



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: VA/18930/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 22 August 2014**

**Determination
Promulgated
On 28 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR GURDEV SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Bexson, Counsel

For the Respondent: Mr Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the respondent, the Secretary of State for the Home Department (“the Secretary of State”), on behalf of the Entry Clearance Officer (“the ECO”). The Secretary of State appeals against the decision of First-tier Tribunal Judge Petherbridge to allow the appellant’s appeal solely

on the basis that the appellant's visit visa application met the requirements of the Immigration Rules "in full".

2. Unfortunately, the Entry Clearance Manager misrepresented the grounds of appeal that were before the First-tier Tribunal. The grounds of appeal that were before the Tribunal included a clear reference to Section 84(1) (b) and (c) of the Nationality, Immigration and Asylum Act 2002. It is common ground that following refusal of an application for a visit visa the unsuccessful applicant may only appeal that decision under sub-paragraph (b), on the grounds that it is unlawful because the decision is contrary to the race relations' discrimination legislation, or, under sub-paragraph (c), on the basis that, as a public authority, the Secretary of State is bound not to contravene Section 6 of the Human Rights Act 1998 (see section 88A of the 2002 Act). Section 6 requires public authorities in the UK, including the Secretary of State, to comply with the requirements of the Human Rights Convention of 1950 ("ECHR") by respecting the appellant's Convention rights.
3. The Immigration Judge was clearly under a misapprehension as to the extent of the right of appeal in this case, despite the fact that both parties were represented and despite the fact that there was clearly a reference by one or both of the parties to the limitation in Section 88A to the relevant sub-paragraphs of Section 84(1) to which I have referred. This is highly unfortunate but my reference to the notes of evidence within the notes of hearing suggests that the matter was referred to at the hearing. Unfortunately, the Immigration Judge seems to have omitted to keep at the forefront of his mind the fact that there was no right of appeal from the actual decision to refuse entry clearance under paragraph 41 of the Immigration Rules, save on the limited basis indicated.
4. Therefore there is clearly a material error of law which requires the decision of the First-tier Tribunal to be set aside. The question that then arises is: whether out of the favourable decision in favour of the appellant I can spell out an analysis of Article 8 such as to allow me to allow the decision of the First-tier Tribunal to stand? In other words is it possible to read the decision of the First-tier Tribunal as a consideration of the issues raised in the grounds of appeal, including the allegation that the ECO had contravened the appellant's rights under the ECHR?
5. Regrettably recent case law tends to suggest that the starting position for any consideration of Article 8 is the requirements of the Rules. That would include a consideration of whether the rules themselves adequately address the need to facilitate family reunion in appropriate cases and whether there are insurmountable obstacles to family life continuing in its present form. I do not think that there is enough consideration of Article 8 or analysis for me to make that leap, and conclude that the appeal ought to be allowed under Article 8 notwithstanding the appellant had no right of appeal against the decision under the Immigration Rules. In any event I would struggle to see how in situations where a foreign national applies to

come to the UK for the purposes of a family visit it would constitute a breach of that person's Article 8 rights to refuse entry clearance, albeit I recognise that there is a duty on public authorities to facilitate family reunion wherever possible. I do not think there was anything like an adequate analysis of that situation here for me to substitute the Upper Tribunal's decision in a way that is favourable to the appellant, and it seems to me that if the appellant wants to come to the UK purely on the basis of Article 8 the appellant ought to make a fresh application.

6. Furthermore there is no cross-appeal in this case on the basis that the Immigration Judge's decision, and in particular his analysis of Article 8, was inadequate or unreasonable. In particular the appellant could have submitted a response under rule 24 of the Tribunal Procedure (**Upper Tribunal) Procedure Rules** 2008 indicating that the decision of the First-tier Tribunal ought to be upheld on the alternative basis that it constituted a proper analysis under Article 8. It seems that the Immigration Judge forgot about Article 8 altogether and went on to consider the requirements of the Rules as if that was a matter before him when in fact it was not.
7. It is an unfortunate set of circumstances and I have got some sympathy with the appellant, who, having achieved a favourable outcome to his appeal before the First-tier Tribunal, then faces an appeal on the basis that the Immigration Judge erred in law. However, I regret to say that, based on my experience of Article 8, I do not consider that sufficient evidence was presented before the First-tier Tribunal for the Immigration Judge to allow the appeal solely on that basis. The appellant did not have any right of appeal on any other basis that was raised in the grounds of appeal.

Decision

8. For those reasons I allow the Secretary of State's appeal on the basis that there was a material error of law by the First-tier Tribunal. I substitute the decision of this Tribunal which is that the appeal against the decision of the Entry Clearance Officer fails and hence the decision to refuse entry clearance in this case stands.

Signed

Date

Deputy Upper Tribunal Judge Hanbury