IAC-FH-CK-VI

IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

JR/1042/2020

Field House,
Breams Buildings
London
EC4A IWR

18 September 2020

THE QUEEN
(ON THE APPLICATION OF
SURESH PRIYADAHRSHANA WEERAXOON MUDIYANSELAGE)

Applicant

and

ENTRY CLEARANCE OFFICER

Respondent

BEFORE

UPPER TRIBUNAL JUDGE SMITH

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Mr A Burrett, Counsel instructed by Capital Legal Solicitors appeared on behalf of the Applicant.

Mr J Fracyk, Counsel instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE SMITH: The Applicant challenges the decision of an Entry Clearance Officer ("ECO") dated 5 March 2020 refusing him a two-year multi—entry visit visa to the United Kingdom.

2. The Applicant is a national of Sri Lanka who requires such a visa to visit the UK. The circumstances of this case are somewhat unusual in that that Applicant is not seeking to come to the UK to visit it but rather seeks a visit visa in order that he can travel onwards and back via the UK to Bermuda where he has been given a permit to work for a housekeeping service for a period of two years from November 2019 to November 2021. In order to be landed in Bermuda he is required to show that he has a visit visa from either the UK, the US or Canada which extends for 45 days beyond the expiry of the work permit. The US has refused to grant him a visa for essentially the same reasons as given by the ECO in the decision under challenge.

3. The Respondent's decision reads as follows:

> "I have refused your application for a visit visa because I am not satisfied that you meet the requirements of paragraph(s) V4.2 of Appendix V: Immigration Rules for Visitors because:
>
> You have applied for a two year multiple entry visit visa, as you state you intend to pass through the United Kingdom en route to Bermuda. I have carefully considered the evidence provided and written statements you have made, however I am not satisfied you have met the requirements of the Immigration Rules on this occasion.
>
> In support of your application you have provided an employment letter issued by Complete Housekeeping Service, a company based in Bermuda, and a work permit issued by the Bermudan authorities valid from 11/11/2019 until

11/11/2021. The work permit explicitly states that you will be required to hold a multiple re—entry visa for the country you intend to transit which must be valid 45 days beyond the expiry of your work permit.

Therefore, it is clear from the above that your circumstances will have significantly changed after your work permit expires in November 2021 as your permission to work will have ceased and you will no longer have valid leave to remain and work in Bermuda. You have applied for a visit visa requesting that the expiry date postdates the expiry of your work permit. However, as the documents and information submitted in your application confirm that your circumstances will change before the visa expiry date I am not satisfied that you have shown that your circumstances will be such that you would leave, after entering the UK, following the expiry of your Bermuda work permit.

For the reasons above I am not satisfied that your purpose for applying for a UK visit visa meets the requirements of the Immigration Rules or that you will leave the UK at the end of a visit. Your application for a visit visa has been refused under paragraph V4.2(a) & (c).”

4. In essence therefore, the Respondent does not accept that the Applicant is a genuine visitor because the Respondent does not accept that the Applicant would return to Sri Lanka after the expiry of his work permit at which point he would be able, if granted a visit visa, to enter the UK as a visitor for a period of 45 days. The Entry Clearance Manager has reviewed the decision but merely upholds it and I have no need to set out what is said by the ECM.

5. The Applicant's grounds of challenge as pleaded are extremely vague. The most that can be discerned from them is that it is said that the Respondent's decision is contrary to the

evidence and has assumed facts, that the decision was not in accordance with the Immigration Rules and that it was unfair and made without due regard for the law. It is also suggested that the Respondent should have exercised discretion by granting a shorter term of visa. I do not understand how that would assist the Applicant since it is my understanding that the Bermudan authorities would not allow him to take up the work permit offer unless he had a visa of adequate length, that is to say, one which extends to 45 days after expiry of the work permit.

6. I remind those representing the Applicant of the need properly to plead the case in the future, see in particular the Court of Appeal's observations at [67] to [69] in **Talpada v Secretary of State [2018] EWCA Civ 841**. It is not good enough to leave the Respondent guessing as to the nature of the challenge until the eleventh hour when the properly pleaded case is set out. However, the case has been fully developed in the skeleton argument and oral submissions and I do not need to return to the pleaded grounds again.

7. Permission was granted by Judge Kamara on the papers on 12 June 2020. The Respondent filed detailed grounds on 21 August 2020.

8. A point is taken in the Respondent's summary grounds regarding the possibility of the Applicant applying instead for a direct airside transit visa. Leaving aside that this is not a point raised in the decision under challenge, I do not understand that point now to be pursued. It is not in any event a meritorious one. As I understand it, it is now accepted that the Bermudan Regulations require a visit visa and not simply a transit one. In any event, it is not clear that a transit visa can be applied for to cover a sufficient period which would extend beyond the end of the work permit as the Regulations

require. For that reason, perhaps the Respondent does not now rely on it. It would in any event amount to ex post facto reasoning.

9. The Applicant raised in his skeleton argument for the first time an argument that the refusal is discriminatory since no Asian subcontinent individuals would be able to enter Bermuda as work permit holders based on the reasoning given by the ECO. Mr Burrett confirmed however that he was not pursuing this as a discrimination challenge for which permission to amend would be required; it was merely an observation about the way in which the decision maker approached the case. He accepted that it did not add much to the case and did not develop the point in oral submissions.

10. The way in which the submissions proceeded therefore was on the basis of the general thrust of the skeletons on both sides. The issues are whether the decision is **Wednesbury** unreasonable on the basis that it is perverse, and whether the decision maker has failed to take into account relevant considerations or has taken account of irrelevant ones.

11. The Applicant makes the point that the decision is unduly speculative as the focus of the decision is what will happen at the end of the work permit when the applicant says that he will return to Sri Lanka via the UK. I do not think that can be described as speculative as that is precisely the reason why the Applicant has and has been obliged to seek a multi–entry visit visa in the first place. Without it the Bermudan authorities will not land him in order to take up his work permit.

12. The reasons given for refusing the visa are that the Applicant is not a genuine visitor under V 4.2 (a) and that he is seeking entry for a purpose not permitted by the Rules under V 4.2(c). That latter point is not because of the nature of the

visa sought as Mr Burrett and I had initially thought. It is clear from the Rules and policy guidance that transit visitors are included in the Rules as a potential purpose. The point is that if the Applicant is not a genuine visitor, then he is not seeking entry for a purpose within the Rules and therefore fails also under V 4.2(c).

13. The guidance to which my attention was drawn and which has some relevance to this case reads as follows:

> "**Assessing an applicant's genuine intentions to visit**
>
> … You must be satisfied that the applicant meets all the requirements of V 4.2 to V 4.10 of the visitor rules and is a genuine visitor … If you are not satisfied, you must refuse their application. A visitor can enter, or extend their stay, to do different permitted activities but they should be expected to have a main reason or reasons for visiting, for example for business or a holiday, and be able to provide details. However, particularly where a visitor holds a long—term, multiple entry visit visa valid for 2, 5 or 10 years it is likely that their reason for visiting will differ over time. This is permissible, provided they continue to intend to undertake one or more permitted visitor activity …
>
> **Assessing an applicant's personal circumstances**
>
> … The following factors will help you assess if an applicant is a genuine visitor:
>
> - their previous immigration history, including visits to the UK and other countries
>
> …

- their financial circumstances as well as their family, social and economic background

- their personal and economic ties to their country of residence

…

- whether, in your judgment, the information and the reasons for the visit or for extending their stay provided by the applicant are credible and correspond to their personal, family, social and economic background.

…

Frequent or successive visits: how to assess if an applicant is making the UK their main home or place of work

You should look at:

- the purpose of the visit and intended length of stay stated

…

- the purpose of return trips to the visitor's home country and if this is used only to seek re-entry to the UK

- the links they have with their home country …

…

Grounds for doubting the applicant' s intentions to visit the UK

… This is not an exhaustive list but may help with your assessment. If:

- the applicant has few or no family and economic ties to their country of residence and has several family members in the UK for example a person with most of their family in the UK and no job or study in their own country may be considered to have few ties

…

- the information that has been provided or the reasons stated by the applicant are not credible."

14. The essential point is whether the decision takes into account all relevant factors and is a rational one on the point of genuineness of the Applicant's intentions. The ECO's reasons for doubting that the Applicant is a genuine visitor are essentially because the ECO is not satisfied that the Applicant would return to Sri Lanka due to the lack of ties to that country. For that reason, the ECO is not satisfied that the Applicant would return after the work permit expires.

15. Mr Burrett says that this is irrational because the Applicant says he will go back and for other reasons. It is self—evident that the Applicant does not have a job in Sri Lanka as he is going to work in another country. Mr Burrett points out that the Applicant has an employment history which is true but the focus of the ECO has to be what will be the position when the Applicant returns to Sri Lanka via the UK at the end of the work permit at which time he will not have employment.

16. As Mr Fracyk points out, it is not said what will be the Applicant's income and expenditure in Bermuda. If that information were included, it might provide some indication about what his financial circumstances might be at that point in time. Mr Burrett says that the Applicant will be more financially stable as Bermuda is a rich country but as Mr Fracyk points out, it is for the Applicant to show the

genuineness of his intentions and he said nothing about his ties at the end of his time in Bermuda in terms of his employment.

17. The second point is the Applicant's family ties. Mr Burrett did not focus on this, no doubt because the Applicant's only ties in Sri Lanka are his parents, with whom he lives. He has no property of his own. Those ties do not assist the Applicant.

18. Mr Burrett says that the Applicant has no ties to the UK but that is not a point which can be given weight one way or the other in relation to his intentions to go back to Sri Lanka.

19. Mr Burrett also says that if the Applicant did not have job prospects in Sri Lanka at the end of his work permit he could apply to extend it but that is not a point made by the Applicant in the application.

20. The ECO was therefore entitled to rely on a lack of ties as reason to doubt the Applicant's intentions to return to Sri Lanka once his work permit has expired.

21. The submissions also focussed on the rationality of the conclusion as to genuineness of intention to return to Sri Lanka at the end of the work permit, bearing in mind the Applicant's compliance with immigration control to date. The guidance provides that, when looking at the credibility of intentions, past immigration history may be relevant.

22. The Applicant has no immigration history so far as the UK is concerned. I have already pointed out that the US has refused a multi—entry visit visa for the same reasons or essentially the same reasons as are given by the ECO.

23. The reasons for the visit visa are credible in terms of why the Applicant needs it. The ECO however took into account

those reasons. The ECO took into account that the Applicant had applied for and obtained a work permit in Bermuda and was seeking to comply with the landing requirements by seeking a visit visa both from the UK and previously from the US, who had also refused it, as I say for very similar reasons.

24. However, as Mr Fracyk points out, there is a disconnect between applying for a work permit and applying for an immigration visa. The fact that the Applicant is seeking an immigration visa to comply with landing requirements is because he cannot do otherwise as the Bermudan authorities will not accept him without one.

25. Mention is made in the Applicant's skeleton argument of the Bermudan authorities' policy reasons behind the requirement for a multi—entry visit visa. There is no mention of this in the application for the visit visa and no evidence as to what are those reasons. If anything, as both Counsel agreed, the requirement appears designed to enable the Bermudan authorities to remove a former work permit holder from Bermuda to a third country if that work permit holder does not leave at the end of that permit. Otherwise, presumably, Bermuda could not return to the work permit holder's country directly and the person would not be allowed to board a plane to the UK, US or Canada without a visa. That point does not therefore assist the Applicant.

26. I agree with the Respondent's submission that the issue of a work permit by the Bermudan authorities and the sponsorship of the Applicant to work in Bermuda is of no material weight to the ECO's consideration because those facts concern employment rather than immigration. In any event, the fact of the work permit and its genuineness are taken into account by the ECO.

27. That the Applicant has no adverse immigration history does not assist him one way or the other. As Mr Fracyk pointed out,

were it to be otherwise, a person applying for a visa for the first time could never rationally be refused a visa. If a person has no immigration history, then the existence or lack of ties which would encourage a person to return to his or her home country become the more important and that is why there is the focus by the ECO on the genuineness of the intention to return to Sri Lanka .

28. I am therefore satisfied that the ECO has had regards to factors which are relevant.

29. The issue thereafter is whether the decision is one which is irrational to the **Wednesbury** standard, that is to say, whether the decision is one which no reasonable decision maker could reach on the material before him. Although I recognise that the impact of this decision for the Applicant is harsh, that is not the test for me. It cannot be said that the ECO was not entitled to make the decision he did on the material before him.

30. For those reasons I dismiss the judicial review application.

Application for permission to appeal to the Court of Appeal

31. Mr Burrett does not make an application for permission to appeal. I am required to consider that in any event. I refuse permission to appeal. The is no arguable error in my decision.

Costs

32. The applicant is to pay the respondent's costs in the sum of £4.500. ~~~*0*~~~~

Upper Tribunal
Immigration and Asylum Chamber
Judicial Review Decision Notice

The Queen on the application of
Suresh Priyadahrshana Weerakoon Mudiyanselage

Applicant

v

Entry Clearance Officer

Respondent

Before Upper Tribunal Judge Smith

Application for judicial review: substantive decision

Having considered all documents lodged and having heard from Mr A Burrett of Counsel instructed by Capital Legal solicitors on behalf of the Applicant and Mr J Fracyk of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on Friday 18 September 2020

Decision: the application for judicial review is refused
For the reasons contained in my decision given orally at the end of the hearing on 18 September, an approved transcript of which is attached hereto

Permission to appeal to the Court of Appeal
No application was made for permission to appeal. I refuse permission to appeal in any event. There is no arguable error of law in my decision.

Costs
The Applicant shall pay the Respondent's costs of this application which I have summarily assessed in the sum of £4500.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: **18 September 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 12/10/20

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).