



Case No: C2/2020/1346

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL

Neutral Citation No: [2021] EWCA Civ 346

The Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 25 February 2021

Before:

LORD JUSTICE RICHARDS
LORD JUSTICE HENDERSON
LADY JUSTICE CARR

Between:

WAHID, R (on the application of)

Applicant

- and -

ENTRY CLEARANCE OFFICER

Respondent

Transcript of Epiq Europe Ltd, Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Tel No: 020 7404 1400 Email: civil@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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MR JAY GAJJAR and MR AHMAD BADAR (instructed by Mr Z Jamali of Ashton Ross Law)
appeared on behalf of the **Applicant**

MR ZANE MALIK (instructed by Government Legal Department) appeared on behalf of the
Respondent

Judgment

LADY JUSTICE CARR:

Introduction

1. This is an appeal against the order of Upper Tribunal Judge Frances ("the Judge") dated 29 June 2020 refusing permission to bring judicial review proceedings against the decision of the Entry Clearance Officer ("the ECO") on 5 February 2020 to refuse to grant the applicant ("Mr Wahid") entry clearance as a visitor ("the refusal decision"). It is said to raise, amongst other things, the question of whether the procedural safeguards identified in *Balajigari v SSHD* [2019] EWCA Civ 673 ("*Balajigari*") in cases of alleged dishonesty apply to applications for entry clearance.
2. The court has had the benefit of able submissions from Mr Gajjar for Mr Wahid and Mr Malik for the ECO.

The Facts

3. Mr Wahid is a married Pakistani national, now 33 years old. He is an advocate of the High Court of Sindh and a practising legal consultant. In 2006, he was granted leave to enter the UK as a student until 31 October 2009. He commenced studies for a LLB at Leeds University.
4. In April 2009, Mr Wahid, then 21 years old, was convicted on his guilty plea entered at the first opportunity to a driving offence ("the driving conviction"). The circumstances of the offending were that he had permitted a friend to drive his car without a licence or insurance. By way of sentence, he received a short driving ban and a fine and penalty, both of which were duly paid. Mr Wahid completed his LLB in August of the same year and then made an in-time application for further leave to remain as a student.
5. In December 2009, his leave to stay as a student was extended to 1 July 2011. Mr Wahid studied for a LLM at Liverpool John Moores University, a course which he completed in March 2011. He made a second in-time application for extended leave to stay as a student

which again was granted, leave being extended until 14 January 2012. On 4 January 2012, following an application in November 2011, Mr Wahid was granted leave to remain as a Tier 1 (PSW) migrant until 4 January 2014.

6. On 6 July 2012, Mr Wahid was travelling from London to Pakistan. His bags were checked by security officers at Heathrow Airport and found to contain a blunt Spanish butterfly knife on a keychain. It was considered a prohibited item. The officers are said to have apologised when explaining to Mr Wahid that the police needed to be called as a matter of protocol. Mr Wahid was taken to a police station and interviewed. He was not charged. He states that he was told, in terms, that no further action would be taken.
7. I refer to this as "the butterfly knife incident". The police record database suggests that Mr Wahid was, in fact, cautioned on this occasion "for possessing dangerous articles on aerodrome". No written caution, signed or unsigned, (or any copy of such a caution) has been put in evidence. Mr Wahid left the UK in 2012.
8. On 20 January 2020, Mr Wahid submitted an application for a visitor visa ("the visa application") in order, amongst other things, to attend his wife's graduation ceremony in London. His arrival and departure dates were 28 February and 14 March 2020 respectively. He was asked, amongst other things, whether he had ever had in the UK a criminal conviction or a penalty for a driving offence or "a caution, warning, reprimand or other penalty". In answer, he declared the driving conviction but made no reference to the butterfly knife incident or, more specifically, to any caution. By sending the form he declared its contents to be correct true to the best of his knowledge and belief. Mr Wahid's position is that he was wholly unaware of any caution in respect of the butterfly knife incident at the time of his application in 2020.

The Refusal Decision

9. As already mentioned, the refusal decision was dated 5 February 2020. The ECO refused the visa application under paragraph V3.6 of Appendix V to the Immigration Rules on

the basis that the applicant, Mr Wahid, had made false representations. The refusal decision stated as follows:

"... you have answered 'yes' ... and have provided details of a motoring offence on 4 April 2009; however, our records show that you also received a police caution on 06/07/12 for an unrelated incident to that which you declared. It is not clear to me why you would declare details of a motoring offence of 04/04/2009 but not declare a subsequent police caution on 06/07/2012. This represents a clear intention to conceal your personal circumstances and your previous police caution in the UK and I am satisfied to a high degree of probability that this false representation was not an innocent mistake and constitutes an intention to deceive for the following reasons: you have not acknowledged your police caution in the UK in your application or, under the 'Extra Information Section', nor have you submitted any documentation to declare this caution. I am, therefore, satisfied that you have made false representations in support of your current application and I am also satisfied that you have used deception. Your application is, therefore, refused under V3.6 of the Immigration Rules."

10. There was no right of appeal or right to administrative review of the refusal decision.

Procedural History

11. Following pre-action protocol correspondence, Mr Wahid commenced these proceedings in March 2020. Two grounds of claim are raised: procedural unfairness and irrationality. The proceedings were and remain contested in their entirety.
12. Upper Tribunal Judge Kekic refused permission on 21 April 2020 in a decision sent to the parties on 7 May 2020. Mr Wahid renewed his application for permission orally before the Judge on 29 June 2020.
13. The Judge found that the refusal decision was not arguably irrational or unlawful nor was it procedurally unfair:

"... 5. The respondent properly applied the relevant Immigration Rules. The decision was not arguably unlawful or irrational. There was no lack of clarity o[r] lack of reasoning in the decision.

6. I am also not persuaded that the decision was procedurally unfair. The applicant disclosed his conviction in 2009 and he attended the police station in 2012. It is accepted the knife was in his luggage and it was a prohibited item. The fact that the applicant claims he was unaware of the caution being recorded against him is not material. An interview or minded to refuse letter would not have altered the factual situation.

7. The decision of 5 February 2020 was not arguably unlawful, irrational or procedurally unfair."

The Grounds of Challenge

14. For Mr Wahid, Mr Gajjar submits that the refusal decision was at least arguably unlawful and that permission to bring the claim should have been granted. He identifies that there are three central questions to be considered. First, whether or not there was procedural unfairness in reaching a conclusion on deception without offering Mr Wahid, an opportunity to give any explanation. Secondly, whether or not the language used by the ECO rationally and safely allowed the ECO to reach the conclusion of deception that he did. Thirdly, whether on the facts the ECO was entitled to reach the conclusion on dishonesty that he did. Materiality is a consideration tied into this third question.
15. As to the first question, Mr Gajjar submits that the refusal decision gave rise to an arguable case of procedural unfairness. Following *Adedoyin v SSHD* [2010] EWCA 773 ("*AA*") (at [43]), false representations require dishonesty to be established. Mere non-disclosure does not establish that. Dishonesty is not a foregone conclusion. The authorities of *Balajigari* and the decision of Saini J in *Karagul & Ors, R (on the application of) v SSHD* [2019] EWHC 3208 ("*Karagul*") (at [102] and [103]) lay down general principles setting out the procedural safeguards that decision-makers are obliged to adopt when alleging dishonesty. o
16. The ECO's suggestion that these procedural safeguards do not apply to applications for entry clearance is both flawed and dangerous for a number of reasons: (i) one should not seek to undermine the importance of entry clearance decisions; (ii) fundamentally, the important question here is the quality and nature of an allegation of dishonesty. It can carry serious consequences. It taints and infects any subsequent application or any second subsequent application by way of re-application for a visitor visa; (iii) *Karagul*

is an authority which provides two "take-aways". First, it shows that the Secretary of State's previous attempts to refine *Balajigari* and narrow the principles there identified have failed in the past and, secondly, it identifies the general position that an opportunity to respond should be given where suspicions of dishonesty are in play; (iv) the suggestion that there is a clear distinction between entry clearance and leave to remain applications is a bold one. By way of example, student applications can involve interviews and that is in circumstances when allegations of dishonesty are not even in play.

17. Mr Gajjar submits that the authorities upon which the ECO relies do not provide the support for his position suggested. There are many reasons why *Taj, R (on the application of) v SSHD* [2021] EWCA Civ 19 ("*Taj*") does not assist. There, it can be seen that the impact of a hostile environment was not a driving force in the court's reasoning. Furthermore, unlike the position here, in *Taj* the applicant had an interview and the relevant authority undertook a site visit. Moreover, the issues in *Taj* were not ones of veracity or honesty but rather went to the credibility and viability of the business that was under scrutiny.
18. As for *Topadar, R (on the application of) v SSHD* [2020] EWCA Civ 1525 ("*Topadar*"), the facts are again distinguishable and, in particular, there was no suggestion of the making of any adverse findings against the applicant.
19. Finally, Mr Gajjar criticises the reasoning of the Judge, in particular at paragraph 6. There, the Judge considered the question of procedural fairness from the wrong angle. The question was Mr Wahid's state of mind. The Judge made a clear-cut error: it was wrong to treat the fact that Mr Wahid was unaware of the caution as being an immaterial consideration.
20. As to the second and third grounds relied upon for Mr Wahid, namely the language used in the refusal decision and rationality, Mr Gajjar suggests that the decision letter reveals an impermissible leap of logic from a lack of clarity as to the motive for the non-disclosure to a finding that the non-disclosure displayed a clear intention to conceal. Mr Gajjar accepts that one must look at the reasons given in the round but he says that does not assist. It cannot be right, he says, for the ECO to state that there was no clear

motive but then to go straight to a finding of dishonesty. The refusal decision revealed the error identified in *AA*, namely a leap from a finding of non-disclosure to a finding of dishonesty without more. It is possible that Mr Wahid was, as he contends, unaware of the caution at the time.

21. It is not clear, in summary, by reference to the language of the refusal decision (see the comments of the court in *Balajigari* at [211]) that the decision-maker properly understood that non-disclosure did not necessarily equate with dishonesty.
22. As for the question of rationality, Mr Gajjar submits that materiality is relevant. If the disclosure of the caution would not have had an identifiable adverse impact, then there was no identifiable motive for non-disclosure. Absence of motive underpins the cogency of the overall evidence before the ECO. If the caution was a minor matter it would have made no difference. The ECO should have asked himself or herself if there was sufficiently cogent evidence. The fact that there has been no attempt to identify any material impact from disclosure of the caution is relevant. To that, Mr Gajjar adds Mr Wahid's general standing and the background of his career to date.

Grounds of Opposition

23. Mr Malik for the ECO resists the appeal. He says that the position is unarguably that the procedural fairness requirement relied upon by Mr Wahid did not exist. In summary, he identifies four reasons for that, in each instance contrasting the position with in-country applications: (i) refusal of entry clearance does not change a person's status; (ii) refusal does not prevent an applicant from making a fresh application without serious consequences; (iii) in a case of this nature, the ECO does not rely on information provided by a third party that is in some way outside the applicant's knowledge or where the applicant would face real difficulty in identifying the areas of concern. In the absence of any such real difficulty, the obligation to consult or afford the opportunity for representation does not exist; (iv) refusal of entry clearance is mandatory and does not involve a discretionary balancing exercise.

24. These are all distinctions that can be drawn between an application for entry clearance and an in-country application for leave to remain. Mr Malik emphasises that there is no authority which suggests that the approach to entry clearance applications is the same as that to be adopted in the context of in-country applications.
25. In particular, *Balajigari* did not lay down any general broad principle applicable in all situations. *Balajigari*, on its facts, submits Mr Malik, does not assist Mr Wahid. Mr Wahid's circumstances are quite different. He was not in the UK and the refusal of entry clearance did not change his circumstances. He could have made a fresh application without risk of committing any criminal offence, for example, as an overstayer.
26. Mr Malik also referred to *R v SSHD ex parte Fayed* [1996] EWCA Civ 946, [1998] 1 WLR 763 which the court in *Balajigari* (at [49]), found to be "instructive". There (at 777) Lord Woolf MR commented that in cases where the issues were obvious, notice might not well be required. The requirements of procedural fairness, submits Mr Malik, depend upon the facts and the context in which a decision is taken, including the nature of the legal and administrative system within which the decision is taken. He refers to *Topadar* (at [52]). He submits that in the context of an application for entry clearance as a visitor, there simply is no public law obligation on the ECO to adopt the minded to refuse procedure.
27. Mr Malik also referred to *R (on the application of Pathan) v SSHD* [2020] UK SC 4 [2020] 1 WLR 4506 (at [46]) as support for the proposition that what procedural fairness requires is always context and fact-specific and, likewise, *Taj* at paragraph 65. *Karagul*, submits Mr Malik, does not assist Mr Wahid. There, the court was addressing refusals by the Secretary of State of applications for leave to remain as business persons. Mr Malik submits that the facts here are important. This was a detailed application form, clear on its face which Mr Wahid would have understood, not least as a lawyer that it was essential for him to provide full and accurate details.
28. As for irrationality, Mr Malik emphasises that normal public law principles of rationality fall to be applied as set out in *R (on the application of Giri) v SSHD* [2015] EWCA Civ 84, [2016] 1 WLR 4418 (at [32]). It was reasonably open to the decision-maker to

find that deception had been used. The ECO made a clear finding of deceit. The suggestion by Mr Wahid that he was not informed about the alleged caution is said to be "simply implausible". There is, submits Mr Malik, no arguable base for interference with the refusal decision on that basis.

Discussion

29. The Immigration Rules are made by the Secretary of State and approved by parliament under section 3(2) of the Immigration Act 1971. Paragraph V3.6 of Appendix V of the Immigration Rules provides:

"False information in relation to an application

"V3.6 An application will be refused where: (a) 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 (b) material facts have not been disclosed in relation to their application or in order to obtain documents from the Secretary of State or a third party provided in support of their application."

30. *AA* (at [43]) makes it clear that the term "false" in this context carries the meaning of dishonesty and not merely inaccuracy. It must be a deceitful representation. Mere non-disclosure will not suffice.
31. In my judgment, the Judge fell into error in the penultimate sentence of paragraph 6 of his decision. He failed to consider the position from the perspective of Mr Wahid's state of mind and, in particular, the question of his honesty. The requirement of procedural fairness depend upon the facts and the context in which a decision is taken, including the nature of the legal and administrative system within which the decision is taken (see *R v SSHD, ex parte Doody* [1994] AC 531 (at 560 D-G) and *Taj* (at [50])).
32. I am persuaded, broadly for the reasons identified by Mr Gajjar, that it is arguable that, where an ECO harbours suspicions of dishonesty, procedural fairness requires the applicant to have the opportunity to respond. The Judge was wrong to conclude

otherwise. This is an important point which does not appear to have been considered directly in any of the authorities to date.

33. It is right that the circumstances of the appellants in *Balajigari* were very different to those of Mr Wahid. The very serious consequences of refusal of indefinite leave to remain for the appellants there played an important part in the Court of Appeal's decision that procedural fairness required the opportunity to make informed representations (see [50] to [55] and [81]). Here, Mr Wahid was applying for a short visitor visa to enter the UK for tourism purposes. He could also have made a second application. On the other hand, and as the court in *Balajigari* also recognised at [51], a finding of dishonesty is a particularly serious matter going to a person's character.
34. It seems to me that these are matters worthy of further debate by reference to full argument and consideration of all the relevant authorities and underlying principles in play.
35. I would also grant permission on the second ground of claim, irrationality, on the basis that, again, it is arguable. The Judge was wrong to conclude otherwise. It is right to say that it is possible to read the sentence in the refusal decision to which Mr Gajjar attaches particular importance:

“.....It is not clear to me why you would declare details of a motoring offence of 04/04/2009 but not declare a subsequent police caution on 06/07/2012...”

as being no more than a reference by the ECO to the absence of any plausible or innocent reason to declare the driving conviction but not the caution. However, it seems to me that the debate on ground 1 may be informed by consideration of at least some of the issues that may arise under ground 2 and, in these circumstances, I am persuaded to grant permission on the second ground as well.

36. For these reasons, in my judgment, the Judge was wrong to conclude that the judicial review proceedings carry no real prospect of success. The claim has a real prospect of success. I would therefore allow the appeal.

Lord Justice Henderson: I agree.

Lord Justice David Richards: I also agree.

Order: Application granted.

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Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Tel No: 020 7404 1400
Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge