HH (Sponsor as representative) Serbia [2006] UKAIT 00063

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House

Date of Hearing: 11 July 2006
Date of promulgation: 16 August 2006

Before:

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

Between

Appellant

and

ENTRY CLEARANCE OFFICER - SKOPJE

Respondent

Representation:
For the Appellant: No representative
For the Respondent: Mr G Saunders, Home Office Presenting Officer

1. There is no objection to a sponsor being a representative, as long as he is not acting "in the course of a business". 2. Whether the sponsor is the representative depends on whether there has been notification that he is the representative. 3. When a sponsor is the representative it will normally be proper to allow him to give evidence as well as making submissions (unlike the case where there is a professional representative). 4. Substantial compliance with the requirements of Rule 8 is sufficient to render an appeal valid.

DETERMINATION AND REASONS

1. The appellant comes from Kosovo. She is a citizen of Serbia and Montenegro and holds a United Nations travel document issued by UNMIK. She applied to the respondent for entry clearance as the spouse of the sponsor. She was refused on 14 October 2005. The sponsor put in a notice of appeal to the Tribunal. Immigration Judge Wiseman determined the appeal without a hearing on 18 April 2006 and allowed it. The respondent sought and obtained an order for reconsideration on the following grounds:

"Material misdirection in law

The Immigration Judge has noted at para 49 that the appellant has not signed the appeal papers nor has a representative. It would appear that they have been signed by the sponsor.

The 2005 Procedure Rules state at 8.3 that the notice of appeal must be signed by the appellant or his representative, and dated.

The 1999 Immigration and Asylum Act at section 84 establishes the requirements for a qualified person to provide immigration advice and services. It is submitted that there was no evidence that the appellant's sponsor was so qualified.

The Immigration Judge has misdirected himself in law by considering the appeal when he should have found there was no valid appeal before him.

In the alternative, if the Immigration Judge has accepted that the sponsor was qualified to act as a representative he has failed to show what, if any evidence he relied on.

The decision of the Immigration Judge is fatally flawed and cannot stand."

2. At the hearing before us Mr Saunders told us that the Entry Clearance Officer no longer relies on the points raised in the grounds for reconsideration. Nevertheless, these or similar grounds have been raised in a number of other cases and similar considerations regularly trouble Immigration Judges. Having raised these matters with Mr Saunders at the hearing we therefore give our views on them.

3. In cases such as the present, there are usually three questions that may need to be answered. They are, first, whether the sponsor (or any other person, apart from the parties, involved in the appeal) can be the appellant's representative; secondly, whether that person is the representative; thirdly, whether the notice of appeal is adequately completed.

Can the Sponsor be a Representative?

4. Rule 28(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 provides that:

> "An appellant or applicant for bail may act in person or be represented by any person not prohibited from representing him by section 84 of the Immigration and Asylum Act 1999".

5. The present Procedure Rules contain no other limitation on the representation of an appellant. The only issue, therefore, is whether or not the person in question is prohibited by s84.

6. Section 84 of the 1999 Act prohibits anybody who is not a "qualified person" from provided "immigration advice or immigration services". That section, and other provisions of part V of the Act contain provisions defining "qualified person" to include members of the regulated legal professions, practitioners registered with the Office of the Immigration Services Commissioner, and certain persons who are exempt. These are the provisions which appear to have been in the mind of the person who drafted the grounds for review and, it is fair to say, the mind of the Immigration Judge. They are the provisions which need to be considered in cases where the representative's connection with the case is purely professional or quasi-professional.

7. Section 82(2) contains important definitions.

> "82(2) In this Part [including s84], references to the provision of immigration advice or immigration services are to the provision of such advice or services are to the provision of such advice or services by a person –
> (a) in the United Kingdom (regardless of whether the persons to whom they are provided are in the United Kingdom or elsewhere); and
> (b) in the course of a business carried on (whether or not for profit) by him or by another person."

This definition is a limitation on the ambit of the prohibition in s84. It has the effect that a person who acts outside the United Kingdom, or a person who acts other than in the course of a business, is not caught by the prohibition in s84. Such a person is therefore entitled to be a representative.

8. This is not the place to investigate in any detail the meaning of "in the course of a business"; what is clear is that the ordinary family sponsor is not providing immigration services in the course of a business. It is for this reason that the sponsor in this case, as in many others, can be the appellant's representative.

Is the Sponsor the Representative?

9. The principal provisions are those in Rule 48(4) and (7):

> "(4) Where a representative begins to act for a party, he must immediately notify the Tribunal and the other party of that fact.
>
> …
>
> (7) Where a representative ceases to act for a party, the representative and the party must immediately notify the Tribunal and the other party of that fact, and of the name and address of any new representative (if known)."

These provisions have certain consequences, also set out in the Rules. Once a representative has begun to act, documents served on the representative are deemed to be served on the party represented unless and until a change of representative is notified.

10. A representative who represents the appellant at the time the notice of appeal is lodged typically complies with the requirements of Rule 48(4) by completing section 5 of the notice of appeal, which has spaces for the representative's personal details and requires the representative to sign and date a declaration as follows:

> "I, the representative, am giving this notice of appeal in accordance with the appellant's instructions and the appellant believes that the facts stated in this notice of appeal are true."

There is also a notice reminding the representative of the provisions of Rule 48(7).

11. It is important to note that the mere fact that the appellant has a sponsor does not mean that the sponsor is the appellant's representative for the purposes of the appeal. The sponsor is normally capable of being a representative, as we have shown above; he only is the representative if notification has been given that he is so acting. But, in general, the notification that a person is acting as a representative does not require any particular form; the notification can be given orally at a hearing but must otherwise be in writing (Rule 48(8)). In the absence of any notification at all, however, the Tribunal should not deal with the sponsor as though he were a representative: it should deal directly with the appellant.

Has the Notice of Appeal been completed validly?

12. Rule 8 is headed "Form and Contents of Notice of Appeal" and includes the following requirements:

> "8(1) The notice of appeal must be in the appropriate prescribed form and must –
>
> (a) state the name and address of the appellant; and
> (b) state whether the appellant has authorised a representative to act for him in the appeal and, if so, give the representative's name and address;
> (c) set out the grounds for the appeal;
> (d) give reasons in support of those grounds;
> (e) so far as reasonably practicable, list any documents which the appellant intends to rely upon as evidence in support of the appeal.
>
> (2) The notice of appeal must if reasonably practicable be accompanied by the notice of decision against which the appellant is appealing, or a copy of it.
>
> (3) The notice of appeal must be signed by the appellant or his representative and dated.

(4) If a notice of appeal is signed by the appellant's representative, the representative must certify in the notice of appeal that he has completed it in accordance with the appellant's instructions."

13. "Appropriate prescribed form" is defined in Rule 2 as meaning the form in the Schedule to the Rules "or that form with any variations that the circumstances may require". We have already indicated that section 5 of the prescribed form has space for the representative to do what Rule 8 requires him to do. The problem with the appeal form in this particular case (which is far from unique) is that the sponsor has completed it as though he were the appellant. He has given his own name and address instead of the appellant's, and he has signed it and dated it at the place where the appellant is supposed to sign and date the form. The section dealing with representation has been left blank. The question raised is whether, given that the sponsor is capable of being a representative, and that he appears to have intended to act as representative, the failure to complete the form in accordance with the Rules prevents the appeal being valid.

14. It is perhaps worthy of note in this context that the following Rule, Rule 9, is headed "rejection of invalid notice of appeal". It contains provisions only for the rejection of a notice of appeal where there is no "relevant decision", that is to say no decision carrying a right of appeal to the Tribunal. In our view that is a clear hint that the draftsman of the Rules did not envisage failure to comply with the requirements of Rule 8 as causing a notice of appeal to be invalid. In any event, the general law requires only that there be "substantial" compliance with even mandatory procedural requirements: R v IAT ex parte Jeyanthan [2000] 1 WLR 354; [2000] Imm AR 10, CA. That case in fact concerned a notice of appeal to the Immigration Appeal Tribunal which had not been properly completed by the Secretary of State. Mr Saunders cited Jarvis v Entry Clearance Officer Manila [1994] Imm AR 102. That decision is perhaps of less direct relevance, because the relevant Rules at that time contained no express requirement of a declaration and signature. The decision there was that a notice of appeal was good if it contained sufficient information to identify the appellant. The requirements of a notice of appeal under the 2005 Rules are substantially more complex. We do not think it would be right now to say that a notice was good if it merely identified the appellant. But, given the terms of the 1984 Procedure Rules, which governed the decision in Jarvis, that decision is entirely consistent with Jeyanthan.

15. Whether there has been "substantial" compliance with Rule 8 is a matter to be assessed on the facts of the individual case. The law gives no encouragement to those who would seek to exclude an appellant for procedural reasons that are purely matters of form. In the present case, although the form itself was incorrectly completed, the notice of decision was included, and, as a result, there has never been any doubt about who the appellant was to be or what was the subject of the appeal. Nor has there been any doubt about the grounds of appeal, for full grounds

accompanied the form. The appellant has not signed the form, but the appellant does not have to sign the form if she has a representative. The sponsor has not signed the declaration appropriate to a representative, but has signed the declaration appropriate to an appellant, that he believes the fact stated in the notice of appeal are true. There is ample ground here for finding that there has been substantial compliance with the requirements of Rule 8 and, if the matter were still contested by the Entry Clearance Officer, we should have so found.

16. There is a further issue. The decision of the Court of Appeal in Jeyanthan shows that the validity or otherwise of a notice of appeal cannot be determined simply by a mechanical application of the formal requirements of the Rules. It is an issue to be determined between the parties. In those circumstances it also follows that if the respondent has not sought to take an issue of compliance with Rule 8 at an early stage in the proceedings, he ought to be treated as having waived the issue in the appellant's favour. Generally speaking, therefore, if the matter is not raised in direct response to service of the notice (or purported notice) of appeal, it is unlikely that the respondent would be successful in excluding an appeal on this ground at a later stage.

General Points

17. There are two other matters to which we should draw attention in relation to sponsors and other representatives. The first is that, except in Rule 8(1)(b), the Rules do not require the appellant to notify the Tribunal that he is represented: it is, generally speaking, the representative's duty to do so. The absence of any authority from the appellant himself is therefore not material. It is, however, clear that the Tribunal should be alert to any suggestion by an appellant that a representative is not currently acting on his instructions.

18. Secondly, the Rules contain no provisions preventing individuals from acting both as representative and as witness in the same appeal. This must be a matter for the Tribunal. The requirements of justice and good order must be balanced against the inherent lesser formality of Tribunal proceedings, and the need to respond appropriately to an appellant who is not professionally represented. A representative acting in the course of a business should not normally give evidence, even about previous procedure in the appeal. If he is required as a witness, some other person should be the representative. On the other hand, a sponsor representative must be seen as having a dual role as witness and as supporter of the appellant's case. There can be no general objection to such a person giving evidence himself before making his submissions. The Tribunal will no doubt itself make proper distinctions between what is said by way of evidence and what is said by way of submission.

Decision

19. As we said at the beginning of the determination the Entry Clearance Officer no longer takes the points made in the grounds for review. We order that the Immigration Judge's determination shall stand.

C M G OCKELTON
DEPUTY PRESIDENT
Date: