ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at Field House
On 3 June 2005
Determination promulgated: 30 September 2005

Before:

Mr L V Waumsley (Senior Immigration Judge)
Mr P Bompas
Mr A E Armitage

Between

Appellants

and

ENTRY CLEARANCE OFFICER - MUMBAI

Respondent

Effect of deletion of paragraph 252 (leave to enter as spouse or child of special voucher holder) of Immigration Rules on applications made before date of deletion but not decided until after date of deletion

Representation:

For the appellants: Mr N Ahmed of counsel, instructed by Jasvir Jutla & Co, solicitors
For the respondent: Mr N Smart, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are both citizens of India. They have appealed with permission against the determination of an adjudicator (now an Immigration Judge), Mr A G O'Malley, sitting in Stoke-on-Trent, in which he dismissed their respective appeals against the respondent's decision to refuse their respective applications for entry

clearance to come to the United Kingdom for settlement as the children of a special voucher holder. By virtue of article 5(1) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Commencement No 5 and Transitional Provisions) Order 2005, the appeals now take effect as reconsiderations pursuant to article 5(2) of that Order.

Combined hearing

2. At the start of the hearing before us, the representatives for both parties confirmed that they had no objection to a combined hearing of both reconsiderations. We therefore directed that both reconsiderations be heard together in accordance with rule 20 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 as applied by rule 29 of those Rules.

Background

3. On 17 April 2002, the appellants made separate applications to the respondent for entry clearance to come to the United Kingdom as the children of a special voucher holder, namely their mother, [ ]. It is not in dispute between the parties that she had been granted a special voucher in 1996 or 1997, and had entered the United Kingdom pursuant to the terms of that voucher on 26 April 1997.

4. The appellants' applications were made under paragraph 252 of the Statement of Changes in Immigration Rules (HC 395) which was still in force at that time in the following terms:

> "The requirements for indefinite leave to enter the United Kingdom as the spouse or child of a special voucher holder are that the person concerned:
>
> (i) is in possession of a valid United Kingdom entry clearance for settlement in the United Kingdom in this capacity; and
> (ii) can and will be maintained and accommodated adequately by the special voucher holder without recourse to public funds."

Notices of refusal

5. However, the respondent's decision in relation to both applications was not made until 18 October 2002, by which date paragraph 252 had been deleted from the Immigration Rules. It had in fact been deleted with effect from 18 September 2002 by Cm 5597. The respondent's notices of refusal addressed to both appellants were *mutatis mutandis* in identical terms. The material part of those notices reads as follows:

> "You have applied for entry clearance with a view to admission to the United Kingdom as the dependant of a special voucher holder but I am not satisfied that entry is being sought for a purpose covered by the Immigration Rules. Furthermore, I have considered your application in accordance with paragraph 317 of the Immigration Rules but I am not satisfied that you are living outside the United Kingdom in the most exceptional compassionate circumstances and are mainly dependent financially on relatives settled in the United Kingdom. I therefore refuse your application."

For present purposes, it suffices to say that both appellants accept that they were unable as at the date of decision to satisfy the requirements of paragraph 317.

Appeal to adjudicator

6. The appellants both exercised their right of appeal to an adjudicator. Their appeals were heard together by Mr A G O'Malley on 16 April 2004. By his determination, which was promulgated on 29 April 2004, he dismissed both appeals.

Permission to appeal

7. The appellants then applied for, and were granted, permission to appeal to the former Immigration Appeal Tribunal. The grounds on which permission was granted were in identical terms. The material part reads as follows:

> "The proposed grounds of appeal are that the Adjudicator erred in law in regarding himself as precluded from considering the Claimant's application under paragraph 252 of the Immigration Rules, and that had he given proper consideration to the appeal under paragraph 252 he may have come to a different decision. It is further submitted that the Adjudicator erred in his consideration and findings in relation to the Article 8 ECHR [European Convention on Human Rights and Fundamental Freedoms] aspect of the appeal. The grounds merit further consideration by the Tribunal."

8. During the course of the hearing before us, Mr Ahmed, who appeared for both appellants, confirmed that they were no longer pursuing their respective claims under Article 8 (right to respect for private and family life) of the Human Rights Convention. In light of the judgment of the Court of Appeal in *Huang and others v Secretary of State for the Home Department* [2005] EWCA Civ 105, particularly at paragraphs 59 and 60, he was plainly right to do so. He accepted that in the event of our concluding that the adjudicator was right to dismiss the appellants' appeals under the Immigration Rules, it was clear that their appeals on human rights grounds under Article 8 would have no realistic prospect of success. It is therefore unnecessary for us to give any further consideration to that aspect of the appellants' grounds.

9. The sole issue which is before us is whether the adjudicator was right to conclude, as he did, that he was precluded from considering the appeals under paragraph 252 of the Immigration Rules by virtue of paragraph 27 of the Rules, which reads as follows:

> "An application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused an entry clearance where entry is sought in one of the categories contained in paragraphs 296-316 solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it."

It is not in dispute that both appellants were well over the age of 18 years at the date of their entry clearance applications. The exception contained in paragraph 27 is therefore not relevant for present purposes.

Appellants' submissions

10. We heard submissions first from Mr Ahmed on behalf of the appellants. He acknowledged that no transitional provisions were made when paragraph 252 was deleted from the Immigration Rules on 18 September 2002. Nevertheless, he submitted that the provisions of paragraph 27 were to be read in conjunction with paragraph 4 of the same Rules, which reads as follows:

> "These Rules to come into effect on 1 October 1994 and will apply to all decisions taken on or after that date save that any application made before 1 October 1994 for entry clearance, leave to enter or remain or variation of leave to enter or remain, other than an application for leave by a person seeking asylum, shall be decided under the provisions of HC 251, as amended, as if these Rules had not been made."

11. He argued that by analogy the appellants' applications should be decided under the provisions of paragraph 252 as if those provisions had not been deleted from the Rules after the date of the appellants' applications but before the date of the respondent's decision. He submitted that it did not necessarily follow from the mere fact that paragraph 252 had been deleted from the Immigration Rules that applications made before its deletion were no longer to be determined in accordance with its provisions. Paragraph 27 was not intended to penalise applicants who had applied for entry clearance before the deletion came into effect.

12. He also relied upon the provisions of paragraph 26 of the Immigration Rules which reads as follows:

> "An application for entry clearance will be considered in accordance with the provisions in these Rules covering the grant or refusal of leave to enter. Where appropriate, the term 'Entry Clearance Officer' should be substituted for 'Immigration Officer'."

13. He argued that where the Immigration Rules are being changed, a fair balance must be struck between the parties. Paragraph 27 referred to the "circumstances" existing at the time of decision. He submitted that the term "circumstances" was intended to refer to the *factual* situation as at the date of decision, and not to the *legal* position as at that date. On the basis of the factual situation as it existed at the date of the respondent's decision, both appellants would have succeeded in their respective applications if paragraph 252 had still been in force at that time.

14. He also stated that he was relying on the reported determination of the Immigration Appeal Tribunal (chaired by the former President, Mr Justice Ouseley) in *HG and RG (India - Special Voucher Rules)* [2005] UKIAT 00002 in which the Tribunal had stated at paragraph 20:

> "Mr Jafferji urged that we should not simply dismiss the appeal because on any reapplication for entry clearance by these Appellants they would inevitably fail under paragraph 252 because that had now been removed from the Immigration Rules. We accept that there is force in that argument and that the Appellants should be entitled to have their application for entry clearance considered under paragraph 252. If we were to say that there had been no

> decision as yet by the Entry Clearance Officer on the application of paragraph 252, notwithstanding the form of the decision on both occasions, the Appellants' success will be dependent on the existence of an obligation on the Entry Clearance Officer to consider an undetermined application on the basis of the entry clearance provisions extant at the date of application even though now repealed. *We have not heard a satisfactory argument one way or another as to the power of the Entry Clearance Officer in relation to such a matter, although we think it probable that the obligation is to apply the Rules as they were at the date of application.*" (emphasis added)

15. Mr Ahmed submitted that the reconsiderations before us constituted exceptional cases. The appellants had not been called for interview by the respondent until the day after paragraph 252 had been deleted from the Immigration Rules. Their respective applications could have been determined by the respondent at an earlier date. The appellants would have benefited if that had been done because they would then have qualified for entry clearance under paragraph 252. Their applications had been made some six months prior to the date of the respondent's decision. Many other applicants were in the same position as the appellants.

16. He also relied upon footnote 2 to paragraph 3.14 of Macdonald's "*Immigration Law and Practice in the United Kingdom*" (5th edition) which reads as follows:

> "In *R v Immigration Appeal Tribunal, ex p Bibi and Purvez* [1986] Imm AR 61, DC, the date of application was used to determine whether the Pakistani wife and children of a Commonwealth citizen settled in the UK on 1 January 1973 should be treated as Commonwealth citizens or aliens. The date of application is often the important date in transitional provisions for new rules and policies."

Conclusions

17. We did not find it necessary to call upon Mr Smart to address us on behalf of the respondent. Following Mr Ahmed's confirmation that the appellants were no longer seeking to rely on Article 8 of the Human Rights Convention, the sole issue which falls to be determined for the purposes of these reconsideration is whether the adjudicator was right to conclude, as he did, that he was precluded by the provisions of paragraph 27 of the Immigration Rules from considering the appellants' appeals under paragraph 252 of those Rules by reason of the fact that paragraph 252 had been deleted from the Rules by the date of the respondent's decision.

18. The terms of paragraph 27 (as set out above) are plain. With the exception of an application for entry clearance made by someone who was under the age of 18 years at the date of application, but who has attained full age by the date of decision, paragraph 27 stipulates *in terms* that an application for entry clearance is to be decided in the light of the "circumstances" existing at the time of the decision. It is common ground between the parties that the exception contained in paragraph 27 does not assist either of the appellants before us.

19. The issue is therefore whether the reference to "circumstances" is to be construed as meaning only the factual circumstances existing at the date of decision, or whether it should be interpreted as comprising both the factual circumstances and the legal provisions of the Immigration Rules in existence at that date. Mr Ahmed contended

for the former construction. He was unable to direct us to any authority on the point one way or the other, apart from the passage in the reported determination of the Immigration Appeal Tribunal in *HG and RG* at paragraph 20 in the terms set out above.

20. That determination was prepared by Mr Justice Ouseley, the former President of the Immigration Appeal Tribunal. Words falling from the lips of such an experienced and learned judge are plainly deserving of the most careful consideration. Nevertheless, it is clear from the final sentence of paragraph 20, read in the context of the paragraph as a whole, that the Tribunal was expressing no more than a tentative view on the point. The passage on which Mr Ahmed relies was plainly no more than an *obiter dictum*, and notwithstanding the distinguished source from which it emanates, it is not one which is binding upon us. In light of the plain wording of paragraph 27 as set out above, and for the reasons which follow below, it is one from which we respectfully dissent.

21. In the absence of any binding authority on the point, it is for us to arrive at our own conclusion as to whether the effect of paragraph 27 was, contrary to the adjudicator's conclusion, such as to require the appellants' entry clearance applications to be determined on the basis of the factual circumstances as they existed at the date of decision as if the provisions of paragraph 252 were still in force at that time, or whether he was right to find, as he did, that paragraph 252 was no longer in force as at the date of decision, and that it was not open to him to allow the appellants' appeals as if it were. We have little (if any) hesitation in arriving at the latter conclusion.

22. Read in context, the reference to "circumstances" in paragraph 27 is plainly intended to embrace, not just the *factual* circumstances existing at the date of decision, but also the *legal* provisions in force at that time. As Mr Ahmed properly acknowledged before us, when paragraph 252 was deleted from the Immigration Rules, there were no transitional provisions dealing with the position of individuals, such as the appellants, who had applied for entry clearance under that paragraph prior to the date of deletion, but whose applications were not decided until after the date of deletion.

23. Paragraph 27 contains in terms an exception safeguarding the position of applicants who were under the age of 18 as at the date of application, but who had attained full age by the date of decision. Similar provisions dealing with the effects of a change of circumstances between the date of application and the date of decision are to be found elsewhere in the Immigration Rules. By way of example, rule 4 safeguards the position of applicants who had applied for entry clearance, leave to enter or remain or variation of leave to enter or remain (other than an application for leave by a person seeking asylum) prior to the date on which the present Immigration Rules replaced the previous Rules. Rule 4 stipulates that such applications are to be decided under the terms of the previous Rules as if the present Rules had not been made.

24. Further examples of transitional provisions are to be found elsewhere in the Immigration Rules. By way of example, the Statement of Changes in Immigration Rules (Cm 2663) stipulated at paragraph 2:

"Paragraph 111 of HC 251 of 1990 and paragraph 60(i) of HC 395 of 1994 shall not apply to any application for an extension of stay for the purpose of studying made by a national of the Ivory Coast or Sierra Leone whose current leave to enter or remain was granted before 21 September 1994."

25. The Immigration Rules contain transitional provisions protecting the position of applicants in a number of different cases. The issue before us is whether similar transitional provisions may properly be implied where an express provision for them has not been made in the Rules, in particular in the circumstances of the appellants before us. Applying the well-established principle of statutory construction enshrined in the Latin tag "*inclusio unius est exclusio alterius*" (the inclusion of one is the exclusion of another), we are satisfied that it would not be right for us to imply the existence of such transitional provisions where the Secretary of State for the Home Department has not considered it appropriate to include them in the Immigration Rules, and in the various changes made from time to time to those Rules.

26. In arriving at that conclusion, we have taken account of the fact that under section 3(2) of the Immigration Act 1971 as amended, the Immigration Rules and any changes to them are required to be laid before both Houses of Parliament, and are subject to disapproval by a resolution of either House passed within the following 40 days. To the extent that the Rules, and subsequent changes made to them, have not been disapproved by either House, they may be regarded as constituting the will of Parliament as to the terms on which persons not otherwise having the right of abode in the United Kingdom are to be allowed to enter or remain. Accordingly, in so far as the Secretary of State for the Home Department, acting with the approval of Parliament, has not considered it appropriate to include in express terms any transitional provisions in the Immigration Rules dealing with the consequences of the deletion of paragraph 252 on pending applications, we do not consider that we would be justified in doing so by implication alone.

27. For these reasons, we are satisfied that the adjudicator was right to conclude that paragraph 27 of the Immigration Rules did indeed have the effect of precluding him from considering the appellants' appeals under the provisions of paragraph 252 as if those provisions were still in force at the date of decision. Despite the submissions put forward by Mr Ahmed, we are satisfied that the adjudicator made no error of law in arriving at that conclusion. There is therefore no arguable basis for interfering with his decision.

Reporting

28. It is intended that this determination should be reported for what we say regarding the effects of the deletion of paragraph 252 of the Immigration Rules on applications for entry clearance made under that paragraph prior to deletion, but not decided until after deletion.

Decision

29. The adjudicator did not make a material error of law and his original determinations of both appeals shall stand.

Signed Dated: 3 June 2005

L V Waumsley
Senior Immigration Judge

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