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R (on the application of Ashrafuzzaman) v Entry Clearance Officer
(precedent fact; general grounds refusal)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard remotely at Field House

THE IMMIGRATION ACTS

Heard on 12 January 2022
Promulgated on 4 April 2022

Before

UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE QUEEN
on the Application of

ASHRAFUZZAMAN
(ANONYMITY DIRECTION NOT MADE)

Applicant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the applicant: Mr P Turner, counsel instructed by Hubers Law
For the respondent: Ms J Anderson, counsel instructed by the Government Legal Department

The issue of dishonesty in a judicial review challenging a decision taken under

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paragraph 320(7A) of the Immigration Rules is not one of precedent fact.

In a judicial review challenge the jurisdiction of the Tribunal to determine an issue of dishonesty for itself arising from a decision taken under the general grounds of refusal in the Immigration Rules is dependent on the engagement of an ECHR right.

<u>JUDGMENT</u>

Background

1. The applicant, a male national of Bangladesh born on 27 September 1997, challenges:

   (i) the respondent's decision made on 6 February 2020 refusing him entry clearance as a Tier 4 (Student) Migrant ("the 1st decision"), and

   (ii) the Administrative Review decision dated 14 February 2020 upholding the 1st decision ("the 2nd decision").

2. On 26 December 2019 the applicant applied for entry clearance as a Tier 4 (General) Student. The online application form included a section headed 'Family in the UK'. Under this heading the applicant was asked,

   > "Do you have any family in the UK?"

3. To this question the applicant answered "No".

4. A declaration at the end of the online application form stated that, by sending the application, the applicant confirmed to the best of his knowledge and belief that the information relating to the application and the supporting evidence was correct.

5. The applicant underwent an entry clearance interview on 31 December 2019. This interview was conducted in English. There was no indication on the face of the interview record that the applicant had any difficulties in understanding the questions asked or in giving his answers. At question 17 of the interview the applicant was asked,

   > "Do you have any friends or family in the UK?"

6. To this question the applicant answered,

   > "No family. No friends."

7. His application was granted on 24 January 2020. On 31 January 2020 the applicant was asked questions by an Immigration Liaison Officer at Sylhet airport prior to boarding his plane to the UK. There is no contemporaneous record of the conversation and the details of the

applicant's conversation with the Immigration Liaison Officer remain vague. There is however no dispute that the applicant informed the Immigration Liaison Officer that he had a sister living in the UK. The Immigration Liaison Officer had doubts concerning the applicant's credibility and revoked the grant of entry clearance.

8. The applicant was invited to a 2nd interview on 6 February 2020. This interview was also conducted in English. The applicant was informed that he had been denied boarding on 31 January 2020 because of the Immigration Liaising Officer's concerns regarding his credibility and whether he was a genuine student and genuinely intended to leave the UK at the end of his course. The applicant was asked whether he had any family in the UK (questions 9 and 11). The applicant initially answered "no", but when asked "are you sure?" he stated,

> "Actually urm last interview the last embassy interview was about my university related but in Heathrow one of my older sisters she live there."

9. The applicant then confirmed that an older sister planned to pick him up from Heathrow on his arrival. At question 14 the applicant was told that one of the reasons he had been denied boarding was because he informed the Immigration Liaison Officer that he had a sister in the UK. This was contrary to the information in his application form and in his 1st interview, and affected his credibility. To this the applicant responded,

> "That was a misunderstanding at the time because I was living in Southampton I thought it was Southampton my one sister live in UK near Heathrow and my one friend got to UK so I told her that recently my one friend."

10. At question 15 the interviewer asked,

> "But the question stated in your last interview was that "do you have any family or friends in the UK" and the same on your visa application form, it didn't specify whether your family or friends lived in Southampton so can you tell me why you didn't declare this and how this was a misunderstanding?"

11. The applicant replied,

> "English is not my first language so it was a misunderstanding so I thought it meant someone lived in Southampton but one my sister in the airport she lives near Heathrow and recently one."

12. Later in his 2nd interview the applicant stated that his sister would arrange "all things" such as opening a bank account for him. The applicant confirmed that he had not booked accommodation for himself when he was due to fly on 31 January 2020 because he had only very recently received his visa and the date for his enrolment had been extended. The applicant also stated that his sister would pick him up and they would go to the university in Southampton and that "she will manage all things." The applicant planned to stay at his sister's house

over the weekend and would then manage his accommodation. At the end of the interview the applicant confirmed that he understood all the questions and that he was still feeling fit and well.

13. On the same day the applicant's application for entry clearance was refused. Having set out the relevant questions from both of the applicant's interviews and the information provided in his application form, the respondent refused the applicant's application under paragraph 320(7A) of the Immigration Rules. The respondent noted that the applicant was given an opportunity to disclose whether he had family in the UK and that he initially disclosed that he did not, but that on further probing he accepted that he had a sister here. The respondent acknowledged the applicant's explanation that he had "misunderstood the question" and thought that it related to whether he had any family in Southampton, but it was noted that the application form and the interview questions referred to whether the applicant had family in the UK in general. The respondent additionally noted the applicant's claim that there had been a misunderstanding because English was not his first language. The respondent observed that the applicant intended to study a course that would be delivered in English and, at the end of his 1st interview, he indicated that he had understood all the questions asked. The respondent was not therefore satisfied that the was any misunderstanding. The respondent found that the applicant used deception as he failed to declare a material fact on his application form and at the interview.

14. The respondent stated,

> "At the end of your previous interview on 31/12/2019 when you were asked if you understood all the questions you said "yes" I am therefore satisfied that it was not a misunderstanding and I am satisfied that you have intended to use deception as you failed to declare a material fact on your visa application form and at your interview."

15. Having found that the applicant failed to declare a material fact, the respondent doubted his intentions in wishing to travel to the UK. The applicant was informed that he may have future applications refused under paragraph 320(7B) for a period of up to 10 years. The respondent then stated,

> "At the end of the interview with me on 06/02/2020 you confirmed that you understood all the questions, that you were happy with the conduct of interview [*sic*] and that you are still feeling fit and well and you did not any [*sic*] other information to add. I am therefore satisfied that you were given an opportunity to answer all the questions to the best of your ability."

16. The applicant applied for Administrative Review of the 1st decision. In the section of the Administrative Review form where the applicant was asked to explain why he thought that the 1st decision is wrong he stated, with respect to the manner in which he completed his visa application

form,

> "However, on the application form the question is [*sic*] if I have family in the UK and in the guideline it says that in [*sic*] family it includes immediate family such as spouse, civil partner, parents or children, grandparents or grandchildren, spouse or civil partner's family, children spouse, civil partner or partner, my partner if I have lived with them for 2 out of the last 3 years. This guideline clearly shows that there is no mention of siblings and it is not considered to be family."

17. The applicant made the same point in relation to his interviews. He also indicated that he did not live with his sister, that she lived with her husband and children, and that she was not considered to be part of "the family." The applicant stated,

> "In my interview at the airport, I was asked if I have relatives and who is picking me up where I stated that my sister will pick me up since she lives close by the airport and I did not get enough time to arrange the university accommodation since my visa was granted so late. In my second interview I have also mention [*sic*] that I have my sister who lives by Heathrow airport. Therefore, I did not hide any information at any stage."

18. It is noteworthy that, in his Administrative Review application, the applicant made no mention of having being advised by an agent in relation to his application.

19. At the beginning of the Administrative Review decision dated 14 February 2020 the respondent recorded that the application had been refused under paragraph 320(7A) because the applicant used deception by failing to disclose material facts both in his application form and during his interviews. Having summarised the applicant's Administrative Review application, and having referred to the applicant's assertion that he had paid his full tuition fees and that he was a genuine student, the Administrative Review considered that the Entry Clearance Officer made a "sound assessment" of the application in accordance with the relevant Immigration Rules, policy and guidance. It was noted that the applicant, in his 2nd interview, did not raise any misunderstanding on his part concerning the definition of family, but that his explanation centred on the fact that he did not have relatives in Southampton. It was again noted that the applicant initially answered "no" in his 2nd interview when asked whether he had any family in the UK. The Entry Clearance Officer was entitled to conclude that the applicant failed to declare information about his sister in the UK, that there was no misunderstanding on his part, that he intended to use deception, and that he therefore failed to disclose a material fact "… and also at various times provided false information when questioned at interview."

20. In a Pre-Action-Protocol Letter dated 17 March 2020 that only challenged the 1st decision it was claimed, for the first time in the applicant's legal challenge, that an agent, Mr Choudhury of 'AIMS Study Abroad', whom

the applicant had employed to complete his student application form, informed him that ‘family’ in the context of the student application did not include a sister. The applicant made a statement dated 10 May 2020 claiming that Mr Choudhury advised him that a sibling was not considered a family member and that, as a result of Mr Choudhury’s mistake, the applicant did not mention his sister. He later produced a statement from Mr Choudhury to this effect.

21. Permission was initially refused on the papers by Upper Tribunal Judge Coker on 26 June 2020, and then at a renewed oral hearing before Upper Tribunal Judge Perkins on 10 August 2020. Judge Perkins accepted "… there was some published guidance defining "family members" and that the definition did not extend to siblings." It is not apparent from the papers before us what specific published guidance Judge Perkins was referring to. Judge Perkins also accepted that an agent advised the applicant that he need not admit to having a sister because a sister was not a family member. Judge Perkins noted however the instances in which the applicant asserted he had no relatives in the UK and that there was no reason to doubt the applicant’s ability to speak and understand English. Judge Perkins stated at the end of his decision:

> "Ironically the existence of a sister may not be material in the sense that it would not of itself stop the Applicant satisfying the rules but it is plainly material that a prospective immigration [*sic*] is not frank about his relatives in the United Kingdom because their presence may provoke all kinds of questions and concerns. The lie was material because it sought to prevent proper investigation."

22. Lady Justice Rose (as she then was) granted permission to appeal to the Court of Appeal on 3 November 2020. The matter was remitted to the Upper Tribunal pursuant to a sealed consent order dated 8 March 2021.

23. In granting permission to appeal Lady Justice Rose stated:

> "There are four grounds in the amended Grounds of appeal which all raise different aspects of the same complaint namely that Mr Ashrafuzzaman was prompted to answer ‘no’ to the question whether he had any family here by his agent telling him that ‘family’ in this context did not include a sister but was limited to immediate family such as a wife and children. In Judge Perkins decision he accepts (a) that the agent did tell Mr Ashrafuzzaman that and (b) that in fact there was an extant Home Office Guidance to that effect, i.e. defining family members in a way that did not extend to siblings. That was not something that Judge Coker mentioned in her ruling as it may not have been drawn to her attention. Mr Ashrafuzzaman provided a witness statement from Mr Choudhury who helps students apply for visas and who helped Mr Ashrafuzzaman fill in his application. Mr Choudhury says that a sister was not included as being a family member on the list in the Visa application form.
>
> If it is right that Mr Ashrafuzzaman thought that the questions about whether he had family related solely to whether he had a wife and children, that may explain his otherwise rather odd answer in interview

that he thought the question related only to whether he had family living in Southampton. Since that is where he was living at the time, his answer is therefore necessarily inconsistent with his previous explanation that he did not think sisters were included since his sister would not be part of his household in Southampton. I do not agree therefore with the Judge's assessment that the answers read as though he was trying to hide the fact that he had a sister.

I also accept the point that the Judge did not give adequate weight to the fact that Mr Ashrafuzzaman had volunteered the information about this sister to the Immigration Officer, albeit after prompting. There was no particular reason for him to do so if he was trying to hide the fact that he had a sister here.

Given the test for deception or dishonesty needed to render a false representation a ground for mandatory refusal as discussed in the case law and Home Office guidance set out in the skeleton, this matter should be looked at again. I bear in mind also the very serious consequences for Mr Ashrafuzzaman if the finding of deception stands. It seems to be agreed that having or not having a sister here would not have affected his application for a student visa, so there was no reason to lie about it."

24. The sealed consent order stated:

"The parties now agree that the matter be remitted to the Upper Tribunal in order that there be some greater clarity about whether there is, in fact, Home Office guidance as to the meaning of "family" and whether it includes sisters."

25. On 6 September 2021 Upper Tribunal Judge Gill permitted the applicant to amend his claim to challenge the Administrative Review decision and she granted permission to proceed with the judicial review challenge "limited to the question of whether the applicant was dishonest".

26. Judge Gill noted the respondent's acceptance at the renewal hearing that the grounds included an assertion by the applicant that there was a factual issue as to whether or not he had been dishonest.

27. Judge Gill stated,

"4. There is an arguable issue as to whether not [*sic*] the judgment of the Court of Appeal in <u>Balajigari & Others v SSHD</u> [2019] EWCA Civ 673 has the effect of, or should be interpreted as, requiring the Upper Tribunal to make its own finding on dishonesty in a judicial review claim against a decision that refuses an application under para 320(7A) in circumstances where the decision in question does not give rise to a right of appeal to the First-tier Tribunal ("FtT").

5.If yes, there is a further arguable issue as to whether the Upper Tribunal, in reaching its decision on the issue of dishonesty, is limited to the evidence that was before the decision-maker(s) as at the date of the decision(s) being challenged or whether it is permitted to take into account evidence that was not before the decision-maker, including oral evidence. If the Upper Tribunal decides that it is limited to the evidence

that was before the decision-makers as at the dates of the decision dated 6 February 2020 and the administrative review decision dated 14 February 2020, it would appear that the applicant will not be able to rely upon his explanation that he had been misadvised by a consultant at AIMS Study Abroad because this was only advanced after the administrative review decision had been made.

6.If the answer to 4 above is "yes", there is arguably a factual issue in the instant case as to whether or not the applicant was dishonest. In that event, the parties will need to address the Upper Tribunal as to the appropriate disposal if dishonesty is established and if dishonesty is not established."

28. At the hearing on 12 January 2022, having considered submissions from both representatives, we determined whether we had to make our own finding on dishonesty in this judicial review claim against the refusal under para 320(7A) (the 'precedent fact issue') as a preliminary issue in the respondent's favour. We then heard submissions on the remaining grounds and reserved our decision.

Summary of legal challenge

The applicant's submissions

29. We summarise the applicant's submissions, as detailed in Mr Turner's skeleton argument and his oral submissions. We have condensed Mr Turner's submissions into five general challenges.

The 'precedent fact' issue

30. Mr Turner relied on several authorities including, *inter alia*, Balajigari [2019] EWCA Civ 673; [2019] Imm AR 1152 ("Balajigari") to support his submission that the Tribunal must engage in a fact-finding exercise and determine for itself whether the applicant was dishonest. His essential submission was that the issue of dishonesty in a judicial review challenging a decision taken under paragraph 320(7A) of the Immigration Rules is one of precedent fact requiring the Tribunal to determine the issue for itself.

31. Mr Turner relied on paragraphs 92, 95 and 104 of Balajigari to support his contention. He submitted that, given the need to consider the applicant's explanation against "the minimum level of plausibility" (a reference to [25] in Shen (Paper appeals; proving dishonesty) [2014] UKUT 00236 (IAC); [2014] Imm AR 971 dealing with the nature of the innocent explanation that must be advanced by an individual after a prima facie case of dishonesty has been established), the application must be treated as one of precedent fact so as to enable the applicant to prove his innocent explanation before an independent judge.

32. Mr Turner further submitted that the respondent's reliance on Begum [2021] UKSC 7; [2021] Imm AR 879 ("Begum") was misconceived because both the instant case and Balajigari concerned allegations of

dishonesty which had serious consequences in respect of future applications and which could result in a 10 year ban on re-entry to the United Kingdom. In contrast, Ms Begum had her citizenship revoked "on grounds of conduciveness to the public good", not because of any issue relating to dishonesty.

33. In reliance on Balajigari Mr Turner submitted that, if it was for the Tribunal to determine for itself the issue of dishonesty, it was then entitled to consider post-decision evidence. This would include the applicant's explanation that he acted on the advice of Mr Chowdhury, which was first contained in his Pre-Action-Protocol Letter on 17 March 2020 and later in his statements, the statement from Mr Chowdhury and the supporting emails. The applicant would also be entitled to give oral evidence. Without such evidence the Tribunal would be unable to fully understand the issue, and the applicant would otherwise be unable to provide evidence to rebut the allegation of dishonesty and prevent his entry clearance being revoked.

The lawfulness of the respondent's approach to dishonesty

34. Mr Turner relied on AA Nigeria v SSHD [2010] EWCA Civ 773; [2010] Imm AR 704, Ahmed (general grounds of refusal - material non-disclosure) Pakistan [2011] UKUT 351 (IAC), Omenma (Conditional discharge – not a conviction for an offence) [2014] UKUT 314 (IAC) and Agha, R (on the application of) v SSHD [2017] UKUT 121 as support for the (uncontroversial) proposition that dishonesty was needed to support a refusal under paragraph 320(7A) and that a mere mistake will not suffice. Mr Turner further supported this proposition by reference to the respondent's published guidance of 6 December 2019, version 2.0, 'False Representations' (page 6 states that "you must not refuse if… a person has made a genuine mistake… or was unaware that the false representation had been made… or has merely claimed something to which they were not entitled without any dishonest intention." Mr Turner also relied on Balajigari at [43] which stated that an allegation of dishonesty was a serious allegation and carried with it serious consequences, that the Secretary of State had to therefore be satisfied that dishonesty occurred, and that the standard of proof was the balance of probabilities "… but bearing in mind the serious nature of the allegation and the serious consequences which follow from such a finding of dishonesty".

35. Mr Turner contended that a "high threshold for the burden" of proving dishonesty had to be met by the respondent and that the respondent could not discharge this burden because this applicant disclosed rather than concealed the relevant information by voluntarily informing the Immigration Liaison Officer about his sister. This materially undermined the respondent's conclusion that he had been dishonest. Mr Turner relied on the view of Lady Justice Rose that "… there was no particular reason for [the applicant] to [have volunteered the information about his sister] if he was trying to hide the fact that he had a sister here", and

that “it seems to be agreed that having or not having a sister here would not have affected his application for a student visa, so there was no reason to have lied about.”

36. Mr Turner submitted that the respondent failed to properly consider the rationale for the applicant allegedly concealing information about his sister, especially given the lack of significance of this information. If he truly intended to conceal the existence of his sister it would have been irrational for him to then disclose this information, unprompted, to the Immigration Liaison Officer at the airport.

The applicant’s understanding of the meaning of ‘family’ in the relevant guidance

37. Mr Turner relied on the observation by Upper Tribunal Judge Perkins that there was “some published guidance defining “family members” and that definition did not extend to siblings.” If this was correct, the agent would have been correct to advise the applicant of the same, and it was therefore “highly flawed to then penalise the Applicant simply for following the advice given by the agent.” It was irrational for the respondent to conclude that false representations occurred when her own guidance policy verified that family members do not extend to siblings.

38. In his written submissions Mr Turner referred to several guidance documents published by the respondent. These included ‘Student and Child Student’ guidance note published on 6 April 2021 (we note that this post-dated the decisions under challenge), Appendix 1 to the form VAF4A (relating to family settlement), and guidance notes for the form VAF2 (relating to visas for work, study and for dependents). Mr Turner additionally relied on other guidance notes including those in respect of family reunion applications, applications by students, dependent family members of Tier 1 migrants, Appendix FM, and family reunion in respect of dependents of refugees. None of these contained any reference to a sibling as a family member.

39. Mr Turner submitted that the absence of any reference to a sibling as a family member in the aforementioned guidance entitled the applicant to infer that siblings did not fall to be considered as ‘family’ for the purposes of his immigration application. Mr Turner relied on a statement dated 5 November 2021 from Stuart Ouseley, a Policy Officer employed at the Simplification and Systems Unit of the Home Office, accepting that there was no definition of ‘family in the UK’ provided in the student guidance because entry as students did not depend on any familial relationship as the basis of the grant of leave. Mr Turner noted however that the guidance listed a select number of categories as family members and did not state that it was a non-exhaustive list.

The issue of materiality

40. Mr Turner submitted that the failure by the applicant to disclose the existence of his sister in the UK in his application form and his first interview was not material to his application. Consequently, the requirements of paragraph 320(7A) were not met.

Procedural fairness

41. According to Mr Turner the respondent acted in a procedurally unfair manner as she was aware that the applicant had a sister prior to the 2nd interview but the respondent "… still attempted to undermine the Applicant's credibility - contrary to the AOS/SGD it is submitted that the interviews themselves do not provide the Applicant a proper opportunity to provide his innocent explanation and as noted above the Applicant left the second interview still uncertain as to why he was prevented from boarding, and ultimately why his credibility was being called into question."

The respondent's submissions

42. We summarise the respondent's submissions, as detailed in Ms Anderson's skeleton argument and her oral submissions.

43. With respect to the grant of permission to appeal issued by Lady Justice Rose, the Court of Appeal did not purport to make any factual findings or to decide any issue that was now before the Tribunal. The Tribunal had to determine what Ms Anderson termed "the constitutional issues" before it could properly form any view of the underlying merits of the application of the general grounds for refusal.

44. In relation to the question of precedent fact, Ms Anderson submitted that the Tribunal could only undertake a supervisory role in its approach to the issue of dishonesty such that its function was to review the respondent's decision on conventional public law grounds. Ms Anderson relied on the judgment in R (Giri) v SSHD [2015] EWCA Civ 784; [2016] WLR 4418 ("Giri") where the Court of Appeal held that dishonesty was not a 'precedent fact' in the context of that judgment.

45. In Giri, a case where the Secretary of State refused an application under the Immigration Rules based on dishonesty, the Court of Appeal rejected the argument that the issue of deception was one of 'precedent fact' to be determined by the reviewing court. It was held that the findings made by the Secretary of State in decisions taken under the Immigration Rules, "are open to challenge in Judicial Review proceedings only on Wednesbury principles" and that "it is not a situation in which their powers depend on some precedent fact the existence of which falls for determination by the court itself".

46. Ms Anderson also relied on Begum which, she submitted, made similar statements of principle as to the approach on judicial review by Richards LJ in LE (Jamaica) [2012] EWCA Civ 597 when finding that the Court of

Appeal did not have jurisdiction to form its own view on facts relevant to the merits of an application for entry clearance and disregard the conclusions of the statutory decision-maker.

47. As to the applicant's reliance on Balajigari, in that judgment the Court of Appeal noted a distinct jurisdiction to ensure compliance with the duties imposed by s. 6 of the Human Rights Act 1998, and that distinct role may require a modified approach to consideration of that ECHR question (which entails examination of dishonesty as part of the proportionality assessment under Article 8(2) ECHR). This was consistent with the view of the Court of Appeal in Ahsan v SSHD [2017] EWCA Civ 2009; [2018] Imm AR 531 ("Ahsan").

48. Both Balajigari and Ahsan concerned the very particular questions that arose where there were parallel Article 8 ECHR claims concerning dishonesty and also judicial review claims where the same dishonesty matters were relevant to the decisions challenged. In each instance, the Court was concerned with the procedural and resource issues that arose from potential parallel applications and appeals which do not arise here. It was in that context that the Court observed that there was no practical or procedural prohibition on the Tribunal considering factual matters albeit the judicial review procedure was not designed to determine questions of fact. Whether the Tribunal could determine a factual question does not mean that it should do so. There was no Article 8 ECHR claim by this applicant associated with his student visa application, nor could there be one.

49. In respect of the 'post-decision evidence issue', Ms Anderson submits that this did not arise if the Tribunal was only exercising a supervisory role. Post-decision evidence, submissions and explanations were inadmissible and legally irrelevant on conventional public law principles. The question the Tribunal had to consider was whether the applicant provided the respondent with reliable evidence of an innocent mistake such that no rational Entry Clearance Officer could have concluded on all the available evidence that the general grounds for refusal applied.

50. Ms Anderson submitted that there was no issue that the applicant wrongly stated in his application and in his first interview, and initially in his second interview, that he had no family in the UK. The onus was therefore on him to provide an "innocent" explanation and to demonstrate that, despite the misrepresentations, he was a genuine student. The respondent was rationally entitled to conclude that no innocent explanation had been provided. In his second interview the applicant did not refer to any confusion over the definition of 'family', nor did he suggest reliance on third-party advice. The applicant did not assert that he had 'volunteered' the existence of his family in the UK 'unprompted' to the Immigration Liaison Officer rather than respond to questioning about his arrangements. There was no reason why, if this was the actual position, the applicant would not have provided his explanations to the respondent in the second interview.

Relevant legislative framework

51. S.3(1) of the Immigration Act 1971 reads:

> (1) Except as otherwise provided by or under this Act, where a person is not a British citizen—
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
>
> …

52. S.3(2) of the Immigration Act 1971 requires the Secretary of State to lay before Parliament "statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter". The Immigration Rules, including those relating to the Points Based System ("PBS") and the general grounds of refusal, are made under this section.

53. The applicant sought entry clearance under Tier 4 of the PBS as a student. Paragraph 245ZV of the Immigration Rules required an applicant to have a minimum of 30 points under paragraphs 113 to 120 of Appendix A, a minimum of 10 points under paragraphs 10 to 14 of Appendix C, and to not fall for refusal under the general grounds of refusal. The Entry Clearance Officer also had to be satisfied that an applicant was a genuine student.

54. The general grounds for refusal of applications are to be found in Part 9 of the Immigration Rules. Part 9 has been amended since the decisions under challenge, but at the relevant time paragraph 320 of the Immigration Rules contained a list of mandatory grounds of refusal of entry clearance, including paragraph 320(7A). Paragraph 320(7A) appears under the heading 'Grounds on which entry clearance or leave to enter the United Kingdom is to be refused'. It reads,

> "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 or in order to obtain documents from the Secretary of State or a third party required in support of the application."

55. Paragraph 320(7B) of the Immigration Rules establishes the consequences of a finding that an applicant previously breached the United Kingdom's immigration laws by, *inter alia*, "using deception in an application for entry clearance, leave to enter or remain (whether

successful or not)", subject to certain exceptions. In the case of a person using deception he or she would fall to be refused entry clearance in respect of future applications for a period of 10 years.

56. According to the definitions in the Immigration Rules (paragraph 6) at the relevant time ‘deception’ in paragraph 320(7B) of the immigration rules meant “making false representations or submitting false documents (whether or not material to the application), or failing to disclose material facts. “

Discussion

Precedent fact

57. We start our assessment of the precedent (or jurisdictional) fact issue with a trite proposition. Judicial review is essentially a supervisory jurisdiction, to be contrasted with an appeal process of reviewing the merits of a decision. The focus of judicial review is the decision-making process. Its concern is whether the decision maker was lawfully entitled to reach his or her decision based on the information made available at the time that the decision was made.

58. The situation is however different where a statutory provision contains a precedent fact. The precedent fact is akin to a trigger which, when activated, enables a particular power to be exercised. The lawfulness of the exercise of power is dependent on the existence of the precedent fact. By way of example, in Ex p Khawaja [1984] AC 74, the question of whether someone was an illegal entrant, with reference to paragraphs 9 and 16(2) of Schedule 2 to the Immigration Act 1971, was held as being one of precedent fact because the relevant power in that case, to be able to detain a person for the purposes of removal, was only exercisable if the person was an illegal entrant. Similarly, in In R (A) v Croydon LBC [2009] UKSC 8 the Supreme Court decided that "there is a right or wrong answer" to the question whether an individual is or is not a child and that it was for the Court to determine the answer. Thus, a person being a child was a precedent fact that had to be established prior to a local authority being able to exercise its power under s.20(1) of the Children Act 1989 to accommodate a “child in need.”

59. Where a statutory provision requires the existence of a precedent fact it will be for a court or tribunal to determine for itself whether it exists. If the exercise of a particular power is dependent on a precedent fact, a court or tribunal is entitled to consider all available relevant evidence in determining its existence, including evidence that was not before the decision-maker at the date of the challenged decision. This is because the existence of a precedent fact will almost always be a binary choice – either it exists or it does not, and if it does not exist there can be no lawful use of the power. The existence of a precedent fact goes to the legality of a decision, and whether the factual condition is satisfied must be determined by a court or tribunal as part of the question of law as to

vires.

60. It is to the empowering legislative provision that one must look when determining whether the exercise of a particular power is dependent on the existence of a precedent fact. In SSHD v Lim & Anor (R, on the application of) [2007] EWCA Civ 773 Sedley LJ noted, at [18]:

> "…whether something is in truth a precedent fact, absent which the decision-maker has no power to decide anything, or is one of the matters confided, at least initially, to the decision-maker himself, has to depend on the terms of the empowering provision, in this case s.10 of the 1999 Act."

61. In R v SSHD, ex p. Onibiyo [1996] QB 768 Sir Thomas Bingham MR observed, (at 784G – 785B):

> "The role of the court in the immigration field varies, depending on the legislative and administrative context. Where an exercise of administrative power is dependent on the establishment of an objective precedent fact the court will, if called upon to do so in case of dispute, itself rule whether such fact is established to the requisite standard."

62. In the instant challenge the applicant contends that the existence of false representations, or the existence of the dishonest non-disclosure of material facts in an application, as set out in paragraph 320(7A) of the Immigration Rules, is a condition precedent that the Tribunal must first determine.

63. Paragraph 320(7A) appears in the section of the Immigration Rules dealing with the general grounds of refusal, and the Immigration Rules themselves are established pursuant to s.3 of the Immigration Act 1971. The authority of Giri engaged directly with the interplay between s.3 of the Immigration Act 1971 and the general grounds of refusal in the Immigration Rules. The main issue identified by the Court of Appeal was:

> …whether the role of the court in the present context is to determine for itself, as a "precedent fact" or "jurisdictional fact", whether deception was used, or to review on normal public law grounds (for which the expression "*Wednesbury* principles" is a shorthand) the Secretary of State's decision that deception was used."

64. The applicant in Giri applied for leave to remain as a Tier 1 (Post Study Work) Migrant. His application was refused under paragraph 322(1A) of the Immigration Rules (part of the general grounds of refusal concerning in-country applications) on the basis that he failed to disclose material facts. He answered 'no' to a question on his application form inquiring whether he used deception in an earlier application when in fact he previously supplied false documents.

65. Richards LJ (with whom Beatson LJ and King LJ agreed), considered Khawaja and Bugdaycay v SSHD [1987] AC 514; [1987] Imm AR 250, where the House of Lords rejected an argument that it was for a court to

determine whether a person was a refugee in a judicial review challenge to issue removal directions following refusal of an asylum claim. The proper construction of the relevant section of the Immigration Act 1971, which concerned the power to give or refuse leave to enter the UK, was to be exercised by immigration officers, and all questions of fact on which this discretionary power depended had to be determined by the immigration officer. Although the question whether someone was a refugee was clearly an important one, when deciding how to exercise the power, an immigration officer (or the Secretary of State) had to make factual determinations on a daily basis, such as deciding whether a person was a bona fide visitor, or a student, or a business person, and these determinations could, in the absence of a right of appeal, only be challenged using conventional judicial review principles (at pages 522F – 523B).

66. Richards LJ held, at [19] and [20]:

> "In my judgment, Mr Malik's reliance on the decision in *Khawaja* was misplaced. The passages I have quoted from *Khawaja* and *Bugdaycay* are fatal to his case on this issue. The decision here under challenge is a decision made in the exercise of the power conferred on the Secretary of State by section 3 of the 1971 Act to grant leave to remain in the United Kingdom. The Rules contain detailed provisions as to how the power is to be exercised (though there is a residual power to grant leave even where it falls to be refused under the Rules). Paragraph 322(1A) is one of those provisions. Its application involves findings of fact, but that is true of a multiplicity of provisions in the Rules. If the conditions in it are found to be satisfied, leave must be refused under the Rules, but that, too, is true of many other provisions under the Rules. A finding that the conditions are satisfied has potentially serious consequences (see, in particular, the effect of paragraph 320(7B) as summarised above), but paragraph 322(1A) is again far from unique in that respect. The key point is that the statute confers the power on the Secretary of State, or the immigration officers acting on her behalf, to make the decision whether to grant or refuse leave to remain. It is for the Secretary of State or her officials, in the exercise of that power and in reaching their decision, to determine which provisions of the Rules apply and whether relevant conditions are satisfied, including the determination of relevant questions of fact. On the reasoning in *Khawaja* and *Bugdaycay*, their findings on such matters are open to challenge in judicial review proceedings only on *Wednesbury* principles; it is not a situation in which their powers depend on some precedent fact the existence of which falls for determination by the court itself."
>
> The position would be different if we were concerned not with the exercise of the power under section 3 of the 1971 Act to grant leave to remain but with a decision to remove a person under section 10 of the 1999 Act on the ground that he or she had used deception in seeking leave to remain (see paragraph 13 above). In that event, as a matter of statutory construction, the very existence of the power to remove would depend on deception having been used; and in judicial review proceedings challenging the decision to remove, the question whether deception had been used would be a precedent fact for determination by

> the court in accordance with *Khawaja*. Miss Giovannetti QC, on behalf of the Secretary of State, accepted as much. In practice, however, the issue will rarely arise in that form, because decisions under section 10 are immigration decisions carrying a right of appeal to the tribunal, which can review for itself the facts on which the decision under appeal was based, and the existence of that alternative remedy means that judicial review is not available in the absence of special or exceptional factors: see, most recently, the decision of this court in *R (Mehmood and Ali) v Secretary of State for the Home Department* [2015] EWCA Civ 744."

67. Nor does it follow that, simply because a particular factual requirement is dependent on a binary choice, the requirement will be one of precedent fact. This was considered in Giri at [25]:

> "Mr Malik argued that aspects of that reasoning could be transposed to the present context: whether deception has been used is likewise an objective question to which there is a right or a wrong answer, however difficult it may be to determine what that answer is. I do not accept, however, that Lady Hale was intending to lay down any general proposition that because a question is an objective one to which there is a right or a wrong answer, it is necessarily one of jurisdictional fact for ultimate determination by the court. These were simply considerations that formed part of the reasoning in support of her conclusion as to the correct construction of section 20(1) of the 1989 Act."

68. Richards LJ, held at [32], that "the relevant question", in such judicial review challenges, is simply "whether it was reasonably open to the decision-maker, on the material before him, to find that deception had been used", and "the finding in question is one of fact" and "issues of proportionality are not relevant to it".

69. Although the instant challenge concerns the application of the general grounds of refusal in the context of an entry clearance application and not an application for further leave to remain, there is no principled distinction between the two scenarios. Both paragraph 322(1A) and paragraph 320(7A) concern whether an applicant was dishonest in his or her application, and both are established by the same statute that confers power on an immigration officer or the Secretary of State to grant or refuse leave to enter, and, in the exercise of that power, to determine relevant questions of fact. Consequently, it is not for the tribunal to conduct a full merits assessment of every factual finding made by the respondent in the exercise of discretionary powers when applying the Immigration Rules.

70. Mr Turner contended that the Tribunal's approach, in a judicial review context, to issues of dishonesty that arise within the context of the Immigration Rules must now be considered in light of Balajigari. Balajigari concerned the refusal of applications for ILR made by Tier 1 (General) Migrants because the Secretary of State believed their presence in the United Kingdom was undesirable based on their alleged dishonest conduct by either inflating their income for the purposes of immigration control or deflating their stated income in order to reduce

their tax liability. The Secretary of State relied on paragraph 322(5) of the Immigration Rules, which required that leave to remain should normally be refused if the conduct or character of a person made it undesirable to permit them to remain in the UK.

71. The challenges in Balajigari arose in the context of judicial review proceedings. The challenges were categorised into three groups. The first group was concerned with, *inter alia*, the exercise of discretion and the requirements of procedural fairness and fell under the heading 'domestic public law challenges' ([20] to [76]). In the second group the applicants contended that the decisions they were challenging interfered with their rights under Article 8 ECHR ([77] to [94]). The third group concerned the suitability of judicial review as a means by which paragraph 322 could be challenged where Article 8 ECHR was engaged ([95] to [106]). It is the second and third group of challenges, in respect of which there is some overlap, that Mr Turner drew upon in support of his submission that the existence of dishonesty within paragraph 320(7A) is a matter of precedent fact.

72. Having analysed the arguments advanced by the parties the Court (Underhill, Hickinbottom, Singh LJJ) accepted that exposure of the applicants to liability to removal could engage their Article 8 ECHR rights given that they would usually have been in the UK for several years ([80], [84] to [91]). Having found that the Secretary of State's decisions engaged Article 8 ECHR, the Court then considered the consequences of such engagement. It is this assessment upon which Mr Turner relies. He cites [92], [95], and [104] in support.

> 92. The principal substantive consequence of our finding that the refusal of T1GM ILR on paragraph 322 grounds will (typically) engage article 8 is that in any legal challenge the tribunal will be obliged to reach its own conclusion on whether the interference is justified, rather than conducting a rationality review: as to this, see para. 104 below. In an earnings discrepancy case that means, principally, that it will have to decide for itself whether the discrepancy was the result of dishonest conduct by the applicant in the supplying of figures to either HMRC or the Home Office. If it was, in the generality of cases such a finding will be sufficient, for the purposes of the final *Razgar* question, to justify the applicant being refused leave to remain and in consequence, which is the relevant interference, becoming liable to removal. The situation is analogous to that in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009, where the claimants' article 8 rights were in practice dependent on whether they had cheated in their TOEIC tests (see paras. 76 and 88 of the judgment of Underhill LJ) and this Court held that they were entitled to have that question determined by the tribunal as a matter of fact. There may be exceptional cases in which it can be argued that removal would be disproportionate despite the applicant's past dishonesty, and that issue too would in principle have to be judged by the tribunal for itself, while giving due weight to Secretary of State's assessment of the public interest. But paragraph 322 (5) itself likewise allows for the possibility of such exceptional cases (see para. 39 above), and there need be no difference in the nature of the exercise whether it is

> expressed as the exercise of a public law discretion or as a proportionality assessment under article 8.
>
> …
>
> 95. Having concluded that article 8 is (generally) engaged by the refusal of ILR in these cases, where does that leave the procedural position with regard to a challenge to that refusal? In principle it seems to us, as it did to the Court considering an analogous issue in *Ahsan* (see para. 115 of the judgment of Underhill LJ), that the appropriate route of challenge is by way of appeal to the FTT rather than by way of a claim for judicial review in the UT. Although the UT can, if it has to, determine disputed issues of primary fact, that is not its usual role, and doing so is not a good use of its limited resources. But the procedural route to an appeal is not straightforward.

73. Having considered the circumstances in which a right of appeal to the First-tier Tribunal might arise, the Court then considered how, in the context of judicial review proceedings, the applicants could rely on their Article 8 ECHR rights.

> 104. If such an article 8 challenge does proceed by way of judicial review in the UT, and the claimant's article 8 rights are found to have been engaged, the Tribunal will, as already noted, have to consider for itself whether the alleged dishonesty on the part of the claimant has been proved and whether removal is proportionate, which in most cases is likely to be determined by the question of dishonesty. It will not be confined, as would usually be the case and as in these proceedings thus far, to reviewing the facts only on the ground of irrationality. This is because, where a claim for judicial review includes a pleaded ground that the Secretary of State's decision either does or would violate article 8, that amounts to an allegation that there has been or will be unlawful conduct contrary to section 6 of the 1998 Act. That allegation has to be adjudicated by the tribunal on its merits: it is an argument based on illegality and not simply irrationality. For a recent summary of the law in this regard see *R (Caroopen) v Secretary of State for the Home Department* [2016] EWCA Civ 1307, [2017] 1 WLR 2339, *per* Underhill LJ at paras. 68-83 (pp. 2366-2372).

74. When considering one of the individual challenges ([153] to [161]) the Court noted the view of an Upper Tribunal Judge that the question to be posed was not whether the particular applicant had been dishonest but whether the Secretary of State was rationally entitled to conclude that there had been dishonesty. The Upper Tribunal Judge had referred to Giri, and the Court of Appeal confirmed that the Wednesbury approach was the "correct approach where the tribunal is not concerned with an issue of precedent fact (or a human rights claim)." The judgment contains a footnote reading:

> "As to the inapplicability of *Giri* where an article 8 claim has been raised, see *Ahsan*, para. 118"

75. Although the Upper Tribunal Judge's decision was vitiated by procedural

irregularity, the Court of Appeal did say ([161]) that, in the absence of any reliance on ECHR Convention rights, the Upper Tribunal was right to proceed on the basis of a rationality review.

76. At [118] of Ahsan, having first considered the circumstances in which a human rights claim could be an appropriate remedy in respect of an allegation of deception in a decision under s.10 of the Nationality, Immigration and Asylum Act 2002 (as it was prior to the Immigration Act 2014), Underhill LJ stated:

> "I should say, for the avoidance of doubt, that the reasoning in the previous paragraph does not mean that in every case where a finding of deception is made the subject of that finding is entitled to a judicial determination of the truth of the allegation. Whether it does so will depend on the legal context in which the question arises, including whether it is material to a human rights claim. That there are cases where only a rationality review is available is illustrated by *Giri* (see para. 43 above). Ms Giovannetti was asked by the Court whether an appellant was entitled to pursue a challenge to a deception finding in its own right, irrespective of its impact on the question of leave to remain or potential removal. She said that in principle they would be, but she submitted, relying on *Giri*, that such a challenge could only be on *Wednesbury* grounds."

77. In our judgement it is readily apparent from the passages cited above that in a judicial review challenge the jurisdiction of the Tribunal to determine an issue of dishonesty for itself arising from a decision taken under the general grounds of refusal in the Immigration Rules is dependent on the engagement of an ECHR right. This is because an allegation that such a decision violates Article 8 ECHR, and is therefore unlawful as being contrary to section 6 of the Human Rights Act 1998, must be determined by the court or Tribunal on its merits, and the approach to the ECHR question is not limited to Wednesbury (Associated Provincial Picture Houses LTD v Wednesbury Corporation [1947] EWCA Civ 1) review (see, e.g. R (Nasseri) v SSHD [2009] UKHL 23, Bank Mellat v HM Treasury (no 2) [2013] UKSC 38 and 39, R (Lord Carlile of Berriew) v SSHD [2014] UKSC 60, Caroopen & Myrie [2016] EWCA Civ 1307; [2017] Imm AR 930). In the absence of any parallel or concomitant ECHR considerations the Tribunal's role is supervisory, (Giri). The issue of dishonesty in a judicial review challenging a decision taken under paragraph 320(7A) of the Immigration Rules is not one of precedent fact.

78. We find that both Balajigari and Ahsan involved particular questions that arose in the context of judicial review challenges concerning matters of dishonesty that had parallel or concomitant ECHR considerations involving the same dishonesty matters.

79. The issue of dishonesty in Ahsan was determinative of whether there would be a breach of the applicants' Article 8 ECHR rights ([76] and [88]). The Court was at pains in Ahsan at [118] to prevent any wider application of the pragmatic approach proposed, and expressly referred

to the s. 10 removal decision at [117] as being the source of the justification for a judicial consideration of the facts concerning deception. It was made clear that the analysis in [117] “does not mean that in every case where a finding of deception is made the subject of that finding is entitled to a judicial determination of the truth of the allegation” and “whether it does so will depend on the legal context in which the question arises, including whether it is material to a human rights claim”. Underhill LJ further added that “there are cases where only a rationality review is available is illustrated by Giri”.

80. Mr Turner did not argue that the applicant’s Article 8 ECHR rights were engaged in respect of his application or the challenged decision. We are satisfied that there is no Article 8 ECHR claim by this applicant associated with his student visa application. We communicated our decision in respect of the precedent fact issue to the parties as a preliminary issue.

Whether the respondent’s assessment of dishonesty was lawful when considered under conventional public law grounds

81. We must assess the lawfulness of the respondent’s decision using conventional public law grounds. As such, we are concerned with whether the respondent was lawfully entitled to reach his or her decision on the basis of the information available to her at the date of the challenged decision. Evidence and explanations, including the explanation first advanced by the applicant in his Pre-Action-Protocol Letter sent in March 2020 that he was assisted in his application by an agent, the witness statement from Mr Choudhury dated 29 September 2021, and the witness statement from the Entry Clearance Officer dated 2 November 2021 cannot therefore be considered when determining the lawfulness of the decisions under challenge. It was for this reason that we declined to hear evidence from the appellant (even if it was available to give, bearing in mind Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 00286 (IAC)).

82. The legal burden of proving that the applicant was dishonest lies on the respondent, albeit that there is a three-stage process. The respondent must first adduce sufficient evidence to raise the issue of dishonesty. The applicant has then a burden of raising an innocent explanation which satisfies the minimum level of plausibility. If that burden is discharged the respondent must establish to her satisfaction, on a balance of probabilities, that this innocent explanation can properly be rejected (Abbas, R (on the application of) v SSHD [2017] EWHC 78 (Admin)).

83. In Giri, at [38], Richards LJ accepted that it was for the respondent to satisfy the court that she had discharged the burden of proof on the balance of probabilities. Further, in the context of such a case, the respondent should furnish evidence of “sufficient strength and quality” and the respondent (and the Tribunal) should subject such material to

"critical" and "anxious" scrutiny. In Balajigari, which concerned paragraph 322(5) of the Immigration Rules, Underhill LJ stated (at [37(2)]) that the rule "is only concerned with conduct of a serious character". The standard of proof is the balance of probabilities but that is to be exercised "bearing in mind the serious nature of the allegation and the serious consequences which follow…" [43].

84. We are satisfied that the respondent was entitled to conclude that evidence of sufficient strength and quality had been adduced to raise the issue of dishonesty. In both his application form and his 1st interview, and at the start of his 2nd interview, the applicant stated that he had no family in the UK. This was not correct. This clear inconsistency in the information provided by the applicant was unarguably sufficient to raise the issue of dishonesty.

85. The explanation given by the applicant in his 2nd interview was based on his misunderstanding of the questions put to him in his 1st interview and the application form. He believed that the questions concerning whether he had family in the UK only related to his intended geographical location in the UK. The applicant also claimed that his misunderstanding arose because English was not his first language. In his Administrative Review application the applicant offered a further explanation; that 'the guideline' in respect of the application form did not mention siblings as family and the applicant did not therefore consider his sister to fall within the definition of family.

86. We now consider whether the respondent was rationally and lawfully entitled to reject the explanations offered by the applicant and whether, in so doing, she applied the principles set out above at paragraphs 82 and 83 above.

87. In the 1st decision the respondent accurately set out the requirements of paragraph 320(7A) before identifying the inconsistency in the information provided by the applicant. The respondent summarised and then engaged with the applicant's explanation. The respondent was not satisfied that the applicant misunderstood the questions in the application form or in his first 1st interview because both questions were framed by reference to the UK and not to Southampton. The respondent was not satisfied that the inconsistencies could be attributed to the applicant's proficiency in English because the applicant was due to commence a course of study that was conducted in English and because, at the end of the 1st interview, the applicant stated that he understood all the questions. It was additionally noted that the applicant maintained that he had no family in the UK at the commencement of his 2nd interview. The respondent was not satisfied that there had been an innocent misunderstanding and then concluded that the applicant intentionally failed to declare a material fact.

88. We can discern no unlawfulness in the respondent's assessment. The respondent took into account the information before her and actively

engaged with the explanation proffered by the applicant. There is nothing in the decision to support the contention that the respondent failed to apply paragraph 320(7A) with the requisite anxious scrutiny, or that she was not aware that the burden of proof rested on her. There was no requirement for the respondent to expressly refer to her own published guidance on 'False Representations', and the fact that the respondent did consider whether the inconsistency could be an innocent misunderstanding suggests that she was mindful of and applied that guidance.

89. In his Administrative Review application, the applicant additionally claimed that he relied on the "guideline" when completing his application and that the guideline did not include siblings, and he did not therefore consider that siblings counted as family.

90. Much of Mr Turner's submissions before us related to advice given to the applicant by an agent to the effect that a sibling did not count as 'family' for the purposes of the student application. This explanation was however first advanced in the applicant's Pre-Action-Protocol Letter. It was not before the respondent, and the respondent cannot therefore be criticised for not considering it. Having found that our jurisdiction is supervisory and that there is no precedent fact issue, we are not permitted to take into account the explanation first advanced in the Pre-Action-Protocol Letter.

91. Mr Turner nevertheless contended that, as asserted in the applicant's Administrative Review application, "the guideline" that he considered when he completed his application did not mention siblings when addressing the existence of 'family' in the UK. It is pertinent to note that the applicant did not refer to any other guidance or any other Immigration Rule. The Administrative Review application read, in material part:

> "First of all, the ECO has referred the visa application form where I did not include my family details such as my sister. However, on the application form the question is if I have family in the UK and in the guideline it says that in family it includes immediate family such as spouse, civil partner, parents or children, grandparents or grandchildren, spouse or civil partner's family, child's spouse, civil partner or partner, my partner if I have lived with them for 2 out of the last 3 years. This guideline clearly shows that there is no mention of siblings and it is not considered to be family."

92. The application form completed by the applicant, as detailed in Mr Ouseley's statement, read:

> **Family who live in the UK**
>
> Do you have any family in the UK?
>
> This includes:

- Immediate family such as spouse, civil partner, parents or children
- grandparents or grandchildren
- your spouse or civil partner's family
- your child spouse, civil partner or partner
- your partner, if you have lived with them for two out of the last three years

93. We note that the description of the application form, set out above, closely matches what the applicant stated in his Administrative Review application. Given that the applicant's explanation in his Administrative Review application related to the question on the application form and "the guideline" relating to it, it is almost certainly the case that the applicant's reference to "the guideline" related to the description set out above.

94. The question relating to whether a person has any family in the UK was broadly phrased in non-exhaustive terms and utilised plain and clear language. Although there was no specific mention of siblings, we find, based on the ordinary and natural meaning of the word 'family', that it would be apparent to anyone completing the form by reference to the accompanying "guideline" that they were being asked whether they had any family at all in the United Kingdom, and that this would necessarily include siblings.

95. In the Administrative Review decision, the respondent engaged with and rejected the applicant's explanation that he did not provide details about his sister because he did not consider her to fall under the definition of 'family'. The respondent noted that the applicant's explanation in his 2nd interview was based on the geographical location of his sibling (the applicant in effect explained that he believed the question related to where he was living in UK; as he would be living in Southampton and as his sister lived year Heathrow, he did not mention her). The respondent noted that the questions in the application form and during the applicant's 1st interview were clear and that he confirmed that he had understood them. We have noted that the application form question was in non-exhaustive terms and the question itself was straightforward. We are also satisfied that the question posed to the applicant in his 1st interview was clear and unambiguous. He was asked whether he had <u>any</u> family "in the UK." There was no indication from the applicant when this question was asked that he did not understand what was meant by "any family in the UK." We do not find the respondent acted irrationally in concluding that a student applicant completing the application form would reasonably understand the question to relate to all relatives. This would necessarily include siblings. The respondent was rationally entitled to conclude that the question in

the application form was sufficiently clear so as to put an applicant on notice that they must mention whether they have a sibling living in the UK.

96. There was no indication before the decision-makers that the applicant had studied other guidance or been advised in respect of other immigration guidance. We are satisfied that these matters have been raised after the event in an attempt to justify the applicant's answer. We have nevertheless considered the other guidance to which Mr Turner drew our attention, particularly in the light of the comments by the Court of Appeal concerning the need for greater clarity about whether there is Home Office Guidance as to the meaning of 'Family' and whether it includes siblings.

97. There is no general definition of family in the interpretive section at paragraph 6 of the Immigration Rules. The Home Office guidance for students did not make any specific reference to who was and who was not considered 'family' in the United Kingdom. Although it was not specifically drawn to our attention we note that the relevant guidance on students included, with reference to child students, a definition of 'close relative' that did include siblings. We additionally note that the guidance for part 1 of the Family Settlement application form provided by the applicant for the purposes of the hearing indicated that "close relatives" included "brother" and "sister".

98. The applicant relied on the respondent's guidance 'Study in the UK on a Student visa', but this did not contain any definition of 'family' that an applicant may have in the United Kingdom. The section upon which Mr Turner relied was headed "Your partner and children" and concerned the ability of a student's partner and children (referred to as 'dependents') being able to apply to come to the UK or stay longer in the UK. This section was concerned with those wishing to accompany or join a student in the UK who fell within a particular familial relationship. The guidance indicated that a Tier 4 (General) Student could apply to bring their partner and/or children into the UK. It did not define 'family', still less did it purport to provide more extensive guidance on what was meant by 'family' in the context of a student application.

99. Mr Turner also relied on ST 28 of the "Appendix Student" to the Immigration Rules, but this too specifically related to the requirements for entry clearance or permission to stay of a dependent partner or a dependent child of a student. The Appendix did not purport to define 'family', whether in the United Kingdom or otherwise, and cannot reasonably be considered to give any guidance on the completion of the student application form.

100. The other Immigration Rules and guidance upon which Mr Turner relied related in the main to categories of individuals seeking to enter the UK based on their familial relationship with a person holding an immigration status allowing for such entry. These categories, many of which are

under Part 8 of the Immigration Rules and Appendix FM, are highly specific. Part 8 of the Immigration Rules relates to ‘Family Members’ and not to the more general term ‘family’, and concerns applications for entry clearance and permission to remain by those within closely defined familial relationships. The same can be said of Appendix FM to the Immigration Rules. The guidelines relating to these categories are not aimed at those contemplating or making applications in the Tier 4 (General) Student category, and student applicants are not directed to consider any of these other categories or the guidance related to these categories.

101. Mr Turner submitted that there was a failure by the respondent to consider the voluntary disclosure by the applicant that he had a sister in the UK and that this should have been considered as it undermined the allegation that he intended to deceive.

102. We have already indicated that we were not provided with either an extemporaneous note of the conversation between the applicant and the Immigration Liaison Officer at the airport, or with a summary of that conversation. We note that in his statement dated 10 May 2020 the applicant said he was stopped at the airport just before boarding the plane and was asked by the Immigration Liaison Officer about his UK arrangements, and in his response he disclosed that he had a sister in the UK. In his Administrative Review application the applicant said that the Immigration Liaison Officer asked him if he had relatives in the UK and who was picking him up from the airport, to which he stated that his sister would pick him up.

103. We are satisfied that the applicant’s disclosure of his sister was prompted by specific questions asked of him by the Immigration Liaison Officer concerning his arrangements on his arrival in the UK. It is apparent from question 14 of the 2nd interview that the respondent was aware of the circumstances in which the applicant disclosed the existence of his sister. We additionally note that the 1st decision accurately referred to the chronology of events, including the questioning of the applicant at the airport. We are not persuaded that the respondent failed to take account of the circumstances in which the disclosure occurred, or that the respondent failed to take into account the fact that the applicant voluntarily disclosed his sister’s presence in the UK.

104. We do not consider that the fact that this information was voluntarily disclosed in response to questions from the Immigration Liaison Officer to materially undermine the lawfulness of the respondent’s view that the applicant purposely failed to disclose his sister’s existence. In circumstances where the applicant has given different explanations for his omission, and in circumstances where he could have, but failed to mention his alleged confusion about the meaning of ‘family’ in his 2nd interview, we are satisfied that it was open to the respondent to find that the failure of disclosure was intentional and therefore dishonest. We

remind ourselves that we are not deciding for ourselves whether the applicant has been dishonest but whether, in reaching her decision, the respondent was lawfully entitled to so conclude for the reasons given, and that in reaching this decision she took into account all relevant considerations and did not place weight on relevant matters.

Whether the applicant's sister's presence in the UK was a material fact in relation to the application

105. We are mindful of the comment made by Lady Justice Rose that there appeared to be agreement that having or not having a sister in the UK would not have affected the applicant's application for a student visa. We are unclear as to the source of this agreement, although it may stem from the observation by Judge Perkins set out in paragraph 21 above.

106. We note that the Court of Appeal was not purporting to make any factual findings nor to decide any issues given that its comments were made at the permission stage and on the papers alone based on the applicant's submissions. We acknowledge that the presence of a sibling in the UK would not necessarily have affected the applicant's application for entry clearance. We are however satisfied that the respondent was rationally entitled to consider the presence of family in the UK as a material fact relevant to an application for entry clearance.

107. Whether the applicant had family members in the UK was a factor relevant to determining the applicant's genuine intentions. The presence of family members may be relevant in ascertaining whether an applicant genuinely intended to leave at the end of his period of leave; if he had family members in the UK he may wish to remain living here to be close to those family members. The assessment undertaken by the respondent of a person's intentions will consider, amongst other things, the strengths of an applicant's links to the UK and factors that may tend to make it more likely that a person will remain in the UK after their leave has expired. We are consequently satisfied that the presence of the applicant's sister in the UK was a material fact in relation to his entry clearance application, and that the respondent was entitled to treat it as a material fact.

Whether the decision was procedurally fair

108. The applicant's judicial review grounds contend, in insufficiently particularised terms, that the respondent's decisions were procedurally unfair because, based on Balajigari, the applicant would not be permitted to adduce further evidence to show he had not been dishonest, and because the respondent was aware that the applicant had a sister in the UK prior to his 2nd interview "…but still attempted to undermine the Applicant's credibility." Mr Turner did not develop this aspect of the judicial review challenge in either his skeleton argument or his oral submissions.

109. To the extent that the challenge may suggest that further evidence could not be provided at the Administrative Review stage following a refusal under paragraph 320(7A), AR2.11(a)(i) of 'Appendix AR Administrative Review', indicates that 'case working error' includes a situation where the original decision maker's decision to refuse an application on the basis of paragraph 320(7A) was incorrect, and, under paragraphs AR2.4(a) and AR2.11(a), it is open to the applicant to adduce further evidence in support of the Administrative Review application.

110. Following the revocation of his entry clearance the applicant was invited to a 2nd interview. The respondent's concerns regarding the applicant's omission in respect of his sister were put to him during the 2nd interview, and he was given an adequate opportunity to respond to those concerns. We do not accept Mr Turner's contention that the applicant did not know why his entry clearance was revoked when he underwent his 2nd interview. At questions 7 and 8 the applicant was told that he had been denied boarding at the airport because of concerns relating to his credibility, and at questions 9 to 15 he was expressly told that the credibility concern arose from his answers relating to whether he had any family in the UK.

111. We are not persuaded that there was any procedural unfairness in relation to the 2nd interview, and we find it was conducted in compliance with guidance given in R (Mushtaq) v ECO (ECO - procedural fairness) IJR [2015] UKUT 224 (IAC) and R (Anjum) v ECO (entrepreneur-fairness generally) [2017] UKUT 406 (IAC). We are satisfied that the 2nd interview, which occurred before the challenged decisions were made, constituted a lawful opportunity for the respondent's concerns to be put to the applicant, and for him to respond to those concerns. The applicant was unarguably given a fair opportunity to respond to those concerns prior to the adverse decision being made. There is no procedural unfairness.

Conclusion

112. For the reasons given above we find that the respondent's decision was lawful. We consequently refuse the judicial review challenge.

Signed: **D.Blum**

Upper Tribunal Judge Blum

Dated: **4 April 2022**