



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/08684/2014

THE IMMIGRATION ACTS

Heard at Field House
On 24 October 2014

Decision Promulgated
On 11 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

KULWINDER SINGH SANGHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Ahmed, Counsel

For the Respondent: Mr M Shilliday, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 13 April 1981. He has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Blum allowing his appeal on article 8 grounds but dismissing it by reference to the Immigration Rules. The appellant is the adult dependant of his sister, Ms Kanwaljit Kaur, and he lives with her and her family. He is registered blind, having no sight in his right eye and very little sight in his left eye. He also suffers from other medical conditions including back pain.

2. The respondent had refused the application for leave by reference to Appendix FM and paragraph 276ADE of the rules, applying paragraph 400. However, the judge reasoned the appropriate immigration rule was paragraph 317, HC395, and he found all the elements were met. He then considered the general grounds for refusal found in paragraph 322 of the rules. He found the point taken in respect of paragraph 322(10) was not made out. However, he found that paragraph 322(12) applied because the appellant had not paid NHS charges in respect of all the medical treatment he had received.
3. Permission to appeal was granted because it was arguable the judge erred in failing to recognise that there was no evidence the NHS had ever asked for payment from the appellant.
4. The respondent has not cross-appealed against the decision of the judge to allow the appeal on article 8 grounds. It is regrettable that it appears the respondent may not have been served the determination of the First-tier Tribunal in time. Mr Shilliday accepted it was the case that it was too late to cross-appeal.
5. I was not asked and saw no reason to make an anonymity direction.
6. I heard submissions from the representatives as to whether the judge's decision contained a material error of law. The representatives were in agreement that the judge was wrong to determine the appeal by reference to paragraph 322 grounds, which had not been relied on by the respondent in her decision and about which the appellant had had no notice. Furthermore, the paragraphs concerned provide for discretionary grounds and the respondent had never exercised discretion. In those circumstances the judge had no jurisdiction to consider the exercise for himself.
7. I agree with the representatives that the judge made a material error of law for the following reasons.
8. Paragraph 322 of the rules reads in relevant part as follows:

“Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused
...
(12) where one or more relevant NHS body has notified the Secretary of State that the person seeking leave to remain or a variation of leave to enter or remain has failed to pay a charge or charges with a total value of at least £1000 in accordance with the relevant NHS regulations on charges to overseas visitors.”
9. The judge appears to have overlooked the fact the rule is discretionary. As noted, the respondent has not applied her mind to the rule or issued a decision which refers to it. In other words, the judge could not have decided that the discretion vested in the respondent by virtue of the wording of the rule has been exercised.

Without that having taken place, the judge had no jurisdiction to review the exercise of discretion or to exercise it himself. The same might be said of the judge's application of paragraph 322(10), although the error was not material to the outcome of the appeal.

10. I therefore set aside the judge's decision dismissing the appeal by reference to paragraph 322 of the rules. However, his findings in respect of paragraph 317 are left undisturbed by my decision and therefore the appropriate disposal of the appeal is to allow it on that basis.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error on a point of law and his determination dismissing the appellant's appeal is set aside.

The following decision is substituted: The appeal brought under the Immigration Rules is allowed.

No anonymity direction has been made.

Signed

Date 5 November 2014

Neil Froom, sitting as a Deputy Judge of the Upper Tribunal

Fee Award

Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a fee award of £140.

Reasons: The appeal has been allowed and the respondent applied the wrong rule. .

Signed

Date 5 November 2014

Neil Froom, sitting as a Deputy Judge of the Upper Tribunal