Upper Tribunal
(Immigration and Asylum Chamber)

Singh (paragraph 320 (7A) – IS151A forms – proof) [2012] UKUT 00162(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 January 2012	.....

Before

UPPER TRIBUNAL JUDGE C N LANE

Between

HARINDER SINGH

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation :

For the Appellant: Mr Rehman of AR Immigration Service

For the Respondent: Mr Avery, Senior Home Office Presenting Officer

(1) In an appeal arising from the refusal of an application under paragraph 320(7A) of the Immigration Rules, the burden of proof is upon the respondent to establish on a balance of probabilities that the requirements of that paragraph are made out. Consequently, where the refusal concerns the alleged service of Forms IS151A, IS151A Part 2 or IS151B upon an appellant, the respondent must prove service of the particular form(s). That evidence may comprise copies of the forms served, records of service made by immigration officers or a statement by the person who served the form(s). A bare assertion by an Entry Clearance Officer is unlikely to be sufficient.

(2) Form IS151A does not require the recipient "to leave the United Kingdom." Such a requirement is made, for example, by Form IS151B. Where a subsequent refusal of an application alleges that the applicant has made a false statement as to whether he or she has been required to leave the United Kingdom in the past, it is, therefore, very important for the Tribunal to know exactly which forms have been served.

DETERMINATION AND REASONS

1.

The appellant, Harinder Singh, was born on 29 November 1976 and is a male citizen of India. The appellant had applied for entry clearance to the United Kingdom as a domestic worker under the provisions of paragraph 159 of HC 395. His application was refused by the Entry Clearance Officer (ECO) New Delhi on 5 January 2011. He appealed to the First-tier Tribunal which, in a determination which was promulgated on 21 June 2011, dismissed his appeal. The appellant applied for permission to appeal to the Upper Tribunal which was initially refused (Immigration Judge Kopieczek) but granted upon renewal (Senior Immigration Judge Warr). The initial hearing took place at Field House on 20 January 2012 when Mr Rehman appeared for the appellant and Mr Avery, a Senior Home Office Presenting Officer, appeared for the respondent. There is no United Kingdom sponsor. Having heard the submissions of both representatives, I reserved my determination.

2.
The appellant had entered the United Kingdom on 23 September 2006 on a working holidaymaker visa which expired on 29 August 2008. During the currency of that visa, the appellant made an in-country application as a Tier 1 (General) Migrant. That application was refused and his appeal to the Asylum and Immigration Tribunal was dismissed on 10 November 2008. The appellant did not seek permission to challenge that determination but he remained in the United Kingdom from 10 November 2008 until 25 April 2009 when he returned to India.

3.
The appellant applied on 15 December 2010 for a domestic worker visa. His application was refused under paragraph 320(7A) of HC 395 which provides as follows:

“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.”

4.
The refusal notice prepared by the ECO appears to have been completed in haste and with a general lack of care. Having refused the application under paragraph 320(7A), the ECO goes on to note that the appellant’s “failure to disclose material facts” seriously undermined his credibility. Reference is then made to paragraph 41(i) and (ii) which have nothing whatsoever to do with this application. The ECO also noted that it was necessary to assess the application “against paragraph 320(7B)”. That paragraph provides as follows:

“Subject to paragraph 320(7C), where the applicant has previously breached the UK's immigration laws by:

(a) Overstaying,

(b) breaching a condition attached to his leave,

(c) being an Illegal Entrant,

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

unless the applicant:

(i) Overstayed for 28 days or less and left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State;

(ii) used Deception in an application for entry clearance more than 10 years ago;

(iii) left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State, more than 12 months ago;

(iv) left the UK voluntarily, at the expense (directly or indirectly) of the Secretary of State, more than 2 years ago; and the date the person left the UK was no more than 6 months after the date on which the person was given notice of the removal decision, or no more than 6 months after the date on which the person no longer had a pending appeal; whichever is the later;

(v) left the UK voluntarily, at the expense (directly or indirectly) of the Secretary of State, more than 5 years ago; or

(vi) was removed or deported from the UK more than 10 years ago.

Where more than one breach of the UK's immigration laws has occurred, only the breach which leads to the longest period of absence from the UK will be relevant under this paragraph."

5.
The ECO concluded by stating that:

" You were issued with an IS151A form and an admin removal (sic) from the United Kingdom. I am therefore refusing your entry clearance under paragraph 320(7B) of the Immigration Rules. Any future applications will also be automatically refused for the same reason under that paragraph 320(7B) of the Immigration Rules until 25 April 2019."

6.
In his determination promulgated on 21 June 2011, Immigration Judge I F Taylor found in favour of the appellant in respect of the refusal of his application under paragraph 159A. He found that paragraph 320(7B) did not apply to the appellant because he had "left the UK voluntarily not at the expense (directly or indirectly) of the Secretary of State more than twelve months ago." He found, however, that the application was properly refused by the ECO under paragraph 320(7A). In relation to paragraph 159A, the Immigration Judge wrote:

"With regard to the substantive paragraph 159A it is not necessary to deal with this at great length because of my findings above. However, the concern of the Entry Clearance Manager [who reviewed the refusal on 24 March 2011] was with regard to 159A(ii) and in all circumstances of the case and in particular with regard to the appellant's employer's witness statement I am satisfied that the appellant has been employed as a domestic worker for one year or more immediately prior to his 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 the employer and employee. The appellant does not have to establish, as is suggested by the Entry Clearance Manager, that his employer resided under the same roof as the appellant for a period of twelve months only that he used those premises on a regular basis and there is a connection between the employer and employee. As indicated above, I am satisfied that if this matter was material it should be determined in favour of the appellant."

7.
Neither at the initial hearing nor in any response to the grounds of permission, has the respondent challenged that finding. I see no reason to interfere with it. Likewise, the respondent has not challenged the Immigration Judge's finding in respect of paragraph 320(7B). At paragraph 7 of the

determination, I note that the Immigration Judge recorded that, “Although [the appellant] left voluntarily, which is not disputed , at the airport he was served with the papers IS151A as an overstayer …” [my emphasis].

8.
It follows, therefore, that the only issue in the appeal is the Immigration Judge’s decision to uphold the refusal under paragraph 320(7A).

9.
At paragraphs 12-16 of his determination, the Immigration Judge set out his reasons for dismissing the appeal:

“ 12 . At question 6.3 [of the Visa Application Form (VAF)], [the appellant] is asked ‘Have you ever been refused a visa for any country including the UK.’ To this he marks the box ‘No.’ Of course the fact is that he had been refused a visa for the UK, namely his in-country application as a Tier 1 Migrant which was refused by the Secretary of State on 1 September 2008 and then dismissed at appeal on 10 November 2008. Subsequent to that the appellant’s case is that he came to realise that no application for permission to appeal this decision had been made. It must have then been abundantly clear to the appellant even some twenty months later that he had been refused a visa for the UK. The only explanation provided by the appellant in relation to this is a reference to his ‘error and misunderstanding’ which I find in all the circumstances to be an inadequate explanation.

13. At question 6.6, he is asked if he has ever been deported, removed or otherwise required to leave any country including the UK in the last ten years to which he marks the box ‘No’. I accept the appellant did leave the United Kingdom in April 2009 voluntarily, however, there is no dispute that whilst at the airport he was served papers indicating that he was an overstayer and was required to leave the United Kingdom. In those circumstances it is not unreasonable to expect the appellant to make some reference to this in his reply to question 6.6 albeit that his explanation may include that he was misled by his former solicitors.

14. At question 6.7 he is asked if he has made an application to the Home Office to remain in the UK in the last ten years to which he ticks the box ‘Yes’. He states that he made an application to remain in the UK on 28 June 2008 which would have been in relation to his in-country application as a Tier 1 Migrant. He is then asked, ‘If yes, please provide details’ to which he gives what appears to be a Home Office reference number. It is Mr Ali’s case [the appellant’s representative before the First-tier Tribunal] on behalf of the appellant that in quoting this number the respondent could easily discover the appellant’s immigration history and thus in doing so the appellant cannot be described as being dishonest.

15. I accept if the number is indeed a Home Office reference number and it is accurate that if enquiries were undertaken it would probably lead to the appellant’s immigration history being revealed. However, the appellant is required to provide details and in the circumstances a Home Office reference number is insufficient. The details provided by the appellant do not include the fact that his application was unsuccessful and that for whatever reason he overstayed his visa in the United Kingdom.

16. Looking at the totality of the appellant’s answers to 6.3, 6.6 and 6.7 I am satisfied that he has made false representations and omissions and that the purpose of doing so was to deceive the Entry Clearance Officer particularly with regard to having been refused a Tier 1 Migrant visa and being regarded as an overstayer.”

10.
There is some difficulty in reconciling the wording of the VAF and the terminology used in the Immigration Rules. As regards the judge's comments concerning question 6.3 of the VAF, the appellant submits that he was never refused a "visa" for the United Kingdom; rather, he was refused further leave to remain. Further, it is not entirely clear why the Immigration Judge, at paragraph 16, should have regarded the appellant's answers to question 6.7 on the VAF as a false representation or omission. As the judge noted, the appellant had correctly answered the question and given his Home Office reference number. The judge regarded the provision of that information as "insufficient" noting that the appellant had not included the fact that his application had been unsuccessful. However, the form only states that an applicant should "provide details"; it does not say what those details should be and, in particular, it does not require the appellant to indicate whether or not any application had been unsuccessful. As the judge acknowledges, the provision of the Home Office reference number should have been enough to have enabled the ECO to access the necessary details. Indeed, the appellant went further than that and gave the date of his application. Insofar as the judge may have found that the appellant's answers to question 6.7 constituted deception, I find that the judge erred by applying an excessively harsh test.

11.
This appeal turns, therefore, upon the answer which the appellant gave to question 6.6. It is agreed by the parties that the appellant has never been deported or removed from the United Kingdom or any other country. The question is whether he has been "otherwise required to leave any country … including the United Kingdom". It is here where the wording of the form or forms which had been served on the appellant is of importance. In his review, the Entry Clearance Manager had noted that "on 25/04/2009 the appellant was encountered at Heathrow Airport departing voluntarily and was served with papers (IS151A) as an overstayer in breach of the conditions of his stay, namely the prescribed duration of two years." That statement is inaccurate because it understates the period during which the appellant had been in the United Kingdom with legitimate leave. Notwithstanding the reasons for the dismissal of the appellant's appeal against the Secretary of State's refusal to extend his leave to remain, the appellant had applied before his leave as a working holidaymaker had expired. The appellant had enjoyed some form of leave to remain (latterly under the provisions of Section 3C (as amended) of the Immigration Act 1971) up until November 2008. Neither the appellant nor the respondent has retained copies of the papers which were served on the appellant.

12.
The UKBA's Enforcement Instructions and Guidance indicates that, in the case of an individual who has not made an asylum or human rights claim, he or she would be served with a Form IS151A Part 2 (which notifies the recipient that he or she has no right to appeal whilst in the United Kingdom), rather than the Form IS151B. The Instructions (Chapter 7) provide as follows:

The procedures to be followed once authority to serve papers is obtained are as follows:

Serve form IS151A – (Notice that a person is to be treated as an illegal entrant/a person liable to administrative removal under section 10 of the 1999 Act). This informs the person that they are an illegal entrant/immigration offender and they are liable to removal and detention.

Serve immigration decision to remove, either

IS151A part 2 – (Notice of decision to remove an illegal entrant/ a person liable to administrative removal) This notice informs a person that a decision has been made to remove them from the UK and that they can appeal against this decision but only from outside the UK : or

IS151B - (where asylum or Human Rights claim has been refused) this notice informs a person that a decision has been made to remove them from the UK and that their asylum/human rights claim has also been refused. It notifies them that they have an “in-country” right of appeal against the decision.

For both the IS151A part 2 and the IS151B it is possible to specify more than one country to which the person may be removed. This is for disputed nationality cases, dual nationals etc.

13.
All that is known in the present case (and accepted by both parties) is that the appellant was served with a “Form IS151A.” It is not clear whether he was served with both Part 1 and Part 2. There is no evidence that he was served with a Form IS151B. It is agreed that the appellant was “flight side” at the airport intending to leave the United Kingdom when he was served. There is no evidence that the respondent knew that the appellant would be at the airport that day; it appears that he was encountered by the Immigration Officers by chance.

14.
The standard form IS151A appears in the appellant’s bundle of documents. The form does not contain any indication that it may be only the first of two parts. It is described as a “Notice to a Person Liable to Removal.” The form states that the Immigration Officer is satisfied “from all the information available” that the appellant is “a person in respect of whom removal directions may be given in accordance with Section 10 of the Immigration and Asylum Act 1999 (administrative removal).” Four categories of such a person are then identified, this appellant being described as “a person who has failed to observe a condition of leave to enter or remain or remains beyond the time limited by the leave.” The form then states:

“LIABILITY TO DETENTION You are therefore a person who is liable to be detained under paragraph 16(2) of Schedule 2 to the Immigration Act 1971 pending a decision whether or not to give removal directions [and, where relevant, your removal in pursuance of such directions].”

15.
During the course of the hearing, Mr Avery obtained a blank form of the document IS151B. Unfortunately, no copy of the Form IS151A Part 2 was produced. It is not clear whether the appellant ever made a human rights claim; it is possible that he had done so in the course of appealing the refusal of his application for further leave to remain. Because that detail is unclear, the relevance of the Form IS151B is limited. I note, however, that the document is headed “NOTICE OF IMMIGRATION DECISION…DECISION TO REMOVE AN ILLEGAL ENTRANT/PERSON SUBJECT TO ADMINISTRATIVE REMOVAL UNDER SECTION 10 OF THE IMMIGRATION AND ASYLUM ACT 1999 – ASYLUM/HUMAN RIGHTS CLAIM REFUSED”. The text of the form continues, “You were served with form IS151A on [date] informing you of your immigration status and your liability to detention and removal…a decision has now been taken to remove you from the United Kingdom.” At the end of the form, after the details of any appeal the recipient of the form might have, appear the words, “REMOVAL DIRECTIONS if you do not appeal or the appeal is unsuccessful, you must leave the United Kingdom. If you do not leave voluntarily, directions will be given for your removal from the United Kingdom to [country].” The latter statement is the first point in either the form IS151A or IS151B where it is stated, in terms, that the recipient of the forms must leave the United Kingdom. What might be described as the “operative part” of the form IS151B is that part requiring the recipient to leave the United Kingdom. The “operative part” of the form IS151A is that part of the form notifying the recipient that he or she is a person liable to be detained. In my opinion, the form

IS151A does not require a recipient to leave the United Kingdom; the form IS151B makes that demand; it has not been possible to confirm whether or not the Form IS151A Part 2 does so also.

16.
The evidence adduced by the respondent in this case is unsatisfactory. The respondent's own Enforcement Instructions state that:

51.2 Immigration Decision (section 10)

Following the service of an IS.151A Part 1, an immigration decision should be served. It is best practice that the IS.151A Part 1 and the immigration decision are served together, but there may be situations where this is not appropriate.

The immigration decision will trigger a right of appeal under Section 82(2)(g) of the Nationality, Immigration and Asylum Act 2002. This will be either an in country or an out of country right of appeal

17. The instructions lend no support to any argument that the two forms are likely to have been served together; it is possible that the immigration officers did not consider it appropriate to serve the Part 2 or Form B. Later in the same paragraph, the Instructions provide that :

Service

The decision can be served in person or by post (where delivery or receipt is recorded). The service of these immigration decisions, and the method of service, should be recorded on CID.

18.
The respondent has been unable to provide any copy of that record of service, assuming one was ever made. The respondent is now seeking to deny the appellant entry on the basis that he has been dishonest. It is for the respondent accordingly to discharge the burden of proving the allegation. That burden may only be discharged if adequate evidence is adduced by the respondent, including, where appropriate, evidence of the service of documents upon which the respondent seeks to rely.

19.
The Entry Clearance Officer has stated that the appellant was "issued with an IS151A and an admin removal from the United Kingdom" but he or she has not stated the source of that assertion nor has any documentary or first-hand evidence from the immigration officers who encountered the appellant at the airport been adduced, despite the fact that the respondent's own instructions provide for a record to have been kept. Further, the words "an admin removal" might refer to either a Form IS151A Part 2 or a Form IS151B. It is also possible that no form in addition to the IS151A was served given that the appellant was about to board an aircraft. I find that the bare and uncorroborated assertion of an Entry Clearance Officer, who had no direct knowledge of the service of any forms upon the appellant and who fails to indicate the source of the facts asserted, has been insufficient to discharge the burden of proof in this instance. The discharge of that burden may not always require the production of copies of the actual forms served on an individual (a statement from the immigration officer who served the papers may well suffice) but equally, given the seriousness of the consequences for an appellant faced with a refusal under paragraph 320, a bare assertion in a refusal letter or notice is unlikely to be adequate.

20.

In the present appeal, I find only that (as the parties agree) the appellant was served with Form IS151A (but not a Part 2 Form or IS151B) and, because that form did not require him to leave the United Kingdom, the appellant did not give a false answer when he answered “No” to the question “Have you ever been … otherwise required to leave any country including the UK in the last ten years?”

21.
The Immigration Judge erred in law by dismissing the appellant’s appeal. I set aside the judge’s determination and have re-made the decision. Although the appellant breached the United Kingdom’s immigration laws by overstaying (as the Immigration Judge correctly observed) his present application for entry clearance should not be thwarted by paragraph 320(7B) because he falls within that category of applicant who has left the UK voluntarily and not at the expense of the Secretary of State and who did so more than twelve months ago (see paragraph 320(7B)(d)(iii)). The appeal is allowed.

DECISION

22.
This appeal is allowed.

Signed Date: 22 January 2012

Upper Tribunal Judge C N Lane