TA (Spouse – requirements for indefinite leave) Pakistan [2007] UKAIT 00011

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Manchester Date of Hearing: 29 August 2006

Date of Promulgation: 31 January 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Taylor
Immigration Judge Lever

Between

TA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr I Hussain, instructed by Southerns Solicitors
For the Respondent: Mr M Raj, Home Office Presenting Officer

Without an individualised grant of leave to enter by an immigration officer, or express extension of the initial probationary period of leave to enter, a foreign spouse is extremely unlikely to be able to meet the requirements for indefinite leave to remain imposed by paragraph 287(a)(i)(a).

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan and is married to the sponsor. She arrived in the United Kingdom on 21 October 2003 in possession of valid entry clearance as a spouse, issued on 19 September 2003 and valid for a year. On her arrival, under the provisions of the Immigration (Leave to Enter and Remain) Order 2000 (SI 1161/2000), arts. 3, 4(3)(b) and 5 that

took effect as leave to enter until 19 September 2004, with a condition prohibiting employment. That was the automatic effect of the visa under the Order: no one appears to have given any other thought as to the period for which leave should be granted. On 12 August 2004 the appellant applied for indefinite leave to remain as the spouse of a person present and settled in the United Kingdom. That application was refused on 25 October 2004. The reason for the refusal was initially that the appellant had failed to provide information requested by the Home Office. That reason was withdrawn when it became clear that the appellant had indeed replied to the Home Office letter. The application was then considered substantively and the refusal was maintained on the ground that the Secretary of State was not satisfied that the marriage was subsisting and that the parties had been or intended living together permanently as husband and wife. The appellant appealed against the refusal, and the matter came before an Immigration Judge on 18 April 2006. The appellant was represented by Mr Hussain, as she was before us; there was no appearance by or on behalf of the respondent. The Immigration Judge heard evidence from the appellant, the sponsor and the sponsor's father and found that he was satisfied that the appellant met the requirements of the Rules mentioned by the Secretary of State as supporting his decision to maintain the refusal. He thus allowed the appeal. The Secretary of State then sought reconsideration of that determination, on a completely different ground. It is set out in the grounds for reconsideration as follows:

> *"The Immigration Judge had allowed the appeal on the basis that the appellant meets the requirements of Rule 287 of HC 395. The Immigration Judge has listed the requirements of Rule 287 at paragraph 3. The Immigration Judge has noted that Rule 287(i)(a) requires that the appellant was admitted for or given an extension of stay for one year.*
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> *However the Immigration Judge has misdirected himself in law since Rule 289(i)(a) requires that the applicant was admitted for, or given an extension of stay for two years. The appellant was admitted for one year (see attached Explanatory Statement) and therefore did not meet the requirements of the Rule.*
>
> *The decision is fatally flawed and unsustainable."*

2. Reconsideration was ordered, the Senior Immigration Judge who dealt with the application noting that the change from one year to two years had been by an amendment in Cm 6339, taking effect on 1 October 2004. Thus the matter comes before us.

3. Unfortunately for the appellant, it is well established that the respondent is entitled to raise at a late stage an issue of non-compliance with an element of the Immigration Rules that has not previously been mentioned. That is because the Notice of Refusal, Explanatory Statement and accompanying correspondence are not in the nature of pleadings; and an Immigration Judge has power to allow an appeal in

these circumstances only if he is satisfied that the appellant did or does at the relevant date meet all the requirements of the Immigration Rules. What is remarkable in the present case is that the respondent appears to have erred again, because, contrary to what is stated in the grounds, the appellant was not admitted for one year. She was admitted for a period beginning on 21 October 2003 and ending on 19 September 2004 – a little less than eleven months in total.

4. The appellant's difficulties in this appeal appear to us to be characteristic of difficulties arising from frequent and piecemeal changes in immigration law during the last few years. In order to understand what has happened, we need to set out some elements of the history of immigration control generally, and of immigration control as it relates to those seeking settlement as spouses. In what follows, we ignore asylum and human rights issues: where we make general statements they are intended to apply only to elective immigration law. We also ignore the different situation of EU nationals and those exempt from immigration control: our references to those who are not British citizens is to be taken those who are not British citizens or EU nationals, and are subject to immigration control.

Before the 1999 Act

5. Under s3 of the Immigration Act 1971, a person who is not a British citizen requires leave to enter the United Kingdom. The power to give or refuse leave to enter the United Kingdom is exercisable only by immigration officers (s4(1)), and those who needed it therefore sought it from an immigration officer on arrival in the United Kingdom, and were granted or refused leave to enter, in accordance with the Immigration Rules applicable to their situation.

6. A person intending to come to the United Kingdom could make application at a British post abroad for entry clearance, and would do so in any of three situations. First, nationals of the countries listed in Appendix 1 to the Immigration Rules require entry clearance to the United Kingdom whatever the purpose of their proposed entry. In their case, entry clearance, if granted, takes the form of a visa. A national of one of the countries mentioned is a "visa national", and will not be granted leave to enter the United Kingdom unless he is in possession of a visa on his arrival. Secondly, the Immigration Rules require those intending to enter the United Kingdom for certain purposes to have entry clearance whether or not they are visa nationals. In particular, entry clearance is required for those intending to settle in the United Kingdom as spouses or dependent family members, but the requirement extends also to various other categories, including working holidaymakers, domestic servants and ministers of religion. Thirdly, a person not a visa national proposing to seek entry for a purpose other than one for which entry clearance is required could and can simply present himself at a port and seek leave to enter. But, if he prefers, he too can apply for

entry clearance in order to save the possibility of a wasted journey. Entry clearance is in all cases granted or refused on the same basis under the Immigration Rules as leave to enter.

7. A person who arrived in the United Kingdom with current entry clearance which had not been obtained by deceit or rendered invalid by a change of circumstances was, broadly speaking, entitled to be granted leave to enter: that is to say, the entry clearance gave a sort of informal presumption that the immigration officer would act on it and grant leave to enter. Indeed a person arriving in the United Kingdom with current entry clearance, who is refused leave to enter, had and has a right of appeal and can remain in the United Kingdom to exercise it. The dichotomy between entry clearance and leave to enter was, however, maintained. Despite the fact that the same Immigration Rules applied, and despite the effective presumption arising from the grant of entry clearance, on arrival in the United Kingdom a person who was not a British citizen required the act of the immigration officer in granting him leave to enter before he could enter lawfully. The possession of entry clearance gave of itself no right to enter the United Kingdom. On his arrival in the United Kingdom, he would present his entry clearance to the immigration officer, who would (normally after asking a few questions) decide whether it was appropriate to grant leave to enter and, if so, would grant leave to enter for an appropriate period, beginning, evidently, on the date of the grant.

<u>After the 1999 Act</u>

8. This system was radically altered by the Immigration and Asylum Act 1999, which inserted a new s3A into the 1971 Act. The relevant part of this section for present purposes is sub-section (3):

> *"(3) The Secretary of State may by order provide that, in such circumstances as may be prescribed –*
> *(a) an entry visa, or*
> *(b) such other form of entry clearance as may be prescribed,*
> *is to have effect as leave to enter the United Kingdom."*

Such an order has to be made by Statutory Instrument. The Instrument in question is that to which we have already referred, the Immigration (Leave to Enter and Remain) Order 2000 (SI 1161/2000), which came into force on 28 April 2000. Under that Order, an entry clearance which (a) specifies the purpose for which the holder wishes to enter the United Kingdom and (b) is endorsed either with the conditions to which it is subject or an indication that it is to take effect as indefinite leave to enter, is to have effect as leave to enter the United Kingdom. That is the sense of Article 3 of the Order. Article 4 of the Order prescribes the terms of the leave (for all purposes other than multiple-entry visit visas and dual-entry visit visas granted pursuant to the ADS Agreement with China) as follows:

> *"4(3) … it shall have effect as leave to enter the United Kingdom on one occasion during its period of validity; and on arrival in the United Kingdom the holder shall be treated for the purposes of the Immigration Acts as having been granted before arrival leave to enter the United Kingdom:*
>
> *(a) in the case of an entry clearance which is endorsed with a statement that it is to have a effect as indefinite leave to enter the United Kingdom, for an indefinite period;*
>
> *(b) in the case of an entry clearance which is endorsed with conditions, for a limited period, being the period beginning on the date on which the holder arrives in the United Kingdom and ending on the date of expiry of the entry clearance."*

9. It appears that in conjunction with the coming into force of this Order, Entry Clearance Officers were directed to change their practice in issuing entry clearance. Whereas previously entry clearances of all sorts had been valid for six months, enabling a holder who travelled within that period of time to apply on arrival in the United Kingdom for leave to enter and be granted it for an appropriate period, for the future the practice was to be that the entry clearance itself would be valid for an appropriate period, depending on the purpose for which entry was being sought. This change, however, did not remove the problem, as we shall see.

Leave to enter as a spouse

10. Entry for the purpose of settlement as a spouse has, at all relevant times required prior entry clearance. On arrival in the United Kingdom the holder of the entry clearance would seek leave to enter, which was normally granted for one year in the first instance. The purpose was for the Secretary of State and indeed the parties to ensure that a trans-national marriage was indeed viable and that the parties intended to live together permanently in the United Kingdom as man and wife, having been given an opportunity to do so. During that first year (while the person who was not a British national had current leave), if all went well, an application would be made for indefinite leave to remain. Paragraph 282 of HC 395 provides that a person seeking leave to enter the United Kingdom as the spouse of a person present and settled in the United Kingdom "may be admitted for an initial period not exceeding 12 months" provided everything else is in order. Paragraph 287 required, as one of the conditions for indefinite leave to remain as the spouse, that "the applicant was admitted to the United Kingdom or given an extension of stay for a period of 12 months and has completed a period of 12 months as the spouse of a person present and settled here".

11. Those provisions have both been subject to subsequent amendment, because it is now necessary to provide for certain other categories of person. They have also both been amended to change the period of one year to that of two years. Paragraph 282 was amended by HC 538, which took effect on 1 April 2003. The amendment to paragraph 287

was by Cm 6339, which took effect on 1 October 2004. The relevant part of paragraph 287 is now as follows:

> *"287(a)…(i)(a) The applicant was admitted to the United Kingdom or given an extension of stay for a period of two years in accordance with paragraphs 281 to 286 of these Rules and has completed a period of two years as the spouse of a person present and settled in the United Kingdom".*

12. Paragraph 289 has, throughout, remained the same:

> *"298. Indefinite leave to remain for the spouse of a person present and settled in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 287 is met."*

The effect of the 2000 Order

13. In the present appeal the grounds for reconsideration rely on the change from one year to two years as the probationary period. They argue that, as the date of the decision was after 1 October 2004, the appellant did not meet the requirements of the Rules as she had not been in the United Kingdom for two years as spouse. We shall return to that difficulty shortly. It is, however, important to note that the present structure of the Immigration Rules, and the practice in their application, creates difficulties for all non-British citizen spouses who seek indefinite leave to remain. That is because of the effect of the 2000 Order. Entry *clearance* is granted, abroad, for the appropriate period. Following the change of the probationary period to two years, that will normally mean that the entry clearance will be valid for two years. It is, however, in practical terms impossible for a person issued with such an entry clearance to obtain leave to enter the United Kingdom for a period of two years by using it. Because of the 2000 Order, it appears that immigration officers no longer give any independent thought to the question of the period for which leave to enter should be granted by them in their discretion. On the holder's arrival in the United Kingdom, the only leave to enter available to the holder is therefore that which the Order gives him. But there is bound to be some interval between the grant of the entry clearance and the arrival in the United Kingdom; indeed the interval is likely to be of at least a few days because a person would normally want to make sure of having entry clearance before paying for travel tickets. Any such delay eats into the period of leave to enter, because under art. 4(3)(b) of the Order, the period of leave to enter will not be a period of the same length as that the entry clearance was valid, but will be a period beginning on arrival and ending with the validity of the entry clearance.

14. So a spouse who arrives with entry clearance valid for two years will in practice necessarily be granted leave to enter for a period of less than two years. Unless such a person seeks and actually obtains an extension of leave, he or she cannot meet the requirements of paragraph 287. That is a matter of some importance, because of the provisions of paragraph 289. A person who has not been "admitted to the United Kingdom or given an extension of stay for a period of two years in accordance with paragraphs 281 to 286" is to be refused indefinite leave to remain. The fact that such a person, by making an in-time application, has leave extended by s3C of the 1971 Act, does not assist, because that of itself does not affect the terms of admission or of being "given" any extension of stay.

15. Even a person who does arrive in the United Kingdom within a few days of the issue of entry clearance and waits until the last possible day for his application for indefinite leave to remain, is making an application outside the Rules. He cannot succeed under paragraph 287, because his leave was of less than two years. He must first make an application for extension for the few days that he needs in order to make up the period of two years, and only when he has been granted it can he properly make an application for indefinite leave to remain under paragraph 287. It is thus vital that such a person makes this first (extension) application and does so specifically. He may find himself in some difficulties if he makes an application in such a form that it may be taken as an application for indefinite leave to remain, because that is an application that cannot succeed under the Rules.

16. Even the seeking of an extension may not be without its difficulties in all cases. An extension of leave for a person seeking leave to remain as a spouse is governed by paragraph 284-286 of HC 395. In its present form, paragraph 284(i) requires that:

> *"The applicant has limited leave to enter or remain in the United Kingdom which was given in accordance with any of the provisions of these Rules other than whereas as a result of that leave he would not have been in the United Kingdom beyond six months from the date on which he was admitted to the United Kingdom on this occasion in accordance with these Rules, unless the leave in question is limited leave to enter as a fiancé".*

17. In the usual case that will no doubt cause no difficulty. But it may be that, for some good reason, the applicant's arrival in the United Kingdom has been delayed and that, as a result, when he arrives in the United Kingdom his entry clearance has less than six months of its validity left. In those circumstances, under the terms of the Order, he will have less than six months leave to enter. But he is entering as a spouse, not a fiancé, and so cannot meet the requirements of paragraph 284.

18. We have set out these points because we do not think that they have previously received any serious attention. There is a mismatch between the terms of the Immigration Rules and the effect of the Order. Mr Raj

confirmed to us that when entry clearance as a spouse is granted, it is granted for the appropriate probationary period, that is to say two years. He acknowledged that this would normally mean that, when the entry clearance took effect as leave to enter, the leave to enter would be for less than two years. He told us that spouses caught in the transition between the one year requirement and two year requirement had received invitations to apply for further leave to bring their leave up to two years. He was, however, unable to confirm that there are any particular arrangements in place for those who need a very short extension in order to be able to meet the requirements of paragraph 287.

What is to be done?

19. It is not for us to cure these difficulties. One possible way forward would be for immigration officers to grant leave of an appropriate period in spouse cases, rather than relying on the slightly shorter period effected by the Order. Another possibility would be for spouse entry clearances to be valid for, say, 27 months, and, when issued, to be accompanied by a warning of the consequence of not using them within the first three months of their validity. What is important from the point of view of the appeals process, is that paragraph 287(i)(a)(i) remains in force, and that a person who cannot show that he already has two years leave to enter granted to him (by way of extension or otherwise as a spouse) simply cannot meet the requirements of paragraph 287, and is bound to be refused. We are afraid that this may apply to a very large number of appeals by spouses against refusals of indefinite leave to remain.

The present case

20. In the present case the position is that the appellant could not meet the requirements of paragraph 287 as it was at the date of the decision in her case. It required her to have had two years leave to enter, and she had had only eleven months. For this reason, which is the reason argued in the grounds for reconsideration although the calculations are wrong, we are satisfied that the Immigration Judge erred in law and we shall substitute a determination dismissing the appellant's appeal. The appellant cannot in law claim a right to have her application decided under earlier Rules (R v IAT ex parte Nathwani [1979-80] Imm AR 9 QBD) but, with only eleven months' leave she did not meet the old requirements of the Rules either.

21. That is not the last problem with this appeal. As we have said, the appellant was granted an entry clearance valid for one year on 19 September 2003. Mr Raj told us that one of the consequences of the change to paragraph 282 (which relates to the granting of leave to enter for the probationary period for a spouse) on 1 April 2003 was that Entry Clearance Officers had been instructed, from that date, to issue spouse entry clearances valid for two years. We have not seen a copy of any

such direction, but there seems little reason to doubt what Mr Raj said. Although no doubt if the appellant had made a proper analysis of the relevant law and the Immigration Rules and the various changes in them she could have understood what to do, the grant of only a year (rather than two years) in her case has had a number of unfortunate consequences.

22. The first is that it failed to draw to her attention the need to have two years leave to remain before making an application for indefinite leave. The second is that her application was indeed made when she had been in the United Kingdom for a much shorter period of time than is now envisaged under the Rules with their two-year probationary period. Bearing in mind the points as to the subsistence of the marriage and so on which were taken against her by the Secretary of State, it may well be that she was prejudiced by being led into making an application at that time.

23. The terms of the Secretary of State's grounds for reconsideration in this case lead us to suppose that the particular point about the length of her leave, which we have dealt with above, might not have been taken against her and, at the proper time, she might not have been able to satisfy the Secretary of State that she met the other requirements of the Rules without difficulty. We do not know. What we do know is that, having been granted entry clearance for the wrong period, having been refused on the grounds of non-compliance when she had complied, having then been refused on grounds on which the Immigration Judge was in her favour, and then having lost her appeal again on a further ground of which the Secretary of State appears himself not to have been precisely aware, she may well feel a sense of injustice. As we indicated at the hearing, and as we understood Mr Raj to agree, the appellant needs a remedy. In our view it is most appropriately provided by the Secretary of State treating any application made by the appellant for indefinite leave to remain as a spouse, made within three months of the date of this determination, as being an application by a person who meets the requirements of paragraph 287(a)(i)(a).

24. For the reasons we have set out earlier in this determination, however, we find that the Immigration Judge made a material error of law and we substitute a decision dismissing this appeal.

C M G OCKELTON
DEPUTY PRESIDENT
Date: