



Upper Tribunal
Immigration and Asylum Chamber

Appeal Number: OA/06589/2013

THE IMMIGRATION ACTS

Heard at Field House
On 7 February 2014

Promulgated on:
On 11 February 2014

Before

Upper Tribunal Judge Kekić

Between

**Nariema Mariesa Ramnarine
(anonymity order not made)**

Appellant

and

Entry Clearance Officer

Respondent

Determination and Reasons

Representation

For the Appellant: Ms S Kansal, Counsel
For the Respondent: Ms A Everett, Home Office Presenting Officer

Background

1. This appeal comes before me following the grant of permission to the appellant by Designated First-tier Tribunal Judge Baird in respect of the determination of First-tier Tribunal Judge Auja who dismissed the appeal by way of a determination dated 29 October 2013. An oral hearing had not been

sought by the appellant and no written submissions or further evidence was adduced in support of the appeal.

2. The appellant is a citizen of Guyana born on 6 August 1992. She seeks entry clearance to join her mother, the sponsor, for settlement. The application was refused under paragraph 301(ii) of HC 395 on the basis that the respondent was not satisfied that the appellant was under 18 years of age. It is the respondent's case that the appellant made her application on the wrong form and paid the wrong fee (i.e. for her own circumstances). The judge agreed and concluded that the Entry Clearance Officer had been entitled to refuse her on the basis that she was not a minor child as the form required.
3. Permission was granted on the basis that there may have been unfairness by the respondent in not alerting the appellant to the fact that she had applied on the wrong form and providing her with an opportunity to rectify her error.

Appeal hearing

4. At the hearing I heard submissions from the parties. Ms Kansal submitted that the decision of the respondent was unfair and unlawful. She submitted that the form completed by the sponsor for the appellant was for a child or dependent relative. There was nothing on the face of it to suggest that the form was the wrong one and that if this was alleged by the respondent, the burden was on her to prove it. The appellant's date of birth was entered on the form and then the fee was requested which was duly paid. It was unfair for the ECO to then proceed to consider the application knowing that it had been made on the wrong form and with the wrong fee. What the ECO should have done was to invite the appellant to complete the correct form and/or pay the appropriate fee. She relied on Naved (Student - fairness - notice of points) Pakistan [2012] UKUT 14 (IAC) and Basnet (validity of application - respondent) [2012] UKUT 00113 (IAC). She submitted that common law principles of fairness should have been applied and the ECO should have asked for the shortfall in the fee. The appellant had been disadvantaged by a poorly designed website, it was not apparent from the form that it was incorrect and measures should be put in place to prevent the wrong fees being paid.
5. Alternatively, Ms Kansal relied on Rule 34 submitting that the ECO should have treated the application as invalid because the wrong fee had been paid and returned the fee to the appellant. That way she could have re-submitted the application correctly and paid the right fee.
6. Ms Kansal submitted that the appeal should be remitted to the ECO for consideration under paragraph 317.

7. Ms Everett submitted that the application was not invalid as it was submitted on a form and a fee was paid. The ECO was not obliged to rectify the error and he considered the application as he was entitled to do. The judge did not err in concurring with that view.
8. In response Ms Kansal submitted that the ECO knew the application had been for entry clearance by an adult dependant and that the correct fee and form had not been submitted.
9. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Conclusions

10. I have taken into account the submissions made and the determination of the First-tier Tribunal.
11. There is some confusion in the evidence before me as to how the visa application was made. The appellant maintains that her mother completed the application on line but the visa application form whilst confirming online payment states that the submission method was in person (D5). The application at D1 also confirms that the submission method was "in person", bears the appellant's signature and a date of 19 November 2012 (D4) and an endorsement of the post with the same date (D1). Further, Appendix 1 of the visa application form is completed by hand. I am therefore not clear as to whether the application was made on line or whether the appellant made it in person.
12. It is difficult to determine what form the appellant should have completed without any of the accompanying guidance as that is where the information about the relevance of the form to the applicant's circumstances would be found. Although the ECO maintains that the form completed by the appellant is incorrect, there is nothing on the face of it to suggest that it is. The form is entitled Child or other Dependant of Settled Person. There is nothing to suggest that the dependant must be a minor and indeed the final page of the form requires an applicant to complete one of five appendices; the first pertaining to applicants who want to come to the UK as adult dependent relatives. It is difficult to understand why this should appear on a form which is, according to the ECO, applicable to under 18s only.
13. I have also considered the submissions on validity. Paragraph A34 does not apply to the appellant as she is not seeking leave to remain in the UK. However, I note that paragraph 34C requires an ECO to reject as invalid an application that is not made on the specified form or accompanied by the prescribed fee.

14. I therefore conclude that the ECO should have done one of two things. Either he should have rejected the application as invalid and returned the fee so that the appellant could remake it correctly or he should have considered it substantively under paragraph 317 there being no obvious reason why the form was the wrong one. I do not agree with Ms Kansal's submissions on the unfairness point as if the ECO had rejected the application as invalid, then the appellant would have had the opportunity to remake her application correctly and there would have been no unfairness.
15. It follows that the judge should have found that the ECO acted unlawfully. Which route the ECO chooses to follow from the options outlined above, is up to him.

Decision

16. The First-tier Tribunal made an error of law. The decision is set aside. I now re-make it and allow the appeal to the extent that it is not in accordance with the law. The appeal is remitted to the ECO to make a lawful decision.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

7 February 2014