Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09242, -45, 10515/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 June 2013	**On 27 June 2013**

Before
UPPER TRIBUNAL JUDGE JORDAN

Between

(1) Tariq Mahmood
(2) Ayesha Azlz, his wife
(3) Hadia Mahmood, their minor daughter

Appellants

and

The Secretary Of State For The Home Department

Respondent

Representation:
For the Appellant: Mr G. Lee, Counsel instructed by Dean Manson, Solicitors
For the Respondent: Mr P. Nath, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction: the decision under appeal

1. The appellants are citizens of Pakistan who appeal against the determination of First-tier Tribunal Judge Sweet promulgated on 30 August 2012 dismissing their appeals against the decisions of the Secretary of State made on 27 and 29 March 2012 refusing their applications for further leave to remain in the United Kingdom.

2. The basis for refusal is said to be derived from paragraph 322 of the Immigration Rules which contains grounds on which the refusal of leave to remain or variation of leave to enter or remain is, on a mandatory basis, to be refused:

> The fact that variation of leave to enter or remain is being sought for a purpose not covered by these Rules

Immigration history

3. The first-named appellant ("the appellant") arrived in the United Kingdom on 12 April 2002. His application for asylum was refused on 11 June 2002 and the appeal dismissed on 21 January 2003. Although an application for judicial review followed, the application was refused at the permission stage. Thereafter, the applicant made further submissions in the form of a fresh claim which were refused on 17 February 2006. However, yet further submissions were made, at which point, on 21 December 2006, the appellant was acknowledged as a refugee and granted leave to remain in that capacity until 20 December 2011. The appellant subsequently stated that his claim for refugee status was based on his being an Ahmadi. In due course, his wife entered the United Kingdom in July 2009 and was granted leave to remain roughly in line with that of her husband until October 2011. The third appellant was born in the United Kingdom on 7 April 2011. All then applied for settlement on the basis of the expiry of their previous grants of leave. The couple now have two children. None is a British citizen.

The facts

4. It is common ground that the grant made in favour of the appellant on 21 December 2006 was the result of the fraudulent activity of Ms Ali, an Executive Officer employed by UKBA. She was convicted of falsely processing 49 or 50 applications for leave to enter or remain in the United Kingdom, of which the appellant's application was one. Mr Richard Jeal, a Higher Executive Officer, investigating Ms Ali's activities, which included the grant of asylum to the appellant, produced internal records within the UKBA purporting to show the approval of Mr Tony Fahy, Ms Ali's superior. However, he subsequently made a statement for the purposes of the criminal prosecution that he had neither discussed nor approved the appellant's application and the signature purporting to be his approval was a forgery. As a result, Ms Ali was charged with wilful misconduct in a public office. In due course she was sentenced to 5 years imprisonment on her guilty plea. Her activities were the effective means by which the grant of status was made to nationals from Pakistan, India, Sri Lanka, and Afghanistan. The fact that the beneficiaries of her fraudulent activity were drawn from a disparate group of applicants, none of whom apparently knew each other, suggests that Ms Ali was not acting at the behest of friends or family.

Ms Ali did not carry out these activities for financial gain. In particular, there was no evidence this appellant paid Ms Ali for the favour.

5. Tariq Mahmood, although mentioned in passing in the criminal papers as an individual who benefited from Ms Ali's activities, was not charged with any involvement in Ms Ali's wrongdoing. Nor, as far as I am aware, were any of the other 49 or 50 other beneficiaries of her activities. No attempt was made to revoke or cancel the immigration status granted to him by reason of Ms Ali's activities. In his sentencing remarks, the Judge made no suggestion that Ms Ali knew the beneficiaries of her actions. Mr Jeal did not suggest in his evidence that they had colluded with Ms Ali. In the grounds of appeal to the Upper Tribunal, the appellant expressly relied upon the sentencing remarks of HHJ Downing in which, addressing Ms Ali, he stated:

> "You as it were single-handedly decided that you would embark on a course of action that would enable people to evade the rules."

6. In support of his appeal, the appellant called Mr Jeal, the Higher Executive Officer employed by the Home Office responsible for investigating Ms Ali's activities who confirmed that Ms Ali pleaded guilty to Count 1 on the indictment which had referred to the grant of leave to remain in favour of the appellant in 2006. Mr Jeal was unable to provide any evidence of deception on the part of the appellant. His statement made no reference to his claim being based on false documentation or that it was fraudulent. He confirmed that the files were no longer available but false minutes created by Ms Ali were traceable.

The Judge's findings: the error of law

7. Notwithstanding this evidence, Judge Sweet (having recorded the appellant's oral evidence that he did not know Ms Ali, that the appeal hearing was the first occasion that he had heard her name mentioned and that he had never been approached by anyone regarding Ms Ali) rejected the appellant's evidence as not credible. He expressed his opinion that he had "*no doubt whatsoever that he knew that his asylum claim was not validly granted*". This finding was not open to the Judge on the material before him, and certainly not on the criminal standard. It could only be predicated on a finding that the appellant knew that there was a fraudster working in the Home Office, a finding which is not supported by the evidence. Even if the appellant had suspected that it was the result of mistake or error, the Judge did not explore what was the effect of this finding; perhaps very little. It had not been the respondent's case that the appellant was implicated in the fraud. There is no suggestion that the fresh submissions made by him were fraudulent and that he knew them to be so (or that Ms Ali did). In these circumstances, the error of the Judge amounted to an error on a point of law requiring me to re-make the decision on the material available to me. The evidence does not permit me to approach this case on the basis that the appellant was complicit in a fraud. Rather, I must

approach the appeal on the basis that he was innocent of wrongdoing in the grant to him of leave to remain.

The procedural history and the decision to proceed with the hearing

8. In granting permission to appeal to the Upper Tribunal, the First-tier Tribunal Judge relied principally upon the Judge's approach to Article 8, but he expressly stated that all grounds were arguable, including those in relation to paragraph 332 and invalidity.

9. When the matter came before me on 4 January 2003 in which Mr Nath appeared on behalf on the respondent, it was accepted by the respondent and there was no evidence before the Judge that the appellant was himself implicated in a fraud perpetrated by Ms Ali. I recited that the fraud was in the nature of the grant of leave to remain by the respondent to the appellant on the basis of a purported decision made by Mr Tony Fahy on 21 December 2006 when no such decision had been made by him and the entry to that effect was forged by Ms Ali. In the recitals of my directions I also stated that the documentation produced by the respondent and sent to the appellant as a result of the fraud was genuine on its face, save for the effect if any of the fraud. I noted the fact that the respondent had not taken steps to revoke cancel or annul the previous grant of leave to remain. I directed that the appellant had until 1 February 2013 to file and serve written submissions as to the validity of the grant of leave to remain with reference to the relevant legal authorities. In particular, the appellant was invited to make submissions (a) as to whether the grant was void or voidable and, if voidable, whether it had been avoided and/or (b) whether the grant of leave to remain (though irregularly processed by the respondent) was nevertheless the grant of leave to remain for the appellant in recognition of his being a refugee. I gave directions that the respondent had 28 days in which to respond. I acknowledged the potential significance of this appeal to the respondent by granting her liberty to apply for an extension of time if the Treasury's Solicitor's advice was sought. The respondent was also at liberty to apply to adduce evidence of fraud on the appellant's part subject, of course, to the appellant being given a right of response.

10. These directions were provided in writing but were also discussed at the hearing on 4 January 2013. I do not, however, suggest that at the hearing that I formulated precise dates as they appear in the written directions. I accept from Mr Nath that he expected written directions to arrive in due course.

11. I subsequently gave further directions on 16 May 2013 for the filing and service of comprehensive bundles to be carried out by both sides within 21 days from the order, permitting ample time for compliance by the date of the hearing set for 24 June 2013.

12. In compliance with my directions, the appellant's representative provided written submissions (page 13 of the appellant's bundle) which

made reference to *ex parte Ku and others* and *ex parte Chan*, see below.

13. At the hearing before me, Mr Nath told me that he had not received either the directions of 4 January 2013 or the appellant's submissions served and filed in response to them. I accept from him that they are not to be found in the Home Office file. I also acknowledge that the pro forma covering letter which is routinely sent out with directions by the Tribunal is not on the Tribunal's file. However, it is more likely than not that one was created because at page 4 of the appellant's bundle, there is a copy of the letter dated 8 January 2013 which was received by the appellant (and which is addressed 'to the appellant and the respondent') containing the directions with which the appellant has complied. It is unlikely the Tribunal intentionally omitted to serve the respondent but mistakes can, of course, happen.

14. I also accept that the Tribunal was served with counsel's submissions on the validity point which the Tribunal received under cover of a letter dated 31 January 2013 (page 11 of the appellant's bundle). I am unable to say whether the respondent was so served.

15. Mr Nath sought an adjournment to respond to the submissions. Whilst I understand his wish to do so, I refused the adjournment. Mr Nath, albeit in general terms, has known of the course on which these appeals were heading since 4 January 2013 and of a hearing date since 16 May 2013. He accepts that he received the directions for the service of comprehensive bundles along with the notice of hearing. He could have approached the appellant's representative or the Tribunal since he must have foreseen the need to deal with the appellant's submissions prior to the hearing.

16. Further, I am satisfied, for the reasons that follow, that the legal position is clear and my understanding of the relevant legal principles is sufficient to dispose of this appeal without the need for further submissions from the respondent. If the respondent wishes to challenge the legal principles, there is a route elsewhere.

The innocent holder

17. The problem raised by this appeal was identified but not resolved in *R v SSHD, ex parte Khawaja* [1984] AC 74; [1983] 2 WLR. 321; [1983] 1 All ER 765, HL(E) in which Lord Bridge of Harwich said at p. 119:

> "Finally I would wish to leave for consideration on a future occasion the difficult questions which may arise when leave to enter has been obtained by the fraud of a third party, but the person entering had no knowledge of the fraud. I am not convinced that *R v SSHD, Ex parte Khan* [1977] 1 W.L.R. 1466 , where it was held that the innocent wife who obtained leave to enter on a false passport procured for her by her husband was an illegal entrant, was rightly decided."

R v Immigration Officer, ex parte Chan

18. In *R v Immigration Officer, ex parte Chan* [1992] 1 W.L.R. 541 [1992] 2 All ER 738 the entrant, whose home was in Hong Kong, obtained a work permit from a friend in return for the payment of the sum of £2,000. (This was, in itself, an indication that he knew the transaction was fraudulent.) He then came to the United Kingdom with his Hong Kong passport and the work permit which purported to be valid for three years. He was given leave to enter but two months later was arrested as an illegal entrant. The reasoning of Neill and Leggatt LLJ was that the entry was illegal, not because there had been through the innocent agency of the entrant a fraud practised upon the immigration officer but because a material document which the entrant had been required to produce to the immigration officer had not been a valid document. It was an essential part of the reasoning that the document could properly be described as *invalid* notwithstanding the fact that the entrant was not aware of that fact. It appears to have been accepted by the court that there had been fraud, albeit by someone other than the entrant himself, and that, but for that fraud, Mr. Chan would not have been given leave to enter.

19. On his renewed application for leave to apply for the judicial review before the Court of Appeal, Neill L.J. described the work permit as follows:

> "It is now plain that the work permit was issued improperly by an officer in the Department of Employment who has now been dismissed. Inquiries have established that the file No. 9029730 (the reference number on the face of the work permit produced by the applicant) cannot be traced and almost certainly never came into existence. Accordingly it seems clear that there never was any supporting documentation for the issue of the work permit. For the purpose of the present proceedings it is accepted on behalf of the Secretary of State that the applicant had no knowledge that the work permit which he produced to the immigration officer had been improperly issued. The question which arises is whether he is nevertheless an illegal entrant within the meaning of section 33(1) of the Immigration Act 1971 notwithstanding that he had no personal knowledge of the invalidity of the work permit in his possession."

20. On the basis of these findings that the work permit was *invalid*, Nield LJ considered the consequences:

> I am satisfied, however, that the obligation imposed by paragraph 4(2)(b) to produce other documents 'specified by the immigration officer' requires, certainly in the case of a document such as a work permit, that the document should be genuine. A work permit is clearly a material document both for the purposes of obtaining leave to enter and for the purpose of determining the conditions of such leave. In this context I can see no

> satisfactory basis for distinguishing between an invalid passport and an invalid work permit. It follows therefore, on the authority of the decision in *ex parte Khan* [1977] 1 WLR. 1466 that if leave to enter is given on the basis of a work permit which later proves to be false the entrant does not enter the United Kingdom with leave to do so 'in accordance with' the Act of 1971. Moreover, it is clear that the immigration officer would have refused the applicant leave to enter had he known of the invalidity of the work permit at the time of entry…."

R v SSHD, ex parte Ku and others

21. In *R v SSHD, ex parte Ku and others* [1995] 2 W.L.R. 589, [1995] Q.B. 364 (Sir Thomas Bingham M.R., Hobhouse and Morritt L.JJ), the Court of Appeal was concerned with exactly similar documents because the court was told that the same official referred to in *ex parte Chan* was responsible for the provision of documentation in *ex parte Ku and others*. On their face, therefore, the two cases were indistinguishable. However, the gloss placed upon those facts was subtly different.

22. Between May 1990 and February 1991 the Department of Employment employed in its overseas labour section an official, since dismissed but who has never been named, who in breach of the internal procedures of the department is said to have issued, or caused to be issued, a considerable number of work permits which the department says he should never have issued. He either did not keep proper records of the relevant applications or he destroyed those records before he left the department. It appears that he ignored the departmental requirement that at least two officers should be involved in each case and that the processing and approval stages should be carried out by different people. His activities were described in these terms by Laws J.:

> "[He] is regarded as having knowingly and deliberately issued a large number of work permits improperly and in an unauthorised manner, and beyond the powers granted to him by the department."

It appears that, had there been a proper examination of the applications, the applications would have been refused as not meeting the skills and experience criteria and because it was contrary to departmental practice to issue more than one permit for a chef in respect of an establishment of the size in question.

23. The applicants in *ex parte Ku and others*, citizens of Hong Kong, were given leave to enter the United Kingdom on production of their passports and work permits which had been obtained from the Department of Employment by their prospective employer. Each permit was in proper form and was authenticated by the departmental stamp. None contained false information or was a forgery. Unlike the position in *ex parte Chan*, it was accepted that both the employer and the applicants had acted in good faith in making the applications. In fact,

the permits had been issued by an official acting contrary to departmental instructions. When it was discovered that they had been improperly issued an immigration officer gave each applicant notice of intention to remove him from the United Kingdom on the ground that he had entered in breach of the immigration laws, contrary to s. 3(1) of the Immigration Act 1971 and was accordingly an illegal entrant, as defined by s. 33(1). In proceedings for judicial review the applicants sought orders of certiorari to quash the immigration officers' decisions. Laws J dismissed the applications.

24. Their work permits were all in similar terms. The employer's name was provided. On each the occupation was said to be "Chef" and the salary or remuneration was set out. The permits were in the proper form and were properly numbered E151975, E152057 and E152058. They were printed on the department's form "OW2" which incorporated security printing. They were authenticated with the stamp of the department. They had been issued by the department and were not forged.

25. The three were interviewed and each was served with a notice which stated:

> "I have considered all of the information available to me and I am satisfied that you are an illegal entrant as defined in s. 33(1) of the Immigration Act 1971 . You are therefore a person who is liable to be detained pending the completion of arrangements for dealing with you under the Act. I propose to give directions for your removal from the United Kingdom in due course and details will be given to you separately."

26. At the same time, each was given temporary admission but as a person who was liable to be detained. Further, s. 26(1)(c) of the 1971 Act rendered it a criminal offence to make to an immigration officer a statement or representation which that persons knows to be false or does not believe to be true.

27. The applicants appealed on grounds that (1) leave to enter the United Kingdom was obtained on production of a valid passport without any fraud or misrepresentation as to the facts by the applicant or any agent of his concerned to promote his entry; (2) the fact that an official in the Department of Employment issued the work permit, which had been duly applied for, in breach of departmental procedures, did not render it a nullity in respect of the person who relied on its having been issued with ostensible authority and was unaware of any defect in it; (3) the entrant's duty to provide a valid passport and such other documents as might be required of him was not breached where he produced a current work permit issued with ostensible authority; no decision had been taken by the department to denounce, revoke or cancel the permit; (4) although Nicholas Blake Q.C. argued that the correctness of Khan's case was a matter for the House of Lords, the court was not

bound by *R v SSHD, ex parte Khan* because there the relevant documents were assumed to be invalid without any argument as to the basis of that invalidity.

28. Their appeals were allowed since the work permits, although issued in breach of departmental procedures by an official acting improperly, were not forgeries and contained no misstatements. They were not invalid. The Court of Appeal was not bound by *ex parte Chan* to hold that the permits in the present case were *invalid* in the sense which the Court of Appeal in Chan's case were using that word. Accordingly, the applicants had not entered the United Kingdom in breach of the immigration laws, nor were they illegal. Their appeals were allowed and the decisions of the immigration officers that the applicants were illegal entrants were quashed.

29. Hobhouse LJ in distinguishing *ex parte Chan* reopened the issue of invalidity.

> We are bound by the decision in *ex parte Chan*, but only by what it decided. That case was expressly decided upon the basis that the work permit with which the court was concerned was *invalid*: entry pursuant to leave obtained by the presentation of an invalid document was unlawful entry. In the present case the entry permits cannot be described as invalid. We have been told that the official who was responsible for their issue was the same as the official referred to in the *Chan* case. But they were nevertheless documents which had been issued out of the department stamped with the official stamp of the department. The only point upon which the minister can rely is that the official in the department who caused them to be issued should not have done so and must have known that he was acting improperly. The permits were not forged. They were what they purported to be - work permits issued by the department. They did not contain any false statement: the "particulars of permit holder" were correct as were the "particulars of employment." It cannot be said of these permits that (to quote Neill L.J., at p. 551) they contained "false information." What can be said is that they should not have been issued by the department official and that if the immigration officer had, as he was entitled to, investigated the position before giving leave to enter, he would have ascertained that, applying the departmental criteria as set out in the department's guidance leaflets OW5 and OW1B, leave to enter should not be given and that the permits should not have been issued. The permits specifically, and accurately, stated that they did not constitute any obligation upon the immigration officer to give the holder leave to enter the United Kingdom. The work permits were *inappropriate* rather than *invalid...* These cases are therefore materially different from what was assumed to be the situation in *Ex parte Chan*.
>
> It has been argued on behalf of the minister that we are nevertheless bound by *Ex parte Chan* to hold that the work permits in the present case were invalid. This is not correct. A case is only authority for the decision of law it contains, its *ratio decidendi*. If the relevant decision is a decision on a matter of fact, a different court is at liberty to reach a different decision. If the relevant question was assumed, it is not part of the decision in that case

and another court is not bound to make the same assumption. Both these qualifications of what is binding precedent apply to the point with which we are concerned and e*x parte Chan*.

30. Sir Thomas Bingham MR had this to say about the jeopardy in which an innocent entrant would be placed, were the decision to have been otherwise:

> I am horrified at the suggestion that an innocent victim of official error (or misbehaviour) should be thereby rendered liable to arrest, detention and forcible removal. Fortunately, for reasons given by Hobhouse L.J., we are not compelled to reach such a distasteful conclusion. In *Ex parte Chan* [1992] 1 W.L.R. 541 it appears to have been accepted that the entry permit was invalid (and the payment of £2,000 by the entrant may have strengthened that impression). But in the present case it cannot be said that the work permits were invalid: they were what they appeared to be; they contained no misstatement; and they were not forgeries.

The application of *R v SSHD, ex parte Ku and others* to this appeal

31. Applying these principles to the facts of the present appeal, the grant to the appellant of leave to remain to the appellant in the letter of 21 December 2006 was a valid grant of leave and the vignettes applied to the appellant's passport and those of the other appellants were valid grants.

Validity and invalidity; void and voidable; nullity

32. The cases to which I have referred speak of the *validity* or *invalidity* of the relevant documents. Without having had sight of these cases, my directions spoke of whether the grant was void or voidable which in one sense might be as useful a means of expressing the distinction.

33. In the course of argument I raised with Mr Nath the example of a colour-printed photo static copy of a £5 note, inexpertly copied by a forger. Such a document is not currency at all. In particular, it is not legal currency. The Bank of England would need to take no action to avoid it. In contrast, if a more sophisticated fraudster was able to operate the presses used to produce a £5 note and did so to produce a series of such notes, those produced would be to those who innocently receive them no more and no less than a £5 note irrespective of the absence of authority on the part of the fraudster to produce them. Whilst the Bank of England might wish to recall the banknotes so distributed, I would not consider them to be forgeries and, by that description, false.

34. So, too, with a passport. There is a significant difference between a passport produced or effaced by a forger and a passport produced by the authorities albeit, like Ms Ali's case, without complying with departmental procedures for the production of a passport. I would

readily classify the former as void from the outset and not a passport at all. I would regard, however, the latter as voidable in the sense that it is liable to be cancelled but until that occurs, it remains a valid passport.

35. The reasons for this distinction appear obvious. Sir Thomas Bingham MR (as he then was) spoke of his being horrified at the suggestion that an innocent victim of official error (or misbehaviour) should be rendered liable to arrest, detention and forcible removal. But the consequences may even go further. As I suggested in argument on 4 January 2013, if the holder of a passport properly issued cannot rely on the validity of his passport to secure entry to his own or another country, he and all passport-holders fail to achieve what is the very purpose of holding a passport. If it is open to an official or a third party to require the holder to prove its validity or refuse entry, there is little point in holding a passport. If the holder of a validly produced bank-note (that is one produced with the apparent or ostensible authority of the issuer) is refused it as payment for a debt, no holders of such notes could rely upon it as serviceable legal tender. Whilst this will be the consequence if a passport or a bank note is, in the popular sense, a forgery, these draconian consequences are limited to those documents which are properly classified as void or a nullity, that is, of no consequence at all. To extend the class to documents which are liable to be invalidated by reason of some impropriety in their production creates a situation in which passports, bank notes or other official documents are in circulation but, in the case of some (a class impossible to identify), they carry a hidden defective gene (as it were) which renders them void, irrespective of the good faith of the holder. What appears to be gold, looks like gold, tests like gold, smells like gold, turns out to be pinchbeck.

General conclusions

36. A document which is invalid or void or a nullity can confer no rights.

37. A document provided by the Home Office which has the effect of granting an individual rights is valid if on its face it carries the authority of the Home Office (that is, it has its apparent, implied or ostensible authority) notwithstanding the fact that its actual production is flawed by a procedural irregularity or by fraud which is the effective cause of its production.

38. Such a document may be rendered ineffective by subsequent cancellation but, until it is cancelled, it remains effective.

Conclusion on this appeal

39. The respondent's decisions in these appeals were said to have been made pursuant to paragraph 322(1) of the Immigration Rules, a

somewhat uncomfortable formulation of the Rule relying on the fact that variation of leave to remain was being sought for a purpose not covered by these Rules, even when applied to the facts as the respondent construed them to be. It is noteworthy that the Secretary of State did not allege that the appellant himself had made a false representation. As I have found the original grant of leave was not invalidated by the actions of Ms Ali and that the appellant was innocent of wrong-doing, the application was not made for a purpose not covered by the Rules and the respondent's objection to the application falls away. The implication of the refusal was that, had the documents been valid, leave to remain would have been permitted. This is the intended effect of my determination.

DECISION

The Judge made an error on a point of law and I re-make the decisions in the following terms:

The appeals are allowed under the Immigration Rules.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
25 June 2013