IAC-HX-MC/12-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/17752/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 4 November 2014** | **On 20 November 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE E B GRANT**

**Between**

**KRANTHIKUMAR KANUKUNTLA**
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr M Chowdhury, UK Legal and Immigration Group
For the Respondent: Ms Isherwood, Senior Presenting Officer

**DECISION AND REASONS**

**The Background to this Appeal**

1. The appellant applied for entry clearance as the partner of points-based scheme migrant. He was refused entry clearance and appealed that decision. His appeal was heard by FTTJ O'Keeffe and in a determination promulgated on 28 July 2014 she dismissed the appeal before her.

2. On 26 August 2014 the Tribunal received an application for permission to appeal which was in the following terms:

> *"2. This is an application for Permission to Appeal to Upper Tribunal against the decision of First-tier Tribunal Judge O'Keeffe. This decision was promulgated on 28 July 2014.*
>
> *3. The Entry Clearance Officer ('ECO') in Chennai, India refused the appellant's entry clearance application as a PBS Tier 1 Post-Study Partner on 26/08/2013. The ECO was not satisfied, on the balance of probabilities, that the appellant met all the requirements under Paragraph 319C(a) and falls under paragraph 320(7B) of the Immigration Rules.*
>
> *4. The appellant is an Indian national who was born on 06/07/1986. He was previously granted leave to enter in the UK in October 2008 under the category of Student. He was later granted leave to remain under the same category.*
>
> *5. The appellant had submitted an application for further leave to remain under the Tier 1 (General) category sometime in 2011. The application was submitted through an agent namely Mr Azharuddin who claimed to be from South India and an OISC Registered Immigration Advisor. This application was refused on 04/05/2011 on the ground that false educational documents were provided in support of his application. The appellant was detained and later released on temporary admission. He was not given in country appeal rights to contend the decision.*
>
> *6. While the appellant was under temporary admission, he assisted the Home Office as well as the court to find out the person who victimized other migrants by encompassing questionable documents in support of the applications without the applicants' consent.*
>
> *7. The appellant is married to Mrs Deepthi Theerthala who is living in the UK under the Tier 1 (Post Study Work) category. The applicant later left the UK to make an entry clearance application as a PBS Dependant to join his spouse.*
>
> *8. The application was refused allegedly on the following grounds:*
>
> *a) The appellant previously made application under Tier 1 (General) which was refused on 04/05/2011 alleging on the ground that false financial and educational documents were submitted in support of the application. As the appellant's previous application was refused under paragraph 322(1A) of the Immigration Rules, any of his future application is to be considered under paragraph 320(7B) which means, the appellant will continue to be refused for 10 years until 05/05/2021. The respondent considered that, the appellant falls for general grounds of refusal and therefore, failed to satisfy paragraph 319C(a) of the Immigration Rules.*
>
> ***Grounds***
>
> *9. The appellant is credible and there was no indication that the appellant breached any immigration rules or made any false submission himself. The appellant is indeed of good character, however, the IJ failed to give weight on the appellant's statement as well as the statement of Mr Lawson. The IJ's assessment of available evidence was wrong as she*

*failed to distinguish among the falsity of documents, the real perpetrator and the victim.*

*10. In paragraph 27 of her determination IJ mentioned that, according to Anwar and Others v SSHD (2010) the appellant had point to take the matter to the First-tier Tribunal seeking in country right of appeal. IJ further stated that, she did not have jurisdiction to make findings as to whether or not the 2011 decision was lawful for want of appeal rights.*

*11. While IJ may have limitation to assess the SSHD's decision made in 2011 in regards to in country right of appeal but during his current appeal she was free to consider whether it is fair to impose the complete burden on the appellant for an uncontended matter that arose in 2011. It is submitted that, IJ failed to assess the common law principle of fairness."*

3. Following receipt of the application for permission to appeal FTTJ Lever granted permission in the following terms:

*"1. The Appellant seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge OKeeffe) who, in a determination promulgated on 28 Jul 2014- dismissed the Appellant's appeal to enter as a PBS post study partner.*

*2. The grounds assert that the judge whilst potentially having no ability to consider an earlier refusal in 2011 where there had been no in-country right of appeal, nevertheless was free to consider the issue of fairness in this current case.*

*3. This is a somewhat unusual case. The Appellants current application had been refused under para. 320(7B) of the rules, because in 2011 the Appellant had supplied false documents in support of that earlier application. There was some evidence to suggest that the Appellant thereafter had assisted the UK authorities to provide evidence against an Immigration advisor who it was said had supplied the false documents without the Appellants knowledge, and had done the same in a number of cases. It was said that whilst the CPS had not pursued a prosecution the OISC had suspended the advisor from practice.*

*4. Para. 320(7B) does not apply to those who seek entry clearance for settlement as a spouse. In this case the application was for entry clearance to be with his sponsor who only had limited leave to remain.*

*5. There was some evidence supporting the Appellants claim to have assisted the UK authorities. It is not clear if by inference it was therefore accepted by the authorities that the false documentation had been lodged without the Appellants knowledge. It may have been difficult for the judge in this case to have properly determined that issue. However it is arguable that the unusual circumstances of this case placed the matter in a category that could potentially have been examined outside of the rules. That is not to say it would have been successful but arguable it was an exercise that should have been undertaken in terms of fairness to the Appellant given the somewhat unusual history.*

*6. There was an arguable error of law in this case."*

4. Thus the matter came before me to determine whether the determination contains an error of law.

5. Ms Isherwood submitted on behalf of the respondent that the judge was looking at evidence of deception and found the respondent had discharged the burden of proof required of her. With regard to the police officer's evidence weight was attached to it and the judge said at paragraph 23 that the police officer had given no reasons for concluding in his statement why he agreed with the appellant that false documents were provided on the appellant's knowledge. The wife is in the United Kingdom on a temporary basis and there is nothing to stop her going back to India and there are no exceptional circumstances in this appeal requiring consideration of Article 8 outside of the Immigration Rules.

6. Mr Chowdhury submitted that the burden of proof was on the respondent with regard to the false representations/deception point and the respondent had failed to discharge the burden of proof that the appellant was involved with the false representation. This is an error of law because the FTTJ concluded that the respondent had discharged the burden of proof where there was a lack of evidence from the respondent's side.

## The Determination of the First-tier Tribunal

7. The key findings are set out in paragraphs 16 to 30 which I set out below:

> *"16. It is not disputed before me that the appellant had made a previous application which was refused on 4th May 2011. That application had been refused as the respondent was satisfied that the appellant had submitted false documents. The application made on 7th August 2013 was therefore refused in accordance with paragraph 320(7B) which provides one of the general grounds on which entry clearance or leave to enter the UK is to be refused. The relevant parts of paragraph 320(7B) provides as follows:*
>
> > *(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:*
> >
> > *.....*
> >
> > *(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)*
>
> *17. Paragraph 6 of the Immigration Rules provides that 'Deception means making false representations or submitting false documents (whether or not material to the application).' The respondent submitted the document verification reports that resulted in the decision to refuse the appellant's application in 2011. The appellant had submitted a bank statement from ICICI Bank in his name. Enquiries with that bank revealed that the documents had not been issued by the bank. A statement was also submitted from the Bank of India. Enquiries with that bank revealed that the account number was invalid. On the*

*evidence before me I find that the respondent has demonstrated that the appellant submitted false documents with his application in 2011.*

18. *Mr Chowdhury submitted that there had been no evidence of dishonesty in accordance with the decision in **AA**. At paragraph 67 of **AA** Rix LJ said, 'It is plain that a false document is one that tells a lie about itself. Of course it is possible for a person to make use of a false document (for instance a counterfeit currency note, but that example, used for its clarity, is rather distant from the context of this discussion) in total ignorance of its falsity and in perfect honesty. But the document itself is dishonest.'*

19. *Although not cited to me, I have considered the Upper Tribunal decision in **Mumu (paragraph 320; Article 8; scope) [2012] UKUT 00143(IAC)**. At paragraph 11 the Upper Tribunal said, '.. in any event, paragraph 320(7A) does not require the appellant even to have been aware of the false representations or false documents submitted. Whoever put forward the false materials plainly did so dishonestly. The motivation was obvious: to pretend that the appellant was over the age of 21, so as not to fall foul of paragraph 277 of the Immigration Rules. It matters not that the appellant was not herself dishonest, although she would have to have been extraordinarily supine not to have been aware of what was being done on her behalf. The judgments in AA (Nigeria) [2010] EWCA Civ 773 make it plain that, although dishonesty is required, it need not necessarily be that of the applicant.'*

20. *In this case the bank statements submitted were false and each told a lie about itself; namely that the information contained therein was a genuine picture of the appellant's finances. To that extent, I find that the respondent has demonstrated that dishonest documents were submitted with the appellant's application in 2011.*

21. *The appellant's case was that he had no knowledge of the submission of those documents and that he was the innocent dupe of a rogue legal representative. I have considered the Upper Tribunal decision in **Ozhogina and Tarasova (deception within para 320(7B) – nannies) Russia (2011) UKUT**. At paragraph 21 the Upper Tribunal said, 'There is therefore not in 320(7B) the proviso that deception as defined can arise whether or not the falsity, and indeed its materiality, was to the applicant's knowledge.' At paragraph 26 the Upper Tribunal said, 'we are satisfied that the use of deception must have been as the judge said, with the deliberate intent of securing advantage in immigration terms by the use of a false document known to be false…'*

22. *The appellant produced a document entitled 'Statement of fact in relation to Mr. Kranthi Kumar Kanukuntla' which has been made by Barry Lawson who describes himself as a serving police officer. Mr. Lawson did not attend to give evidence before me. I was shown e-mail correspondence between Mr. Chowdhury and Mr. Lawson which indicated that Mr. Lawson was required at Wood Green Crown Court on the morning of this hearing. The weight that I can attach to his evidence is therefore reduced as it was not tested in cross examination.*

23. *Although the statement provided by Mr. Lawson was submitted for the benefit of proceedings before the Tribunal, I was surprised that it was not in the standard statement format usually seen when police officers make statements. Indeed the first statement provided did not contain*

*Mr. Lawson's shoulder number. That was corrected in a second statement. Mr. Lawson said in the body of his statement, 'I can confirm that Mr. Kanukuntla did not make, alter or supply the false documentation within his application and was unaware that his application contained such documents until the application was refused by the Home Office.' Mr. Lawson gives no reasons as to why he comes to that conclusion beyond pointing out that the appellant agreed to be a witness in the case against his immigration adviser.*

24. *No evidence was provided to show how the appellant's first application was made or any correspondence with the new lawyer that the appellant instructed once he became suspicious of his first representative. Ms Theerthala said in evidence that she had contacted Mr. Lawson before this hearing. She was asked whether she had asked him to provide any other documentary evidence and she said 'He told us if you need any other documents but unfortunately he is not here today.' Mr. Chowdhury said that Mr. Lawson had been asked about the investigation by the OISC and Mr. Lawson had said that it was unlikely that the OISC would assist with giving information as it was confidential. There was no evidence that any attempts had been made to contact the OISC for information relevant to the appellant's case and Mr. Lawson's statement makes no reference to the OISC being unwilling to disclose information because of confidentiality.*

25. *In the notice of decision, the respondent referred to false financial and educational documents being submitted with the appellant's application. In his statement the appellant makes no reference to the false bank statements that were submitted and neither did his witness. On the evidence before me considered as a whole, I find that the respondent has demonstrated that deception, as defined in paragraph 6 of the Rules, was used by the appellant in his previous application for leave to remain. The application was made by or on behalf of the appellant and the false statements submitted are in his name. None of the evidence before me supports a conclusion that those documents were submitted on the appellant's behalf by a rogue representative acting on his behalf without his knowledge. I find that the bank statements were submitted in order to demonstrate that the appellant met the financial requirements applicable to his application at that time. I find that the respondent has demonstrated that the deception was for the deliberate intent of securing an advantage in immigration terms.*

26. *Mr. Chowdhury submitted that the decision made in May 2011 has been unlawful as the appellant had not been given a right of appeal. No documentary evidence was submitted to support that assertion. It is impossible for me therefore to make any finding as to whether or not the appellant was given a right of appeal. In any event the 2011 decision is not the decision that is appealed before me.*

27. *In the appellant's bundle was a document entitled Grounds of Appeal although this document was not in fact submitted with the notice of appeal. In that document there is a reference to the Court of Appeal decision* ***Anwar and Others v SSHD (2010) EWCA Civ 1275****. The point in* ***Anwar*** *was whether if the immigration decision which was being appealed to the Immigration and Asylum Chamber carried no right of in-country appeal, but the point was not taken on appeal to the First-tier Tribunal, could it thereafter be contended that there was no jurisdiction to entertain the appeal. I do not read* ***Anwar*** *as authority for any suggestion that I have jurisdiction to make any findings as to whether or not the 2011 decision was lawful for want of appeal rights.*

> *28. Paragraph 320(7B) is one of the mandatory grounds of refusal contained in Part 9 of the Immigration Rules. Where it bites, the respondent has no discretion but to refuse the application. For the reasons set out above, I find that the decision was in accordance with the Immigration Rules.*
>
> *29. I consider the appeal then on human rights grounds. The appellant's spouse has leave to remain in the UK as a Tier 1 (Post study work migrant). It was accepted on behalf of the appellant that he could not meet the requirements of Appendix FM or paragraph 276ADE on the grounds of his family or private life. Nor could his spouse. The appellant's case therefore has to be considered in accordance with the guidance found in the cases of **MF Nigeria (2013) EWCA Civ 1192**, **Nagre (2013) EWHC 720 (Admin)** and **Gulshan (2013) UKUT 640**. These cases make clear that proportionality must be looked at in the context of the Immigration Rules with no need to make a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring consideration.*
>
> *30. I bear in mind that Article 8 does not afford the parties a right to choose where to enjoy their married life. I asked Ms Theerthala whether there were any reasons why she could not go back to India to enjoy married life with her husband there. She said that she wanted to settle in the UK and that her goals and ambitions were in the UK. She then said that she did not want to go back and she wanted to live here. On the evidence before me, I find that there are no particular compelling or exceptional circumstances in this case which require consideration outside the Rules. Mr. Chowdhury submitted that the exceptional circumstances were that the appellant would be barred from entering the UK until 2021. I do not find that to be an exceptional circumstance on the facts of this particular case. On the evidence before me there is nothing to stop this couple resuming family life in India should that be their decision. The fact that they would rather live in the UK does not afford them any rights under Article 8."*

## Decision

8. Contrary to what is submitted in the grounds which are an attempt to re-argue matters already placed before the judge, it can be seen at paragraph 17 that the judge properly directed herself to the meaning of deception as set out in paragraph 6 of the Immigration Rules. It is incontrovertible that two false documents had been supplied with the earlier application. Evidence that that was so came not only from the respondent but also from the appellant in the form of a witness statement from police officer Barry Lawson who supplied evidence in support of the appeal. The appellant did not seek to distance himself from the fact that false documents had been lodged with the earlier application but he said that he had no knowledge that those documents had been submitted and he was the innocent dupe of a rogue legal representative. He co-operated with the prosecution of the rogue representative and gave evidence in support of the criminal prosecution.

9. The FTTJ was fully aware of the appellant's conduct in assisting the criminal prosecution at the appeal before her but she found none of

the evidence before her supported a conclusion that those documents were submitted on the appellant's behalf without his knowledge. The judge made a positive finding of fact that the bank statements were submitted in order to demonstrate the appellant met the financial requirements applicable to his application at that time. She found the respondent had discharged the burden of proof in showing that deception was for the deliberate intent of securing an advantage in immigration terms.

10. The judge has given cogent reasons for finding that the respondent had discharged the burden of proof upon her in respect of the earlier application consequently the application which was the subject of the appeal before the FTTJ was bound to be refused. As the judge pointed out paragraph 320(7B) is one of the mandatory grounds of refusal contained in Part 9 of the Immigration Rules and where it bites (as it did in the appeal before her) the respondent had no option but to refuse the application.

11. The judge went on to consider Article 8 properly noting that it was a qualified right and giving adequate reasons for finding there were no particular compelling or exceptional circumstances which required consideration outside of the Rules.

12. Although not argued before her that decision was plainly correct in the light of the guidance of the Court of Appeal in **Meera Muhiadeen Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558** where Beatson found at paragraph 40:

> "I, however, consider that the FTT Judge did err in his approach to Article 8. …… These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them…… ."

**Summary of Decisions**

The judge did not err in law. I do not set aside the decision.

The decision of the First-tier Tribunal will stand.

No anonymity order is made.

Signed 14 November 2014

Judge E B Grant
Deputy Upper Tribunal Judge