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Heard at Field House

DB (Dependent Relative - Appeals Procedure) Pakistan [2003] UKIAT 00053

On 8 July 2003
Prepared 8 July 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

27/08/2003

Before:

Mr H J E Latter (Chairman)
Mr C P Mather
Mr A Smith

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

APPELLANT

and

RESPONDENTS

Appearances
For the appellant: Mr A Sheikh, Home Office Presenting Officer
For the respondent: Mr R Sheikh of RS Advisory Service

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer, Islamabad, against the determination of an Adjudicator (Dr S S Juss) who allowed the respondent's appeals against the decision made on 1 October 2001 refusing them entry clearance for settlement under paragraph 317 of HC395. In this determination the Tribunal will refer to the respondents to this appeal as the applicants.

2. The applicants are both citizens of Pakistan, the first applicant was born in 1922 and his wife, the second applicant, was born in 1927. They applied for entry clearance to join their grandson, Shabbir Hussain, as his dependent relatives. This was not the first application which had been made for settlement. In November 2000 an appeal

was heard by an Adjudicator against a decision made on 20 April 2000 refusing them entry clearance to join their son and grandson, Shaheem Akhtar and Shabbir Hussain as dependent relatives.

3. That appeal was heard and dismissed by Mrs D E Taylor on 28 November 2000. She was not satisfied that the requirements of para 317 of HC395 were met. In particular she was not satisfied that the applicants only had one son living in the United Kingdom. There was evidence from a field trip to the village at Dhak, where the applicants lived, that the Entry Clearance Officer saw an Eid card in their home from their son Abdul Aziz in Stoke. In the evidence before Mrs Taylor Shabbir Hussain had said he was unable to identify Abdul Aziz and repeated that there was only one son in the United Kingdom. The Adjudicator did not believe this evidence. She also did not believe that land owned by the applicants in Pakistan was not producing any income. She accepted that money had been sent from relatives in the United Kingdom and that Shabbir Hussain had sent to the applicants reasonably substantial sums of money but she was not satisfied that this amounted to financial dependency on him. She felt that it was more likely that it was his father and uncle who had provided money for the house in Pakistan. She also commented that the applicants had two grandsons working in the next village. They were well housed and had received financial support from the United Kingdom family over the years. That support might continue but whether it did or not, the applicants had equally close relatives to the sponsor in Pakistan to whom they could turn for financial support should that prove necessary. In these circumstances the appeal was dismissed.

4. There was an application for leave to appeal to the Immigration Appeal Tribunal which was refused in a determination notified on 15 March 2001. When refusing leave the Vice President commented that the Adjudicator had not been satisfied that the applicants were wholly or mainly dependent on a relative present and settled in the United Kingdom and that it was clear that there were other close relatives of their own in Pakistan to turn to for financial support.

5. A further application for entry clearance was made on 27 April 2001. The first applicant was interviewed on 1 October 2001. He confirmed that he wished to go to the United Kingdom to settle with his grandson as there was no one to take care of them in Pakistan. He confirmed that he had been refused entry clearance on three previous occasions, two visitor applications and one settlement application. He was asked what had changed since the last application and he replied that it was the same. His grandson sent him R.10,000 a month. He received money from other members of the family. His son sent R.15-20,000 every two or three months. He was asked about Abdul Aziz. He replied that he did not know where he was. He was reminded that the application had been refused on the last occasion as he had two daughters in Pakistan. One was married with sons. He was asked what had changed. He replied that his first daughter was living with her

husband and the second daughter was living with them. She was not well and her children looked after her. They could not look after the applicants as well.

6. The Entry Clearance Officer refused the application as he was not satisfied that the applicants were financially wholly or mainly dependent on Shabbir Hussain, nor that they had no other close relatives in their country to whom they could turn for financial support.

7. At the hearing the Adjudicator heard oral evidence from the sponsor. He also had documentary evidence which is referred to in paragraph 5 of his determination. In paragraph 7 the Adjudicator referred to the previous determination. He commented as follows:

> "The respondent relies upon a previous determination by an Adjudicator, namely, Mrs D E Taylor, dated 25 January 2001. I have looked at this decision. It states (at para 12) that the appellants are financially dependent upon money coming from the UK. There is no suggestion that they have any other income from Pakistan. However the Learned Adjudicator notes that there are other close relatives in Pakistan to whom the appellants can turn for financial support. I have naturally looked at this determination because it is referred to by the ECO. However I have taken care not to be affected in any way by it. This is a *de novo* application for entry clearance and a *de novo* hearing. The ECO's explanatory statement goes on to say that since the appeal was dismissed, the sponsor, Mr Hussain has continued to remit money to the appellants. At the interview there appear to have been no material changes in circumstances since the last appeal was dismissed. The principal difficulty with this case as I note, is this. There appears to have been a credibility challenge to the first appellant. Mr Mohamed gave a full family tree to the ECO. However, he continued to maintain, as previously, that he did not know the whereabouts of his second son. The ECO said that given that they had seen evidence of contact on their last visit, this did not appear credible."

8. The Adjudicator went on to review the evidence before him. The sponsor explained that the applicant had a daughter Sakina who lived about 40 miles away. She was a widow and could not look after the applicants. Maqsood Bi is the other daughter who lives about half an hour away. Her husband is a farmer. She has six children. The sponsor explained that their culture was that daughters did not support the father if there was a son. There was also a daughter in England called Zamir Bi. The sponsor explained that he had supported his grandparents for 10 to 12 years sending about £100 per month which was converted into about 9,000 Rupees. Since 1984 he had made six visits to Pakistan to see his grandparents.

9. The sponsor went on to explain how Abdul Aziz fitted into the family. He was not the son of the applicants but was his grandfather's brother's son. When Abdul Aziz's father died he had been brought up by the applicants. The sponsor's father had given his daughter (i.e. the sponsor's sister, Rubini) to him in marriage. This had not worked out and as a result the sponsor's family had broken off contact with him but Abdul Aziz did maintain some contact with the applicants, even though he was not their son.

10. The Adjudicator accepted that the sponsor's evidence was credible. A steady stream of remittances had been sent over a long period of time. He accepted that the applicants were wholly or mainly dependent on funds being remitted from the United Kingdom. He accepted the evidence that the daughters in Pakistan were not in a position to help and that there was no other son in Pakistan. There was Abdul Aziz but the Adjudicator commented that he saw no evidence that he was in a position financially to support the applicants. In these circumstances the appeal was allowed.

11. In the grounds of appeal it is argued that the Adjudicator was wrong to leave out of account the findings in the first appeal heard by Mrs Taylor. The Adjudicator should have followed the guidelines set out in Devaseelan [2002] UKIAT 00702. The first Adjudicator's determination should always be the starting point and if facts personal to the applicants had not been brought to the attention of the first Adjudicator they should be treated with circumspection.

12. Mr A Sheikh adopted these grounds. He argued that it was implicit from the terms of Rule 44 of the 2000 Procedure Rules that previous determinations were relevant. The Adjudicator had been wrong to direct himself that this was a fresh hearing and that he should not be effected in any way by the previous determination.

13. Mr R Sheikh submitted that it was not clear that Devaseelan applied as a matter of principle to second appeals on the same or similar facts. The approach in human rights and asylum cases would necessarily be different from immigration appeals. The Adjudicator has found the sponsor to be credible. This finding was properly open to him on the evidence. These were issues of fact for him to determine.

14. The issue of second appeals based on similar facts is not a new phenomenon in this jurisdiction but the issue acquired a degree of prominence following the determination in Pardeepan (00/TH/02414) which considered the Immigration & Asylum Act 1999 (Commencement No. 6 Transitional and Consequential Provisions (Order 2000)) which provided that human rights appeals under Section 65 of the 1999 Act would not have effect when the decision was taken before 2 October 2000. The consequence of the Transitional Provisions was that following the determination of asylum claims, further human rights claims were made often based on the same facts. The determination

in Devaseelan set out guidelines as to how Adjudicators hearing the second appeals should approach the first determination. However the issue of second appeals is not limited to asylum and human rights appeals. In immigration appeals and in particular marriage and settlement applications, it is not unusual for a second or even third application to be made following previous adverse decisions. Previous determinations were not left out of account but were treated not only as part of the factual background but also as determinative of the issues as at the date of the decision

15. There is nothing in Devaseelan which limits its principles to asylum and human rights appeals. There is no reason why they should be so limited. We are satisfied that the principles set out in Devaseelan apply to all categories of appeals coming before Adjudicators and the Tribunal.

16. It follows that the Adjudicator was wrong to disregard the findings in the previous determination, and wrong to take care, as he described it, not to be affected in any way by the previous determination. It would be very unsatisfactory and not in the interests of justice if an Adjudicator paid no regard to a previous determination in such circumstances, particularly when the application the subject of the appeal before him was made only a matter of weeks after a refusal of leave to appeal by the Tribunal. In this case Mrs Taylor heard the appeal on 28 November 2000. Leave to appeal was refused on 15 March 2001 and a fresh application was made within a matter of weeks on 27 April 2001. Even though the first appeal related to a decision made on 20 April 2000, it would be wholly artificial to disregard that determination when assessing the merits of the second decision.

17. As the Tribunal emphasised in paragraph 37 in Devaseelan the first determination stands as an assessment of the claim made as at the date of the determination. It is not binding on the second Adjudicator. The second Adjudicator is not hearing an appeal against it. The first determination may be built on and further evidence may come to light which leads to a different outcome before the second Adjudicator. The situation at the date of the later decision may be shown to be different from the situation previously obtaining, and there may be further evidence which either was not or could have been put to the first Adjudicator.

18. In our view therefore the guidelines set out in Devaseelan apply in respect of all second appeals, subject only to applying the guidelines sensibly to immigration appeals: the guidelines refer to country evidence but as only an example of the evidence of other facts not personal to the applicants which may fall to be considered.

19. The Tribunal cannot be satisfied that if the Adjudicator had applied the principles set out in Devaseelan to this appeal that he would necessarily have reached the same conclusions. When interviewed

the applicants accepted that the situation was the same as at the previous application. It was accepted that they had land which had been farmed. There was some issue about precisely who was the owner of the land but no issue that the income from the land would have been available to the applicants. Mrs Taylor simply did not believe the evidence that the fields were just left alone and people in nearby villages took the crops for free. She said that no doubt the applicants received some crops from their land and possibly monies as well. She had been told in evidence that the applicants had been unable to identify Abdul Aziz and that there was only one son in the United Kingdom. She did not believe this. She did not believe that the sole source of the money used to maintain the applicants was from Shabbir Hussain, the sponsor. She commented at paragraph 14 of her determination that there were two other grandsons working in the next village. She was satisfied that the applicants had equally close relatives to the sponsor, i.e. grandchildren, in Pakistan to whom they could turn for financial support.

20. At the hearing before Dr Juss there was an explanation about Abdul Aziz. This is set out in paragraph 12 of the determination. He accepted the evidence that there had been a family rift and that Abdul Aziz was in fact the nephew of the applicant and had been brought up by them. There appears to be no further explanation of his continued relationship with the applicants or what role, if any, he played in the applicants' lives. Dr Juss found that the relatives in Pakistan were not in a position to help the applicants whereas Mrs Taylor had been satisfied that they could be turned to for financial support.

21. In summary the Tribunal are not satisfied that Dr Juss would necessarily have come to the same conclusions if he had taken proper account of Mrs Taylor's determination in accordance with the guidelines in Devaseelan. In our view the proper course is for this appeal to be remitted for a fresh hearing. We appreciate Mr R Sheikh's concerns which he expressed at the hearing arising from the age of the applicants and the effect of the evidence given by the sponsor and summarised by Dr Juss in paragraph 12 of his determination. However, the fact remains that the Tribunal are not in a position to assess whether the provisions of para 317 of HC395 have been met. The only course that does justice to both sides is for this appeal to be remitted for re-hearing.

22. Accordingly, this appeal is allowed to the extent that it is remitted for a fresh hearing by an Adjudicator (not Dr S S Juss).

H J E Latter
Vice President