



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/44943/2006

THE IMMIGRATION ACTS

Heard at Field House
On 20 May 2014

Determination Promulgated
On 07 August 2014

Before
THE HON. LORD BANNATYNE
UPPER TRIBUNAL JUDGE LATTER

Between

ENTRY CLEARANCE OFFICER ISLAMABAD

Appellant

And

MUHAMMAD NADEEM SIDDIQI

Respondent

Representation:

For the Appellant: Ms A Holmes, Presenting Officer
For the Respondent: No appearance

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer, Islamabad against a decision of the Asylum and Immigration Tribunal ("AIT") issued on 04 June 2007 allowing the claimant's appeal against the decision made on 15 October 2006 refusing to grant him entry clearance as a visitor. In this determination we will refer to the parties as they were before the AIT, the entry clearance officer as the respondent and the claimant as the appellant.

2. There has been a most unfortunate delay in this appeal being relisted for hearing. The application by the appellant for a visit visa was refused on 15 October 2006. His appeal against that decision was allowed on 04 June 2007 but the respondent applied for and was granted an order for reconsideration notified to the parties on 25 June 2007. The appeal was listed for hearing on 10 August 2007 but adjourned. The file has been inactive ever since, neither party making any enquiry about a fresh hearing date.
3. The file came to light again in March 2014 and on 1 May 2014 a notice of hearing was issued for 20 May 2014. As the appellant's last notified address was in Lahore, Pakistan this was not adequate notice and we have deferred making our decision until 56 days has expired from the date the notice was issued. No response has been received from the appellant and we now proceed to reconsider his matter which proceeds by virtue of transitional provisions as an appeal to the Upper Tribunal.

Background

4. The appellant is a citizen of Pakistan born on 15 October 1968, who sought entry to the UK as a visitor to attend a Digital Print World Exhibition in London between 17 and 19 October 2006. His application was refused as the respondent was not satisfied that he had produced satisfactory evidence that he had legitimate business interests or contacts that required his presence in the UK leading him to doubt whether the circumstances of the trip were as claimed. The appellant had stated that he was married with three children and earned Rs 125000 a month (£1100) but had £4000 available to spend on the trip to the UK. The respondent did not consider this expenditure to be commensurate with his economic circumstances. The appellant had failed to submit his personal bank statements and had only submitted company statements. The respondent was therefore not satisfied that he had produced satisfactory evidence of his personal and financial circumstances in Pakistan. For these reasons he was not satisfied that the appellant was genuinely seeking entry as a visitor for a limited period or that he intended to leave the UK at the end of his proposed stay.
5. The appellant filed a notice of appeal against this decision, saying that he was self employed, he owned his own printing business in Lahore and his assets included a house valued at Rs 5 million. He said he had been invited to a conference by the International Council of Graphic Design Associations, an organisation based in Montreal. He had money set aside for the visit and had no intention of staying in the UK in the light of his family responsibilities in Pakistan.
6. The decision was reviewed by a senior officer and was confirmed. The appellant's appeal was not a full right of appeal but was limited to the grounds set out in s.84 (1) (b) and (c) of the Nationality, Immigration and Asylum Act 2002, namely that the decision was unlawful by virtue of s.19B of the Race Relations Act 1976 or unlawful

under s.6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

The Judge's Findings

7. The judge noted that appellant only had a limited right of appeal and said in [8] of his decision that the only relevant legislation on which he could rely was s.6 of the Human Rights Act 1998 namely that a public authority should not act contrary to the ECHR and that the only possible article relevant to the application was article 6, the right to a fair and public hearing.
8. The judge approached this issue as follows:

“11. The first question to be asked is whether there is evidence to establish if the appellant's appeal does in fact engage the European Convention of Human Rights. This has to depend on whether the respondent can show that he or she has carefully considered and evaluated all the documents submitted by the appellant in support of his application. Only then, can the decision said to be “fair”. I will therefore review the evidence and come to my conclusion on that matter, before coming to any conclusion on whether the appeal should be allowed or dismissed on its merits, if there are grounds to invoke the 1998 Act and the accompanying ECHR.”
9. The judge reviewed the documentary evidence which had been submitted in support of the application and in [15] said that he was perfectly satisfied that there was satisfactory evidence of legitimate business interests in that his bank clearly confirmed that the appellant was the sole proprietor of his business and the respondent should have accepted that the appellant had full power over that bank account. The business was a firm, not a company and was therefore not a separate legal identity. The judge said that this was a very important fact. He then said at [16] :

“All this shows is that the respondent has not fully understood and comprehended the documents in support of the application. Given that the decision was reviewed, albeit only on the grounds of appeal and not on the documents submitted with the original application, I find this to be very unfortunate, if not unprofessional. The appellant has been denied an opportunity to advance his business by attending the exhibition in London.”
10. The Judge went on to conclude that article 6 of the ECHR applied and he was satisfied that the burden of proof had been discharged. In these circumstances he held that all the requirements of para 41 of HC 395 were met and the decision was not in accordance with the Immigration Rules and Human Rights Act legislation and he therefore allowed the appeal.

Submissions

11. After the order for reconsideration further representations were received from the appellant on 20 July 2007. He asked for the judge's decision to be sustained. He said that he had obviously been deprived of the chance to grow and enhance his business by the refusal of entry clearance and in consequence his trade and business had suffered. There were a number of events he could not attend due to this refusal and he referred to future events and conferences which he had hoped to attend. Ms Holmes submitted that the judge's decision was plainly wrong and an appeal on human rights grounds could not simply be used as a vehicle for a full appeal on the merits.

The Error of Law

12. We must consider whether the judge erred in law such that the decision should be set aside. When basing his decision on article 6, the judge failed to take into account the fact that ECtHR has held in Maaouia v France 33 EHRR 42 that article 6 has no application to "decisions regarding the entry, stay or deportation of aliens as these do not concern civil rights or a criminal charge". There was, therefore, no power to review the merits of the decision under article 6. The fact that this article does not apply does not of course mean that the respondent is not bound by the common law duty of fairness in the decision making process: see Thakur (PBS decision: common law fairness) Bangladesh [2011] UKUT 151 but in any event there was no proper basis on which it could be said that the respondent did not observe that obligation. The respondent reached a decision falling within the range of decisions properly open to him on the available evidence. The judge came to a different view of the evidence but there was no lawful or rational basis on which he could find that the decision was in breach of the appellant's human rights.
13. In Patel and Others v Secretary of State [2013] UKSC 72, Lord Carnworth in the context of an appeal by a student against refusal of further leave to remain said that it was important to remember that article 8 was not a general dispensing power [57]. To all intents and purposes the judge was seeking to use article 6 to suspend or dispense with statutory provisions. In primary legislation Parliament has set out the grounds of appeal available to an appellant in a visit appeal and it was not open to the judge to use human rights grounds as a cloak for a merits appeal.
14. For these reasons we are satisfied that the judge erred in law in a way material to the outcome of the appeal. We set aside his decision. For the reasons we have already given, the appellant is not able to show that the respondent's decision was unlawful under s.6 of the Human Rights Act 1998 and the appeal should have been dismissed.

Decision

15. The appeal by the respondent is allowed. The decision of the AIT is set aside and replaced by a decision dismissing the appeal by the appellant against the refusal of entry clearance as a visitor.

Signed

Date 25 July 2014

Upper Tribunal Judge Latter