



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/17801/2013**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 5th August 2015**

**Promulgated
2015**

**Decision
On 14th August**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**SSR
(Anonymity Direction Made)**

Appellant

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr C Lewis (counsel) instructed by The Immigration Law Practice solicitors

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, preserving the anonymity order made at first instance.
2. The Secretary of State for the Home Department brings this appeal, but in order to avoid confusion, the parties are referred to as they were in the First

Tier Tribunal. This is an appeal by the Secretary of State against the decision of First Tier Tribunal Judge R Cooper, promulgated on 29 April 2015 which dismissed the appellant's appeal on human rights grounds but allowed the appellant's appeal under the Immigration Rules. The determination promulgated on 29 April 2015 also dealt with the case of the appellant's brother whose appeal was allowed under the Immigration Rules and dismissed on human rights grounds. There is no appeal against the decision in relation to the appellant's brother.

Background

3 The appellant is an Indian citizen, born on 20 December 1994. On 14 August 2013, the respondent refused the appellant's application for entry clearance to enter the UK as the dependent child of her father and sponsor who became a British citizen in 2003.

The Judge's Decision

4 The appellant appealed to the First Tier Tribunal. First Tier Tribunal Judge R Cooper ("the judge") dismissed the appellant's appeal on Article 8 ECHR grounds but allowed the appeal under the Immigration Rules, finding that the appellant submitted her application before her 18th birthday and considering the appellant's appeal under Paragraph 297 of the Immigration Rules.

5 Grounds of appeal were lodged by the respondent and on 18 June 2015, First Tier Tribunal Judge Grimmett gave permission to appeal stating *inter alia*:

"2 *The grounds assert that the judge erred in finding that the appeal should be considered under Paragraph 295 and not Appendix FM of HC395 as the appellant's application was not accompanied by a fee and a fee was not paid until some four months later, by which time the appellant was no longer a minor. This point is arguable as the judge's reason for this conclusion is not clear.*"

The Hearing

6 Mr Avery for the respondent submitted that the case turned on one narrow technical point. The appellant's 18th birthday was on 20 December 2012. An online application was submitted on 19 December 2012 but the lodging fee was not paid until around April 2013. The respondent relies on Paragraph 30 of the Immigration Rules which provides that an application for entry clearance is not made until any fee required has been paid. Mr Avery therefore argued that the application was not made until April 2013, approximately four months after the appellant's 18th birthday. As the appellant had attained majority by the time the application was made, Paragraph 297 of the Immigration Rules has no relevance.

7 For the appellant, Mr Lewis submitted that there is no material error of law contained in the determination promulgated on 29 April 2015. He referred me to the rehearsal of evidence at [36] to [39] of the decision. He admitted that

the judge had correctly directed himself in law between [41] and [44] of the decision and that this case is analogous to the case of Basnet, that what was important was the attempt to tender a fee rather than the respondent's receipt of a fee.

Analysis

8 In R (on the application of Da'Costa) v Secretary of State for the Home Department [2010] EWHC 2259 (Admin) Judge Pelling QC said that the Secretary of State had no discretion in regards to an application that did not comply with the requirements relating to fees under paragraph 21 of the Immigration and Nationality (Fees) Regulations 2007. Furthermore, the Immigration Directorate Instructions drew a clear distinction between an application which was invalid because of non-compliance with a requirement imposed by the Immigration Rules and invalidity arising from non-payment of fees which was subject to the 2007 Regulations. An in-time application not accompanied by a fee could only be treated as valid if payment of the fee was waived. If an application was rejected, as in the instant case, then it could only be valid if it was resubmitted with the fee.

9. In Kaur (Entry Clearance - date of application) [2013] UKUT 00381 (IAC) it was held that (i) The date on which an application for entry clearance is made is not effectively established by paragraph 30 or any other provisions of the Immigration Rules, and has therefore to be established by reference to statute and secondary legislation; (ii) An application for entry clearance that does not comply with the requirement in regulation 37 of the Immigration and Nationality (Fees) Regulations 2011 (SI 2011/1055) to be accompanied by payment of a fee is a nullity - it is not an application for the purpose of the immigration rules or any statutory provisions; and (iii) An application for entry clearance is made on the date on which payment of the relevant fee is made. If the application is made online, and payment of the relevant fee is also made online, contemporaneously with submission of the online application, the date of application is the date of submission. If payment of the relevant fee is not made until the printed application form is submitted, the date of application is the date on which those are handed over.

10 In Basnet (validity of application - respondent) [2012] UKUT 00113(IAC) the Tribunal held that (i) if the respondent asserts that an application (not an appeal) was not accompanied by a fee, and so was not valid, the respondent has the onus of proof; (ii) The respondent's system of processing payments with postal applications risks falling into procedural unfairness, unless other measures are adopted; (iii) When notices of appeal raise issues about payment of the fee and, consequently, the validity of the application and the appeal, Duty Judges of the First-tier Tribunal should issue directions to the respondent to provide information to determine whether an application was accompanied by the fee.

11 At [47] the judge finds that the original application was received by the respondent on the day before the appellant's 18th birthday but that the fee was not finally paid until April 2013. The judge does not properly engage with the

four month gap between the day before the appellant's 18th birthday and the date of payment of the fee, but does find that the delay is the shared responsibility of both the sponsor and the respondent. The respondent may not have acted flawlessly in this case but the judge's finding is that the sponsor shares responsibility for the delay.

12 At [47] the judge finds "*...that a valid application was eventually made...*" Those findings cannot support his finding that the application was made whilst the appellant was in minority. In any event, the case of Kaur indicates that the judge's logic was flawed.

Conclusion

13. I therefore find that the decision promulgated on 29 April 2015 is tainted by a material error of law and must be set aside.

14 Because the appellant was in majority at the date the application was made (April 2013) the appellant's case cannot be considered under Paragraph 297 of the Immigration Rules and could only be considered under Appendix FM of the Immigration Rules.

16 The judge dismissed the appellant's case on human rights grounds. There is no challenge to that finding. The error of law contained within the decision promulgated on 29 April 2015 means that the appellant cannot succeed under the Immigration Rules.

Decision

17 The decision promulgated on 29 April 2015 contains a material error of law and must be set aside.

18 I remake the decision and substitute the following decision.

19 The appellant's appeal is dismissed under the Immigration Rules.

Signed

Date 7 August 2015

Deputy Upper Tribunal Judge Doyle