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Upper Tribunal
(Immigration and Asylum Chamber)

SP (allowed appeal: directions) South Africa [2011] UKUT 00188 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 February 2011	.....

Before

LADY DORRIAN

SENIOR IMMIGRATION JUDGE ALLEN

Between

SP

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation :

For the Appellant: No legal representation. The sponsor attended

For the Respondent: Ms L Ong, Home Office Presenting Officer

Section 87(1) of the Nationality, Immigration and Asylum Act 2002 permits the Tribunal to give a direction for the purpose of giving effect to its decision and is a broader power than paragraph 21 (5) of Schedule 4 to the Immigration and Asylum Act 1999 where the direction must be 'necessary'

In an entry clearance case directions should only be given requiring the issue of entry clearance where the judge is satisfied that the appellant will be able to meet all the requirements of the relevant rule in the foreseeable future.

DETERMINATION AND REASONS

1. The appellant is a national of South Africa who was born on 21 March 2001. She appealed to an Immigration Judge against the decision of the Entry Clearance Officer refusing to grant her entry clearance to the United Kingdom for the purpose of settlement with her paternal grandparents.

2. The only basis upon which the application was refused by the Entry Clearance Officer was under paragraph 297(f) of HC 395. The Entry Clearance Officer did not accept that the appellant's mother in South Africa was incapable of, and unwilling to provide her with parental care and did not accept that it had been shown that her mother was content for her to move to the United Kingdom with her grandparents. The Entry Clearance Officer was not satisfied that there were sufficiently serious and compelling considerations in the application such as to lead him to conclude that denying the appellant entry clearance was undesirable. The Entry Clearance Officer expressed himself satisfied that the appellant met all the other requirements of paragraph 297. He did not consider that the decision to refuse entry clearance constituted a breach of the appellant's Article 8 rights.

3. The Immigration Judge found the sponsor, the appellant's grandfather to be entirely credible. He accepted the entirety of the evidence and found that the requirements of paragraph 297(i)(f) had been made out. He directed that entry clearance be issued to the appellant.

4. The Entry Clearance Officer sought permission to appeal this decision, on the basis that the Immigration Judge had not explained why it was considered necessary to direct the Entry Clearance Officer to grant entry clearance. It was said that the Immigration Judge had failed to have regard to guidance given to Entry Clearance Officers about the effect of an allowed determination and the action to be taken in response to it. Reference was made to a decision of the Tribunal in EA (Ghana) [2005] UKAIT 00108.

5. Ms Ong very fairly said that she was in difficulties, in light of points we put to her about the nature of the findings and the facts of this case. The kind of difficulty referred to in the authorities that could attach to the making of a direction, in that time would have passed between the application and the hearing and there might well have been significant changes in the circumstances of an appellant, did not it seemed to us appertain in this case. In the circumstances Ms Ong was content to rely on the grounds.

6. We indicated that the Secretary of State's appeal would be dismissed and the Immigration Judge’s decision maintained, with reasons to follow. We now provide those reasons.

7. Section 87 of the Nationality, Immigration and Asylum Act 2002 makes the following provision in respect of directions after a successful appeal:

“(1) If the Tribunal allows an appeal under Section 82, 83 or 83A, it may give a direction for the purpose of giving effect to its decision.

(2) A person responsible for making an immigration decision shall act in accordance with any relevant directions under subsection (1).

(3) But a direction under this section shall not have effect while

(a) an application for permission to appeal under Section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b) permission to appeal to the Upper Tribunal or a court under either of those Sections has been granted and the appeal is awaiting determination, or

(c) an appeal has been remitted under Section 12 or 14 of that Act and it is awaiting determination.

(4) A direction under subsection (1) shall be treated as part of the Tribunal's decision on the appeal for the purposes of Section 11 of the Tribunals, Courts and Enforcement Act 2007.”

8. In MG (Visit appeal – directions) Jamaica [2004] UKIAT 00140, the Tribunal considered the issue of directions in the context of a visit appeal. It quoted from what had been said earlier by the AIT in Obeid [1986] Imm AR 341, where an adjudicator directed “the appropriate entry clearance” in the case of a visit. The Tribunal in Obeid made the point that a lack of justification of refusal of entry for a proposed visit made for express purposes on a different date could not entitle a person to entry clearance for a visit made at a different time and indeed the purposes themselves might have changed. Even if that were not the case, there would still be likely to be issues of maintenance and accommodation.

9. Subsequently in a decision in Sharif [2002] UKIAT 00953, referring to paragraph 21(5) of Schedule 4 to the Immigration and Asylum Act 1999, the Tribunal suggested that a direction should only be made by an adjudicator if was indeed necessary or required to give effect to a determination. Those remarks reflect the wording at paragraph 21(5) of the Schedule, which was repealed by Schedule 9 of the Nationality, Immigration and Asylum Act 2002. In Sharif the Tribunal emphasised the appropriateness of making directions which were reasonably required.

10. In MG itself the Tribunal accepted that the direction given by the adjudicator in that case was not necessary to give effect to his decision. The Entry Clearance Officer would still have to be satisfied when the rescheduled visit was made that the requirements of the Rules were fulfilled.

11. Subsequently in EA (Family visitor, directions, mistake of fact – unfairness) Ghana [2005] UKAIT 00108, the Tribunal agreed with what was said in MG , noting such matters in the case before it as the fact that the adjudicator had not taken into consideration the fact that he did not have the opportunity to hear from, or receive any up-to-date documentary evidence from the sponsor, who had played no part at all in the appeal proceedings. The appellant had proposed to travel to the United Kingdom for a short visit of four weeks in May 2003 between the end of his undergraduate final examinations and the commencement of his military service. As the Tribunal noted, that window of opportunity had long gone by the time the adjudicator considered and decided the appeal in October 2003 and evidence as to the appellant's circumstances at that stage was missing.

12. We have also had regard to the guidance given to ECOs concerning the effect of an allowed determination, which was noted in the Entry Clearance Officer’s grounds of appeal, though not, as far as we are aware, put before the Immigration Judge. It is clear, for example, from paragraph APL2.5 “Appeal allowed – no directions given” that an allowed appeal means the Immigration Judge has ruled that the Entry Clearance Officer was wrong to refuse entry clearance and not that the applicant is entitled to entry clearance. It is also clear from paragraph APL2.8 “Appeal allowed – directions given to issue” that these instructions contemplate what was done in the instant case, and that, as is said, an Entry Clearance Officer has no power to re-refuse an application if an Immigration Judge has “directed issue” of entry clearance. The ECO must issue the entry clearance if the applicant still wants to travel.

13. The case before us is some way distant from the factual situation in the cases we have set out above. There was only, as we have noted, an issue as to paragraph 297(i)(f). That matter was resolved in the appellant's favour by the Immigration Judge and the Entry Clearance Officer did not seek to challenge the findings in that regard. There is no indication of any degree of likelihood of change in circumstances. The appellant is a child of 9. The circumstances might have been different if she had been a young woman of 17, or if there had been evidence of significant ill-health of the sponsor or his wife or some other factor that might have made it appropriate for the issue to be considered afresh by the Entry Clearance Officer.

14. We remind ourselves of the wording of s. 87(1) and the difference between that wording and what was set out in paragraph 21(5) of Schedule 4 to the 1999 Act. Sharif should no longer be followed since it employs the somewhat more restrictive test under paragraph 21(5). There was a clear purpose in this case and that is the need for a speedy reunion of the appellant with her grandparents. She is a child of 9 whose father has died, whose mother has abdicated responsibility for her, and who is living, seemingly on a temporary basis, with somebody who amounts to a foster mother. The sponsor and his wife, her grandparents, have exhibited very great care and concern for her as is attested to by their regular visits to South Africa to see her and the daily telephone calls they make to her and the letters that they write to her. It is not, as we have said above, a case where there is any reason to suppose that circumstances will change such as to necessitate the Entry Clearance Officer requiring to assess the evidence afresh. We bear in mind the guidance to ECOs quoted at paragraph 12 above, and the consequences of a direction by an Immigration Judge that entry clearance be issued. If a judge is contemplating making a direction, we think it would be sensible to ask the Presenting Officer (if one is attending) if he or she sees any difficulties arising from the direction. The absence of a Presenting Officer should not preclude the making of a direction in an appropriate case, however. But the judge will have to be alert to the statutory framework in which the making of a direction operates, and will need to consider the practicalities. A direction should not be made unless the judge is satisfied that the appellant will be able to meet the requirements of any relevant rule in the foreseeable future, but where he or she is so satisfied, then, especially where a child or other vulnerable person is involved, a direction may be appropriate. Accordingly, this being a proper case to do so, we endorse the direction of the Immigration Judge in this case and dismiss the Entry Clearance Officer’s appeal.

Signed Date

Senior Immigration Judge Allen

(Judge of the Upper Tribunal)