Upper Tribunal
(Immigration and Asylum Chamber)

Kaur (Entry Clearance – date of application) [2013] UKUT 00381 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**

On 22 March 2013

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

and

JASPREET KAUR

Claimant

Representation :

For the Claimant: Mr R Sharma, Legal Representative

For the Respondent: Mr S Allan, Senior Home Office Presenting Officer

(1) The date on which an application for entry clearance is made is not effectively established by paragraph 30 or any other provisions of the Immigration Rules, and has therefore to be established by reference to statute and secondary legislation.

(2) An application for entry clearance that does not comply with the requirement in regulation 37 of the Immigration and Nationality (Fees) Regulations 2011 (SI 2011/1055) to be accompanied by payment of a fee is a nullity – it is not an application for the purpose of the immigration rules or any statutory provisions.

(3) An application for entry clearance is made on the date on which payment of the relevant fee is made. If the application is made online, and payment of the relevant fee is also made online, contemporaneously with submission of the online application, the date of application is the date of submission. If payment of the relevant fee is not made until the printed application form is submitted, the date of application is the date on which those are handed over.

DETERMINATION AND REASONS

1.

The Entry Clearance Officer ("ECO") appeals with permission against the determination of Judge of the First-tier Tribunal Callender-Smith allowing the appeal against the ECO's decision to refuse her entry clearance to the United Kingdom as a domestic worker in a private household as provided for in paragraph 159A of the Immigration Rules.

2.
For clarity, I shall refer to Ms Kaur who was the appellant before the First-tier Tribunal, but who is the respondent in this appeal, as the claimant.

3.
The claimant was employed by Baljinder Singh in a house he owns in India; he is resident in the United Kingdom. She applied for entry clearance to take up an offer of employment in his home in the United Kingdom. That application was, it is claimed, made on 4 April 2012. She was interviewed in connection with the application on 9 April 2012 when she handed over various documents and paid the application fee.

4.
The respondent refused the application on 20 April 2012 (applying the immigration rules in force from 6 April 2012) as she was not satisfied, with reference to paragraph 159A of the Rules that the claimant intended to stay in the United Kingdom for a limited period, or that the employer was qualified to sponsor the application as his permanent place of residence was in the United Kingdom. It was also refused as the claimant was to be paid £59.26 per month, considerably less than the UK national minimum wage, contrary to a requirement of paragraph 159A of the Rules in effect from 6 April.

5.
The claimant appealed against that decision, submitting:

i.
That the application had been made before 5 April 2012 and for that reason she benefitted from transitional provisions whereby her application should have been considered under the Rules as in effect on that date [5];

ii.
That the contract specifies that she is to be paid the minimum wage [6]; and,

iii.
That there is evidence that the applicant's employer travels to India regularly where he has family financial interests [7].

6.
In the Entry Clearance Manager's review it is stated that it has long been established that an application is not legally lodged until the fee is paid and in this case, that occurred after the rules changed. It is also stated that "it is unfortunate that the commercial partner [1] erroneously took in the application under the old rules, and failed to advise of the rule change, and accepted the old, higher, long-term fee".

7.
The appeal was heard by the judge of the First-tier Tribunal on 12 October 2012. Both parties were represented. The judge allowed the appeal under the Rules to the limited extent that it is as stated in

paragraph 24 of his determination "remitted to the respondent to make a lawful decision." The judge found:

i.
The application had been submitted online on 4 April 2012 [18];

ii.
The applicant was interviewed on 9 April 2012 [19];

iii.
The issue in the appeal turns on when the application was made [17], it being clear that she would succeed if the rules in place on 4 April 2012 were applied [16], [17];

iv.
It is arguable that the matter falls to be decided on the rules in force from 6 April 2012 [20] as the claimant did not pay for her application on 4 April 2012;

v.
the basis of the refusal was not a failure to comply with the express requirements of the immigration rules and, following the decisions in Pankina v SSHD [2010] EWCA Civ 719 and Alvi [2012] UKSC 33 **,** the application should not have been refused simply for non-compliance with guidance [21];

vi.
Accordingly, the decision was not in accordance with the law and was to be considered again by the respondent [23].

8.
Permission to appeal was granted by Designated Judge Murray who considered that it was arguable that the judge should have considered the appeal based on paragraph 159A of the Immigration Rules as at 6 April and made a decision to allow or dismiss the appeal.

9.
Directions were then given requiring the parties to address the following issues:

a.
The date on which the application to the ECO was made.

b.
Whether, with regard to paragraph 30 of the Immigration Rules, any fee was payable under the Consular Fees Act 1980.

c.
Under which Act, Regulation or Order, Entry Clearance fees were payable in this case.

d.
Whether, if the application was made on 4 April 2012, the application fell within the transitional provisions set out in HC 1888; and, if so

e.
Whether the application met the requirements of the Immigration Rules in force on 4 April 2012.

Did the determination of the First-tier Tribunal involve the making of an error of law?

10.
I am satisfied that it did. Prior to 6 April 2012, paragraph 159A of the Rules provided, so far as is relevant:

159A. The requirements to be met by a person seeking leave to enter the United Kingdom as a domestic worker in a private household are that he:

(ii) has been employed as a domestic worker for one year or more immediately prior to application for entry clearance under the same roof as his employer or in a household that the employer uses for himself on a regular basis and where there is evidence that there is a connection between employer and employee;

…

(iv) intends to work full time as a domestic worker under the same roof as his employer or in a household that the employer uses for himself on a regular basis and where . . .

11.
Paragraph 159A of the Immigration Rules as in force from 6 April 2012 provides (so far as is relevant to this appeal) as follows:-

159A. The requirements to be met by a person seeking leave to enter the United Kingdom as a domestic worker in a private household are that the applicant:

…

(ii) has been employed as a domestic worker for one year or more immediately prior to the application for entry clearance under the same roof as the employer or in a household that the employer uses for himself on a regular basis and where evidence in the form set out in guidance published by the UK Border Agency is produced to demonstrate the connection between employer and employee; and

…

(iv) intends to leave the UK at the end of six months in the United Kingdom or at the same time as the employer, whichever is the earlier; and

(v) has agreed in writing terms and conditions of employment in the UK with the employer, as specified in guidance published by the UK Border Agency, including specifically that the applicant will be paid in accordance with the National Minimum Wage Act 1998 and any Regulations made under it, and provides this with the entry clearance application; and

…

12.
The significant changes here are the limiting of the period of leave to a maximum of six months (159A (iv)), and requirements to supply evidence as set out in guidance. Although other requirements for the contract of employment were set out in guidance, the requirement for an applicant to be paid in accordance with the National Minimum Wage Act 1998 was expressly written into the rules (paragraph 159A (v)). The refusal of entry clearance on the basis that the claimant was not being paid the minimum wage was therefore a refusal based on the rules, not guidance.

13.

The judge erred in considering that the requirement to be paid at least the minimum wage was imposed by guidance rather than by the immigration rules, and thus erred in applying the principles of Pankina and Alvi . On that basis, the decision must be set aside and that requires it to be re-made.

Re-making the decision

14.
In re-making the decision, it is necessary first to consider which Rules were applicable. It is established law that an application is to be decided in accordance with the Rules in force at the date of decision. An exception to that is where there are transitional provisions.

15.
The Statement of Changes in Immigration Rules HC 1888, published on 12 March 2012 made substantial changes to paragraph 159A with effect from 6 April 2012. HC 1888 includes the following provision:

“The […] changes set out in this Statement shall take effect on 6 April 2012. However, if an applicant has made an application for entry clearance or leave before 6 April 2012 and the application has not been decided before that date, it will be decided in accordance with the rules in force on 5 April 2012.”

16.
It is not in dispute that the claimant met the requirements of the Rules in force at 5 April 2012, or that she cannot meet the requirements of the Rules in force from 6 April 2012. It is therefore important to identify when her application was made. Was it, as she contends, 4 April 2012 when an online application was submitted? Or, was it, as the ECO contends, 9 April 2012 when the application fee was paid?

17.
The starting point is the Rules themselves which define the “date of application” in paragraph 6 as follows:

"date of application" means the date of application determined in accordance with paragraph 30 or 34G of these rules as appropriate.

18.
The claimant contends that in this case paragraph 30 is applicable and as there was no fee payable under the Consular Fees Act, the application was made once submitted electronically. In the alternative, it is submitted that the electronic submission of the application falls within paragraph 34G.

19.
Paragraph 30 provides

30. An application for an entry clearance is not made until any fee required to be paid under the Consular Fees Act 1980 (including any Regulations or Orders made under that Act) has been paid.

20.
Paragraph 34G provides:

34G.For the purposes of these rules, the date on which an application or claim (or a variation in accordance with paragraph 34E) is made is as follows:

(i) where the application form is sent by post, the date of posting,

(ii) where the application form is submitted in person, the date on which it is accepted by a public enquiry office of the United Kingdom Border Agency of the Home Office,

(iii) where the application form is sent by courier, the date on which it is delivered to the United Kingdom Border Agency of the Home Office, or

(iv) where the application is made via the online application process, on the date on which the online application is submitted.

21.
The ECO contends that the fee payable was in effect payable under the Consular Fees Act, and in the alternative that the effect of the Immigration and Nationality (Fees) Order 2011 (SI 2011/445)("the Fees Order") and the Immigration and Nationality (Fees) Regulations 2011 (SI 2011/1055) ("the Fees Regulations") is that an application for entry clearance must be accompanied by a fee, if required under the Fee Regulations, and is not validly made unless this is done.

22.
Article 3 of the Fees Order provides:

3. (1) Applications to which this article applies must be accompanied by the fee specified in regulations made under section 51(3) of the 2006 Act.

(2) This article applies to applications for

(a) Leave to remain the United Kingdom

(b) Entry clearance.

23.
Regulation 37 of the Fees Regulation provides:

37. Where an application to which these Regulations refer is to be accompanied by a specified fee, the application is not validly made unless it has been accompanied by that fee.

Discussion

24.
Section 1 of the Consular Fees Act 1980 permits Orders in Council to specify the fees to be levied for the carrying out of consular functions which includes charging for visas (see schedule 1 of the Consular Fees Act 1980). This power has been exercised by Orders in Council issued from time to time, specifying the level of fees to be paid in conjunction with different types of entry clearance applications, the notarisation of documents and similar activities. This is reflected in paragraph 30 of the Immigration Rules as set out above.

25.
The power to charge fees for entry clearance applications is also conferred by sections 51 and 52 of the Immigration, Asylum and Nationality Act 2006 which provide for this to be done by way of statutory instrument. The powers conferred are without prejudice to the powers granted by the Consular Fees Act, but that cannot be construed as an indication that the fees are payable by virtue of that Act. The relevant statutory instruments – the Fees Order and the Fees Regulations - provide that they are made under the 2006 Act, not the Consular Fees Act.

26.
Article 3 of the Fees Order requires applications for entry clearance to be accompanied by the fee specified in the Fees Regulations; in this case, regulation 25(1)(o) which provides:

25. (1) In the case of an application to which article 3(2)(b) of the 2011 Order applies, namely an application for entry clearance

…

(o) where the application is for entry clearance other than—

(i) for the purposes listed in sub-paragraphs (a) to (n)… the fee is £265

27.
The power to charge (and to waive) fees for entry clearance applications has been considered by the High Court in Elmi v SSHD [2010] EWHC 2775, but the particular issue of the date of application was not considered there nor was it considered in MA v SSHD [2012] EWHC 2683 as no issue appears to have been taken about paragraph 30 of the Immigration Rules.

28.
The Orders in Council made under the Consular Fees Act 1980 in force since 2008 do not specify fees for entry clearance applications. It follows that if no fee is required under that Act, then for the purposes of the Rules, the date of application cannot be established by reference to a payment of a fee and would, thus, appear to be the date on which the application is submitted, not when any fees (payable under another provision) is paid.

29.
Although the Rules are to be interpreted in a “common sense“ way, that cannot include the rewriting needed for them to provide that an application is not made until fees payable under the Fees Order and Fees Regulations.

30.
The claimant submits that the date on which an application for entry clearance is made is therefore the date on which it is submitted online, not the date on which payment of any fee is made and that such an application is an application for the purposes of the immigration rules.

31.
The difficulty with this submission is that it would require an application for entry clearance to be considered under the rules without payment of a fee, expressly contrary to regulation 37 of the Fees Regulations. The Fees Order and the Fees Regulations make it clear that an application is not validly made unless accompanied by an application fee. That is supported by the decision of the Upper Tribunal in Basnet (validity of application - respondent) [2012] UKUT 00113 (IAC) although in-country applications are not made in the same way as applications made out of country. At [20] in Basnet it was stated:

“[The] validity of the application is determined not by whether the fee is actually received but by whether the application is accompanied by [emphasis added] a valid authorisation to obtain the entire fee that is available in the relevant bank account.”

32.

The phrase “accompanied by” requires closer analysis in the context of entry clearance applications as the system for applying for Entry Clearance does not operate in the same way as in-country applications; the means by which those are processed are set out in detail in Basnet .

33.
Where payment of a fee is required for an in-country application, if the application is made by post either a cheque is sent with the application form, or authority to make deductions from a credit or debit card is given as part of the form. If the application is made in person, payment is taken at the appointment.

34.
In contrast, in the case of an application for entry clearance, payment of a fee is a separate transaction; the application form does not provide for payment details. As was acknowledged by both parties and is evident from the UKBA website, that whether an application can be made online, and whether payment of any fee can be made online, varies from entry clearance post to entry clearance post. At many posts, both the application and fee-payment can be done online; in others, only the application; in some, neither can be made online. If submitted online, the print-out of the form must be signed and sent to the ECO. Payment may (if not already made) be sent at the same time. This is not in dispute, and is evident from the information publicly available on the UK Visas website.

35.
Where an application is submitted online and payment is also made online contemporaneously, it would be taking an overly literal interpretation of regulation 37 to consider that such an application had not been “accompanied by” payment, nor has such an interpretation been canvassed by the ECO. Such a literal interpretation would mean that an online application combined with online payment could never be valid as at no stage would it be physically accompanied by payment.

36.
In contrast, where there has been an online application and a later delivery of payment, it cannot reasonably be said that the online application is accompanied by payment; there is insufficient proximity in time. It follows that in this scenario, the online application is not accompanied by payment, and so is not valid. An application which does not comply with a statutory requirement necessary for it to be valid is a nullity unless otherwise provided for. That said, an online application, once printed out and signed, then lodged with a payment would be accompanied by a fee, and so would be a valid application.

37.
The claimant submits that an application could, where the fee is paid later, be deemed to have been made when the form was sent, but absent any express provision to that effect, giving retrospective effect to an application invalid at the time of its submission, I am not satisfied that the relevant statutory instruments permit such an interpretation, nor despite Mr Sharma’s submissions, that paragraph 34G and associated provisions of the Rules are relevant to the issues of online applications for entry clearance or otherwise of assistance in his argument.

38.
Mr Sharma submits that paragraph 34G(iv) can be construed to include applications made overseas but I consider that it cannot do so. Although in isolation the phrase “the online application process” might appear to cover overseas application, as this phrase in rule 34G is not qualified by “relevant” (as appears in rule A34), the difficulty is that “relevant” is necessary in rule A34 because that paragraph makes provision for several slightly different processes for applicants within Tier 2,

Tier 5 and the dependants of both. Further, and importantly, the overseas online application process is nowhere set out in the immigration rules.

39.
A further reason for doubting this construction suggested by Mr Sharma is the effect of applying paragraphs 34A to 34G to entry clearance applications to which they were not intended to apply. The provisions at 34A to D set out requirements in respect of prescribed forms. There is no indication that at the time this application was made, there was a specified form in place. Indeed, as is clear from the claimant's application as generated by the online system, it is not a form as such, and is different in character from those forms used in-country.

40.
To summarise, the position is this:

i.
The date on which an application for entry clearance is made is not effectively established by paragraph 30 or any other provisions of the Immigration Rules, and has therefore to be established by reference to statute and secondary legislation;

ii.
An application for entry clearance that does not comply with the requirement in regulation 37 of the Immigration and Nationality (Fees) Regulations 2011 (SI 2011/1055) to be accompanied by payment of a fee is a nullity – it is not an application for the purpose of the immigration rules or any statutory provisions;

iii.
An application for entry clearance is made on the date on which payment of the relevant fee is made. If the application is made online, and payment of the relevant fee is also made online, contemporaneously with submission of the online application, the date of application is the date of submission. If payment of the relevant fee is not made until the printed application form is submitted, the date of application is the date on which those are handed over.

41.
It follows from this that as the signed application form and fee were not in this case handed over until 9 April 2012, that is the date of application. The claimant cannot therefore benefit from the transitional arrangements. The ECO did, therefore, apply the correct rules and, as accepted, the appellant could not meet the requirements of paragraph 159A as in force at the date of decision, and the appeal under the immigration rules must be dismissed.

Is the decision otherwise in accordance with the law?

42.
Mr Sharma for the claimant submitted that the decision under appeal is not lawful as the claimant was led to believe that her application would be treated as an application under the former rules, given the actions of the ECO's commercial partner in accepting the application under the rules in place until 5 April 2012, and it would be conspicuously unfair and unreasonable to consider her application under the rules in force from 6 April 2012, and therefore not in accordance with the law.

43.
It is not disputed that the application here was treated by the commercial partner as an application for entry clearance as a long-term domestic worker, as provided for in the rules in force until 5 April

2012. Nor is it disputed that the fee payable for entry clearance in that category was higher than that charged for entry clearance in the new, short-term domestic worker category (which replaces the long-term domestic worker category) and was the basis on which the application was considered.

44.
The ECM review states:

“It is unfortunate the commercial partner erroneously took in the application under the old category and in so doing failed to advise her of the rule change and accepted the higher long-term fee. I accept she has a prima facie cause for complaint in this regard but not that it be addressed by the issue of a visa in a category that did not exist at the time of application.”

45.
Mr Allan for the ECO submitted that it is inadvisable to apply private law concepts such as contract, or principal and agent, to the relationship between the respondent and its commercial partner as the powers of an immigration officer or the Secretary of State, are given by statute. They are delegated powers, and, absent a power to do so, a holder of a delegated power may not delegate it to another. Consequently, the commercial partner is not the agent of the ECO, and was not capable of binding him.

46.
It is not disputed that the commercial partner was contracted to carry out certain functions on behalf of the ECO. I consider that there is a power to do so, and it is not contrary to general principles of public law that a public body may contract with another; that is implicit in Flanagan v South Bucks District Council [2002] EWCA Civ 690.

47.
In the circumstances where the commercial partner was accepting an application and were acting within the ordinary course of their business, I am persuaded that they had the ostensible authority to accept the claimant’s application in the manner in which they did.

48.
I accept that an agent cannot bind his principal to do what is ultra vires and arguably cannot bind his principal by exceeding his own authority if that authority is circumscribed by statute. Neither proposition is applicable here. Given the breadth of discretion given to the Secretary of State and thus to the ECO to waive requirements of the immigration rules, I am not persuaded that there was an ultra vires promise here. In any event, there has been detriment to the claimant who was charged a higher fee, and there is no evidence that there is any detrimental effect on a third party.

49.
In the circumstances, given the acceptance of the application as one under the prior Rules and the acceptance of a higher fee I consider that the claimant was, in the circumstances of this case, entitled to infer that discretion had been exercised in her favour such that her application would be considered under the Rules in force on 5 April 2012. I consider also that, on the particular facts of this case, it was in all the circumstances, conspicuously unfair to do otherwise, and thus the decision was unlawful. I therefore allow the appeal on that ground.

50.
Given the acceptance that the appellant would have succeeded in her application had the Rules in force as at 5 April 2012 been applied, I consider that it is, in the particular circumstances of this

appeal, appropriate to direct that the appellant be granted entry clearance as a domestic worker on that basis.

51.
It is regrettable that for whatever reason, paragraph 30 was not amended in 2008 when the Secretary of State ceased to use her powers under the Consular Fees Act 1980 to charge for Entry Clearance applications, using instead her powers under the 2006 Act. While it is a matter for her, it may be appropriate now to amend paragraph 30 of the immigration rules to reflect the current position; it may also be appropriate for the overseas online application procedure to be underpinned by the immigration rules, as is the in-country online application procedure, to ensure legal certainty.

SUMMARY OF CONCLUSIONS

1.
The determination of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2.
I re-make the determination of the First-tier Tribunal by dismissing the appeal under the immigration rules but allowing it on the basis that the decision to refuse entry clearance was not in accordance with the law.

3.
I direct that the claimant be granted entry clearance as a domestic worker.

Signed: Dated:

J K H Rintoul

Judge of the Upper Tribunal

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[1] In this context, the reference to “commercial partner” means VFS, the company appointed by the UKBA to process entry clearance applications in India.