Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/16664/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 26th June 2013	**On : 1st July 2013**
	……

Before

Upper Tribunal Judge McKee

Between

PURVI NILAYKUMAR DESAI

Appellant

and

Entry Clearance Officer, Bombay

Respondent

Representation:

For the Appellant: Mr Zane Malik, instructed by Malik Law Chambers
For the Respondent: Miss Emily Martin of the Specialist Appeals Team

DETERMINATION AND REASONS

1. Mrs Purvi Desai is married with two children, and lives in Valsad, Gujarat. She must be very keen to come to the United Kingdom, for she has made four applications for a visa in quick succession. The first was refused on 2nd November 2011, because the evidence of the sponsor's finances was unsatisfactory. The second application

was refused on 17th February 2012, again because of concerns about the sponsor's finances, but this time also because the photograph provided of the sponsor's house was actually of a neighbour's house. It was pointed out on this occasion that the sponsor was not related to Mrs Desai closely enough to bring her proposed trip into the category of a 'family visit', generating a full right of appeal. Any appeal would therefore be limited to the grounds set out at section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002. The decision was not appealed, but a third application was made, this time accompanied by a family tree purporting to show that Mrs Desai is the sister-in-law of the sponsor, Hetal Desai. In fact, the sponsor is the daughter of the brother of Mrs Desai's mother-in-law. That relationship is not within the degrees of kinship listed in the Immigration Appeals (Family Visitor) Regulations 2003, which were (apparently ~ see below) in force at that time. A sister-in-law there is defined as the "*sister of the applicant's spouse*". So Mrs Desai fell to be treated as a 'general visitor' rather than a 'family visitor', with a limited right of appeal. On 3rd April 2012 this application too was refused because of unsatisfactory evidence of maintenance and accommodation.

2. With dogged persistence, Mrs Desai made a fourth application on 16th April 2012, calling in person at the British Deputy High Commission in Bombay. This time she brought a letter from her husband, Nilaykumar Desai, dated 5th April 2012, saying that he was "*currently working for Pacard Associates with salary of 20,000/-Rs*." This was accompanied by a letter from Pacard Associates dated 1st September 2010, certifying that Mr Desai had been "*working with our organization since January 2008, as a Service Engineer – UPS & Batteries. His last drawn salary is Rs 19,860 per month*." Payslips from Pacard Associates were also provided, for the months March through to August 2010.

3. To back this up, Mr Desai added two invoices and a 'delivery challan' concerning SMF batteries supplied by Pacard Power Products, a company with the same (very precise) address as Pacard Associates, namely A-225/1 Popular Plaza, 132 ft Ring Road, nr Shyamal Cross Roads, Satellite, Ahmedabad. Finally, Mr Desai left his business card. This has his name and mobile telephone number at the top left-hand corner, but the card is actually for the Jala-Sai Agency, with the strap line "*All Types of Industrials and SMF Batteries*." This agency has an address in Navsari, but its Head Office is given as Pacard Associates, Popular Plaza, Satellite, Ahmedabad.

4. On 1st May 2012 a Document Verification Report was produced at the Deputy High Commission, in connexion with Pacard Power Products and the Jala-Sai Agency. A member of the Risk Assessment Unit says that he called a number (which he does not give, as this information is 'sanitised' under the Data Protection Act) but could not get connected. So he rang another number ('sanitised') and spoke to a Mr ('sanitised'), the director of Pacard Power Products, who told him that Mr Nilay Desai was working as ('sanitised') on a commission basis, representing the Jala-Sai Agency.

5. This was not quite the information that caused the visa application to be refused on 7th May 2012, under paragraph 320(7A) of the Immigration Rules. "*Our office has contacted Pacard Associates*", writes the Entry Clearance Officer, "*who state that your husband left their employ two to three months previously*." This information seems to have been derived from a report made on 27th April 2012 by a member of

the Document Verification Unit, who was investigating a letter from Pacard Associates of Ahmedabad. He says that he called the number and spoke to ('sanitised'), who told him that the applicant's husband, ('sanitised'), used to work for ('sanitised') but left the job 2-3 months back. The informant further stated that Mr (sanitised') was in charge of Service & Marketing, South Gujarat. Then ('sanitised') reconfirmed that ('sanitised') used to work for them and left the job 2-3 months back.

6. At all events, Mrs Desai was told that she had made false representations, in submitting a letter from her husband claiming that he was currently employed by Pacard Associates. She was also reminded that, not being a 'family visitor', she could only appeal on the grounds given by section 84(1)(c) of the 2002 Act.

7. On 14th May 2012 Malik Law Chambers completed an IAFT-2 notice of appeal, ticking the boxes marked 'family visit' and 'oral hearing', and appending Grounds of Appeal which are vague, unfocused and rambling. They do not address the reason for refusal, i.e. the making of false representations, nor do they address the respondent's contention that the application was not for a 'family visit' and so attracts no right of appeal save on the grounds of racial discrimination or breach of human rights. There is no mention of racial discrimination in the Grounds, and as for human rights, there is one sentence among the ten paragraphs of Grounds which baldly states that the ECO's decision is "contrary to the provisions of the European Convention on Human Rights Act (*sic*)." No attempt is made to explain why this is so. That these Grounds have been appended to the Notice of Appeal without any attention being paid to what the appeal is actually about, save that it is a visit appeal, is confirmed by their referring to the appellant throughout as 'he'.

8. An oral hearing having been requested (and apparently paid for), the appeal was listed before the First-tier Tribunal on 11th January 2013. Despite notice of the hearing having been sent to the sponsor and to Malik Law Chambers, there was no appearance by either on the day, and no explanation for their absence. The HOPO Unit informed Taylor House that no one was available to represent the ECO either, and so Judge Beach proceeded to determine the appeal in the absence of the parties. She agreed with the respondent that the appeal could only succeed on race discrimination or human rights grounds. No issue at all had been raised by the appellant on race discrimination, and as for human rights, the judge noted that no reasons had been given in the grounds of appeal as to why the refusal of a visit visa interfered with the appellant's human rights.

9. Judge Beach might well have ended her determination at that point. The refusal of the visa application under one of the general grounds in Part 9 of the Immigration Rules had not been challenged in the Grounds of Appeal. It was not suggested in the Grounds that Mrs Desai had not made false representations, nor was any attempt made to show how a 'mandatory refusal' under rule 320(7A) was in breach of Mrs Desai's human rights. Nevertheless, Judge Beach did consider whether the information obtained by the Deputy High Commission in respect of Mr Desai's employment showed that false representations had been made. Contrary to what Mr Desai had written in his letter of 5th April 2012, he was not "*currently working for Pacard Associates with salary of 20,000 Rs*." Rather, he had ceased working for them prior to his wife's application, and was now working for Pacard Power Products on a commission basis. That, thought the judge, was a material misrepresentation –

although one may note that rule 320(7A) does not actually require a false representation to be material.

10. The appeal was of course dismissed, and that might have seemed the end of the matter. Permission to appeal to the Upper Tribunal was granted, however, on the strength of three grounds settled by Mr Malik of counsel, who withdrew the second of them when the appeal came before me today. This ground asserted that the ECO took no point as to jurisdiction during the appeal proceedings, and so it was not open to the First-tier Tribunal to take it of its own motion. Mr Malik withdrew this ground because of the recent judgment in *Pavandeep Virk* [2013] EWCA Civ 652, holding that it is open to the Upper Tribunal to query whether there is jurisdiction to entertain an appeal, even if the appeal has proceeded through the First-tier Tribunal without anyone noticing that there might be no jurisdiction to hear it. It seems to me that this ground was in any event misconceived, because the jurisdiction point was taken by the ECO, who pointed out in the notice of decision that the appeal was restricted to the grounds set out at section 84(1)(c) of the 2002 Act. Judge Beach was also aware that that was the scope of the appeal, although for the sake of completeness she also addressed the 'mandatory refusal' ground.

11. Mr Malik's third ground is that it was an error of law for the First-tier judge not to make a finding on whether any misrepresentation made by the appellant was dishonest. Reliance was placed on *Adedoyin* [2010] EWCA Civ 773, in which it was held that "*dishonesty or deception is needed to render a false representation a ground for mandatory refusal*." The short answer to that, of course, is that the refusal under paragraph 320(7A) of the Immigration Rules was not challenged in the grounds of appeal, and so the judge was not required to decide whether the refusal on that ground was rightly made. If the appellant had challenged the ECO's decision on that ground, it is hard to see how she could have succeeded on an appeal confined to the issues of race discrimination and human rights. It might have been possible, perhaps, to show that the ECO was wrong to suppose that deception had been employed, and to argue that the ten-year re-entry ban consequent upon a paragraph 320(7A) refusal would be a disproportionate breach of Article 8 rights. But there is no need to speculate further about that.

12. Judge Beach did, nevertheless, consider the mandatory refusal substantively, and I heard submissions on the point from Mr Malik, who argued that Mr Desai's letter was not a 'false representation' by the appellant, and from Miss Martin, who argued that it was, since Mrs Desai had taken it in person to the Deputy High Commission. I agree with Miss Martin. Even if Mrs Desai had not intended herself to practise deception, *Adedoyin* does not come to her rescue. The *ratio* of that case is that if an applicant makes a representation which is inaccurate but not dishonest, then it is not a 'false representation' for the purposes of rule 320(7A). But if somebody else makes a dishonest representation in support of the applicant, then she is caught by it, even if she is unaware of it. Rule 320(7A) does specify "*whether or not to the applicant's knowledge*."

13. In days gone by, ECOs used to send Document Verification Reports to the appellate authority in plain brown envelopes, with a request to invoke section 108 of the 2002 Act and not disclose to the other side how the forgery had been detected. The Report would usually relate that, for example, an administrative assistant had rung up

the branch of the bank which had purportedly issued the applicant's bank statements, to check whether the applicant really did have an account with the bank, and whether he really did have as much in his account as the statements said. This method of gathering information was hardly the sort of thing that had to be kept out of the public domain, lest forgers and traffickers use it to elude the vigilance of the British posts abroad. Nowadays it seems that, instead of trying to keep the Document Verification Reports away from the gaze of appellants and their representatives, our overseas posts are 'sanitising' these reports to a point of near-incomprehensibility.

14. In the instant case, however, it has not been challenged that Mr Desai was not, contrary to what he asserted in his letter supporting Mrs Desai's application, currently employed by Pacard Associates at a salary of Rs 20,000/- per month. He was working for them still, or at least for an associated company, on a commission basis, but no longer on a regular salary. Perhaps he thought it would look better to the ECO if he was in regular employment, rather than working on a commission basis. Whatever the reason, it was deliberate dishonesty.

15. I turn now to Mr Malik's first, and principal, ground, namely that the Immigration Appeals (Family Visitor) Regulations 2003, made under section 90 of the Nationality, Immigration and Asylum Act 2002, ceased to have effect when section 90 was repealed on 1st April 2008 and replaced by a new section 88A, inserted by section 4 of the Immigration, Asylum and Nationality Act 2006. Mr Malik prays in aid Craies on Legislation, which states at 14.4.23 : "*Subordinate legislation lapses automatically when the enabling power ceases to have effect, unless saved expressly*." The 2003 Regulations were not saved expressly, and so they must, argues Mr Malik, have lapsed automatically when the enabling power of section 90 ceased to have effect. The new section 88A is not, he insists, a re-enactment in the sense required by section 17(2)(b) of the Interpretation Act 1978. It was assumed in *Ajakaiye (visitor appeals – right of appeal) Nigeria* [2011] UKUT 375 (IAC) that the reference to section 90 in the 2003 Regulations should now be read as a reference to section 88A, but the Presidential panel heard no argument on the matter, and their assumption should, he contends, be considered as *obiter*.

16. Mr Malik may well be on to something here, and it may be that his argument will in due course be ventilated before a tribunal of higher authority than the present. It is not necessary for me to decide whether Mr Malik is right, because – as adumbrated by Mr Parkinson in his Rule 24 Response, and picked up today by Miss Martin – if he is right, then there was no provision at all for a 'family visit' appeal at the time when Mrs Desai's application was refused. The Immigration Appeals (Family Visitor) Regulations 2012, made under the new section 88A of the 2002 Act, did not come into force until 9th July 2012, while the previous Regulations had lapsed on 1st April 2008.

17. Mr Malik has an ingenious answer to that. Section 88A(1) of the 2002 Act, anticipating the roll-out of the Points Based System, severely limits the right of appeal against the refusal of an application for entry clearance. A person can only appeal against the decision if the application was made for the purpose of –

    (a) visiting a person of a class or description prescribed by regulations for the purpose of this subsection, or

(b) entering as the dependant of a person in circumstances prescribed by regulations for the purpose of this subsection.

18. No regulations having been prescribed for the purpose of section 88A(1) until 9th July 2012, subsection (1)(a) must be read, according to Mr Malik, without any reference to the regulations. That means ignoring the prepositional phrase 'of a class or description prescribed by regulations for the purpose of this subsection'. What is left is simply 'visiting a person'. One can therefore appeal against the refusal of entry clearance if the application was made for the purpose of 'visiting a person' – any person, regardless of how closely related, or even if unrelated. So in Mrs Desai's case, the fact that she was proposing to visit quite a distant relative does not matter. She has a full right of appeal on the merits.

19. Miss Martin protests that subsection (1)(a) cannot be chopped up in this manner, and she is right. An examination of the syntax demonstrates this. A sentence is not an unstructured, linear sequence of words. Syntactically, it is arranged in a hierarchical structure. Subsection (1)(a) is not a full sentence, but it still has a structure. The verb 'visiting' has as its object the entire noun phrase 'a person of a class or description prescribed by regulations for the purpose of this subsection'. One cannot excise part of that noun phrase, leaving a rump behind to be governed by 'visiting', so as to accord with what one would like the subsection to mean. One cannot do violence to the syntax in the way proposed by Mr Malik. If he is correct to say that there were no Family Visitor Regulations in force between 1st April 2008 and 8th July 2012, then the only right of appeal against the refusal of entry clearance during that period was the one given by section 88A(3)(a), namely an appeal brought on the grounds referred to in section 84(1)(b) and (c) of the 2002 Act. Incidentally, the logic of this argument means that after the end of March 2008 no entry clearance appeals under Part 8 of the Immigration Rules would have been possible either, save on the restricted grounds of racial discrimination or breach of human rights, since no regulations had been prescribed under section 88A(1)(b).

20. The upshot is that, whether the 2003 Regulations were in force or not when Mrs Desai's visa application was refused, her right of appeal was restricted to the grounds given by section 84(1)(b) and (c) of the 2002 Act. Her appeal to the First-tier Tribunal did not mention race discrimination at all, while the assertion that the ECO's decision breached her human rights did not condescend to any particulars. The appeal was frankly hopeless, and Judge Beach made no error in dismissing it.

DECISION

The appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

29th June 2013