



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/18382/2013

THE IMMIGRATION ACTS

Heard at Field House
On 31 July 2015

Decision & Reasons Promulgated
On 12 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER
DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MASTER S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER (ISLAMABAD)

Respondent

Representation:

For the Appellant: Ms V Easty, counsel instructed by Brighton Housing Trust
For the Respondent: Mr P Naith, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Dineen (hereinafter referred to as the FTTJ) dismissing an appeal against a decision to refuse the appellant leave to enter the United Kingdom.

Background

2. On 24 April 2013, the appellant applied, under the respondent's family reunion policy, to be reunited with his brother, H (hereinafter referred to as the sponsor) who was recognised as a refugee in the United Kingdom. The appellant's younger brother, F also made an application at the same time, but was subsequently kidnapped and killed. At the time of the application, the appellant was residing in Panian refugee camp in Haripur, Pakistan with his brother F and their mother. The appellant's mother, aged 53, was injured in an attack, which took place in Pakistan in 2011 and cannot walk. The appellant faced regular harassment and discrimination in Pakistan owing to his Afghan nationality and F had been kidnapped before, in March 2012. The application stressed that the appellant was particularly vulnerable in that he was a child living in a female-led household.
3. On 26 August 2013, the ECO refused the appellant's application and that of his brother, with reference to paragraph 352D(i) of the Immigration Rules. The ECO did not accept that the appellant was related as claimed to the sponsor owing to the recent issuing of the appellant's documents. Reference was made to the "compassionate reasons for the application." Account was said to have been taken of reports regarding the sponsor, as well as that the appellant's mother was not applying or travelling with the appellant. It was also said that no evidence or information had been provided so as to demonstrate that the appellant's individual upbringing and circumstances merited exceptional consideration beyond the provisions of the Rules.
4. The appellant's grounds of appeal argued that the decision of the ECO was not in accordance with the Rules, the law and that a discretion conferred by the Immigration Rules was not exercised. It was further argued that the decision violated Article 8 ECHR and that the decision did not consider the best interests of the appellant. An indication was given that DNA evidence could be arranged in order to provide proof of the relationship between the appellant and sponsor.
5. An Entry Clearance Manager (ECM) did not review the decision to refuse entry owing to a shortage of staff.
6. Prior to the hearing before the FTTJ, the appeal of the appellant's brother F was withdrawn owing to reports of his death at the hands of his kidnappers. At the hearing before the FTTJ on 13 October 2014, the sponsor gave evidence and reliance was placed on an extensive quantity of subjective material and country evidence. In dismissing the appeal, the FTTJ accepted the account provided by the appellant and sponsor as credible; that it was common ground that the Rules were not met; that the respondent exercised the discretion and thereby complied with the policy; that section 55 of the BCIA 2009 had no application to children who were abroad and that there would be no interference with the existing family life between the appellant and sponsor.

Error of law

7. The grounds of application argue that the FTTJ erred in failing to remit the appeal to the respondent for a lawful decision, having identified compassionate reasons. Alternatively, it was said that the FTTJ failed to consider whether this was a case where he could apply the policy directly. It was also argued in the grounds that the FTTJ failed to consider the appellant's emotional and financial dependency on the sponsor in concluding that there was no family life and that the FTTJ failed to consider the relevance of the respondent's policy in relation to his decision on Article 8.

8. Permission to appeal was granted on all grounds.
9. The Secretary of State's response dated 3 June 2015 opposed the appeal on the basis that the FTTJ directed himself appropriately. It was said that there was no failure by the respondent to consider the exercise of discretion. With regard to Article 8, it was argued that it was open to the FTTJ to conclude that there was no family life with the sponsor.

The hearing

10. It was common ground that the appellant could not meet the requirements of paragraph 352D(i) of the Rules and that a failure by the respondent to consider the appellant's circumstances under the relevant policy would render the decision not in accordance with the law.
11. After some preliminary discussion, Ms Easty advised us of the process to be followed by the respondent under the Entry Clearance Guidance General Instructions. She referred to extracts of that Guidance which had been included in her skeleton argument which was before the FTTJ and which she subsequently supplied to the panel. Ms Easty informed us that she had not placed much emphasis on this aspect of the policy at the hearing before the FTTJ and this issue did not form part of the grounds for permission to appeal.
12. Ms Easty applied to amend her grounds of appeal to include the following; *"the Tribunal erred in law in finding that the ECM had properly applied her family reunion policy (at paragraph 37 of the decision) as a) the ECO failed to properly consider whether there were any compassionate circumstances in the present case and failed to refer the application to NCC5; and b) the ECO did not have the power to consider the matter once compassionate circumstances had been identified."*
13. Mr Naith advised us that he did not object to the grounds being amended. We agreed to permit the amendment in view of the fact that the appeal concerns a minor and the FTTJ's findings as to his circumstances.
14. In essence, Ms Easty's submission was that the ECO ought to have passed the appellant's case to the Home Office for a decision once compassionate circumstances were identified. She added that the ECO's decision did not clearly indicate whether or not it was accepted that there were compassionate circumstances.
15. Mr Naith agreed that the issues were whether the policy was considered at all or whether it should have been referred on. He confirmed that the ECM did not review the matter owing to a lack of resources. He was of the view that it could be said that there were enough grounds for the ECO to refer the case up. Having discussed it with Ms Easty prior to the hearing, he advised us that he was happy for the matter to be sent back to the respondent for reconsideration.
16. At the end of the hearing we indicated that we intended to allow the appeal with a direction that the appellant's case be placed before the appropriate person under the terms of the Guidance. We set out our reasons below.
17. We are guided by the decision in AG and others (Policies; executive discretions; Tribunal powers) Kosovo [2007] UKAIT 00082 and paragraph 3 of the headnote in particular;

"(3) If the claimant fails to establish that his human rights compel the remedy he seeks, but is able to show that there was at the date of the decision a policy in force that governed his case but was not taken into account, he

may win an appeal on the ground that the decision, having been made not in accordance with published policy, was 'otherwise not in accordance with the law' within the meaning of s84(1)(e)."

18. The relevant part of the respondent's family re-union policy states as follows:

"People who flee to the UK to seek asylum can include their dependants in their application for asylum, if those dependants have travelled with them to the UK. However, we recognise that families can become fragmented in cases of asylum, depending on the speed and manner in which the person has fled.

If you are a recognised refugee or have been given humanitarian protection in the UK, our family reunion programme allows you to be reunited with your family members (that is, those who were part of your family unit before you fled).

Under the Immigration Rules, only your pre-existing family (husband, wife, civil partner or unmarried/same-sex partner, plus any children under 18 who formed part of the family unit when you fled to seek asylum) can apply to enter the UK under the family reunion programme. However, we may allow family reunion for other family members if there are compassionate reasons why their case should be considered outside the Immigration Rules. "

19. In terms of the process to be followed by the ECO for applicants who are neither partners nor the minor children of the sponsor, The Entry Clearance Guidance General Instructions states as follows:

"If you consider there are compelling compassionate circumstances involved and the appellants do not meet the requirements above, you should refer the application to NCC5 in the Home Office for a decision. You should say why the application falls outside the normal criteria and explain clearly the compassionate circumstances to be taken into account."

20. The ECO's decision refers to an indication of "compassionate reasons" for the application but at the same time concludes, that there was no evidence or information provided to demonstrate that the appellant's "individual upbringing and circumstances to date merit exceptional consideration now beyond the requirement and provisions of the Immigration Rules."
21. The reasoning of the ECO is far from clear. We find that the phrasing of the decision in question indicates that the ECO, upon noting compassionate circumstances, went on to decide the matter without reference to NCC5 in the Home Office as should be the case under the Guidance. Alternatively, the ECO has decided that there are no compassionate circumstances, which given the detailed representations and substantial supporting evidence sent with the application, is somewhat concerning.
22. In this case there was also no review carried out by the ECM, a process which might have thrown some light on the procedure followed by the ECO in coming to a decision. We are therefore not satisfied that the ECO followed the correct process or that the decision was reached in accordance with the published policy. It follows that we conclude that the FTTJ materially erred in finding that the respondent exercised discretion and complied with the policy.
23. The FTTJ accepted the account put forward on the appellant's behalf by the sponsor whom he found to be a "credible and truthful witness" and owing to the consistency between the sponsor's account and the substantial supporting evidence. There is no reason to disturb those findings.
24. We would wish to emphasise our concern that an application concerning a minor, whom the FTTJ subsequently found, at paragraph 44 of the decision, to be living in "harrowing" circumstances and which was clearly made under the policy from the outset, was not reviewed by an ECM after the appellant lodged his appeal.

25. We accordingly allow the appellant's appeal.

Decision

- (1) We are satisfied that the FTTJ erred in law in dismissing the appeal on the basis that the respondent had complied with the family reunion policy.
- (2) The Entry Clearance Officer has yet to exercise discretion under the family reunion policy. We therefore allow the appeal to the Upper Tribunal to the limited extent that;
 - (a) the decision of the judge to dismiss the appeal is set aside.
 - (b) We substitute a fresh decision to allow the appellant's appeal against the refusal of leave to enter to the limited extent that it remains outstanding before the Entry Clearance Officer for the matter to be referred to the NCC5 in the Home Office for consideration of the discretion to be exercised under the family reunion policy.
- (3) In reaching that conclusion we have had regard to Mr Naith's view that there were sufficient grounds for the appellant's case to have been referred to the Home Office and we conclude that it would be wrong to confidently anticipate that the only possible outcome will be a refusal.

An anonymity direction was made by the FTTJ and as this case concerns a minor, we consider it appropriate to do likewise;

"Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. "

Signed

Date: 1 August 2015

Deputy Upper Tribunal Judge Kamara