Tribunals Service
Asylum and Immigration Tribunal

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/01145/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 November 2015	**On 18 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE ENTRY CLEARANCE OFFICER, ISLAMABAD

Appellant

and

WAQAR NAVEED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr F Bajwa, Legal Representative

DECISION AND REASONS

1. The respondent to this appeal is a citizen of Pakistan born on 29 July 1943. The appellant is the ECO, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Monaghan, allowing the respondent's appeal against a decision of the ECO made on 28 January 2014 refusing his application for a family visit visa by reference to paragraphs 320(7B) and 41(i) and (ii) of the Immigration Rules, HC395.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Mr Naveed from now on as "the appellant" and the ECO as "the respondent".

3. The background is important. On 26 October 2010 the appellant was refused a

visit visa to visit his cousin by reference to paragraph 320(7A) of the rules. The decision was upheld on appeal. Judge Rintoul found that the appellant had made a dishonest statement in his visa application form. On 25 July 2012 the appellant was refused a visit visa to visit his sister who was, at the time, seriously ill in hospital. The decision was made by reference to paragraph 320(7B) and 41(i) and (ii) of the rules. The appellant appealed that decision. In a determination dated 26 February 2013 Judge Coutts found that the decision was not in accordance with the law in that the respondent had not considered her policy[1] before making a decision under paragraph 320(7B). The policy required the respondent to consider whether there were any exceptional compelling circumstances which would justify the issuance of entry clearance. In the view of Judge Coutts, it was clear to everyone that the decision was likely to produce a harsh result for the sponsor (the appellant's niece) and her mother (the appellant's sister). The latter was terminally ill with cancer and there were medical letters confirming this. Other than the sponsor, the appellant's sister had no other relatives and, being unable to cope, the sponsor wished the appellant to visit the UK to assist her with looking after her mother. Judge Coutts regarded time as being of the essence.

4. The decision now under appeal appears to have been made in response to Judge Coutts's decision and further representations made. The notice of decision stated that no updated medical evidence regarding the appellant's sister's health had been provided.

5. Judge Monaghan found there were exceptional compelling circumstances when the appellant was first refused entry clearance on deception grounds relating to the appellant's sister's battle with cancer. The judge noted the decision stated that no evidence had been provided regarding the appellant's sister's condition since Judge Coutts's decision and therefore there were no compelling compassionate circumstances. However, the respondent should have had regard to the findings made by Judge Coutts about the appellant's sister's condition. Applying *Chomanga (binding effect of unappealed decisions) Zimbabwe* [2011] UKUT 00312 (IAC), she considered herself bound by Judge Coutts's decision. She allowed the appeal because the policy should have been applied in the appellant's favour.

6. The respondent applied for permission to appeal on the basis that entry clearance officers do not routinely refer cases for consideration under the policy but only if they consider that there are exceptional compassionate circumstances. No further evidence of the appellant's sister's condition had been provided so the decision was re-made. The judge erred in her application of *Chomanga* because she failed to recognise that Judge Coutts had only allowed the appeal to the limited extent that the decision was not in accordance with the law. No findings were made to reverse Judge Rintoul's decision that the appellant had used deception.

7. The First-tier Tribunal granted permission to appeal.

[1] The policy is helpfully set out in paragraph 3 of Judge Monagahan's decision. In effect, the ECO must consider whether there are any human rights grounds (in particular article 8 grounds) or any exceptional compelling circumstances which would justify entry clearance. If there are, the case should be referred to the Referred Cases Unit for a decision. Otherwise refusal was mandatory.

8. A handwritten response has been filed on behalf of the appellant, asserting that there are exceptional compassionate circumstances as the close (*sic*) whom the appellant wishes to visit is seriously ill. The earlier finding of dishonesty no longer stood. It was hard to imagine a greater miscarriage of justice. Mr Bajwa did not associate himself with the response.

9. I heard submissions on whether the judge made a material error of law.

10. Mr Tufan argued the judge had failed to consider paragraph 41 of the rules so should not have allowed the appeal in any event. There was no medical evidence justifying a finding that compelling compassionate circumstances existed.

11. Before asking Mr Bajwa to reply, I raised with the representatives the question of whether the judge was entitled to allow the appeal outright or whether the exercise of discretion was for the ECO.

12. Mr Bajwa argued that the effect of the policy was that paragraph 320(7B) was not mandatory in the circumstances that there was evidence of exceptional compelling circumstances, as there clearly were. There was evidence in the respondent's bundle that the appellant's sister was in hospital with cancer. If there were such circumstances the omission of reference to paragraph 41 was immaterial. He asked me to find there was no error in the judge's decision.

Error of law

13. After considering the grounds and the oral submissions made to me, I have decided that the judge's decision is vitiated by material error of law. The judge misunderstood the effect of Judge Coutts's decision and the meaning of *Chomanga*. That case was concerned with the circumstances in which the respondent ignored the findings of a tribunal and issued a second decision circumventing the tribunal's decision. The respondent was bound by the findings of the tribunal. In this case, Judge Coutts did not make a finding that paragraph 320(7B) did not apply. He found there were circumstances which the respondent was aware of which, on the face of them, engaged the policy such that a decision which failed to give effect to that policy was not in accordance with the law. Judge Coutts carefully limited the extent of his decision, stating at [11]: "*I make no finding in respect of the circumstances here being exceptional compassionate ones because that was not a matter which was argued before me. However, in my view, the correct approach is to remit this matter back to the respondent for her to consider this issue with any further representations or medical information provided by the appellant.*"

14. In *Ukus (discretion: when reviewable)* [2012] UKUT 00307 (IAC), the Upper Tribunal explained the limits of the tribunal's jurisdiction under the 2002 Act in discretionary cases. There is an important distinction between the circumstances in which the tribunal can exercise discretion differently itself and

cases in which it can do not more than find a decision unlawful on *Abdi* lines[2]. The current case is plainly of the latter variety. The tribunal cannot review the decision not to apply a policy not to employ a mandatory ground for refusal and allow an appeal outright on the basis that discretion should have been exercised favourably. If she was persuaded the circumstances gave rise to a need for the respondent to apply the policy and to consider not making a mandatory refusal then the most the judge could do was, like Judge Coutts had done, allow the appeal on the limited basis that the decision was not in accordance with the law.

15. It is also right to say that the appeal should not have been allowed outright without full consideration being given to paragraph 41 of the rules.

16. I set aside the decision of Judge Monaghan.

Re-making the decision

17. In terms of re-making the decision, there was no attendance by the sponsor and the most recent medical evidence is more than a year old. Mr Bajwa could only say he was instructed that the appellant's sister is still alive and therefore there is still a justifiable basis for pursuing the point.

18. In my view, there was evidence of compassionate circumstances justifying Judge Coutts's decision when he made it. Judge Monaghan took the view that there was evidence before the respondent justifying a referral under the policy when the decision was made in January 2014. Mr Bajwa argued that there were medical documents before the respondent in any event. However, as Judge Monaghan pointed out at [17], the respondent stated in the notice of decision that the appellant had not provided up to date evidence and no evidence was provided to show documents had been sent but had gone astray. The evidence which was before Judge Coutts was a year old by the date of decision. In sum, it cannot be said the respondent's decision was not in accordance with the policy because there was no up to date evidence justifying a referral. Judge Coutts had made it clear that further medical information was to be provided. If nothing had been provided since Judge Coutts's decision then the respondent cannot be criticised for not referring the case.

19. In these circumstances, the rules provide for mandatory refusal because Judge Rintoul's decision upholding the original refusal on deception grounds has not been overturned. The correct outcome is therefore to substitute a decision dismissing the appeal under the Immigration Rules.

20. The appellant has not appealed on human rights grounds.

21. In view of the sad circumstances behind this case, I would like to add that the fact there was no evidence justifying a decision to refer which was before the entry clearance officer at the date of decision does not mean there were not circumstances in existence warranting a referral or, indeed, that such circumstances do not currently exist. If there are such circumstances because the appellant's sister is still alive and her daughter still requires help, the

[2] *SSHD v D S Abdi* [1996] Imm AR 148.

appellant can make a fresh application and he must ensure that up to date medical evidence is provided with his application.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and her decision allowing the appeal is set aside. The following decision is substituted:

The appeal is dismissed under the Immigration Rules.

Signed Date 17 November 2015

Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal