

Heard at Field House
On 17 June 2004

IMMIGRATION APPEAL TRIBUNAL

notified: Date Determination
2004..... 05th July

Before
:

Mr D K Allen (Vice-President)
Mr R Hamilton
Mr A P Richardson

Between

APPELLANTS

and

ENTRY CLEARANCE OFFICER - DHAKA

RESPONDENT

DETERMINATION AND REASONS

1. The Appellants appealed to the Tribunal with permission against the Determination of an Adjudicator, Mrs C E Roberts, who dismissed their appeals against the Respondent's decision on 20 June 2000, refusing to grant entry clearance.
2. The hearing before us took place on 17 June 2004. Mr A Bashir of Bashir Consultancy appeared on behalf of the Appellants, and Mrs L Prince appeared on behalf of the Entry Clearance Officer.
3. The Appellants are half-brothers who seek to join their father Israk Ali as his over-aged dependant relatives. The refusal was under paragraph 317 of HC 395. In addition the matter was

considered outside the Immigration Rules and the decision to refuse entry clearance was maintained.

4. In a clearly structured Determination the Adjudicator set out the relevant issues. These were firstly the age of Amir Ali, secondly the nature and impact of the 1989 Concession on DNA testing, and thirdly the situation under the Immigration Rules.
5. The first of these issues was relevant because the 1989 Concession enables a person whose application for entry clearance was refused when that person was under 18 years of age to have their case given special consideration on account of the fact that a number of cases involved refusals of persons who were children at the time when there was no satisfactory evidence as to relationships but where such evidence in the form of DNA evidence may now be available. The Adjudicator gave careful consideration to the issue of the age of Amir Ali since there were discrepancies as to his date of birth, and concluded on the evidence that she was not satisfied that his date of birth was 9 June 1959 as claimed and therefore concluded that there was no credible evidence before her to show on balance that he was an under-age applicant when he made his original application for entry clearance in 1974. He therefore did not fall within the Concession. Nesar Ali's date of birth was agreed to be 2 January 1967 and therefore his case fell for consideration within the Concession.
6. The Adjudicator went on to consider the circumstances in which the Concession was to be applied, and concluded that as it was a policy of special consideration that it was wholly unreasonable some nine years after the first time when its application had been considered in relation to the Appellants to expect the Secretary of State again to give special consideration to the Appellants' application. She therefore did not go on to consider the evidence necessary to determine whether Nesar Ali's case fell within the provisions of the Guidelines since she did not accept that she was empowered to review the Respondent's decision or as she described it more properly, his lack of it, in this regard.
7. Thereafter she went on to consider the Immigration Rules and concluded that neither Appellant satisfied the stringent requirements of paragraph 317 of HC 395.
8. The grounds of appeal expressly do not challenge the dismissal of the appeal under paragraph 317. It is however contended that her decision was unlawful and, as it was put to us by Mr Bashir, *ultra vires*, in deciding not to make findings.
9. Mr Bashir's argument in his grounds which he amplified before us is that there was nothing in the wording of the Concession to indicate that the Secretary of State could or should not be

expected to consider a subsequent application for consideration under the Concession. It is also argued that the Secretary of State did consider the application as could be seen from paragraph 3.5 of the Explanatory Statement, but applied the wrong test in that he referred to “sufficient compelling and compassionate circumstances” whereas the wording of the Concession refers to “compassionate circumstances” only. The government had published a policy to which had not adhered when it was required to so there was an error of law in not considering it.

10. In her submissions Mrs Prince argued that the Adjudicators findings were open to her and it was unreasonable to expect the Secretary of State to reconsider on every occasion when a fresh application was made. It might be different if there were a real change in the circumstances and fresh evidence but their situation had not materially changed. In any event the matter had been considered by the Secretary of State at paragraph 3.5 of the Explanatory Statement, and Mrs Prince accepted that there was an error in the terminology employed, but the matter had been considered. If the Secretary of State did not have to consider the matter then there could not be an error of law if he chose to do so.
11. By way of reply Mr Bashir argued firstly that it was not clear that the Entry Clearance Officer had sent to the Secretary of State all the relevant information to consider under the Concession and there was nothing to show the factor that had been taken into account. There had been a significant change in the circumstances over the years. The land had been divided; the number of people concerned had risen very significantly, and they were living at a very poor level.
12. The Concession referred to is to be found in a statement made by Mr Hurd, the then Secretary of State for the Home Department, on 14 June 1989. In that he stated that he was prepared to consider waiving the requirements of the Rules in certain circumstances. He went on to state that to be eligible for such consideration a re-applicant aged 18 or over would have to show:
 - (a) that he was refused entry clearance as a child on relationship grounds;
 - (b) that DNA evidence establishes that he was, after all, related as claimed;
 - (c) that he is still wholly or mainly dependent on his Sponsor in the United Kingdom; and
 - (d) that there are compassionate circumstances in his case. Thereafter the Secretary of State went on to set out

particular aspects forming part of the circumstances of the case that would be relevant including the nature and degree of the dependency, the extent and nature of the compassionate circumstances, the re-applicant's present age and marital status, whether other close family members such as siblings were already settled in the United Kingdom and the lapse of time between the original application and re-application. In considering the compassionate circumstances of the case the Secretary of State would attach greater weight to compassionate circumstances relating to the situation of the re-applicant abroad than he would to those relating to the situation of his Sponsor in the United Kingdom.

13. The appeal is concerned only with the issue of the Concession in this case. There is no challenge to the Adjudicator's finding that Amir Ali had not been shown to be an under-age applicant when he made his original application, and that therefore the Concession did not apply to him.
14. We can see no indication that the relevant information was not passed on by the Entry Clearance Officer to the Secretary of State prior to the issuing of the Explanatory Statement on 17 March 2003. The evidence is clearly set out there in particular at paragraphs 3.2 and 3.3 of that document. It is also clear from paragraph 3.5 that the Secretary of State considered the applications outside the Immigration Rules but was not satisfied that there were sufficient compelling and compassionate circumstances justifying him exercising discretion in the Appellants' favour. It is in our view sufficiently clear from that that the Secretary of State, although he did not specifically state as much, was considering these cases within the context of the Concession. It cannot therefore in our view properly be argued that he did not do so, and if he did do so then we consider that that is clearly arguable that he would have to take into account the relevant criteria set out in the Concession Statement of June 1989. Should he choose not to do so, then that is a matter for the Secretary of State, but in this case he clearly did do so and it is therefore appropriate for us to consider whether the consideration of these cases under the Concession or rather this case under the Concession can be said to be flawed.
15. In this regard Mrs Prince properly accepted that the terminology employed at paragraph 3.5 of the Explanatory Statement, including a requirement that the compassionate circumstances had to be "compelling" did not accord with the wording used in the Concession itself. In that regard the consideration of this case under the Concession is arguably flawed. Although one should be wary of treating the wording of a Concession of this kind as a statutory language, it is entirely clear from our reading of the Concession that the various factors set out that have to

be established in order to be eligible for consideration are in no sense alternatives but all have to be satisfied. It is clear from paragraph 3.4 of the Explanatory Statement that the Secretary of State had concluded that the Appellants were not mainly dependent financially on the Sponsor. The Adjudicator assessed the evidence and concluded at paragraph 41 of her Determination that she agreed with the Secretary of State that the Appellants had not shown that they were mainly dependent financially on relatives in the United Kingdom. This conclusion was not challenged in the grounds of appeal. Accordingly it is clear in our view that the Secretary of State in considering the application of the Concession to this case clearly came to the conclusion that the Appellant did not come within it because he had not satisfied the dependency requirement of the Concession. Although there is an arguable flaw in his assessment of the compassionate circumstances, for the reasons that we have stated above, we consider that since these requirements all have to be satisfied, that it is clear that this particular requirement of the Concession was not satisfied and the Adjudicator agreed with that and her conclusion has not been challenged. The only appeal before us relates to the situation of Nesar Ali under the Concession, and we conclude that his appeal for the reasons set out above is not made out.

16. This appeal is dismissed.

**D K Allen
Vice President**