SM (Working – Holidaymakers - Age) India [2004] UKIAT 00057

IMMIGRATION APPEAL TRIBUNAL

Date of hearing: 18 March 2004
Date determination notified:
24 March 2004

Before:

MR G. WARR	Vice President
DR H H STOREY	Vice President
MR A JORDAN	Vice President

Appellant

and

ENTRY CLEARANCE OFFICER, MUMBAI Respondent

DETERMINATION AND REASONS

1. The Appellant, a citizen of India, appeals the determination of an adjudicator (Mr D M Brunnen) dismissing his appeal against the refusal of the respondent to grant his application for an entry clearance as a working holidaymaker.

2. Before us, the Appellant was represented by Mr S Ahmed, of Counsel, instructed by K Ganchi. Mrs Giltrow appeared for the Respondent.

3. The appellant made his application for an entry clearance on 9 October 2001. He was interviewed on that day. The application was refused under paragraph 95 of HC 395 on 30 May 2002, the respondent not being satisfied that the appellant was unmarried, that he intended to take employment incidental to his holiday nor that the appellant intended to leave the United Kingdom at the end of his working holiday. The respondent observed in the explanatory statement that the appellant appeared older than his claimed age although this particular concern did not appear to feature in the notice of refusal.

4. At the adjudicator hearing the respondent was not represented. The adjudicator resolved all matters in dispute in favour of the claimant and accepted that he had been born on 22 October 1974 as claimed. There has been no appeal by the respondent or respondent's notice challenging the adjudicator's findings.

5. The adjudicator dismissed the appeal because he considered the appellant fell outside the age bracket laid down by the rules.

6. The relevant sub-paragraph of the rule at the relevant time made it a requirement that the applicant “is aged 17-27 inclusive or was so aged when first given leave to enter in this capacity”. The adjudicator observed: “The appellant has thus far not been given leave to enter his application having been

refused by the Entry Clearance Officer and therefore on a reading of this requirement of the paragraph he falls outside the age bracket necessary to qualify for entry under this heading."

7. Mrs Giltrow could not support the adjudicator's reasoning and both sides requested us to allow the appeal.

8. There is no doubt that the appellant fell within the correct age range at the date of application and at the date of decision.

9. Paragraph 27 of the rules provides:

> "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."

10. The adjudicator's analysis appears to be based on an unduly restrictive reading of the rules. Having found the claimant was aged 27 at the date of decision and being satisfied about all other matters he should have allowed the appeal. True it is that on arrival in the United Kingdom an Immigration Officer could technically refuse entry under paragraph 321 on the basis of a change of circumstances and the Entry Clearance Officer could revoke any entry clearance granted on a similar basis under rule 30A. However, had the entry clearance been granted – which on the adjudicator's analysis it should have been – the appellant could have entered the United Kingdom promptly and prior to his 28th birthday. The rules have been amended to extend the upper age limit to 30 so the appellant can still meet the requirements even today. The part of the rule on which the adjudicator placed reliance was designed to cover the situation where a working holidaymaker returns to the United Kingdom (after a visit home for example). If then aged 29, say, he will not be refused entry provided he complied with the rules when first given leave to enter. Reading the rules in the way the adjudicator did would render the appeal useless. Incidentally, the problem should not often arise because under section 88(2)(a) of the 2002 Act (as under section 62(1)(b) of the 1999 Act) an individual may not appeal if the refusal is on the ground that the applicant "does not satisfy a requirement as to age …specified in immigration rules." In this case the notice of the decision does not appear to specify this requirement as a ground. We note the right of appeal was expressed on the notice of refusal to arise (we assume incorrectly) under section 13(2) of the 1971 Act. In any event, Mrs Giltrow took no point on the matter and as we have observed the appellant meets the current age requirements.

11. With the agreement of the parties the appeal is allowed.

G. Warr
Vice President
18 March 2004