Upper Tribunal
(Immigration and Asylum Chamber)

PS (working holidaymaker – maintenance – assessment) India [2010] UKUT 280 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 13 May 2010

Before

MR JUSTICE OUSELEY

SENIOR IMMIGRATION JUDGE LATTER

Between

PS

Appellant

and

ENTRY CLEARANCE OFFICER (NEW DELHI)

Respondent

Representation :

For the Appellant: Mr A Mahmood, Counsel, instructed by UKIC Immigration Lawyers

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

(1) There is no single, proper test to be applied when assessing the adequacy of maintenance in a working holidaymaker appeal.

(2) The onus is on the appellant to show that he can meet the requirements of para95(v) of HC395. It is for him to explain his plans and how he proposes to maintain and accommodate himself without recourse to public funds.

(3) Whether those proposals are practical can be assessed against any reliable evidence of the likely costs subject to ensuring that a true comparison can be made. However, any such evidence is a guide only and cannot be treated in itself as determinative or as displacing or putting a gloss on the wording of the rule itself.

DETERMINATION AND REASONS

1. This is an appeal by the appellant against the determination of Immigration Judge Lowe issued on 14 April 2009 dismissing his appeal against the respondent's decision to refuse him entry clearance as a working holidaymaker. Reconsideration was ordered by the High Court and on 11 January 2010 the

Asylum and Immigration Tribunal found that the judge had materially erred in law. The reconsideration now proceeds by virtue of transitional provisions as an appeal to the Upper Tribunal. The factual issue which remains unresolved between the parties is whether the appellant is able to meet the maintenance and accommodation requirements of para 95 of HC 395. A more general issue of principle has been raised, both by the Immigration Judge and by the Senior Immigration Judge at the first stage of the reconsideration, as to the proper test to be applied when making his assessment.

Background

2. The appellant is a citizen of India born on 15 April 1988 and he lives with his family in the village of Pandori Ran Singh in Amritsar. On 22 January 2008 he applied for entry clearance as a working holidaymaker. In his application he said that he assisted his father in the family agriculture business and the total family income after tax was Rs1,20,000. He intended to stay in the UK for two years for an extended holiday and would take work incidental to that holiday for less than twelve months. He set out his holiday plans and said that he would take £500 with him and would be maintained and accommodated by his brother-in-law, the sponsor.

3. However, the respondent was not satisfied that the appellant had shown that he could meet all the requirements of para 95 for the following reasons:

“ Although I accept that your age makes you eligible to apply for a working holiday visa, you must also show me that you will leave the UK at the end of your working holiday and that you will not take up permanent work.

You state that you are currently working, assisting your father in your family’s agricultural business since August 2006. Your presence here is clearly not essential given that you are able to travel to the UK for an up to two year working holiday.

Because of this I am not satisfied that you are genuinely seeking entry to the UK as a working holidaymaker, that you plan to leave the UK at the end of your working holiday or that you plan to do only temporary work which is incidental to a holiday (paragraph 95(vi)(viii) of HC 395).

You state that you have £500 (about Rs40,000) available for your trip. You have not provided satisfactory evidence that such funds will actually be available to you or that it is credible for your family to deplete their savings to fund an extended holiday by you. You have not explained or shown that it is realistic for you to spend such funds on a working holiday. The costs involved in spending two years in the United Kingdom on a two year working holiday will be considerable. Taking into account your circumstances and experience in India, I am not satisfied that your earning potential in the UK would be sufficient to enable you to support yourself for two years if you were not to take employment that was only incidental to a holiday and for not more than twelve months. You have not provided satisfactory evidence as to how you will be able to support yourself during this period. I am not satisfied, on the balance of probabilities, that you will be able to maintain and accommodate yourself in the UK without recourse to public funds or without taking employment other than that which is incidental to a holiday (paragraph 95(v)(vi) of HC 395).

Although I accept that you may not have firm plans for the future, you must show that you plan to leave the UK at the end of your working holiday. Because you have not shown me any realistic future plans, I am not satisfied that you plan to leave the UK at the end of your stay (paragraph 95(viii) of HC 395).

I therefore refuse your application.”

4. At the hearing before the immigration judge the sponsor gave oral evidence. He confirmed that he had offered the appellant hospitality for an initial week or so and also whenever he returned to the West Midlands during his holiday. He said that this was optional as the appellant had underlined that he wished to be self-sufficient. He lived with his parents and elder brother and helped his father on the farm which would continue to be run by the appellant's father who could hire labourers. As the appellant worked for his father, he took no wages and so in return his father had given him funds for the trip. The sponsor had also made him a gift of £1,000. He said that the appellant's family had earned a good living from the farm for a long time and the value of their land was increasing so there was no question that the expenditure on the trip would affect their overall financial position. The appellant would have about £2,800 to spend in the UK and would do no more than twelve months' incidental unskilled work. The sponsor said that he was a transport driver making deliveries to large construction companies. He had made enquiries about labouring jobs for the appellant and had been told that there were always concrete laying jobs going at the minimum wage. The appellant would be able to improve his English. He could work for maybe three days and then go sightseeing for the other four days in a week. He would take him to see local sights but the appellant had also mentioned living in London and Glasgow.

The Findings of the Immigration Judge

5. The judge dealt with the points in the respondent's decision in turn. She commented that the refusal appeared to doubt the appellant's employment status in India because he could be released from the family farm for up to two years as he was "not essential" thus adding to the respondent's suspicions about the appellant's personal and financial circumstances and whether he intended to work in the UK in breach of the scheme. She said that the scheme was a "gap year type of opportunity for those who had yet to establish themselves in their home country" and that there was no requirement that an appellant had to have been working in his home country, have a job to return to or even have settled plans for the future. She found that the respondent had made a mistake in his assertion that the appellant had initial funds of only £500 accepting from the evidence before her that he had about £2,800 in funds under his control derived from gifts. She accepted that he intended to work as required by the case of NS (Working holidaymaker; intention to work) India [2007] UKAIT 00090) [2007] UKAIT 00090 and that his sponsors had modified their offer of hospitality from two years to an initial period in the UK followed by ad hoc accommodation. She found that the appellant appeared to be aiming for realistic work such as labouring where the sponsor had been making enquiries. There was no reason to suppose that a 20 year old man, physically fit from working on a farm and used to hard manual work would not be able to get this type of job.

6. At the hearing the appellant's representative produced a list of places which could be visited for free in the London area but the judge that she did not attach much weight to this as it appeared to be post-refusal and contained places which did not have any obvious attraction to a working holidaymaker like the appellant. Rather more relevant evidence was produced about the cost of hostel and dormitory accommodation to support an argument that realistically the appellant need only pay about £5 per night to accommodate himself. It was argued on behalf of the appellant that the income support rates provided an appropriate benchmark for the assessment of whether he could maintain himself.

7. The judge considered the determination in TS (Working Holidaymakers: no third party support) India) [2008] UKAIT 00024 where the Tribunal had held that an appellant had to show that he could meet the costs of the holiday from a combination of his own financial resources and his earnings from incidental employment and that he would not be able to do so if he had to rely either in whole or in

part upon promises of financial support from third parties whether family, friends or others to meet his maintenance or his accommodation needs. In MH (Working Holidaymaker: intention to support) Bangladesh [2008] UKAIT 00039 the Tribunal held that so far as accommodation was concerned, an offer of hospitality was not necessarily fatal on third party support grounds but the appellant still had to be in the position of being able to show that if any proposed hospitality did not materialise or came to an end, he would be able to maintain and accommodate himself.

8. The judge was referred to the guidance set out in the relevant IDI April 2004 and in the Entry Clearance Guidance (General) Directions Chapter 18, 18.4 to the effect that any working holidaymaker must be able to satisfy the ECO that he has the means to support himself for at least the first two months after arrival or for at least one month if he has a job arranged in advance. She rightly made the point that this guidance could not override the provision of the rules. She accepted that the appellant would have £2,800 in initial funds and would be able to work. If he worked a 40 hour week for 52 weeks at the national minimum wage, he could earn about £9,700 net and therefore the maximum that he would have available for his holiday would be in the region of £12,500. On this basis, over a period of two years, the appellant would need about £120 per week to support himself.

9. She commented that the respondent normally used the figures given in the Lonely Planet Guide for the UK as the benchmark for assessing how much it would cost a working holidaymaker to maintain and support himself. The provincial rate for a “shoestring” traveller for food and accommodation alone would be £25 a day and on this basis, without taking into account any travel or discretionary expenditure, the appellant would need £18,250 for a two year stay or about £175 per week.

10. It was argued on the appellant’s behalf that the income support rates with accommodation costs added provided a better benchmark than the Lonely Planet Guide. The income support rates were used as the benchmark for assessing the adequacy of maintenance for a married couple and it could hardly be the case, so it was argued, that a working holidaymaker would in reality need more resources when showing that he could maintain and accommodate himself when there was no requirement of adequacy in para 95.

11. The judge set out her findings on these issues as follows:

“ 24. I take the view that using income support plus accommodation costs as a benchmark is not valid for a working holidaymaker, who is by definition doing some work and having an extended holiday. The recipient of this subsistence level allowance is someone usually living at home who is definitely not a tourist or holidaymaker, and is incurring only living expenses and perhaps travel expenses to job interviews. The case of KA is not therefore applicable. Whilst it would be helpful to have judicial confirmation of the formula to be used (albeit on a defunct scheme) the working holidaymaker has to be regarded as someone who will in pursuit of their extended holiday incur board and lodging expenses not in their own home, travel costs and sightseeing expenses even if travel passes and free entries are to be used as much as possible. Not all free schemes would cater for a working holidaymaker’s needs or interests, so some tourism and socialising expenditure has to be expected, including entrance fees to the theme parks and major tourist attractions mentioned by the appellant. As it is an extended holiday, there has to be some expenditure on toiletries and discretionary items such as clothing to meet changing seasons, and costs arising from the limited opportunity to cook one’s own meals. If the TS determination quoted without disapproval 2006 daily costs of £30-£60 in the provinces, £25 per day at the date of refusal in 2008 does not seem unreasonable. The appellant is therefore short of about £5,750 to fund his working holiday, on the basis of funds, likely employment and costs as at the date of refusal.

25. I appreciate that the appellant and sponsors will be disappointed by this decision. However, the appellant may wish to consider applying for a family visa as this would give him up to six months of staying with his sister and brother-in-law, and going sightseeing. Providing a family visit to them is intended, there is nothing in the Immigration Rules to stop the appellant from doing some touring and sightseeing on his own. He would not be able to work, but he would be able to meet people and improve his English through conversation. His father is apparently willing for him to take time off from the farm, and he has savings to fund his trip ."

For these reasons the appeal was dismissed.

The Grounds

12. The grounds seek to challenge the judge's finding that the appellant's financial requirements fell short by £5,750. They argue that the judge was wrong not to take proper account of the guidance in the IDI and to proceed on the basis that the working holidaymaker scheme required an appellant to have all the necessary finances available in advance and and would need the level of resources set out in the Lonely Planet Guide. The rules did not require maintenance and accommodation to be adequate and the grounds repeat the argument that the income support figures provide a more appropriate guideline for assessing whether the requirements of the Rules are met.

The Material Error of Law

13. The Tribunal (Senior Immigration Judge Freeman) found that the judge had erred in law for the following reasons:

a)
This is a working holiday-maker appeal, in which HH Judge David Pearl, sitting as a deputy judge of the High Court, granted reconsideration on the basis that the immigration judge's decision was challenged over what she said about third party support. This was in fact not the case, as the appellant's solicitor Mr Thomas made clear before me: the appellant argued that he would be able to pay his own way, not only by the money he would bring with him, but by what he would earn in this country. (Probably Judge Pearl was misled by the incidental reference to the question of third party support in the grounds for review).

b)
The judge seems to have accepted that the appellant would have been able to bring the equivalent of £2,800 with him. So far as earning capacity goes, she accepted (at paragraph 17) that he could get a labouring job in this country; but there was nothing apart from the fact that his uncle had made some inquiries to show any specific prospects of that. Mr Thomas argued that he should be taken as having the capacity to earn the equivalent of the national minimum wage at 40 hours a week for 12 months, which he calculated as £12,376.

c)
I do not think this was necessarily the conclusion the judge should have drawn from her findings; but these certainly included a finding that the appellant did have some earning capacity, and that figure no doubt represents the maximum that could reasonably have been attributed to it; so the judge's round figure of £12,500 on that basis is not wrong in law, in the absence of any challenge to it by the Home Office in a r. 30 reply. That brings the relevant finding on the appellant's resources for his two-year stay to a total of £14,300.

d)

The problem with the judge's reasons for dismissing the appeal comes with her use of the 'Lonely Planet' guidelines. This well-known work of reference for travellers is often cited by entry clearance officers, and use of it has passed without comment in various decided cases. Though Mr Smart for the Home Office was undoubtedly right in pointing to the Court of Appeal's calculation of resources in KS (India) [2009] EWCA Civ 762 as covering the whole of the two-year period, that is not the length of stay with which the 'Lonely Planet' is dealing.

e)
Clearly someone who is here for that length of time will have a cheaper daily cost of living than a short-term visitor. On the other hand, the expenses he will have to meet, even on the notional basis that he will be living as a self-supporting independent person, will include the cost of housing, not included in the single person's income support rate; so it would not seem possible to take that as the basis, as done in family reunion appeals.

f)
It is not clear from KS (India) or any other case cited to me what the right basis of assessment would be, and, even with the declining number of working holiday-maker appeals still passing through the system, it may be of some general interest for this to be established. There is no issue on third party support in the present case, so it may have to be decided on another occasion whether what the Court of Appeal said about that in KS (India) survives Ahmed Mahad [2009] UKSC 16.

Submissions

14. Mr Mahmood submitted that on this basis of the funds available to the appellant he would have at his disposal about £12,368 (savings of £2,800 together with earnings at the minimum wage of £9,568 (£4.60 an hour x 40 hours x 52). The cost of living for two years on income support levels would be £47.95 per week x 104=£4,986.85 and if accommodation costs were £5 a day they would total about £3,605 (£35 per week x 103 weeks as he would stay for at least a week with his sponsor = £3,685). His total costs would therefore be £8,591.85 which would leave him with a surplus of £3,908.15.

15. He submitted that there was no legal basis for using the figures in the Lonely Planet Guide and this had led the judge wrongly to conclude that the appellant would need £18,200 for his holiday, a weekly cost of £175. So far as any issue of third party support was concerned he argued that the judgment of the Court of Appeal in KS (India) and JA (Bangladesh) [2009] EWCA Civ 762 should no longer be regarded as correct in the light of the judgments of the Supreme Court in Ahmed Mahad [2009] UKSC 16. He argued that there was no reason why the income support levels should not be regarded as a sensible benchmark rather than the figures in the Lonely Planet Guide.

16. Ms Isherwood submitted that the judge had not erred in law by referring to the Lonely Planet Guide. A working holidaymaker could not be regarded as meeting the requirements of the Rules simply by showing that he could scrape by at a very minimal level. He would be in a very different position from a person on income support and would have to meet the additional expenses of taking a holiday. There was no reason not to take the Lonely Planet Guide figures into account as a guide but a flexible approach should be taken.

The Issues

17. Although the respondent was not satisfied about the appellant's intentions or whether he intended to leave the UK at the end of his working holiday, the immigration judge found that these requirements of the rules were met and her decision to dismiss the appeal was solely on the ground

that the appellant would not be able to meet the maintenance and accommodation requirements of the rules. The Rules require the appellant to show that he:

“ (v) is able and intends to maintain and accommodate himself without recourse to public funds … (para 95(v) of HC 395) .”

18. The onus is on the appellant to show on a balance of probabilities that he can meet this requirement. The grounds have raised the issue of how maintenance and accommodation should be assessed in working holidaymaker cases. We heard submissions on whether the income support level or the figures given in the Lonely Planet Guide could or should be regarded as the appropriate benchmark.

19. The proper starting point is to emphasise that the onus is on the appellant to show that he can meet the requirements of the rules. It is for him to explain his plans and how he proposes to maintain and accommodate himself. This is a question of fact to be assessed in the light of the evidence as a whole. Whether his proposals are practical can be assessed against any reliable evidence of the likely costs subject to ensuring that a true comparison can be made. However, any such evidence is a guide only and cannot be treated in itself as determinative or as displacing or putting a gloss on the wording of the rule itself. It will always be a question of fact to be assessed in the light of the evidence produced whether the appellant has shown on a balance of probabilities that he is able and intends to maintain and accommodate himself without recourse to public funds.

20. If an appellant has family or friends in this country and intends to stay with them for a substantial part of his working holiday, he will not incur the same accommodation costs as someone who, out of necessity, has to meet the expense of finding and paying for accommodation for the whole of his stay. In the latter case and in the absence of any evidence to the contrary, the guideline figures set out in the Lonely Planet Guide can properly be regarded as a good indication of the likely costs.

21. In this case the Lonely Planet Guide figures were not referred to by the respondent in his decision and have not been produced in evidence but no issue has been taken with the figures referred to by the judge in para 23 of her determination. In 2006 the guide gave figures of between £40-£60 per day for the cheapest accommodation, food, transport and cheap sightseeing/nightlife in London in contrast to £30 per day outside London if a traveller had his own transport and cooked his own meals to £60 for bed and breakfast accommodation, one other daily meals and entrance fees and the judge relied on the provincial rate for a shoestring traveller of £25 a day.

22. It was argued on behalf of the appellant that the income support level for a single person was £47.95 a week and that if he lived in cheap hostel accommodation, he would be able to support and maintain himself. We agree with Ms Isherwood’s argument that the income support rate is not a satisfactory benchmark for assessing the maintenance and accommodation requirements for a working holidaymaker. Income support rates what can be regarded as the minimum necessary requirement for a resident not a holidaymaker and they do not include any allowance for accommodation, travelling or other incidental expenses associated with a holiday. They provide a reasonable benchmark for assessing maintenance and accommodation needs for those seeking to settle in the UK but they are of limited value in relation to working holidaymakers who may have to meet the cost of buying their own meals, finding accommodation and paying for travel costs and other general costs associated with a holiday. There is no single proper test to be applied when assessing maintenance and accommodation in working holiday maker appeals but in general terms the Lonely Planet Guide rather than the income support rate is likely to provide a better way of testing the

viability of an appellant's evidence but inevitably each case will depend upon its own facts. We now turn to the specific facts relating to this appellant.

23. The way the appellant has put his case has shifted with the changing understanding of what the rules mean particularly on the issue of third party support although it is now accepted that this issue does not arise in this appeal. When the appellant initially made his claim he said that he would be maintained and accommodated by his sponsor. Following the judgment of the Court of Appeal that third party support was not available for working holidaymakers, the appellant revised the way he put his case to explain how he said he could still meet the requirements of the rules. There is no reason why an appellant should not seek to take this course in the light of a changed understanding of the meaning of the rules: it will be a question of fact whether any adverse inferences on credibility should be drawn from a change in the evidence as to how an appellant says that he is able meet the requirements of the rules.

24. The appellant sought to argue that with the money he had and would earn, he would still be able to support and accommodate himself as cheap hostel and dormitory accommodation was available in places like London and Edinburgh with rates ranging from £3.30 to £10.00 per night. It was on this basis that it was argued that with accommodation costs of £5 per day added to the cost of maintaining himself at income support levels, his costs would fall well within his available funds of about £12,500. However, we are not satisfied that if the appellant had to find accommodation for his entire holiday save for one or two weeks with his relatives that he would have sufficient funding or that it would really be his intention to spend such long periods of time in such very cheap and low quality accommodation.

25. The judge accepted that a genuine working holiday was intended, that the work the appellant proposed to take would be incidental to that holiday and that he intended to return to India once his holiday was over. She also accepted that in fact the appellant would be able to stay with his family, his sister and the sponsor. In para 25 of her determination she referred to the option of applying for a family visit visa saying that this would give the appellant the ability of staying for six months with his family and going sightseeing. We can properly infer from this comment that the judge accepted that the reality of the position was that the appellant would be able to stay with his family if necessary for extended periods during his working holiday.

26. We are satisfied that the appellant's real plans were as outlined in his original application. He would be based with his family in the West Midlands, would obtain work and when finance permitted would take the opportunity of visiting other parts of the UK when he would be able to stay for relatively short periods of time in cheap hostel or dormitory accommodation. The appellant has access to funds of £2,800; he can stay with a close relative in this country and there is no reason to believe that this accommodation will not be available as and when needed and he has shown that he is likely to be able obtain work yielding up to £9,568. We are satisfied that he has shown on a balance of probabilities an ability and intention to maintain and accommodate himself without recourse to public funds.

Decision

27. The immigration judge erred in point of law. We set aside her decision and substitute a decision allowing the appeal against the refusal of entry clearance as a working holidaymaker.

Signed

Senior Immigration Judge Latter

(Judge of the Upper Tribunal)