



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/17954/2012
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THE IMMIGRATION ACTS

Heard at Field House
on 22nd October 2013

Determination Promulgated
On 7th November 2013

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MANJIT KAUR
JASPEET KAUR
SURPREET KAUR
(Anonymity order not made)

Appellants

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Mr Malik instructed by Malik Law Chambers Solicitors.
For the Respondent: Mr Avery – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Kanagaratnam promulgated on 17th June 2013, following a hearing at Hatton Cross on 29th May 2013, in which he dismissed the appeals of all three

appellants against the refusal of an Entry Clearance Officer (ECO) to grant them leave to enter the United Kingdom for the purposes of settlement.

2. Permission to appeal was refused by another judge of the First-tier Tribunal but granted on a renewed application by Upper Tribunal Judge Craig on 9th September 2013.
3. The Appellants' are a mother and her two children, all nationals of India, born on the 2nd January 1967, 19th September 1995 and 2nd July 1998 respectively. They were refused under the provisions of paragraphs 281 and 301, as applicable, of the Rules by the ECO in decisions dated 28th August 2012.

Discussion

4. The grounds of appeal prepared by Mr Malik clearly indicate that he considers this to be a suitable case to seek a finding in relation to the effect of the ECO's policy on the application of paragraph 320 (11) of the Immigration Rules. Paragraph 5 of the grounds on which permission to appeal is sought provides:
 5. There is one ground, namely the Entry Clearance Officer's decisions to refuse the Appellant's application under Paragraph 320(11) of the Immigration Rules is inconsistent with her own published policy and thereby not in accordance with the law and, therefore, the FTT erred in law in upholding it.
5. The ECO refused the appeal by reference to paragraph 281 and 301 of the Rules only and it was the Presenting Officer before the First-tier Tribunal who asked the Judge to consider whether paragraph 320 (11) was engaged. Judge Kanagaratnam found, on the basis of the evidence he heard and read, that the First Appellant had contrived in a significant way to frustrate the intention of the Immigration Rules in that her conduct fell within the relevant guidelines which the ECO would have observed if he knew that the First Appellant's husband was not with her in India at the time she claimed him to have been, when making an earlier application.
6. Mr Malik sought to rely upon an unreported decision of the Upper Tribunal, Gurpreet Singh v ECO, New Delhi (OA/04089/2011), and there was much discussion regarding his ability to do so at the hearing. I indicated my preliminary view that as a result of the fact the Upper Tribunal is now a Superior Court of Record all decisions of the Tribunal should be available for reference purposes. However, following the hearing I have considered the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011, No 2, to which I was not referred by Mr Malik, which was amended in February 2012 and September 2013. In relation to the use of unreported determinations the guidance provides:

3. Most decisions of the Chamber are unreported. It is not considered conducive to the overriding objective for thousands of fact sensitive decisions to be published, placing onerous obligations on advocates and litigants in person to search for decisions of potential relevance to their own.
4. Following promulgation to the parties other reported decisions are stored electronically and may be accessed on the chamber website at <http://www.judiciary.gov.uk/media/tribunal-decisions/immigration-asylum-chamber>. By the terms of the Senior President's Practice Direction 11 of unreported decisions of the Chamber may not be cited as authority without the permission of the judge that it will only be granted sparingly where there is good reason to do so.
7. There is now a new link to the database of Chamber decisions, <https://tribunalsdecisions.service.gov.uk/utiac/decisions>, which makes it easy to access all decisions of the Upper Tribunal. I do not find on the facts of this case it is appropriate for me to go beyond the guidance note issued by the previous President, Mr Justice Blake, but I do accept that this is a case in which permission should be granted to Mr Malik to rely upon the case of Gurpreet Singh.
8. Before considering the merits of his claim I note that all decisions of the High Court, another superior court of record, and the Court of Appeal are reported. The issue is the weight given to any decision which will be fact specific. Reported decisions will warrant greater weight being given to them as they are considered to be of use in providing guidance and fulfil the criteria for reported determinations as will country guidance cases, the benefit of which has been recognised by the Court of Appeal.
9. The case of Gurpreet Singh was not reported for the reasons set out in paragraph 26 of that determination where the Panel state: "Given however the conspicuous failure of the respondent to offer adequate assistance to the Upper Tribunal on this matter, we consider that this case is not an appropriate one in which to seek to enunciate any general guidance". The Panel therefore recognised that they were not seized of sufficient evidence to allow him to give any form of authoritative guidance, which is relevant to the weight to be given to their findings.
10. Mr Malik's point arises from the fact that when an ECO is considering paragraph 320 (11), the Policy Guidance and Instructions issued to an ECO states that ECO's will need to obtain an Entry Clearance Managers (ECM) authorisation for refusals under paragraph 320 (11). Mr Malik's argument is that if such authorisation is not sought the refusal must be "not in accordance with the law".

11. The Panel in Gurpreet Singh held that the 320 (11) decision made in that case by an ECO was not in accordance with the law for the following reasons:
 24. First of all, in the light of the failure of the respondent to confirm whether or not the decision under appeal was the subject to prior ECM authorisation such as is required by Entry Clearance Guidance instructions, we are not satisfied it was made in accordance with established policy instructions. As such it falls foul of D.S. Abdi [1996] Imm AR 148 principles.
 25. Second, even if we were to accept that the decision was made in accordance with Entry Clearance Guidelines instructions on prior ECM authorisation, we cannot, without more, be satisfied that this authorisation process did not in fact have the effect of improperly restricting the individual ECO (as distinct from the ECM)'s exercise of judgement under paragraph 320 (11). Applying the guidance set out by the Court of Appeal in NA (Iraq) at [26] and [38], and in light of the failure of the respondent to furnish relevant information, we are not satisfied that the procedure, if followed (as Ms Tanner and Ms Kenny urged us to accept must have been followed) did not restrict the freedom of the ECO to make his own decision on the particular facts. Indeed, bearing in mind that in NA the focus was on paragraph 320 (3) which required only a judgement on whether there had been a failure to produce a valid national passport or other document "satisfactorily establishing" his identity or nationality, it might be thought in respect of a provision such as paragraph 320 (11), requiring a much broader discretionary judgement, the importance of ensuring policy instructions did not fetter the ECO from making his own decision were even more pressing.
12. Mr Malik submitted that what applied in Gurpreet Singh equally applies to the present case such that the same result should follow. There is however a material difference between Gurpreet Singh and this appeal in that in the former case the decision to refuse by reference to 320 (11) was made by an ECO whereas in this case the Tribunal was invited to consider it by the Presenting Officer as a result of issues arising from the evidence. The decision it applied was made by the Judge. The guidance considered by the Panel in Gurpreet Singh is clearly guidance published to assist ECO's making decisions 'in post'. The consequences of such a decision can be severe and hence the introduction of the second layer of administrative review by the ECM before such decisions can be approved. Whilst the issues identified in Gurpreet Singh may need to be the subject of further findings by the Upper Tribunal in an appropriate case, I do not find it proved on the fact that this is such a case.
13. The burden is upon the Appellants to prove that the guidance given to ECO's has equal effect and application upon Presenting Officers who appear before the Tribunals as specialist advocates. They represent both the ECO's and the Secretary of State for the Home Department. I find any claim they are equally bound not to have been substantiated on the basis of a claim they appear in the capacity of an agent for the decision maker such that they have no discretionary

power of their own in relation to cases they are dealing with. Indeed, it is established practice that Presenting Officers have power to raise issues under the Rules in relation to appeals which may not previously have been considered for which such an unfettered discretion must exist, especially if matters arise from oral or other evidence prepared for the purposes of an appeal hearing which was not previously made available or known to the original decision maker.

14. To suggest that a Presenting Officer, as a professional advocate, is unable to exercise discretion as a result of a restriction placed upon an ECO (if this actually exists such as to make a decision unlawful if there has been no ECM approval), to the extent that they would be required to seek the authorisation of an ECM in such circumstances, cannot be in the interests of justice or in accordance with the overriding objectives of the Tribunal; especially based upon the resulting delay. I do not find it substantiated that unless a Presenting Officer appearing before a Tribunal who thinks 320 (11) or other 320 grounds arise consults an ECM renders that decision "not in accordance with the law". It is also relevant, as noted above, that in a case in which such issues arise at hearing the decision the rule applies is actually that of the Judge who cannot have his or her judicial discretion fettered by guidance issued to an ECO or otherwise.
15. On the basis of the evidence that arose during the hearing before the First-tier tribunal, it is clear that the requirements of 320 (11) were met for the reasons set out. Such a finding in relation to engagement of this rule is within the range of decisions open to him on the evidence and legally sustainable. The decision was therefore determinative of the appeal.

Decision

16. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

17. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....
Upper Tribunal Judge Hanson

Dated the 6th November 2013