Bulletin 174

CF **CIS/47/02**

1. This appeal, brought with leave of a district chairman, fails. The decision of the Appeal Tribunal on 7 8 01 was not erroneous in point of law. The appellant was not entitled to income support from and including 11 5 99 because he was a person from abroad with an applicable amount of nil..

2. I held an oral hearing at which the appellant did not appear but was represented by Simon Cox of counsel, and Julie Anderson of counsel represented the Secretary of State. I am, as usual, grateful to both for their assistance. Mr Cox had produced written submissions in advance of the hearing. His opening oral submissions largely corresponded with these.

3. The issue by the time of the oral hearing was simply whether a statutory declaration headed "Statutory Declaration to Sponsor" executed by the appellant's son-in-law on 17 3 98, and which was followed by the grant of entry clearance to the appellant and his wife on 30 3 98, was an "undertaking" (as the Secretary of State contended and the tribunal found) or was no more than evidence of satisfaction of the immigration rules at the date it was made.

4. We had to concern ourselves with these nice distinctions because the appellant had been denied income support as a "person from abroad". Regulation 21(3)(i) of the Income Support (General) Regulations 1987 excluded, at the date of claim, a list of people including a person who

> has been given leave to enter, or remain in, the United Kingdom by the Secretary of State upon an undertaking given by another person or persons in writing in pursuance of immigration rules within the meaning of the Immigration Act 1971, to be responsible for his maintenance and accommodation; and he has not been resident in the United Kingdom for a period of at least 5 years beginning from the date of entry or the date on which the undertaking was given in respect of him, whichever date is the later.

From 3 4 00 the relevant provision became s115 of the Immigration and Asylum Act 1999, which provides

> (1) No person is entitled to
> ...
> (e) income support,
> ...
> ...while he is a person to whom this section applies

> (3) This section applies to a person subject to immigration control unless he falls within such category or description, or satisfies such conditions, as may be prescribed
>
> ...
>
> (9) "A person subject to immigration control" means a person who is not a national of an EEA State and who -
>
> ...
>
> (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking;
>
> ...
>
> (10) "Maintenance undertaking" in relation to any person, means a written undertaking given by another person in pursuance of the immigration rules to be responsible for that person's maintenance and accommodation.

5. The appellant and his wife, who are both elderly, had been receiving financial support while at home in Sri Lanka from their daughter and son-in-law in London. Both the latter were then civil servants. The son-in-law was a government solicitor employed by the DSS Solicitor's Office. He has since gone into private practice and is the principal of the firm which has advised the claimant and instructed Mr Cox (and his predecessor before an earlier tribunal). It was decided that the parents should apply for entry clearance to come here and settle.

Missing documents

6. I pause here to say that unfortunately none of the documents surrounding their application, except the statutory declaration itself, has ever been produced: the Benefits Agency approached the British High Commission in Colombo, but was told that such documents were confidential and that the Data Protection Act prohibited their being supplied for the purpose of DSS claims.

7. The matter first came before a tribunal early in 2000. The appellant himself had argued that there was a distinction between voluntary and mandatory sponsorship, or between an informal and a formal undertaking. He said that as far as he could remember his sponsor had not entered into a formal undertaking in terms of the Immigration Act 1971. If there was evidence that he had, it was for the Benefits Agency to produce it. This ties in with the line always taken by the appellant that it is for the Secretary of State to prove that someone is a "person from abroad", as this is a bar to what would otherwise be entitlement to income support. The appellant did not attend the tribunal hearing, but he was there represented by counsel who had prepared a most competent skeleton argument, making the points Mr Cox made to

me; but she was misleadingly instructed that although there was a voluntary undertaking, it was not in writing.

8. The tribunal was not convinced, and it adjourned, directing the representative to produce evidence as to the form of the sponsorship agreement. The appellant accordingly wrote to the British High Commission in Colombo explaining his position and was sent a copy of his son-in-law's statutory declaration. This came under cover of a letter from a Mr Kenny which said

> You and your wife were granted entry clearance on 30 March 1998 to join your daughter as her dependent relatives. It was stated that she and her husband had been providing financial support while you were in Sri Lanka and that she would provide adequate support and accommodation for you both in the United Kingdom **without recourse to public funds** [emphasis in original]. I enclose a copy of your son-in-law's statutory declaration, which clearly states that he and his wife are "able and willing" to accommodate and look after you both.
>
> In short, it is your daughter's responsibility to provide financial support for you and your wife and not the State.

Both documents were submitted to the Appeals Service by the appellant's solicitors who maintained, however, their distinction between voluntary and obligatory undertakings and asked for a paper hearing.

9. At a much later stage, I issued a direction to the appellant to produce copies of his and his wife's applications for entry clearance and related correspondence which led to or followed from the execution of the statutory declaration. The appellant responded to his son-in-law's firm that he had no copy of the application. He did not remember taking a photocopy of it. When he left Colombo for good he never thought that copies of his documents relating to the application for settlement would be of any use or need in London. I could not therefore take this further, and as the appellant said he could not attend the oral hearing because of his ill-health, neither Miss Anderson nor I could ask him anything further. Nor was there any representative from his solicitors present, although it had been stated that one would attend.

10. We had quite a lengthy discussion about whether I could, and if I could, whether I should, either direct the Home Office to produce the documents, or direct the Department of Work and Pensions Secretary of State to pursue the matter. But both parties said they preferred to go

ahead on the present state of the evidence, and I understood both parties, in the end, to agree that the burden of proof was not a critical issue in this case. I agree, and have reached my conclusion on the evidence I have.

History

11. To return to the sequence of events, the appellant's son-in-law made on 17 3 98 a statutory declaration in the usual UK form and headed "Statutory Declaration to Sponsor". It recited the details of his employment as a government solicitor with the DSS and that his wife was also a civil servant. Both of them are Sri Lankan nationals, but the declarant at least was a UK resident with indefinite leave to remain. He and his wife jointly owned a property in East London, which had three bedrooms, one through lounge and all modern amenities, and they were the only occupants. The appellant and his wife were the declarant's wife's parents, both aged over 65. She was their only child, and they had no-one else to look after them in Sri Lanka or London. They wanted to come and live with their only child. The declarant went on

> We are able and willing to accommodate and look after them in our house at [address].
>
> I have already sent to my parents-in-law all the necessary papers in support of the claims I have made in the foregoing paragraphs.
>
> I should therefore be grateful if you could issue my parents-in-law with the necessary visa so as to enable them to come over to London with a view to spending the evening of their life with their child.

On 30 3 98 the appellant and his wife were granted entry clearance, and their passports were endorsed "Single Entry. Settlement to Join Child - Daughter" and further endorsed "Sponsor [name of declarant's wife]" and what I imagine is her date of birth, "19-11-52". On 25 7 98 both the appellant and his wife were granted leave to enter the UK for an indefinite period.

12. On 2 2 99 the appellant claimed income support. He says in his letter to the British High Commission at page 43D that he did this on the advice of his GP, but nothing more of the circumstances is known because the appellant did not attend before the tribunal or before me. I do not have a copy of the claim form, but by 5 8 99, the date of the appeal against refusal, he was no longer living with his daughter and son-in-law. I have no evidence as to the cause for these changes, and indeed if Mr Cox is right I do not need any. (He told me later in the hearing that

the appellant and his wife continued to be maintained by the declarant and his wife.) If he is correct that the statutory declaration was not an undertaking within regulation 21(3)(i) but merely a means of securing entry clearance for the appellant and his wife which could be discarded once that end had been achieved, there was nothing to stop a claim for income support. Indeed until regulation 21(3) was amended from 5 2 96 by SI 30/96, even written undertakings in the RON 112 form making express reference to the immigration rules seem to have been routinely reneged on, for good cause or for none, without objection from the Benefits Agency. The Agency had power under s105 of the Social Security Administration Act 1992 by criminal proceedings to enforce a maintenance undertaking; but this does not seem to have been done on any wide scale - possibly because of the more difficult burden of proof in criminal proceedings.

13. Mr Cox rightly says that I must look at the immigration rules in construing regulation 21(3)(i), which specifically refers to an undertaking in writing pursuant to the immigration rules within the meaning of the Immigration Act 1971. If the DSS draftsman chose to refer to rules which are so very different, both in their nature as House of Commons papers rather than duly-enacted statutory instruments, and in the latitude they allow for discretion, he must live with any adverse consequences.

14. After much to-ing and fro-ing, the tribunal on 7 8 01, which held a paper hearing at the appellant's request, rejected the appeal. In an admirably crisp decision, it referred to the conditions which the representative had submitted at page 3 (now page 9) must be fulfilled by any document which is put forward as an undertaking. (These are that it must be written - at this stage the representative had been misled into believing that there was nothing in writing - that it must make reference to being made pursuant to the Immigration Rules under the 1971 Act, that it must make clear to the sponsor that her dependant is granted leave to enter or remain on a promise that the sponsor will maintain and accommodate them, that the sponsor must be aware of the consequences of breaking the promise, and that it must be signed and dated by the sponsor.) The tribunal held that the statutory declaration fulfilled these conditions. It was in writing and signed and dated by the son-in-law, and the tribunal had no doubt that he would be aware of the significance of any undertaking he gave. It did not refer specifically to the immigration rules, but it was clear from Mr Kenny's letter that there had been other correspondence which had not been produced. It did not use the word

"undertaking", but the High Commission obviously considered that entry clearance had been given on the basis that there would be no recourse to public funds. The declarant said he was willing to accommodate and look after the appellant and his wife; admittedly he did not specifically agree to maintain them, but in the context of an application for leave to enter, the tribunal inferred he was offering financial provision, as there would otherwise be no reason for a declaration.

15. The appeal drew attention to the fact that the tribunal had said "There is no dispute that Mr Ratnavel is a person from abroad" (the expression not being in inverted commas). This, it was contended, showed that the tribunal had either been biased (a wearisome allegation too readily made by some representatives where they do not agree with a decision) or had not tried to understand the issues raised, ie to understand the difference between a "voluntary or informal sponsorship" and an "undertaking".

Mr Cox's arguments

16. I can clear one point out of the way before setting these arguments out. I reject the deeply unattractive, and not very vigorously-pursued, argument that any liability I might find could be avoided because the declaration was made by the son-in-law rather than the daughter and Mr Kenny's letter referred to the daughter as the sponsor (as indeed the passports show she is). As Miss Anderson, said, the document says "We" are able and willing to accommodate and look after them in "our" house.

17. Mr Cox's argument was that the Immigration Rules are permissive: an undertaking may be, but does not have to be, required, and if one is, it can still be argued that it was not an undertaking relevant for the purposes of regulation 21(3)(i) but only evidence to satisfy the immigration requirements. I set out the rules from HC 395 (1994) which are argued to be relevant to this appeal.

> 317. The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person
> (i) is related to a person present and settled in the United Kingdom in one of the following ways:
>
> ...
>
> (c) parents or grandparents travelling together of whom at least one is aged 65 or over...and

> (ii) is joining...a person who is present and settled in the United Kingdom...and
> (iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom; and
> (iv) can, and will, be maintained and accommodated adequately...without recourse to public funds in accommodation which the sponsor owns and occupies exclusively; and
> (v) has no other close relative in his own country to whom he could turn for financial support.
>
> 318. ...Indefinite leave to remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 317(i)-(v) is met.

The statutory declaration is so perfectly tailored to meet all these requirements that it is difficult to suppose they were not in the mind of whoever drafted it. Mr Cox agrees that it meets all the requirements, but contends that it was merely evidence produced to persuade the entry clearance officer to grant clearance and was not, apparently, intended either by him or by the declarant to have any binding effect. He cites rule 35 to show that undertakings are recognised as a particular class of statement:

> 35. A sponsor of a person seeking leave to enter or variation of leave to enter or remain in the United Kingdom may be asked to give an undertaking in writing to be responsible for that person's maintenance and accommodation for the period of any leave granted, including any further variation. Under the Social Security Administration Act 1992...the Department of Social Security...may seek to recover from the person giving such an undertaking any income support paid to meet the needs of the person in respect of whom the undertaking has been given.

18. Paragraph 320 provides

> 320. In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2-8 of these Rules, and subject to paragraph 321 below [this was not cited to me], the following grounds for the refusal of entry clearance or leave to enter apply:
>
> ...
>
> (14) refusal by a sponsor of a person seeking leave to enter the United Kingdom to give, if requested to do so, an undertaking in writing to be responsible for that person's maintenance and accommodation for the period of any leave granted.

It was notable that the word "sponsor" is used in a general sense, it is not limited to one who has given an undertaking.

19. I am entirely satisfied from these excerpts that it is within the discretion of the entry clearance officer to request an undertaking or not to do so, and further that if he requests one and the sponsor refuses, this will be a ground for refusing entry. I accept that the statutory declaration made here does not *have* to be interpreted as an undertaking. But I do not see that the rules cited so far help me to determine whether or not it *was* one.

20. Mr Cox then took me to rule 322. This provides

> 322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for variation of leave to enter or remain or, where appropriate, the curtailment of leave:
>
> ...
>
> (6) refusal by a sponsor of the person concerned to give, if requested to do so, an undertaking in writing to be responsible for his maintenance and accommodation in the United Kingdom or failure to honour such an undertaking once given;
>
> (7) failure by the person concerned to honour any declaration or undertaking given orally or in writing as to the intended duration and/or purpose of his stay.

This, said Mr Cox, expressly supported the distinction he sought to draw between an undertaking and a declaration, and he cited *Jackson on Immigration Law and Practice* (copy of single page at page 34, no edition specified), who says in discussing rule 322(7) that a declaration "must be made consciously and in such a context that the individual is aware that he is being asked to make a formal statement about his intentions", whereas an undertaking "is a more powerful concept and for a statement so to qualify there must be an element of promise in it"

21. On this foundation, Mr Cox referred me to *Jalloh v Home Secretary* [1988] Imm AR 544. Here, the Immigration Appeal Tribunal (IAT) refused to construe as an undertaking an oral statement, made during an interview on an application for leave to enter as a visitor, that the appellant wished only to spend a 3-week holiday in the UK and would not seek to extend his stay to work or to study. Shortly afterwards he applied for leave to remain as a student, and this was refused on the basis of what he had said in the interview. The Secretary of State and the adjudicator used the expressions "undertaking" and "declaration"

interchangeably and had sought to tie them together by reference to the appellant having given an "assurance". The IAT rejected this approach, citing its holding in an earlier case that

> ..."undertaking" means in effect a promise and "declaration" means simply a conscious or deliberate statement addressed specifically to the point at issue. A casual statement would not, in our view, amount to a declaration.

This IAT's recent decision in *Tekere v Home Secretary* (01/TH/174) expressly relied on *Jalloh* in similar circumstances. Even though I am not bound by them, I ought to follow the decisions of the IAT, as we share the same appellate level. These cases were not cited to the Court of Appeal in *Shah v Secretary of State for Social Security* [2002] EWCA Civ 285 because that case, which treated an undertaking given to secure entry clearance as in the nature of a contractual promise, or a voluntary conditional promise which became unconditional once indefinite leave to enter and remain had been granted, was actually dealing with a RON 112 undertaking. Its reasoning is thus wholly consistent with *Jalloh* and *Tekere.*

22. It was therefore clear that there was a distinction between a declaration and an undertaking. The statutory declaration in this case might be a very important and solemn document, but it was not a promise. The tribunal had shown confusion of thought, because it asked itself what would have been the point of making the declaration if it had not been meant as an undertaking, and thus did not have regard to the arguments addressed to it that a declaration did not have to be an undertaking. Nothing in the declaration itself suggested it was meant by the sponsor as an undertaking; if one had been intended, it would have been an easy thing to use the word, or indeed to use the readily-available form RON 112. Mr Kenny's letter did not describe the declaration as an undertaking; it had not been certified as one. And even if the British High Commission believed itself to have given entry clearance based on an undertaking, its belief was not conclusive. When Mr Kenny said it was the appellant's daughter's responsibility to provide for him and not the state's, he was making a moral, not a legal, point. Mr Cox drew an analogy with a wife-beater who simply promises the court he will not do it again, rather than giving an enforceable undertaking.

23. And, said Mr Cox, if the statutory declaration in this case is treated as a binding undertaking for the purposes of regulation 21(3), where would the law stop? The reasons for failure to maintain a sponsored

immigrant can range from wicked irresponsibility to an unforeseen loss of earning power because of a bad accident; local decision makers have no discretion. The regulation should therefore be construed jealously, and only a document which is clearly intended to operate as an undertaking should be taken as such. The declaration in this case was not meant to have a continuing effect. It was merely a declaration, made for the purpose of securing entry clearance, and made formally so as to lend weight to the declaration of fact that the declarant and his wife were at that time willing to accommodate and look after the appellant and his wife in their house. It did not mean that they would continue to do so, so as to avoid recourse to public funds for the period of leave and any variation of it.

Miss Anderson's arguments

24. Miss Anderson urged me to look at the facts of this case. It was not in dispute that the appellant and his wife had been maintained by their daughter and son-in-law while they were still in Sri Lanka. The entry clearance officer had relied on the statutory declaration as an undertaking, as could be seen both from Mr Kenny's letter and the fact that no other request for an undertaking had been made. The appellant's own letter to the British High Commission following the directions given at the earlier tribunal hearing had asked for "a copy of any sponsorship undertaking you may have which has been given by the person who sponsored me", and the statutory declaration, with Mr Kenny's covering letter, was what was produced in response. The entry clearance officer had been entitled to rely on the declaration as an undertaking that the previous state of affairs (maintenance by the daugher and son-in-law) would continue, and any social security lawyer or administrator reading the declaration would assume it was meant to operate as a binding undertaking.

25. The two immigration cases cited by Mr Cox were dealing with completely different circumstances: they were about protecting people from the effect of oral statements at interviews, where there might have been a genuine post-entry change of mind.

Mr Cox's response

26. Mr Cox substantially reiterated the points he had already made about the difference *under the immigration rules* between an undertaking and a declaration and that the entry clearance officer had a discretion not to require an undertaking. I must disregard the fact that the entry clearance officer gave clearance based on the statutory declaration, and

that procuring such clearance was the sponsor's intention. I asked him how much legal knowledge could be expected of officers administering income support when assessing whether or not a document was an undertaking. He responded that it would either be in form RON 112 or they would simply have to ask themselves, is this a promise? They would easily conclude in a case like this one that it was not, it was only a statement.

My conclusions

27. I accept that the immigration rules do not *require* the giving of an undertaking; I must not suppose that every solemnly-expressed document which appears in this context is an undertaking. I find elusive the concept of a document in solemn form which is made solely for the purpose of securing entry clearance and can then be discarded; but I am persuaded that in immigration law, such things happen. I understand the distinction sought to be drawn, for example in CPAG's *Welfare Benefits* 1998/9, between a voluntary, and a mandatory or obligatory, undertaking for immigration purposes, even though in law all sponsorship undertakings are voluntary, in the sense that no-one can be forced to give one. But I do not accept that only undertakings in a particular form can satisfy the rules. Mummery LJ in *Shah* (paragraph 43) points out that the form of the undertaking is not prescribed by the immigration rules. Mr Commissioner Williams in CIS/2474/99, paragraph 5, did not accept that any particular form was necessary to satisfy regulation 21(3)(i): the rehearing tribunal would have to decide whether the document (agreed not to be in form RON 112) to be produced to it was capable of constituting an undertaking or was "nothing more than a letter of support". I conclude that the statutory declaration made on behalf of himself and his wife by the appellant's son-in-law is properly to be treated as an undertaking for the purposes of regulation 21(3)(i), so that the appellant was correctly refused income support. I have not had the advantage of seeing all the correspondence and documents surrounding the entry clearance applications, but I am satisfied on the balance of probabilities from what I have seen that the declaration was (a) made for the express purpose of securing entry clearance, (b) referred to other evidence which had already been sent to the appellant "in support of the claims I have made in the foregoing paragraphs", and (c) was treated by the entry clearance officer as an undertaking. I reject the contention that I should disregard the officer's view of the transactions which led to entry clearance being granted. The appellant's and his wife's passports were stamped for settlement to join their daughter. I further reject the suggestion that Mr Kenny was discoursing of morals rather than the law

in observing that it was the appellant's daughter, not the state, that should be supporting him.

28. I understand Mr Cox's point about the need for a jealous construction of regulation 21(3)(i) to avoid catching out people whose sponsors become unable to support them for some genuine and unforeseen reason; but this can apply equally to those whose sponsors have been required to give undertakings, and I am wholly unpersuaded that I need to avoid construing the present declaration as an undertaking for this reason.

29 I found singularly unhelpful Mr Cox's analogy with a wife-beater who assures the court that he will not do it again and so is not required to give an undertaking. This analogy as also put forward by counsel leading Mr Cox in *Shah* was there rejected too. An undertaking to the court is an enforceable alternative to the grant of an injunction, not just something that may sometimes be required to fortify a promise not to indulge in unlawful activity.

30. The burden of proof in these cases is indeed on the Secretary of State because the structure of the Income Support (General) Regulations is such that the existence of an undertaking operates as a bar to an entitlement which might otherwise exist. The appellant and those advising him sought to take full advantage of this burden. But in my view once the statutory declaration had been produced, the evidential burden shifted to the appellant to show that what to any lawyer or officer administering benefit would appear (*pace* Mr Cox) to be a promise as to the future was not to be taken at face value but to be treated only as "a conscious and deliberate statement addressed specifically" to the securing of entry clearance as at its date of 17 3 98.

31. Mr Cox conceded, but I should in any case have found, that entry clearance was granted upon that declaration, and the closeness of the dates bears this out: the declaration was made on 17 3 98 and entry clearance was granted on 30 3 98, followed by indefinite leave to remain in July. There was clearly the "temporal causal connection" mentioned by Mummery LJ in *Shah* (paragraph 46). The appellant has not discharged the evidential burden of showing that the declaration, couched in the form it was, was not to be regarded as an undertaking.

32. The two immigration cases cited, like the passage from *Jackson*, were of little assistance. They related to rule 322(7). This has nothing to

do with sponsorship. As Miss Anderson submitted, it serves to protect "the person concerned" (ie the immigrant himself, not anyone else) from the consequences of an oral as well as a written "declaration or undertaking". Mr Cox said there were many immigration cases on sponsorship where the distinction between undertaking and evidence was accepted, but he did not cite any to me, and I was not taken to any other rule in which the undertaking/declaration dichotomy appears.

33. The appeal therefore fails. It is arguable that the tribunal's view that the statutory declaration would not have been made except to act as an undertaking might have indicated a rather less clear appreciation than I have myself formed that undertakings are not required in many cases; but on balance I am not persuaded that I should set its decision aside only to substitute my own to the same effect. The tribunal dealt with the alleged requirements for an undertaking as set out in the submissions then before it (see paragraph 14 above), and it reached a conclusion that was open to it on the evidence. It committed no error of law, and I uphold its decision.

34. I should not be taken as casting any aspersions on the appellant's son-in-law in so far as he may have sought to take legitimate advantage of loopholes and to rely on the burden of proof in upholding his father-in-law's claim to state benefits: the analogy would be with tax avoidance, rather than tax evasion. The device simply fails, both under regulation 21(3)(i) and under s115 of the Immigration and Asylum Act 1999.

(signed on original) Christine Fellner
Commissioner

11 October 2002