



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04535/2016

THE IMMIGRATION ACTS

Heard at Field House
On 5 June 2018

Decision & Reasons Promulgated
On 19 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

PATHAMAJORTHY CHANDIRAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

For the Appellant: Ms B Jones (for Krisinth Solicitors)
For the Respondent: Ms A Everett (Home Office Senior Presenting Officer)

1. This is the appeal of Pathamajorthy Chandiran, a citizen of Sri Lanka, to the Upper Tribunal, against the decision of the First-tier Tribunal of 5 October 2017 dismissing her appeal against the refusal of her entry clearance application made on human rights grounds (of 8 December 2015).
2. The Appellant is the wife of the Sponsor Muththaiah Santhiran, a citizen of Sri Lanka. They married in Sri Lanka on 10 September 1994 and have two adult children, both born in Sri Lanka. The Sponsor came to the UK in November 2001 and claimed asylum; he eventually received indefinite leave to remain under the legacy arrangements for failed asylum seekers.

3. In 2009 the Appellant and her children sought entry clearance as visitors, before the Sponsor had acquired any immigration status in the UK, in assumed names using false documents and passports to which they were not entitled, a fraud which was in due course detected by the consular authority. Her application received a mandatory refusal under Rule 320(7A) on the basis of the false representations and false documents.
4. In 2012 the Appellant and the children, applied to join the Sponsor, with a view to settlement, using the names in which further dealings with the UK authorities have been conducted. She did not reveal the prior application and its refusal, those matters being detected only following a fingerprint check. Accordingly she was again refused for making false representations, and additionally for failing to provide the relevant evidence of English language proficiency.
5. She had submitted a marriage and birth certificate in her present name, but it was not accepted that those documents were genuine given the different names previously used. The Appellant and her children appealed, and in the course of those proceedings she explained that in 2009 she was advised by an agent that she should not use her own name because to do so would associate her with a person without leave. She had not completed the 2012 application, again relying on an agent, and had been reliant upon them for the accuracy of the application; however they had been negligent. The First-tier Tribunal rejected her evidence of innocence in the 2012 application and found that she had been dishonest on both her original entry clearance applications; it also rejected her argument that she should be exempted from the English language requirements.
6. The children, now aged over 18, made further applications in their own right. These were refused under Rule 320(3) on the basis that they had failed to produce a valid national passport or other document satisfactorily establishing their identity. They appealed to the First-tier Tribunal which accepted that they were related as claimed to the Sponsor but nevertheless dismissed their appeals, on the basis that they could not meet the high threshold set out in the adult dependent relative Rules.
7. The Appellant then made the application leading to the present appeal. The First-tier Tribunal treated the Entry Clearance Officer as satisfied with the suitability, eligibility, financial and English language requirements; however that left the additional ground as to the general grounds of refusal. She had submitted a declaration made by the Sponsor in October 2015 in which he recounted the family's circumstances; the surname for the Appellant appearing in her passport was Chandiran rather than Santhiran. He explained that this was because the person who had helped complete the passport applications had mistakenly recorded their surname as Chandiran. His wife had been genuine in her protestations that she had been wholly reliant on the agent's services regarding the 2012 application. She was now able to travel again because she was no longer after her mother, who was with her elder brothers. She had used a passport in the name Veerebanu in 2009 and one

in the name Chandiran in 2012 and so the application was refused under Rule 320(3).

8. The First-tier Tribunal determined the appeal in the absence of the parties. It found that given the previous success of the Appellant's appeal when her identity was accepted, the Home Office had not discharged the burden of proof on them to show that her identity and nationality was not adequately established by the passport she relied upon. The explanations for the prior use of false names and use of false passports were credible. The children had already succeeded on appeal on the Rule 320(3) refusal ground; it was appropriate to take the same approach to the mother's appeal now.
9. However, the First-tier Tribunal considered that the application nevertheless fell foul of the mandatory refusal ground for use of historic deception in the ten years leading up to the present application. That defeated the appeal under the Rules which required a mandatory refusal in such circumstances. Outside the Rules, the key issue was proportionality given it was necessarily accepted that the refusal of entry clearance would interfere with the genuine and subsisting relationship of man and wife. The fact that the application fell for mandatory refusal was a significant one. There were no significant obstacles to the couple pursuing family life in Sri Lanka; the same public interest considerations catered for by the general refusal reason for dishonesty carried over to assessing the appeal outside the Rules. The section 117B factors regarding English language proficiency, precariousness of immigration status and financial independence were cited towards the end of the decision, though it is not apparent what impact they had on the reasoning.
10. Grounds of appeal of 2 November 2013 contended that a different general refusal reason had been invoked against the Appellant on appeal than that cited by the Respondent in the refusal letter. Furthermore the First-tier Tribunal had failed to exercise independent judgment by relying on the previous determinations in the case and failed for itself to determine whether the interference with Article 8 rights was proportionate.
11. Before me Ms Everett acknowledged that it was difficult to defend a decision where the appeal had been determined on the papers and a new matter had been relied upon of which the Appellant did not have notice.

Findings and reasons

12. The Rules provide:

“Refusal of entry clearance or leave to enter the United Kingdom

A320. Paragraphs 320 (except subparagraph (3), (10) and (11)) and 322 do not apply to an application for entry clearance, leave to enter or leave to remain as a Family Member under Appendix FM, and Part 9 (except for paragraph

322(1)) does not apply to an application for leave to remain on the grounds of private life under paragraphs 276ADE-276DH.

Grounds on which entry clearance or leave to enter the United Kingdom is to be refused ...

(7A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application. ...

Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused

(11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:

- (i) overstaying; or
- (ii) breaching a 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.

Appendix FM

Section EC-P: Entry clearance as a partner ...

Section S-EC: Suitability-entry clearance ...

S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance."

13. There are accordingly various ways in which historic dishonesty might be addressed under the Rules:
 - (a) A *mandatory* refusal for historic deception under Rule 320(7A): but Rule A320 make it clear that the mandatory ban provision did not apply to the Appellant, given that it is not one of the provisions of the Rules Appendix FM applications are generally excluded;
 - (b) A *discretionary* refusal for aggravated breaches of immigration control under Rule 320(11), which does apply to Appendix FM;
 - (c) A *good character* refusal under the Suitability requirements within Appendix FM.

14. It is particularly important that the First-tier Tribunal conducts proceedings fairly when an appeal is determined without a hearing, because the parties have agreed to forgo an oral on the basis that the issues are agreed clearly beforehand. I do not consider it was fair to consider the Appellant's case against a benchmark other than which had been used in the refusal letter.
15. Of course, the error here is rather more significant, because the Rule invoked without notice simply does not apply. The First-tier Tribunal was therefore under the misguided impression that the Rules required a mandatory refusal of an application where there had been dishonesty in the past decade. In reality Rule 320(11) involves both an assessment as to the gravity of past dishonesty and a discretionary evaluation as to the weight to attribute to such conduct. Rule S-EC.1.5 is not expressed in terms of mandatory of discretionary nature, but does require a *judgment* to be made on the individual's character, which must be reviewed on appeal for the decision to be compatible with the Human Rights Act 1998.
16. Here the Judge relied on the unyielding refusal policy expressed by the inapplicable Rule 320(7A) in making judgments as to proportionality. That inevitably undermines those conclusions.
17. I accordingly find there to be a material error of law in the decision appealed. Given that the error arises in the context of the issue on which the entire appeal turns, ie the impact of the Appellant's admitted historic dishonesty on the proportionality of the immigration decision, it will be necessary for the appeal to be re-determined. The appeal must be determined afresh with no preserved findings.

Decision:

The decision of the First-tier Tribunal contains a material error of law.
The appeal is allowed and remitted to the First-tier Tribunal for hearing afresh.

Signed:

Date: 8 June 2018



Deputy Upper Tribunal Judge Symes