Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08272/2014
OA/08267/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On: 28 May 2015	**On 30 June 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR RAJU JOSE MULVARICKAL
MASTER ABDEL RAJU
(Anonymity directions not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: Ms Watterson of Counsel
For the respondent: Mr S Witwell, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are born on 25 May 1974 and 19 February 2013, and are citizens of India. They are father and son. They appealed against the decision of the respondent dated 13 June 2014 refusing them leave to remain in the United Kingdom as Tier 4 (General) Student dependents pursuant to paragraph 320 (7B) of the Immigration Rules HC 395 (as amended).

2. First-tier Tribunal Judge Abebrese in a determination dated 26 January 2015 dismissed the appellant's appeal pursuant to the Immigration Rules and Article 8 of the European Convention on Human Rights.

3. Permission to appeal was granted by Designated Tribunal Judge Zuker on 8 April 2015 stating that it is arguable that the Judge wrongly placed the burden of proof on the appellants and there has been unfairness. He further noted that it is also arguably that the Judge failed adequately to consider whether there had been any dishonesty.

First-tier Tribunal's decision

4. The First-tier Tribunal made the following findings which I summarise.

5. [8] "At paragraph 8 he stated "the appellant brings this appeal and therefore bears the burden of proof. The appellant must satisfy this burden on a balance of probabilities".

6. [9] "The Tribunal has taken into consideration the appellant's additional grounds of appeal, witness statements of the first appellant's spouse Mrs Raji and also the witness statement and oral evidence of Raji Joshi. The appellant's additional grounds of appeal at paragraph 5 state: "the entry clearance manager has conducted an appeal review of the appellant's PBS dependent application after receipt of the appeal papers. It is stated in the review the decision of the entry clearance manager that Empire College London did provide a written notification to the entry clearance manager's office confirming that the appellant had been notified of the withdrawal of the sponsorship prior to the appellant submitting his visa application. The respondent has not provided a copy of the correspondence from Empire College London containing this information with the appeal bundle or even subsequent to that. This information is material to the appellant's appeal and the confirmation letter from Empire College London ought to be produced before the Honourable Tribunal".

7. [10] "The appellant at paragraph 6 of the additional grounds of appeal make the following point: "the appellant has confirmed that he provided all the relevant documents and had paid half of the course fees to the Empire College London. The college had assigned the CAS letter to the sponsorship management system of the UK Border Agency and had provided the CAS number to the appellant to submit with his visa application. The appellant was not informed by the College that his CAS was withdrawn before submitting his Tier 4 application. The appellant only came to know about the withdrawal of the CAS when he received the refusal letter relating to his Tier 4 application".

8. [11] The appellant stated further that the first appellant would not have submitted his application if he had known that his CAS had been withdrawn.

9. [12] The Tribunal finds that First appellant was aware that he had previously submitted an application which had been refused and that refusal was on 28 August 2009. The First appellant was specifically asked

in his application, whether or not he has been refused a visa for any country including the United Kingdom in the last 10 years. The first appellant responded to this question by indicating that he had made a visa application in this country as a student and that had been refused. The appellant was asked to state the reasons for the refusal and he stated in his application form, "insufficient documents". This would have been the opportunity for the appellant to expound on the issues which were pertinent to his previous application and failed to do so.

10. The fact is that based on the information before the Tribunal that the First appellant only refers to the information which relates to his previous application after he had been refused by the ECO in his current application. The Tribunal found therefore that the respondent is not in a position to go behind the previous decision made by the ECO based on the fact that the appellant knowing that he had been previously refused an application in the spirit of candour should have cited as much information as he was aware of and the fact that he did not do so left the ECO to make a decision based on information and responses that had been provided to him.

11. The appellant's appeal pursuant to Article 8 has been properly considered by the ECO and the appellant's spouse and the second appellant's mother can make periodic visits to see the appellants in India if she so wishes. Furthermore she may adjust her educational studies accordingly in light of the refusal of the application/appeal of the First and Second appellant.

Grounds of appeal

12. The grounds of appeal state the following which I summarise.

13. The only ground of refusal raised for refusing the appellant application is the general ground of refusal from Part 9 of the Immigration Rules which is Paragraph 320 (7B). The First appellant denies using any deception in his application for entry clearance in 2009.

14. There was a material misdirection of law as to the burden and standard of proof when the Judge stated at paragraph 8 of his determination that the appellant brought this appeal and therefore bears the burden of proof. It is well established that when the respondent relies on one of the general grounds of refusal in Part 9, the burden is proof is on her. Further where an allegation of deception is made, the respondent is required to discharge that burden. The Judge's misdirection had a material effect on the outcome of the appeals because had the Judge directed herself appropriately, she would have appreciated the importance of the failure by the respondent to produce supporting evidence which, the Entry Clearance Manager claimed was in the respondent's position.

15. The appellant sought disclosure of the written notification from his college which allegedly showed that he knew that his offer was withdrawn. This was not produced by the respondent. It was for the respondent to

produce clear evidence of the allegation as per the case of **RP (proof of forgery) Nigeria [2006] UKAIT 00086**. The Judge failed in his determination to refer to this matter at all, proceeding on the basis that it was for the appellants to prove his explanation and to persuade the Tribunal to go behind the previous decision of the Entry Clearance Officer.

16. The Judge failed to take into account the First appellant's explanation that he did not know at the time of making his application that the offer from Empire College London had been withdrawn. He stated quite logically that "if I knew that the CAS was withdrawn, then I would not submitted material for application because it was definite that it will be refused, I was not at all aware". The appellant sister, Ms Joshi also gave evidence which has largely corroborated this evidence. She played a role in arranging her brother's place at Empire College and produced bank statement showing the transfer of funds. The Judge failed to make a clear finding on the matter whether the appellant knew that his offer had been withdrawn when he applied for leave. This was crucial to the appeal.

17. The First-tier Tribunal's reasons for dismissing the appeal in his view that the First appellant did provide his explanation earlier to the respondent, and in particular on the application form. This is also a material error of law. First the evidence before the Tribunal was not that the appellant gave his explanation after refusal. He first give his explanation in response to the 2009 respondent's refusal in a request for administrative review. The ECM's comments clearly show that the respondent did request a review albeit that the review was without a positive outcome for the first appellant. The first appellant was not entitled to an appeal to an independent Tribunal of that 2009 decision.

18. The Judge further fell into error when he found that it was either appropriate or physically possible to provide, at question 28 of the application form, a full explanation challenging the previous refusal. The Judge appears to have considered his jurisdiction as supervisory to assess whether the respondent was entitled to come to the view he did on the evidence. The first-tier Tribunal by exercising his appellant jurisdiction was entitled, indeed obliged to go behind the previous decision and decide for himself whether the allegation of deception had been proved.

The respondent's Rule 24 response

19. The respondent stated the following. The respondent opposes the appellant's appeal and will argue that the Judge of the First-tier Tribunal directed himself appropriately. The Judge noted that the submissions made by the appellant's representatives in respect of the evidence to be provided by the respondent. It is therefore clear that the submissions has been taken into account.

20. The Judge's findings are contained within paragraph 12. They are adequately reasoned. The Judge goes into detail about the appellant's response to the opportunity to expand on issues regarding his previous visa application. He found that the appellant's failure to give sufficient

explanation about his previous application and the refusal thereof damages his credibility. The information provided to the respondent was insufficient to grant the appellant visa.

Findings as to whether there is an error of law

21. The Judge stated at paragraph 8 of the determination under the title "Burden and Standard of Proof" the following. "The appellant brought this appeal and therefore bears the burden of proof. The appellant must satisfy this burden on the balance of probabilities". It is established law that in cases where the respondent alleges fraud, the burden of proof is on her to show on a balance of probabilities that the appellant used deception. The burden was on the respondent to show that the appellant in his previous application for entry clearance used deception.

22. The features of the general grounds for refusal in Part 9 of the Immigration Rules were considered by the Asylum and Immigration Tribunal in **JC (Part 9 HC395 - burden of proof) China [2007] UKAIT 00027** ('JC'). Part 9 of the Immigration Rules contains 'general grounds' for the refusal of entry clearance or leave to enter. The applicant is not showing why he qualifies; rather the decision-maker is seeking to show why the applicant is, or should normally be, disqualified. (See **JC**, paras. 8, 10 and 14.) Each of the general grounds depends for its application on the decision-maker being able to establish a precedent fact or facts, and in relation to all of the general grounds the burden of proof is on the decision-maker to establish the facts relied upon (**JC**, para. 10). The reason why the burden rests on the decision-maker is that each of these grounds alleges in one way or another failing or a wrongdoing on the part of an applicant (**JC**, paras. 11-12). The standard of proof is at the higher end of the spectrum of balance of probability, but the standard is flexible in its application, and the more serious the allegation or the more serious the consequences if the allegation is proven, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities (**JC**, para. 13). However, once the decision-maker establishes the underlying facts, the burden shifts to the appellant, stating why the refusal was not properly refused.

23. At paragraph 11 the Judge noted the submissions by Miss Watterson who submitted that the respondent did not provide the required evidence in relation to the allegation of breach of the Rules and use of deception in a previous application made by the first appellant. This is because the fact of a breach of the Rules brings about a 10 year ban and therefore the evidence has to be cogent.

24. It is implicit in the determination that the Judge found that it is for the respondent to first prove that the appellant has used deception. It is equally implicit in the determination that the Judge then considered the appellant's evidence and found it not to be credible.

25. The Judge who considered all the evidence in the appeal was entitled to find on the evidence that the First appellant was aware that he had

previously submitted an application which had been refused by the respondent pursuant to paragraph 320 (7B) on 18 September 2009.

26. The Judge found that the first appellant was specifically asked in his application form whether or not he had been refused a visa for any country including the UK in the last 10 years. The First appellant responded to this question by indicating that he had made a visa application in this country as a student and which had been refused. The appellant was asked to state the reasons for the refusal in the application form and the appellant stated the reason as “insufficient documents”.

27. The Judge was entitled to find that the reason for refusal was not “insufficient documents” as stated by the First appellant, to his knowledge but the appellant knew that his application had been refused under paragraph 320 (7B). Failure by the appellant to give the true reason in his application form, even if the appellant did not agree with the decision, was found by the Judge not to be a credible response by the appellant.

28. The Judge stated that it was incumbent on the appellant to state in his application form that not only that he felt that he had been wrongly refused under paragraph 320 (7B) but also that he required notice of any relevant documentation which they may have in their possession which might have been sent to them by the Empire College of London.

29. It is implicit in the determination that the Judge found that the respondent had refused the appellant’s previous application pursuant to paragraph 320 (7B). It was now for the appellant to show why he did not state in his application form this reason but instead stated that his previous refusal was because of “insufficient documents” which is clearly not the case. The Judge was entitled to find that the appellant lacked credibility when he did not give the correct reason in his application form even if as he says, he did not agree with the respondent’s previous decision.

30. It was evident to the Judge found that the appellant gave a false answer to the question in his application form he did not state that he had been refused pursuant to paragraph 320 (7B) because he knew that this would have led to his application being automatically refused. The Judge took into account that the appellant did request a judicial review of that earlier decision which did not have a positive outcome for the first appellant. The appellant clearly intended to mislead the respondent by his response of “insufficient documents” when he knew this was not true. This was not a case of simply being incorrect.

31. I therefore find that the Judge did not materially err in law or fact in his decision which he arrived at based on all the evidence before him.

Conclusion

32. I find that the Judge did not begin error of law and I uphold the decision of the First-tier Tribunal.

DECISION

Appeal **dismissed**

Dated this 27th day of June 2015

Signed by

A Deputy Judge of the Upper tribunal
Mrs S Chana