Upper Tribunal

(Immigration and Asylum Chamber)

Ozhogina and Tarasova (deception within para 320(7B) – nannies) Russia [2011] UKUT 00197 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 October 2010	.....

Before

MR JUSTICE BURTON

SENIOR IMMIGRATION JUDGE ESHUN

Between

IRINA ANATOLYEVNA OZHOGINA

NATALYA ALEKSEYEVNA TARASOVA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr L Fransman QC, instructed by Gherson & Co

For the Respondent: Mr P Nath, Home Office Presenting Officer

Where a nanny lived in an employer's home during a period where the employer had come to live in the United Kingdom, she: (a) was not living under the same roof as an employer but qualified under the alternative provision of 159A (ii) of "in a household the employer uses for himself on a regular basis"; (b) could not comply with 159A (iii) "intends to travel to the United Kingdom in the company of his employer"; but the appeal could be allowed without remittal for reconsideration where the Tribunal was satisfied that the respondent was bound to conclude that the appellant met the terms of a policy in an IDI.

Where the respondent relies on paragraph 320(7B) (d) to refuse an application for entry clearance because of a breach of the UK's immigration laws by using 'Deception in an application for entry clearance' it is necessary to show that a false statement was deliberately made for the purpose of securing an advantage in immigration terms.

DETERMINATION AND REASONS

1. This has been the hearing of an appeal by Miss Ozhogina and Miss Tarasova, who are both nannies at present in Russia and wishing to come to this country in order to fulfil duties in the household of a Mr and Mrs Chichvarkin. They appeal against the decision of the First Tier Tribunal, Judge Lewis, of 26 th February 2010 refusing leave to enter. The facts are very thoroughly set out in, if we may say so, the excellent judgment of Judge Lewis, and we do not propose to repeat them in any detail and the material facts will appear in the course of our analysis of the three issues which have come before us for decision on this appeal.

2. The first issue relates to the entitlement of the nannies, if I can call them that, to seek leave to enter pursuant to the terms of paragraph 159A of the Immigration Rules.

3. Paragraph 159A reads as follows:

“The requirements to be met by a person seeking leave to enter the United Kingdom as a domestic worker in a private household are that he:

(i)
is aged 18-65 inclusive;

(ii)
has been employed as a domestic worker for one year or more immediately prior to application for entry clearance under the same roof as his employer or in a household that the employer uses for himself on a regular basis and where there is evidence that there is a connection between employer and employee.

(iii)
that he intends to travel to the United Kingdom in the company of his employer, his employer’s spouse or civil partner or his employer’s minor child.”

And there are then other requirements which are either not relevant or met in this case.

4. The learned judge below found that there had been continuous employment of the nannies throughout the material period up to and including July 2009, when this application for leave to enter was made. The circumstances, however, are somewhat unusual and that is that the employers, the Chichvarkins, who had lived in Moscow and were also developing a home in the United Kingdom, entered the United Kingdom at various stages in 2008 and have decided to remain here on the basis that they assert a fear of return to Russia. Such fear has materialised or has been illustrated insofar as it is justified in the fact that they are now locked into considerable legal proceedings in this country. The initial application of Mrs Chichvarkin for leave to remain on the basis that she was an investor was refused but has been reopened, but in any event has been superseded or supplemented by a claim by Mr Chichvarkin for asylum and accompanied by an extradition warrant issued by Russia for his return to Russia on alleged charges.

5. This has been the background to the situation in which these two nannies who, as we have indicated, it is common ground were employed as such, successfully applied in 2008 and 2009 to come from Russia and visit the children. It was found by the learned judge that on those previous visits to this country they did not breach any condition of the visit visas which were issued to them and they both returned after their visits in 2008 and 2009 back to Moscow, where they lived until April 2009 in a substantial house which was, it seems, not owned but rented by Mr and Mrs Chichvarkin. That house ceased to be rented in April 2009, when it became apparent that Mr and Mrs Chichvarkin would not be returning there, and their residence in this country continued. It is not clear

where the nannies were living from April until July, but they continued, as we have indicated, on the findings of the judge, to be employed by the Chichvarkins and on 7 July this application was made by the nannies with the support of their employers to enter this country, in order to work as nannies as domestic workers in the private household of the Chichvarkins in England, where at least unless and until one or other of their applications is determined unfavourably to them, subject to any appeal, the Chichvarkins intend to continue to remain.

6. There are three issues, as we indicated, for determination on this appeal, with which we shall deal in turn. Two of them relate to the construction and effect of paragraph 159A and the third relates to paragraph 320 subparagraphs (7A) and (7B).

The First Issue

7. This is a short question. The learned judge concluded that the employment of the nannies remained continuous (see paragraphs 48 and 59 of his judgment). The latter paragraph set out the facts by reference to the 7 July letter which accompanied, or was, their application, and which the learned judge is plainly accepting for the purposes of his judgment.

8. The judge then continued as follows in paragraph 60, which is the paragraph which has been the subject of challenge before us today by Mr Fransman QC.

“60. I find that the Chichvarkins did not use their Moscow home from 22/23 December 2008. However I would not consider an absence up to April 2009 inevitably to have caused a cessation in their regular use of such a home. I am prepared to accept that up to the cessation of rent payment in April 2008 the Moscow home was a ‘roof’ or ‘household’ in which the appellants were engaged as domestic workers such as to met those special requirements of 159A(ii) had an application been made during that time.

61. However, it is clear to me that at the date of the applications neither Appellant could be said to be so employed for one year or more immediately prior to the application under the same roof or in a household used regularly by Mr Chichvarkin. The appellants had not been employed under any such ‘roof’ or ‘household’ since April 2009. I find that the ordinary meaning of the words of paragraph 159A(ii) cannot bear a meaning such as to ‘accommodate’ the circumstances of the Appellants and the Chichvarkins.”

9. It seems to us that where the learned judge fell into error was in failing to distinguish between the expressions “under the same roof” and “in a household”. He correctly quoted the two alternatives, which appear not only in the rule itself but also in the relevant Immigration Directorate Instructions (IDIs) pursuant to it, paragraph 2.3, and yet in the following sentence at paragraph 61 he failed to make such distinction when he says the appellants had not been employed under any such roof or household since April 2009. They were not under a roof together with Mr Chichvarkin, for reasons the judge has found, but it is a quite different question as to whether they were in - not under - a household qualifying for the purpose. It seems to us that the word “roof” is a physical question, but the word “household” might be better described as a metaphysical question. Although not physically under a roof with Mr Chichvarkin, on the findings by the judge they remain part of his household albeit that Mr and Mrs Chichvarkin and the children were in the United Kingdom and the nannies remained employed in Russia, waiting for the call which subsequently came. We are satisfied that the nannies on the findings by the learned judge qualify within paragraph 159A(ii), contrary to his conclusion.

The Second Issue

10. This relates to paragraph 159A(iii), which is a requirement on the face of it that the nannies intend to travel to the United Kingdom in the company of their employer. On the facts of this case that is not a possibility. They intend to come to the United Kingdom to work for the employer, they are already employed by the employer and have been in his household, as we have indicated and found, but they are in Moscow waiting to come here, and he and his wife and family are already in the United Kingdom. So there cannot be, because of the understandable reluctance - understandable as even the learned judge found it to be, and in the light of the development of further proceedings since quite clearly the case - to travel to Moscow simply for the purpose of then accompanying the nannies back here, there is no question that the scenario of intention to work here is fulfilled but the strict requirement that they must travel with their employer cannot be satisfied. In those circumstances there was in our judgment no way in which the learned judge could, as Mr Fransman QC suggests he should, construe the clear words of the paragraph so as to remove that specific requirement, which is expressly there. It is not possible in our judgment to read anything other than what it says, travelling in the company of the employer; and to attempt to construe this as meaning following on subsequently to the employer at the employer's request seems to us to go outside any possible construction of the requirement.

10. In our judgment there is no need for there to be such a construction and indeed the learned judge himself so concluded, because there is a discretion in the IDIs for the nannies to be allowed to come even though they are not travelling in the company of the employer but travelling independently. The relevant IDI appears in chapter 5 section 12 Domestic Workers in private households, and reads as follows:-

"When first travelling to the UK the domestic worker is expected to travel with his employer, his employer's spouse, his employer's minor child. However a domestic worker may be admitted if travelling independently provided that there is no excessive time lapse and provided satisfactory evidence e.g. a letter from the employer is produced explaining why he is travelling alone."

11. The learned judge himself drew attention to the existence of this IDI and in paragraph 80 of the judgment said this:

"Whilst I accept that the Respondent's decision in respect of paragraph 159A(iii) is not in accordance with the law because of the failure to have regard to the policy as represented in the IDIs, such a failure does not render the decision to refuse the application under paragraph 159A not in accordance with the law because the refusals were properly made under 159A(ii) for the reasons already given. Allowing the appeals to the extent of remitting to the Respondent for reconsideration is not appropriate. If I had concluded that paragraph 159A(iii) had been the only sustainable basis for refusal under the Rules, then, in accordance with the reasoning set out above, and subject to the issue under 320(7B), I would have concluded that the appeal should be allowed to the extent of being remitted to the Respondent to reconsider in accordance with the law and specifically thereby in accordance with the discretion in the IDIs)."

12. That paragraph has stood in the judgment of course since February of this year and has been capable of being considered by the respondent in the meantime. The position now is that we have already allowed the appeal in respect of paragraph 159A(ii) and, as will be seen, we propose to allow it in respect of the third issue also. It must have been quite apparent to the respondent that there would be that prospect, although of course Mr Nath has been instructed properly to oppose the appeal in all respects. Mr Nath, however, had no instructions on what the attitude of the respondent was in the light of the clear terms of paragraph 80 and the at least possible result of the appeal in

relation to the other two issues. We conclude that it is preferable if we can, rather than following the learned judge's indication that he would have remitted to the respondent, to decide this issue ourselves if we are going to, as we do otherwise, allow this appeal. Whether we can do so depends upon whether we have jurisdiction to substitute a decision of the respondent by that which we have concluded. Indeed the learned judge concluded it was right on the basis in which it was given but wrong by reference to a failure to address the discretion under the IDIs.

13. Mr Fransman QC has drawn our attention to the well known case of Secretary of State for the Home Department v Abdi [1996] IAR 148 in which in the event it was concluded that the decision taker had not exercised a discretion that he should have exercised, but despite the submission by Mr Macdonald, Counsel then appearing, the Court of Appeal concluded (at paragraph 160) that this was not "one of the rare cases where it is appropriate that the court should substitute its own decision for that of the decision-taker. It is not inevitable that the respondents will be given entry clearance". We are clear that we have to reach the decision that the result would be inevitable if the matter was remitted back to the respondent for further reconsideration, before we can substitute our own conclusion.

14. We are satisfied that such decision is inevitable. There was plainly no lapse of time in the circumstances found by the Immigration Judge, and described briefly by us, and there is plainly satisfactory evidence, not simply by reference to the detailed letter of 9 July 2009, which formed the basis of the application, and which we have already indicated was adopted in substantial part by the learned judge in his findings (see, for example, paragraph 59), which explained why the nannies are to be travelling alone. In any event, we have so considered ourselves above. It is quite plain that there is no basis upon which the respondent could concluded that the [ ] would be in a position now to leave England, go back to Russia (extradition to which and/or deportation to which they are resisting) in order to accompany the nannies back to England which in those circumstances may never happen. Consequently we are satisfied that the respondent would inevitably reach the decision that this was one of those cases in which the strict terms of paragraph 159A(iii) could be excused and independent travel by the nannies could be permitted.

The Third Issue

15. The terms of paragraph 320(7A) and (7B) are as follows:

"Grounds on which entry clearance or leave to enter the United Kingdom is to be refused"[That is a provision for a mandatory refusal]:-

"(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.

(7B) ... where the applicant has previously breached the UK's immigration laws by ...

(d) using Deception in an application for entry clearance leave to enter or remain (whether successful or not)

unless the applicant

(ii) used Deception in an application for entry clearance more than ten years ago."

16. The Immigration Judge at paragraph 118, after citing those paragraphs noted the use of the upper case D in Deception. Mr Fransman QC has satisfactorily explained that, by producing paragraph 6 of

the Immigration Rules, which is the interpretation clause, where Deception is expressly defined as follows: "'Deception' means making false representations or submitting false documents (whether or not material to the application) or failing to disclose material facts".

17. We considered the papers without, at that stage, the benefit of the skeleton recently delivered by Mr Fransman QC or the authority to which he expressly referred in that skeleton. This authority is the case of A v Secretary of State for the Home Departmen t [2010] EWCA Civ 773, a case in which Rix LJ gave the lead judgment as recently as 6 July 2010, although we understand it has been subsequently followed in a decision of this Tribunal given by the President, LD (Article 8 – best interests of the child) Zimbabwe [2010] UKUT 278 (IAC) on 15 July 2010.

18. Without that decision of the Court of Appeal, which is of course binding on us, we would have approached consideration of paragraph 320(7A) differently. Paragraph 320(7A) is not strictly in issue before us, as we shall explain, but forms the basis of consideration of the paragraph which is expressly before us, namely paragraph 320(7B) and in particular (7B)(g). We would have concluded, without such guidance, that the inclusion of the words in paragraph (7A) "whether or not to the applicant's knowledge" suggested that dishonesty or knowledge of falsity was not required for the purpose of a justified refusal of entry clearance pursuant to paragraph (7A). By the Court of Appeal's consideration of the equivalent paragraph in the Rules (paragraph 322(1A)) that dishonesty was required in order for that paragraph to apply, then the decision which we propose to make in relation to 320(7B) is a fortiori, because we would have been minded to distinguish between the two paragraphs. What we now say is subject to that caveat.

19. Paragraph 320(7A) applies where leave to enter is sought on the basis of documents which are false and that application must be refused if the paragraph is satisfied. 320(7B) relates to a subsequent application, such as in this case, where there has previously been deception used in an application for leave to enter. On the facts of this case the challenge to the nannies by the respondent, which was successful before the learned judge, was on the basis that for the purpose of their visitor's visa application in 2008 they had each presented to the immigration authorities for the purpose of leave to enter as a visitor their employment documentation in Russia. That employment documentation was false, in the sense that the documentation, produced and apparently accepted in Russia, recorded that they were both employed by the Chichvarkins' company, a matter of itself which is expressly said not to be a problem in the IDIs at paragraph 2.3; but in this case it was recorded in such employment documentation that they were employed as managers, that is managers of the business. The learned judge found at paragraph 97 of his judgment as follows:

"97. Further I find that at no material time has either appellant been occupied as a manger. Indeed, it is not disputed that beyond being given the title on company documentation (and as a reflection of salary level rather than duties) neither appellant has ever worked in the capacity of a manager.

98. As such it is plain to me that in stating that she was occupied as a manager, each appellant made a statement that was untrue. It was a positive representation as to occupation that was false.

99. Further, I am satisfied that each appellant was fully aware of what her actual occupation was, was fully aware that she was not a manager, and was fully aware that in stating she was a manager this was an inaccurate statement of her occupation. It was a deliberate untruth in the sense that it was a statement in full knowledge of its untruthfulness."

20. The learned judge without the benefit of the reference to the Court of Appeal decision in A , not surprisingly found that in those circumstances and the other facts which he found there had been a

breach of paragraph 320(7A). The issue, however, before him was as to the applicability in those circumstances, in relation to the instant application for leave to remain, of paragraph (7B) which made a mandatory refusal of leave to enter dependent upon proof that there had been a previous breach i.e. a breach at the time of those earlier applications to enter as a visitor by using Deception.

21. Whatever our view would have been, and as we have indicated we would have been inclined to reach the same conclusion as the learned judge in relation to paragraph 320(7A), we must consider his conclusion in relation to paragraph 320(7B), which we are satisfied on its wording imposes a different test. First of all there is no such proviso as is contained in 320(7A,) whereby that paragraph applied whether or not false and material documents had been submitted " to the applicant's knowledge ". There is therefore not in 320(7B) the proviso that deception as defined can arise whether or not the falsity, and indeed its materiality, was to the applicant's knowledge.

22. Secondly, and to the same effect, by incorporating into paragraph 320(7B) by using the word Deception the definition of Deception in Rule 6, which we have set out, there was once again the omission of the caveat as to the immateriality of the applicant's knowledge of the falsity.

23. Thirdly, and in our judgment, significantly, there is a drastic consequence to paragraph 320(7B) which is not present in paragraph 320(7A). The result of a breach of paragraph 320(7A), production of false documents, is simply the refusal of the instant application. The consequence of a refusal under paragraph (7B) is as set out above, that there is then a continued bar for a further ten years i.e. until ten years has elapsed since the last deception. That does, in our judgment, raise the bar for a construction of paragraph 320(7B) so that we would have on that basis distinguished between the two paragraphs, although as we indicated if paragraph 320(7A) is indeed now authority to be interpreted as the Court of Appeal have decided, then a fortiori such must be the case in relation to paragraph 320(7B).

24. The learned judge very helpfully set out his conclusions in paragraph 106:

"In all of the circumstances I find that whilst I am satisfied that the statements as to occupation as managers were made by the appellants knowing them to be false – and to that extent were in breach of their duties of bona fides – the Respondent has not satisfied me on a balance of probabilities that the false statements were made with the deliberate intent of securing advantage in immigration terms."

He then continued in the light of his own conclusion:

"However, ultimately on a true construction of 320(7B) I do not consider that the absence of such a deliberate intent avails the appellants".

25. In the light of our conclusion, we have decided that in fact the formulation by the learned judge, which he concluded not to avail these appellants, is the correct one, that for the purpose of qualifying for the ten year treatment under paragraph 320(7B) the nannies must be shown to have made the false statements with the deliberate intent of securing advantage in immigration terms. We agree that such was not the case here. Indeed as a matter of common sense one can see that by submitting the false documents as they did on both occasions they made it less likely rather than more likely that they would be admitted on this application to work in a domestic household on the basis of documents which showed that they had been office managers, and if they had been minded to make any alteration it would have been not to use those false documents, so that the use of the false documents on this occasions made their entry the less likely.

26. But all that we need to say for the purposes of this decision is that we are satisfied that the appellants did not “use deception” which is the final basis upon which we distinguish paragraph (7B) from paragraph (7A) in the application for entry clearance. If “used” simply meant “supplied documents” then of course they did, but given what we are satisfied about and that is the high level of requirement for satisfaction for finding the applicability of paragraph (7B), we are satisfied that the use of the deception must have been as the judge said, with the deliberate intent of securing advantage in immigration terms by the use of a false document known to be false, and like the Judge, we do not conclude that that was the case.

27. In those circumstances we allow the appeal in respect of the judge’s decision on this third issue and, having found for the appellants on all three issues upon the grounds that we have indicated, we allow the appeal.

Signed Date

Mr Justice Burton

(Sitting as a Judge of the Upper Tribunal)