) is mandatory.
20. Ms Dhaliwal argued the contrary proposition, relying on extracts from the relevant IDIs as of 4 February 2016.
21. She pointed out that page 5 of the IDIs stated that where paragraph 322(1A) was applicable, staff should refer the matter to a senior caseworker before refusing, and that staff must also check the harm matrix before consideration. She submitted that as a result of the matter not being considered under paragraph 322(1A) the screening process had not taken place, to the appellant's potential disadvantage.
22. There is however no reason to suppose that a refusal on discretionary grounds would be any less rigorous. On the contrary, logically it should be more rigorous, precisely because the ground of refusal is discretionary. Moreover, at page 11 of the same IDIs, it is plainly stated that when a representation is confirmed as false and is made in connection with a current application, the caseworker "must" refuse the application under paragraph 322(1A). It is thus wholly unrealistic to postulate that the outcome would have been any different if the right Rule had been referred to and/or applied.
23. The second ground of challenge is that the judge failed to set out the correct legal burden and standard of proof. The judge rendered himself vulnerable to such criticism by stating at paragraph [6] that the burden of proof was on the appellant, and in stating at paragraph [7] that in considering documents produced by or on behalf of the appellant he had to bear in mind the guidance given in **Tanveer Ahmed IAT [2002] UKAIT 00439**, where it was held that the onus was on an individual claimant to show that a document on which he sought to rely could be relied on.

24. This was arguably not a misdirection in respect of the appellant's asserted non-compliance with paragraph 287(vi). The burden of proof rested with the appellant to show that he had demonstrated sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
25. But clearly at this point the judge had not directed himself that the burden rested with the respondent to prove that the appellant had dishonestly submitted a false test certificate.
26. However, when making his findings on this question, it is clear that the judge treated the respondent as being required to discharge the burden of proof on the balance of probabilities, and he expressly recognised that a finding of dishonesty should not be made lightly and that cogent evidence should be required before such a finding ought to be made. So I find that the judge applied the correct burden and standard of proof with respect to the Secretary of State's allegation that the appellant had knowingly submitted a false notification letter.
27. The genesis for ground 3 is the judge's comment at the end of paragraph [21] that it remained open for the appellant to make a new application with a valid notification letter. In fact, as Ms Dhaliwal submits, the appellant cannot make a new in-country application relying on a valid notification letter in circumstances where the general ground of refusal has been upheld. What is envisaged in the One-Stop Warning which accompanied the refusal decision is that the appellant should leave the country; and that an application for entry clearance, in most categories, will be refused for a period of one year if, following the breach, he has left the United Kingdom voluntarily at his own expense.
28. However, I do not consider that the judge's comment at the end of paragraph [21] vitiates his subsequent reasoning on the application of Appendix FM, Rule 276ADE or the assessment of proportionality in an Article 8 claim outside the Rules. The judge had given adequate reasons for dismissing the appeal under Article 8 grounds, and thus his finding on Article 8 is not vitiated by an error of law.

### **Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson