



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/00927/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke-on-Trent
On 5 May 2016**

**Determination Promulgated
On 16 May 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

And

**MR SHUJAH JAVAID
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr Moksud, Legal representative

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Entry Clearance Officer ("ECO"). For ease of reference, I refer below to the parties as they were in the First-Tier

Tribunal albeit that the ECO is technically the Appellant in this particular appeal.

2. The ECO appeals against a decision of First-Tier Tribunal Judge M Davies promulgated on 11 August 2015 (“the Decision”) allowing the Appellant’s appeal against the ECO’s decision dated 27 November 2014 refusing the Appellant entry clearance as the spouse of a British citizen. The ECO’s decision was upheld on administrative review by the Entry Clearance Manager (“ECM”) following the lodging of the appeal by a decision dated 11 March 2015. The ECM upheld the ECO’s decision under paragraph 320(11) of the Rules.
3. By the Decision, the Appellant’s appeal was allowed on the basis that the ECO’s decision was not in accordance with the law for failure by the ECO to follow the correct procedure when refusing an application under rule 320(11) of the Immigration Rules (“the Rules”) namely to have the decision reviewed by an ECM. For that reason, the Judge allowed the appeal and required the ECO to re-take the decision in accordance with the procedure required by the ECO guidance.
4. Permission was granted by Upper Tribunal Judge Kebede on 4 January 2016 on the basis that it was unclear why the Judge concluded that the ECO had failed to obtain the necessary authorisation of the ECM. This matter comes before me to decide whether the Decision contains an error of law and if so to re-make the Decision or remit the appeal to the First-Tier Tribunal for re-hearing.

Grounds and submissions

5. It was common ground that the guidance given to ECOs in relation to refusals based on rule 320(11) requires that the decision be reviewed by an ECM prior to issue.
6. The ECO appeals the Decision on the basis that it was not reasonably open to the Judge to decide the appeal on this basis. Mr McVeety submitted, firstly, that the Judge had found that the ECO had not followed the correct procedure based on an allegation which was completely unsupported by evidence. He should at least have required the Appellant to provide some evidence that the correct procedure had not been followed. He also submitted that the allegation was based on a misunderstanding of entry clearance procedures. It appears to have been assumed by the Appellant and the Judge that, because there was a decision of the ECM on 11 March 2015 after the decision to refuse that this in some way pointed to a failure of review prior to the decision being made and issued. Mr McVeety pointed out that the decision of 11 March 2015 was part of the usual review procedure followed on appeals in entry clearance cases.
7. Mr McVeety also showed me notes from the ECO system which disclose that the ECO’s decision was in fact reviewed by an ECM prior to issue. He accepted that this evidence was not before the First-tier Tribunal at

the date of Decision and he did not seek to rely on it as evidence. He relied on it only to the extent of supporting the Respondent's position that there was no evidence that the ECO had not followed the correct procedure.

8. Mr Moksud, who also appeared before the First-tier Tribunal, accepted that he could not point to any evidence that the ECO had not followed the correct procedure. There is nothing on the face of the ECO decision which shows that it was reviewed by the ECM but equally there is nothing to show that it was not.
9. The position taken by the Appellant in the rule 24 reply is that the Respondent's legal representative did not produce any evidence at the hearing to show that the decision was reviewed and that, if time were needed to establish this, an adjournment could have been sought. It was said that if the decision had been reviewed then that evidence could have been included in the Respondent's bundle.
10. I pointed out to Mr Moksud that there was no challenge to the decision on this issue in the Appellant's grounds of appeal and there was no reason why the Respondent would be on notice that this was challenged or that evidence would be required. He accepted this to be the case. He also appeared to suggest at one point that the issue was raised by the Judge and not by him.
11. I also asked Mr Moksud why, even if it were the case that there was no ECM review prior to the ECO's decision, that defect could not be cured by the subsequent review which took place after the lodging of the appeal. The Judge relied on the case of Gurpreet Singh v ECO, New Delhi (OA/04089/2011) ("Singh") to support the proposition that this could not assist ([9] of the Decision). Quite apart from the fact that this is an unreported decision of the Upper Tribunal, I was unable to find any passage in that decision which supported the Judge's conclusion that the ECM review after the decision could not remedy any defect in the initial procedure. Mr Moksud was unable to point me to any such passage; in that case there did not appear to have been any subsequent review. Mr Moksud indicated however that he was unfamiliar with that decision and had not relied on it before the Judge.
12. For completeness, and to the extent that the decision in that case was relied upon by the Judge, I note that the Upper Tribunal panel in that case pointed to two concerns about the guidance - one in the event that the ECO's decision had not been reviewed and one in the event that it had since it appeared to the panel that the guidance was not in accordance with the principle that guidance should not fetter the discretion of an individual ECO. However, that second concern forms no part of the Decision.
13. In reply, Mr McVeety very fairly accepted that it might have been possible for the Presenting Officer who appeared for the Respondent to have sought an adjournment to produce evidence. It might even have

been possible to obtain that evidence quite quickly after the point was raised even though this is an entry clearance case if the Presenting Officer had access to entry clearance electronic systems. However, he pointed out that the hearing in fact proceeded substantively with evidence and cross-examination and it is quite possible that the Presenting Officer did not see the need for an adjournment in relation to something which he did not consider decisive in the expectation that the Judge would also determine the substantive issues.

14. Mr McVeety also submitted that it was very unfortunate that, having heard evidence, the Judge had not gone on to decide the substance of the appeal as the delay which would ensue if the Respondent were right in her challenge to the Decision was not in the Appellant's interests either.

Decision and reasons

15. I indicated at the end of the hearing that there is a clear error of law in the Decision and that I would provide reasons in writing which I now turn to do.

16. The relevant passage of the Decision is as follows:-

"[10] It is not necessary for me to go into the facts of this particular appeal or indeed the basis of the Respondent's decision. It is clear that the Entry Clearance Manager when refusing the Appellant's application on 27th November 2014 did so without obtaining the authorisation of the Entry Clearance Manager. The Entry Clearance Manager's subsequent review on 11th March 2015 cannot be regarded as an authorisation of a decision made many months previously.

[11] It is not necessary for me to go into the particular facts of this appeal in relation to paragraph 320(11) other than to find that the Appellant can discharge the burden of proof upon him and satisfy me that the Respondent's decision was not in accordance with the law for the reasons stated."

17. Whilst that passage rightly records that the burden (at the very least the evidential burden) is on the Appellant to raise the issue that the ECO had not followed the correct procedure, there is nothing in the preceding part of the Decision which points to what that evidence was. The only reference to why the Judge reached this conclusion is at [9] which records Mr Moksud's submission that, based on Singh, the ECO's decision was not in accordance with the law. Leaving aside Mr Moksud's submission before me that he did not raise the issue (or at least not unprompted) and that he did not rely on Singh, that does not amount to evidence at all let alone evidence to show that "it is clear" that the ECO did not follow the correct procedure.
18. The Appellant's Rule 24 reply makes the submission that when the Appellant argued that the ECO had failed to follow the correct procedure, the burden shifted to the Respondent to prove that she had and the Presenting Officer had failed to provide that evidence. That is not the correct analysis. The Appellant could not simply rely on a

submission by the legal representative without more (particularly when the issue was not raised in the grounds of appeal). Whilst I readily accept that the evidence whether the correct procedure was followed will lay with the ECO, there must be something which gives rise to at least a reasonable suspicion that it was not. At the very least, the issue should be raised in a way which permits the ECO to counter it properly, particularly where, as here, the issue is considered by the Judge to be decisive. I note in particular that in Singh the issue was raised by the Appellant in that case at an early stage in the grounds of appeal and that the Tribunal gave directions for the Respondent to produce evidence to show that the correct procedure was followed. That was not done here. As Mr McVeety was able to show, had that happened, the Respondent could have produced the evidence that the ECO did follow the guidance.

19. That is a sufficient basis on which to find a material error of law. Had it been necessary to do so, I would have accepted in any event that the subsequent ECM review, coming as it did before the hearing of the appeal, would cure any initial defect. That review is not without force as is shown in this case by the fact that the ECM who conducted the review withdrew some of the basis of the original ECO decision (whilst upholding the refusal based on rule 320(11)). The decision in Singh does not deal with that issue (contrary to what is said at [9] of the Decision).
20. There was some discussion at the end of the hearing about how the appeal should proceed. It is unfortunate that the Judge did not go on to consider the substance and facts of the appeal, particularly when he had heard evidence and submissions on the substance of the ECO's decision. There is no doubt that this has not benefitted the Appellant who will suffer further delay due to the need for a further hearing of his appeal.
21. Although Mr Moksud did indicate that the Appellant may be willing to waive his right to have the substance of his case considered by the First-tier Tribunal to avoid further delay, I am satisfied that this would not be in the Appellant's interest. There are no initial findings of fact about the genuineness, extent and nature of his relationship. There are no findings about the extent of his previous immigration misdemeanours. Both of those elements are central to the question of whether discretion should have been exercised in his favour when applying paragraph 320(11) of the Rules. It would be unfair for the Appellant to be deprived of the right to have those initial findings made in the First-tier Tribunal.
22. I therefore indicated at the end of the hearing that I intended to remit the appeal to the First-tier Tribunal for the appeal to be re-heard before a Judge other than Judge M Davies. I record that the ECO decision in this case is dated November 2014 and, as Mr Moksud noted, the Appellant and his spouse have been kept apart for nearly eighteen

months as a result of the course which this appeal has taken. It is desirable therefore that the appeal be heard as soon as possible.

DECISION

I am satisfied that the Decision contains an error of law. The Decision of First-Tier Tribunal Judge M Davies is set aside. The appeal is remitted to the First-Tier Tribunal for re-hearing (as soon as possible) by a different Judge.

Signed

Date: 9 May 2016



Upper Tribunal Judge Smith