HG and RG (India – Special Voucher Rules) [2005] UKIAT 00002

IMMIGRATION APPEAL TRIBUNAL

Date: 18 November 2004
Date Determination notified:
11 January 2005

Before:

The Honourable Mr Justice Ouseley (President)
Professor D B Casson
Mr R A McKee

Between:

[ ]
[ ]

APPELLANTS

and

Secretary of State for the Home Department

RESPONDENT

Appearances:
For the Appellant: Mr Z Jafferji, instructed by Jasvir Jutla & Co
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an unusual appeal involving, as it does, a Special Voucher holder and his children. Its unusual nature may have led to some of the difficulties which have arisen. The two Appellants are brother and sister and are nationals of India. He was born in October 1980 and she was born in July 1978. They both sought entry clearance for settlement to join their father, the sponsor, in the United Kingdom. In August 2001, an Entry Clearance Officer refused entry clearance and on appeal confirmed his decision after a review in an explanatory statement of February 2002. The Adjudicator, Mr R A Prickett, dismissed the appeal in a determination promulgated on 14th March 2003. The Tribunal refused permission to appeal but that was quashed on Judicial Review and, following the subsequent grant of permission, now comes before us. In fact, an earlier application for entry clearance in 1999 had been refused and an appeal to an

Adjudicator dismissed in March 2000. The manner in which that application and appeal were considered contributed to the problems faced on the second application.

2. The Special Voucher Scheme was devised to permit, but also to control, entry into the United Kingdom of Ugandan Asians and their families. The scheme was originally outside the Immigration Rules. We do not have the full terms of the whole Concession which embodied the Special Voucher Scheme. The Entry Clearance Officer referred in his explanatory statement to the part dealing with dependant children which stated as follows:

> "(1) Dependant children (ie those who are unmarried and unemployed) of any Nationality who are under the age of 25 when their parent received a voucher may be granted entry clearance to join or accompany UKPH heads of household who are settled and present in the United Kingdom ..."

3. paragraph 252 of the Immigration Rules HC395 provided:

> "252 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."

4. That paragraph is no longer part of the Rules. Neither application for entry clearance spelt out the basis either in the Concession or the Immigration Rules upon which entry clearance was sought. The first Entry Clearance Officer referred to paragraph 252 and the guidelines in the Concession. He said that the requirements were not met in the first place because he concluded that neither Appellant was dependent on the sponsor because both were in employment, well able to manage financially and indeed had contributed substantially to the family's living expenses. On the second application for entry clearance, the two Appellants said that they were now dependent on the Special Voucher holder, their father, because they had lost their jobs, had been forced to move and had then been unable to obtain any, or any regular, employment.

5. Because of inconsistencies in their evidence, the Entry Clearance Officer in the explanatory statement said that he did not accept that they were not in gainful employment in India. He concluded that they did not satisfy the terms of the Concession because at the time of issue of the Special Voucher to the father both were in gainful employment and were not financially dependent on him (the finding of facts also showed that they had not satisfied the Entry Clearance Officer that they had subsequently ceased to be in gainful

employment). The Entry Clearance Officer obviously interpreted "*when their parent received the voucher*" as applying both to the age limit requirement and to the fact of dependency. Further, the Entry Clearance Officer said that there were no exceptional compassionate reasons for the grant of entry clearance and like the first Entry Clearance Officer said that they did not satisfy the terms of paragraph 252 of the Immigration Rules.

6. Before the Adjudicator, Mr Jafferji, for the Appellants, argued simply that only paragraph 252 fell to be considered, the Concession was to be ignored. The Entry Clearance Officer did not dispute the requirements as to relationship, maintenance and accommodation. He said that those requirements of paragraph 252 were not disputed because the Entry Clearance Officer's decision did not refer to them, and because the decision did not refer to those requirements there was no need for the Appellants to address them. Accordingly, as a matter of law the Adjudicator was obliged to allow the appeal.

7. The Adjudicator, however, dismissed the appeal on the basis that if only paragraph 252 mattered, the Appellants had failed to comply with the requirement in paragraph 252 (i) that the Appellants have a valid United Kingdom entry clearance for settlement as the children of a Special Voucher holder. As Mr Jafferji pointed out, that basis for dismissing the appeal was plainly erroneous in law. It is commonplace for the Immigration Rules to require the prior grant of entry clearance before leave to enter is granted. It does not matter that sometimes the grant of entry clearance can operate as the grant of leave to enter. It would be illogical and would nullify the Immigration Rules that require a prior grant of entry clearance, if the Entry Clearance Officer dealing with necessary application for entry clearance had to refuse it because of the want of the very entry clearance being sought. The Immigration Rules are to be applied by the Entry Clearance Officer when considering the grant of entry clearance as paragraph 26 of the Immigration Rules makes clear; but it is inevitable, as Mr Jafferji pointed out, that when he considers an application for entry clearance he does so on the basis of the application of all the other provisions of the Rules apart from the one requiring entry clearance to be granted; any alternative approach makes a nonsense of the Rules. It follows that it would be equally illogical for it to be a basis for dismissing an appeal against the refusal of entry clearance, that the entry clearance in question had not been granted. Nonetheless, that conclusion is not sufficient to dispose of all the issues in the appeal.

8. We turn to the relationship between the Concession and paragraph 252 of the Immigration Rules. We had no information as to whether the Concession was still in existence at the decision date in the light of paragraph 252. We reach no conclusion on whether an Applicant

can fail paragraph 252 and still rely on the Concession as an extra statutory policy.

9. But it is plain that an Applicant can fail the Concession and nonetheless satisfy the requirements of paragraph 252 because of differences in the age test and the dependency requirement. The Concession places an age limit on the children and requires that age limit to be satisfied at the time of issue of the Special Voucher. In paragraph 252 no age limit is specified. We take the view that "*child"* in paragraph 252 is not a minor but rather is son/daughter. Although in the abstract the word "*child*" is apt to cover either someone who is a minor or someone who is adult offspring, within the Immigration Rules the age of a child is specified where the Rules are concerned to limit entry to those who are under eighteen. We conclude that this means that paragraph 252 is focusing on the relationship rather than minority or adulthood. The terms of dependency are different. In the Concession it is expressed by reference to marital status and employment. In paragraph 252 the dependency requirement involves the Special Voucher holder maintaining and accommodating the child without recourse to public funds. It is not sufficient in paragraph 252 if the Appellants can maintain themselves or someone other than the Special Voucher holder can maintain them. This in different language imposes a dependency requirement. It is one to be satisfied at the decision date. We reach no conclusion on the Entry Clearance Officer's interpretation of the Concession in that respect.

10. With those differences in mind we are satisfied that if an Applicant satisfies paragraph 252 but does not satisfy the Concession, the Adjudicator and Tribunal should allow an appeal against the refusal of entry clearance. There would be no point in paragraph 252 and in the differences from the Concession which it contains if any Applicant had to satisfy both the Rules and the Concession. To require compliance with both the Rules and the Concession would involve ignoring the statutory provisions. Those provisions require an appeal to be allowed if the decision is not in accordance with those Rules. If the relevant Rule is complied with entry clearance is to be granted.

11. A decision by the Entry Clearance Officer may not be in accordance with the law if it ignores or misinterprets a relevant policy and it is then for the Secretary of State to reconsider his decision to see if they do comply with a policy and if so, whether any exceptional circumstances exist to deprive an Applicant of the benefit of the policy. The extra statutory policy in the form of the Concession is an additional means of obtaining entry clearance and not an alternative means of failing the tests for entry clearance. There is no room for an extra statutory policy to restrict the scope of the Immigration

Rules. A decision does not fail to accord with the law simply because it does not fit with the terms of an extra statutory policy.

12. It was argued that even if the Concession could not qualify or let alone override the Rules, nonetheless the Concession was relevant as an aide to the interpretation. In principle, where a Concession leads to a Rule that might be a sensible approach. However in this case there are differences in language which mean that to use the Concession as an aide to interpretation would undermine or pervert the clear language of the Rules. We have already explained that the two key differences relate to the age limit and to the nature of the dependency. It would be quite wrong to revert to the concepts in the Concession in view of the very different way in which the paragraph clearly expresses itself when set within the Rules. The differences are also explicable. Although the Concession and Rules represent a different view of how old a child benefiting from the provisions could be, the Rules could be seen as lengthening the relevant age of the child so as to deal with those who were caught within a long queue. It may have been thought that very few now could or would satisfy the relevant test or would seek to do so. The relevant test as to dependency in the Rules is different from the Concession. For some it may be stricter and for others more readily satisfied. But to try to turn the one into the other or to restrict one by reference to the other would be to undermine the clear language of the Rules.

13. The gravamen of the appeal was that the Adjudicator should have accepted Mr Jafferji's argument that because paragraph 252 had not in substance been dealt with by the Entry Clearance Officer, there was therefore no dispute as to its application and therefore inevitably and as a matter of a law the Adjudicator had to allow his clients' appeals. We reject that argument.

14. An entry clearance application form does not require the precise basis for entry clearance to be specified, whether the Immigration Rules and if so which, or whether an extra statutory policy, and the Appellants did not specify the basis for seeking entry here. It is therefore for the Entry Clearance Officer to consider what are the potentially applicable provisions and to apply them to the facts. But that does not by itself permit these Appellants to succeed.

15. In this case the forms and the interviews dealt with dependency under the Concession at the first application and then with what was said to be changes in dependency following the loss of gainful employment by the Appellants. Neither Appellant provided anything in order to satisfy the burden of proof upon them as to maintenance and accommodation by the Special Voucher holder which paragraph 252 envisages. The issues under the Rules were never considered on either occasion despite the references to them by the Entry Clearance Officer, but it is very difficult to see how on the brief

information provided in the forms about the size of the rented accommodation in the United Kingdom occupied by the Special Voucher holder, any Entry Clearance Officer or Adjudicator could have thought that the requirements were satisfied.

16. Although it is commonplace for those aspects of the Rules which the Entry Clearance Officer does not rely on, for failing an Applicant, not to be the subject of later debate on appeal, it is quite wrong for Mr Jafferji to suggest that such issues cannot be debated on appeal and cease forever to be potential issues, to be regarded forever as conceded and closed. The question for the Adjudicator as for the Entry Clearance Officer is whether the decision of the Entry Clearance Officer was in accord with any applicable Immigration Rule. The question for the Tribunal is whether the Adjudicator erred in his conclusion that the decision was not in accord with the applicable Immigration Rules.

17. An Adjudicator has to be satisfied on evidence or Concessions by the party that the Immigration Rule relied on is met. If a plain requirement of the Rules is not met, whether previously overlooked or not, the point should be taken and if not satisfactorily dealt with, the appeal before an Adjudicator must fail. This is of course subject to the requirements of procedural fairness as to notice being given of the point being taken whether by the Secretary of State or by the Adjudicator and such adjournment being granted as may be necessary in order to deal with it for procedural fairness.

18. Here, there was no evidence upon which the Adjudicator could say that paragraph 252 of the Immigration Rules was satisfied and had he not made the error which he did, he would nonetheless have been bound to dismiss the appeal or alternatively, to give the Appellants the chance to deal with the issues arising under paragraph 252 as at the relevant date. In view of the error made by the Adjudicator and the approach which we have concluded should be adopted to paragraph 252, three courses of action are open to us.

19. First, we could allow the appeal of the Appellants because of the Adjudicator’s error and remit it to an Adjudicator in order for him to consider the evidence which might be available as to the satisfaction of paragraph 252. Secondly, we could dismiss the appeal because there is no evidence before the Entry Clearance Officer or Adjudicator which could show that the Appellants satisfied the requirements of paragraph 252, notwithstanding the error of the Adjudicator; the Appellants could then reapply for entry clearance. The third course of action would be to dismiss the appeal on the basis that there had been no effective decision by the Entry Clearance Officer on paragraph 252 and in effect require him to

consider paragraph 252 in the light of the evidence which might be placed before him for the first time.

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.

21. However, we consider, bearing in mind the position of the Appellants, that the most satisfactory way of dealing with the deficiencies in the decision-making process so far at all levels is to allow the appeals and remit them to an Adjudicator for the Adjudicator to consider whether or not the application falls within the scope of paragraph 252 as at the date of the Entry Clearance Officer's decision. This means that the sponsor will have to provide evidence in the light of the conclusions which have been expressed about the credibility of the Appellants as to the satisfaction of paragraph 252. We see no reason why the Adjudicator should not hear fresh evidence in relation to that position, even though that evidence will be confined to the examination of circumstances at the date of the Entry Clearance Officer's decision. That should enable evidence in relation to maintenance and accommodation by the Special Voucher holder as at that date to be provided and will have the advantage that, as the crucial evidence would come from the Special Voucher holder, it can be provided within the United Kingdom rather than provided second hand to the Entry Clearance Officer.

22. For those reasons this appeal is allowed and it is remitted for an Adjudicator to consider. We see no reason why Mr Prickett should be unable to handle the remitted appeal, although there is no requirement that he do so.

23. This case is reported for what it says about the Special Voucher Scheme and the inter-relationship between the Rules and the Concession and the way in which Rules should be approached on appeal by an Adjudicator in the light of the argument put forward by Mr Jafferji.

MR JUSTICE OUSELEY
PRESIDENT