



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02566/2016**

Appeal Numbers:

HU/13511/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 20 March 2018**

**Decision & Reasons Promulgated
On 9 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

**MR FARUK CHOTANI
MR FAIZAL CHOTANI
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr D Bazini, Counsel

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. For reasons which will become clearer in a few moments, I am going to provide one decision in respect of these two Appellants' appeals. The appeals were originally heard separately by different judges. Although the second in time is the appeal of Mr Faruk Chotani (the father) it makes more logical sense to deal with his matter first. That matter, which related to an application for entry clearance, had been heard by First-tier Tribunal Judge Abebrese sitting at Taylor House on 29 September 2017 and by way of a decision promulgated on 24 October 2017 the judge had allowed the Appellant's appeal. The

other appeal that of Mr Faizal Chotani (the son) was heard by First-tier Tribunal Judge Metzger QC at Taylor House on 4 May 2017 and by way of a decision promulgated on 10 May 2017 he had dismissed the Appellant's appeal. Both the Entry Clearance Officer and the claimant appeal with permission.

2. In relation to the father's appeal, in which it is the Entry Clearance Officer who has sought permission to appeal, the grant of permission was by First-tier Tribunal Judge Robertson dated 15 January 2018 when she said as follows:

"There is arguable merit in the grounds because the Judge does not state why he accepts the appellant has fully co-operated with the entry clearance officer regarding his previous immigration history when he is alleged to have used deception on three separate occasions. The Judge does not refer to any other occasions on which deception was used and while he has found that the appellant did not exercise deception. It is unclear if this would have made a material difference to the outcome of the appeal and it is therefore material. There is also some arguable merit in the grounds at para 2 on the basis of 28 and para 3 of the appellant's wife's witness statement nor does he provide reasons as to why he finds that the Appellant's wife would have difficulty in integrating into life in Pakistan. It is therefore arguable that the Judge's findings are not adequately reasoned and permission to appeal is granted."

3. I shall now introduce the son's appeal. Namely the decision of First-tier Tribunal Judge Metzger QC whereby he had dismissed the Appellant's appeal and said that the wrong application was made, in that paragraph 297 of the Immigration Rules was relied upon but this Appellant at the time was over 18 and that therefore the judge concluded that the appeal had to be dismissed. The judge did say he was going to make some observations at paragraph 4 of his five paragraphed decision. He said that the other matters needed to be considered and indeed that if the father did have his appeal pending before the First-tier Tribunal then his decision namely that of First-tier Tribunal Judge Metzger's, should be brought to the Tribunal's attention in due course. The grant of permission in that case was by First-tier Tribunal Judge Holmes when it was said:

"It is arguable as set out in the grounds that the Judge's decision discloses a material error of law. The ground of appeal relied upon was that the decision was a breach of section 6 of the HRA but the appeal is dismissed under the Immigration Rules alone without consideration of the Article 8 claim. Moreover, the contemporary evidence suggests that although this will be a matter for the Upper Tribunal that the appellant made an application for an adjournment so that his appeal could be heard alongside that of his father on 12 June 2017. If that is so then

the appears to have been some confusion in the mind of the judge as to what he was being asked to do with the result the appellant was denied a fair hearing of his appeal.”

4. To give an overview of what these cases are about, the Sponsor is here in the UK, she works, and she wants her husband and her adult son to come and live with her here in the UK. Some years ago, her husband had overstayed and ultimately ended up being out of the jurisdiction and for some years. Since then, it is clear he has sought to return to the United Kingdom, as has his son.
5. The Entry Clearance Officer had refused the husband’s application citing in particular paragraph 320(11) of the Immigration Rules and it was said in this case that paragraph 320(11) was applicable in the husband’s case because of the following factors:

“You entered the United Kingdom on a six month visit visa in January 2003, you stayed in the UK until 18/08/2006 when you were served with removal papers. You failed to disclose this information when you previously applied for a visa in May 2010 and have used deception in two of your applications for entry clearance. Furthermore, you have also admitted when interviewed during the course of your last application that you were working illegally in the UK. Given that you were an overstayer, worked illegally and have used deception in an application for entry clearance I am satisfied that you have previously contrived in a significant way to frustrate... the intentions of the Rules and I therefore refuse your application under paragraph 320(11) as amended.”

There were other bases for refusal including if I use the shorthand, the issue was whether or not the Sponsor was earning sufficient funds. That aspect was later to be conceded at the hearing before the judge by the Presenting Officer.

6. In submissions before me today, Mr Melvin relied upon the grounds of appeal against First-tier Tribunal Judge Abebrese’s decision which state as follows:

“(1) The FTT at 23 has found that the applicant has fully co-operated with the Entry Clearance Officer it is unclear as to how the FTT has reached that finding as the Appellants’ refusal clearly show the Appellant has sought to deceive the Entry Clearance Officers on three separate occasions.

(2) In addition, the FTT has found that the Appellant sought to re-enter the country legally it is unclear as to how that finding was reached when the Appellant has consistently attempted to adopt deception in order to gain entry.

- (3) The FTT has found that the ECO has failed to give weight to the fact that the Appellant is seeking to join his wife who has resided here for the duration of her adult life. The Sponsor has been here since 2009 and was born in 1971. It is unclear therefore how the FTT has reached that finding.
- (4) The FTT has accepted the evidence of the Sponsor as she has struggled to reintegrate into life in India without providing any reasoning.”
7. Mr Melvin said that insofar as the work is concerned that the father had previously worked in breach of visitor conditions and that was premeditated intention to work and that this issue had not even been considered by the First-tier Tribunal Judge. There was also the issue of frivolous and vexatious applications, some four or five different applications had been made by the father and this should have been considered by the judge. The judge had not given adequate reasons. The judge’s findings were irrational findings it was said. There was insufficient reason insofar as paragraph 320(11) was concerned and that there was a cherry-picking exercise by the judge. In any event in respect of Article 8 the judge was factually wrong in saying that the Sponsor had resided in this country for all of her adult life. There was a slight error in respect of whether she had been here since 2009 or 2004 but in any event when she came into the UK she must have been in her 30s.
8. Mr Bazini on behalf of the father said that this really was a case in which there was a complete distortion of what had happened at the First-tier Tribunal and of reality. He said the starting point was the Entry Clearance Officer’s decision, that had explained why it was being argued paragraph 320(11) was applicable. It was said that all of what was relied upon by the ECO was not true. The interview was never produced and in any event there was simply insufficient evidence for 320(11) to be engaged. The earnings issue relating to the Sponsor was conceded at the appeal.
9. I was taken then at some length to a previous decision of First-tier Tribunal Judge Chamberlain following a hearing at Hatton Cross on 27 February 2014 which was promulgated on 11 March 2014. Now interestingly that was a joint decision on that occasion. Mr Bazini’s point was that the previous judge had found that there was no deception on the part of the father and it was with that in mind that one had to look at Judge Abebrese’s decision. It was said that there was no dispute that the father had overstayed a very long time and indeed that he had worked but in addition there had to be aggravating circumstances and I was referred to the case of **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)**. The argument was one simply did not have the aggravating features in this case and therefore it was inevitable that the judge was going to allow the appeal under paragraph 320(11). In

any event the judge did not need to consider Article 8 but having done so he looked at the five steps from **Razgar** and at stage 3 he says that the decision was not in accordance with the law so one did not even need to get to proportionality and there was no challenge from the ECO on this basis and it was submitted that this was a perfect decision by the judge. **Devaseelan** had applied. It was submitted this was a case in which there was a failure by the ECO to look at Judge Chamberlain's decision and it was a case almost verging on abuse it was submitted.

10. In reply Mr Melvin said that insofar as the interview record was concerned that was placed before the judge and it was strange that the judge said it did not relate to the Appellant. The judge had been cherry-picking at paragraph 23 and he should have looked at the Immigration Rules in respect of the previous work and the working in breach of his stay.
11. In view of the complexity of the background to these two cases I invited Mr Bazini to respond and Mr Bazini said that the Immigration Directorate Instructions which will now be referred to were not placed before the judge and their relevance was therefore disputed but in any event insofar as the interview was concerned one was still waiting for the actual relevant interview and the interview that Mr Melvin was referring to had no such thing as deception having been referred to within it.
12. I now turn to my decision. Insofar as the decision in **PS** is concerned I of course entirely accept that there has to be an incentive for people who are overstayers to leave the United Kingdom. Thereby when they are then making proper and appropriate applications from their country of nationality to seek to enter the United Kingdom their voluntary removal should be noted. If the message was that when such Appellants leave the United Kingdom, it is next to impossible to return, then that will cause the system to break down. I have no hesitation accepting that as a principle, the incentive must be there and that there has to be good faith on the part of the Entry Clearance Officer when assessing such applications. Indeed, I also note the extensive findings which Judge Chamberlain made in his decision in 2014 and it is right to say that there are significant favourable findings for the claimants.
13. I am troubled however when I look to the way in which paragraph 320(11) is drafted and what it requires to be considered. Paragraph 320(11) reads as follows:

“Where the applicant has contrived in a significant way to frustrate the intentions of the Rules by:

- (i) overstaying; or

- (ii) breaching condition attached to his leave; or
- (iii) being an illegal entrant; or
- (iv) 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)

and there are other aggravating circumstances such as absconding, not meeting temporary admission/reporting restrictions or bail conditions using an assumed identity or multiple identities switching nationality, making frivolous applications or not complying with the re-documentation process.”

14. It is this broad reference to matters which has caused me to hesitate as to the way in which I have to look at the Entry Clearance Officer’s grounds of appeal. In my judgment it is quite clear that not all of the bases upon which the operation of 320(11) can come about is explicitly set out within the paragraph itself and that is clear from the introductory words “such as”. The *eiusdem generis* is relevant. What else could have been taken into account in this instance? Mr Bazini takes great exception to reliance now by the ECO, so late in the day, on the Immigration Directorate Instructions (the ones provided to me by Mr Melvin were published on 14 November 2013) because Mr Bazini says the case was never put on the basis now being put. He also submits that in any event, the IDIs are not part of the Immigration Rules. In my judgment, in any event the introductory phrase “such as” enables the Entry Clearance Officer to quite properly say that various and extensive factors can be taken into account. I then ask myself did the judge adequately consider the basis upon which the Entry Clearance Officer’s decision was put forward? I remain concerned, for the purposes of assessing whether there is a material error of law, that he did not. I was initially attracted to the detailed arguments of Mr Bazini, but having looked at the history of the case again and after exploring matters during the hearing and after taking into account what has been recorded by Judge Chamberlain and indeed by the First-tier Tribunal Judge, in my judgment much more needed to be said about the father’s background, his time here in the United Kingdom and what has occurred since. Therefore, for those reasons I do find that there is a material error of law and that the matter will have to be re-heard in relation to the father’s appeal.
15. That then brings me on to the other appeal. That is against the decision of FTT Judge Metzger QC. That is the appeal of the son. In summary Mr Bazini said that he relied upon a witness statement by Miss Shaw of Counsel and an attendance note that was prepared by her on the same day for her instructing solicitors. The grounds are

encapsulated as follows. Firstly, it was incumbent upon the judge to use Case Management powers and /or the submissions which were put to have the son's appeal heard with the father's or indeed after it. Secondly, in any event the judge materially erred because he only dealt with the appeal based on the Immigration Rules whereas it was abundantly clear from various places such as the grounds to the Tribunal that Article 8 had to be considered as well. In my judgment it is quite clear that First-tier Tribunal Judge Metzger did materially err in law in both respects. This case should indeed have been adjourned as sought by Miss Shaw of Counsel. I accept what was said (the Respondent did not attend that hearing) and indeed it was incumbent upon the judge to deal with Article 8. This was not a straightforward Article 8 case noting that various aspects were referred to, including reference to suicide. In the circumstances the decision of Judge Metzger has to be set aside. Only in respect of Article 8 and not the Immigration Rules.

16. Having made both of those decisions, in my judgment it is quite appropriate for both cases to be consolidated and to be heard together. The result is both cases will be remitted to the First-tier Tribunal at Taylor House and they will not be heard by Judge Abebrese or Judge Metzger. Insofar as the son's appeal is concerned that is only being remitted in respect of Article 8 ECHR because the Immigration Rules aspect of the appeal remains dismissed. It is appropriate for me to say now that the First-tier Tribunal will provide the further directions. One consolidated bundle shall be prepared by the claimants' solicitors and it is proper for me to say now that all relevant documents should be contained within that bundle in readily accessible form including the decision of Judge Chamberlain. None of the previous findings shall stand.

Notice of Decision

The decisions of the First-Tier Tribunal Judges contain material errors of law.

Both decisions are set aside.

The matters are remitted to the First-tier Tribunal for re-hearing.

Both cases are consolidated and shall be heard together by one Judge.

No anonymity direction is made.

Signed

Date: 20 March 2018

A Mahmood

Deputy Upper Tribunal Judge Mahmood