IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/16750/2013

THE IMMIGRATION ACTS

Heard at Birmingham
On 3rd July 2015

Decision & Reasons Promulgated
On 17th July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

MANGAT SINGH
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Mr T Muman, Counsel instructed by SKB Law

DECISION AND REASONS

Introduction and Background

1. The Entry Clearance Officer (ECO) appeals against a decision of Judge of the First-tier Tribunal Ferguson promulgated on 28th August 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the Claimant.

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3. The Claimant is a male Indian citizen born 1st October 1966 who on 2nd July 2013 applied for entry clearance to the United Kingdom as a visitor. He indicated that the purpose of his visit was to attend a wedding ceremony, as his niece, his sister's daughter, was due to marry in the United Kingdom. The Claimant indicated that he intended to travel to the United Kingdom on 1st August 2013, and return to India on 30th August 2013.

4. The application was refused on 25th July 2013. The ECO did not accept that the requirements of paragraph 41(i) and (ii) of the Immigration Rules which require an applicant to prove that they are genuinely seeking entry to the United Kingdom for a limited period and that they intend to leave the United Kingdom at the conclusion of the visit, were satisfied. This was because the ECO placed reliance upon paragraph 320(7A), contending that the Claimant had submitted a false document with his application. It was contended that a letter from Goel Sweet Shop was counterfeit.

5. The ECO contended that the Claimant had only a right of appeal limited to the grounds referred to in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

6. The Claimant appealed, contending, in summary, that the ECO's decision was contrary to law, not in accordance with the Immigration Rules, and the ECO had not taken into account the totality of evidence provided. It was also contended that the ECO should have exercised discretion differently.

7. It was denied that the Claimant had submitted a false document.

8. The appeal was heard by the First-tier Tribunal (the FtT) on 4th July 2014. The ECO had raised as a preliminary issue the validity of the appeal. The Presenting Officer, representing the ECO at the hearing, accepted that there was a valid appeal and the FtT considered the Immigration Rules, in particular paragraph 320(7A). The FtT concluded that the ECO had not proved that a false document had been submitted and therefore the appeal was allowed.

9. The ECO thereafter applied for permission to appeal to the Upper Tribunal. It was contended that the FtT had exceeded its jurisdiction because the Claimant had a limited right of appeal against refusal of entry clearance, and the only Grounds of Appeal that could be relied upon following the introduction of section 52 of the Crime and Courts Act 2013 on 25th June 2013, were the grounds set out at section 84(1)(b) and (c) of the 2002 Act which are set out below;

    (b) That the decision is unlawful by virtue of section 29 of the Equality Act 2010 (discrimination in the exercise of public functions etc.), so far as relating to race as defined by section 9(1) of that Act;

    (c) That the decision is unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention) as being incompatible with the Appellant's Convention rights.

10. It was contended that the FtT had not considered limited appeal rights, and because the Claimant had not appealed pursuant to section 84(1)(b) or (c) the FtT had exceeded its jurisdiction by allowing the appeal.

11. Reliance was placed upon Virk and Others [2013] EWCA Civ 652 in support of a submission that statutory jurisdiction cannot be conferred by waiver or agreement or the failure of the parties or the Tribunal to be alive to the point. It was submitted that the fact that the Presenting Officer accepted that there was a valid appeal, would not confer jurisdiction upon the Tribunal.

12. Permission to appeal was granted by Judge of the First-tier Tribunal Colyer on 6th October 2014. Following the grant of permission the Claimant did not lodge any response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

13. The Tribunal issued directions that there should be an oral hearing before the Upper Tribunal to ascertain whether or not the decision of the FtT disclosed a material error of law.

Submissions

14. Mr Smart relied upon the grounds contained within the application for permission to appeal and submitted that the FtT was under the misapprehension that the issue to be decided related to the Immigration Rules. I was asked to find that in paragraph 13 the FtT was clearly allowing the appeal with reference to paragraph 41 of the Immigration Rules.

15. Mr Smart pointed out that Article 8 was not mentioned or relied upon in the Grounds of Appeal to the FtT, and the skeleton argument dated 3rd July 2014, placed before the FtT, did not seek to amend the Grounds of Appeal. I was asked to note paragraph 2 of that skeleton argument which contended that the Claimant's case "falls squarely within the Immigration Appeal (Family Visitor) Regulation 2012. The suggestion otherwise is a misdirection by the ECM and should be struck out." Mr Smart submitted this was clearly wrong in law. The remainder of that skeleton argument involved an argument in relation to section 108 of the 2002 Act, which in the event did not take place before the FtT, as a document verification report was provided to the Claimant, and there was no need to consider a hearing in private pursuant to section 108.

16. Mr Smart argued that at no point had the FtT engaged with Article 8.

17. Mr Muman relied upon his skeleton argument which is undated but which had been prepared for the Upper Tribunal hearing, and which the Tribunal and Mr Smart had received shortly before the commencement of the hearing.

18. Mr Muman accepted that section 52 of the Crime and Courts Act 2013 came into effect on 25th June 2013, and therefore the application for entry clearance made by the Claimant was made after this date, and accepted that paragraph 2 of the skeleton argument placed before the FtT was incorrect.

19. Mr Muman argued that Article 8 had been raised in the grounds before the FtT, as there was a reference in the second Ground of Appeal to the decision made by the ECO being contrary to law.

20. Mr Muman argued that the Presenting Officer before the FtT had conceded that Article 8 was engaged and rightly acknowledged that the only issue before the FtT related to paragraph 320(7A) and consideration of the third of the five questions posed in Razgar [2004] UKHL 27. That question being;

    (3) If so, is such interference in accordance with the law?

21. Mr Muman argued that the FtT had not erred in law because the Presenting Officer had conceded that Article 8 was engaged, therefore the FtT correctly dealt with the only issue that was before it, which related to paragraph 320(7A). Mr Muman submitted that the judge had in fact found that the decision of the ECO was not in accordance with the law which meant that the decision remained outstanding before the ECO for a lawful decision to be made. Mr Muman submitted that the appeal had not been allowed under paragraph 41 of the Immigration Rules.

22. Mr Smart stated that it was not contended by the ECO that the FtT did not have jurisdiction, but that the FtT went beyond its jurisdiction and did not accept that there had been any concession by the Presenting Officer before the FtT that Article 8 was engaged.

23. Before oral submissions had commenced, I had indicated to both representatives that I was likely to reserve my decision, as the comprehensive skeleton argument prepared by Mr Muman had only reached me fifteen minutes prior to the commencement of the hearing. Having heard the submissions, I decided that it was appropriate to reserve my decision as to whether or not the FtT had materially erred in law.

24. I asked the representatives to let me have their views if I decided that a material error of law was disclosed, as to whether there would be the need for a further hearing.

25. Mr Muman's view was that there had been no challenge to the findings made by the FtT in relation to paragraph 320(7A) and those findings should be preserved, and the appeal should therefore be allowed without the need for a further hearing.

26. Mr Smart took a contrary view, contending that the Grounds of Appeal to the FtT had not raised Article 8 as a Ground of Appeal. Those grounds had not been amended and therefore the FtT had no jurisdiction to consider the appeal and the appeal should be dismissed for want of jurisdiction. At this point the hearing concluded. Later in the day the Tribunal received from Mr Muman a document headed 'Respondent note' timed at 11:57 hours on 3rd July 2015. A copy was provided to Mr Smart.

27. This note had been prepared after Mr Muman had left the Tribunal hearing and addressed the submissions made by Mr Smart that the FtT had not had jurisdiction to

consider the appeal. Mr Muman pointed out that Mr Smart had accepted in making his response to Mr Muman's submissions that the FtT did have jurisdiction to hear the appeal, therefore this indicated that the appeal before the FtT had already been accepted to have been a human rights appeal. Reliance was again placed on the second Ground of Appeal before the FtT, which referred to the ECO decision being contrary to law, and Mr Muman submitted that this meant not in accordance with section 6 of the Human Rights Act 1998. It was therefore contended that if the decision of the FtT is set aside, save for the preserved findings in relation to paragraph 320(7A), and the Upper Tribunal re-makes the decision, the Upper Tribunal must do so on the basis of the Presenting Officer's concession to the effect that Article 8 is engaged.

28. If the Upper Tribunal decided that the Claimant's human rights appeal as a whole required reconsideration, then there would be the need for evidence on the engagement of Article 8.

29. Mr Smart responded to the note explaining that his comment in relation to jurisdiction simply meant that the FtT would have jurisdiction if human rights had been raised as a Ground of Appeal. In this case human rights had not been raised and therefore there had been no valid appeal before the FtT and there was no need for a further hearing before the Upper Tribunal.

My Conclusions and Reasons

30. I have reflected carefully upon the submissions made by both parties as to whether the FtT erred in law. I have considered all the documents placed before the FtT, and the skeleton argument and 'Respondent note' submitted on behalf of the Claimant before the Upper Tribunal.

31. The FtT was clearly aware that validity had been put in issue by the ECO and this is noted in paragraph 2 of the FtT decision. My view is that the FtT materially erred in law for the following reasons.

32. The FtT was not assisted by the claim made on behalf of the Claimant, in the second paragraph of the skeleton argument which contended that the appeal fell squarely within the Immigration Appeal (Family Visitor) Regulations 2012. That submission was wrong in law, and this is now accepted on behalf of the Claimant.

33. It is clear that the Presenting Officer before the FtT accepted that there was a valid appeal. I do not find that this acceptance without more, confers jurisdiction upon the FtT. I have taken into account the principles outlined in Virk and Others. If the appeal was invalid, a concession by a Presenting Officer that the appeal is valid, does not confer jurisdiction upon the Tribunal.

34. I do not agree that the Presenting Officer accepted that Article 8 was engaged. There is no reference to Article 8 in the FtT decision. The FtT set out the reason why the Presenting Officer accepted there was a valid appeal in paragraph 5 which is set out below;

> "5. The Presenting Officer accepted that there was a valid appeal since the Appellant had applied to visit his sister prior to the reduction in appeal rights for family visitors on July 2013. It was also accepted by both parties that the outcome of the appeal turned on whether or not the document was a forgery and so there was no need to hear any evidence from the Sponsor."

35. The above makes it clear the Presenting Officer believed the application for entry clearance had been made before the introduction of limited rights of appeal. This was wrong. Section 52 of the Crime and Courts Act 2013 came into effect on 25th June 2013. This meant that any application for entry clearance made on or after 25th June 2013 attracted only a limited right of appeal, and it is common ground that those appeal rights are set out in section 84(1)(b) and (c) of the 2002 Act.

36. If racial discrimination or human rights are not raised as Grounds of Appeal, then the appeal which is entered against refusal of entry clearance as a visitor is invalid and the Tribunal has no jurisdiction to consider that appeal. In this case there is no need to consider the issue of racial discrimination, as it is accepted on behalf of the Claimant, that no such claim was made in the Grounds of Appeal.

37. The correct approach is set out in Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC), the head note of which I set out below;

> "1. The first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether Article 8 of the ECHR is engaged at all. If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the rules and should not do so. If Article 8 is engaged, the Tribunal may need to look at the extent to which the Claimant is said to have failed to meet the requirements of the rule because that may inform the proportionality balancing exercise that must follow. Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) is not authority for any contrary proposition.
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> 2. As compliance with para 41 of HC 395 is not a Ground of Appeal to be decided by the Tribunal, any findings concerning that will carry little weight, especially if based upon arguments advanced only by the Appellant. If the Appellant were to make a fresh application for entry clearance the ECO will, if requested to do so, have regard to the assessment carried out by the judge but will not be bound by those findings to treat the Appellant as a person who, at least at the date of the appeal hearing, met the requirements of paragraph 41."

38. Adjei had not been decided when the FtT considered the appeal that had been entered by the Claimant, but does set out the principles and procedure that should always have been applied. The FtT did not consider as a first question, whether Article 8 was engaged at all. I conclude that there has been no consideration of Article 8 by the FtT. My view is that the FtT was persuaded the appeal was valid because the 2012 Family Visitor Regulations applied, on the basis that the application for entry clearance was made before 25th June 2013. This was an error, it is now accepted the application for entry clearance was made after introduction of the limited appeal rights. The FtT does in fact refer to the application having been made on 2nd July 2013, in paragraph 1 of the decision. The Visa Application Form that was

before the FtT was dated 4th July 2013, and indicated that the application for entry clearance had been submitted online on 2nd July 2013.

39. I find that the FtT did not consider whether Article 8 was engaged and proceeded on a mistaken basis that there was a full right of appeal. Therefore the decision is flawed and I must conclude that the FtT materially erred in law. The decision is set aside in its entirety.

40. The decision therefore needs to be re-made. It was not suggested by either representative that the decision should be remitted back to the FtT, and having considered paragraph 7 of the Senior President's Practice statement I do not find that such a course of action would be appropriate, and I conclude that the decision should be re-made by the Upper Tribunal.

41. I have considered the conflicting views expressed by both representatives. I have decided that there is no need for a further hearing.

42. I do not accept any concession has been made on behalf of the ECO that Article 8 is engaged in this appeal.

43. I do not accept that Article 8 was raised as a Ground of Appeal before the FtT. No application was made to amend the Grounds of Appeal to include Article 8.

44. I do not accept the submission that making reference in the second paragraph of the Grounds of Appeal to the FtT in which it is contended that the decision is contrary to law, amounts to raising Article 8 as a Ground of Appeal. Section 84(1)(c) of the 2002 Act has been set out earlier in this decision. There is no reference in the Grounds of Appeal either expressly or implicitly to Article 8 or any reference to human rights. Reference to the decision being contrary to law, is in my view a reference to section 84(1)(e) which is set out below;

    (e) that the decision is otherwise not in accordance with the law;

45. This is a separate and distinct Ground of Appeal, from section 84(1)(c) which makes reference to this decision being unlawful under section 6 of the Human Rights Act 1998.

46. The issue that I have to consider is whether Article 8 was engaged. I conclude that as it was not raised as a Ground of Appeal the answer to that question must be that it is not. Therefore I conclude that the Tribunal has no jurisdiction to consider this appeal.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeal entered by the Claimant is invalid.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date 8th July 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The Claimant's appeal is invalid. There is no fee award.

Signed Date 8th July 2015

Deputy Upper Tribunal Judge M A Hall