IN THE UPPER TRIBUNAL

R (on the application of Hetal Rajesh Patel (AKA Raval)) v Secretary of State for the Home Department IJR [2015] UKUT 00077 (IAC)

Field House

26 January 2015

BEFORE

UPPER TRIBUNAL JUDGE O'CONNOR

Between

HETAL RAJESH PATEL
(AKA RAVAL)

Applicant

and

ENTRY CLEARANCE OFFICER

Respondent

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Mr S Vokes, Counsel, instructed by Salam & Co Solicitors appeared on behalf of the Applicant.

Ms C Patry, Counsel, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

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APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

Delivered orally on 26 January 2015

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JUDGE O'CONNOR: This is an application for judicial review brought with the permission of Upper Tribunal Judge Rintoul, such permission having been granted on 2 October 2014. Section 3 of the claim form identifies the decision that is under challenge as being that made by the Entry Clearance Officer on 8 August 2013. For reasons which I will identify later there are also two other decisions relevant to this application, the first being a decision made by an Entry Clearance Officer on 13 September 2010 refusing the applicant entry clearance and the second being a decision which was received by the applicant on 26 September 2013, but which has no date of authorship on it. This document has to be read together with the earlier decision of 8 August 2013 and it is a combination of these two decisions that in reality together form the decision under challenge in these proceedings.

2. It is prudent first to briefly traverse the applicant's history that underpins her submissions as they are now made. The applicant was refused leave to remain whilst living in the United Kingdom in March 2009 and was, as a consequence, required to leave the country at that time. There is no dispute that she did so both in a good and timely fashion and voluntarily.

3. The applicant subsequently made an application for entry clearance as a Tier 1 (General) Migrant pursuant to paragraph 245C of the Immigration Rules. Although she was awarded the full gamut of the points on offer under the Rules in relation to this application she was nevertheless refused entry clearance in a decision dated 13 September 2010, this being ostensibly for the following reasons;

> "In your application you said under Section 6.7 that you have never been deported, removed or otherwise required to leave any country, including the UK. I am satisfied that this statement

is false because checks made by this office show that you have been removed. As false representations have been made in relation to your application, it is refused under paragraph 320(7A) of the Immigration Rules. You should note that because this application for entry clearance has been refused under paragraph 320(7A) of the Immigration Rules, any future applications may also be refused under paragraph 320(7B) of the Immigration Rules."

4. The applicant had a right of appeal against this decision to the First-tier Tribunal, although such appeal could only have been pursued on Race Relations grounds or Human Rights Act grounds, neither of which assisted this particular applicant.

5. The applicant did seek to pursue an administrative review of the Entry Clearance Officer's decision. Such review, according to the decision letter itself, should have been a full reconsideration of the application. The Entry Clearance Officer has asserted, during the course of these proceedings, that this review was refused in a decision of the 22 October 2010. The applicant maintains that she did not receive a copy of such decision and I observe that the Entry Clearance Officer has been unable to produce a copy of it to this Tribunal.

6. The next relevant event occurred in May 2012 when the applicant made an application for entry clearance to visit the United Kingdom. This visit application was refused by an Entry Clearance Officer on 13 June 2012, reliance being placed on paragraph 320(7B) of the Immigration Rules – the Entry Clearance Officer concluding that the application must fail on the basis of the conclusions reached relating to the application of paragraph 320(7A) of the Rules in the September 2010 decision.

7. The applicant appealed this refusal of entry clearance as a visitor to the First-tier Tribunal and in a determination promulgated on 11 March 2013 that appeal was allowed by First-tier Tribunal Judge Cruthers. In relation to paragraph 320(7B) the judge concluded as follows at paragraph 28 of his determination:

> "Overall, the respondent has not established that the appellant made a false statement in relation to her previous visa application [refused on 13 September 2010] with the deliberate intent of securing advantage in immigration terms…"

8. When one reads the decision of the First-tier Tribunal as a whole it is clear that this conclusion was reached ostensibly because the burden was on the Entry Clearance Officer to prove the deception in September 2010 and that such burden had not been met, primarily because the Entry Clearance Officer had failed to provide the entirety of the applicant's Visa Application Form from 2010 to the First-tier Tribunal.

9. The applicant was, as a consequence of the First-tier Tribunal's decision, granted entry clearance as a visitor to the United Kingdom.

10. On 7 August 2013, approximately five months after the decision of the First-tier Tribunal, the applicant's solicitors wrote to the Entry Clearance post in Mumbai as follows:

> "We write on behalf of our above client. Our client seeks reconsideration of a decision made by the Mumbai visa section on a previous application for entry clearance."

Enclosed with this letter was a copy of the refusal decisions and the First-tier Tribunal's determination to which I have made reference earlier. I observe at this stage that the terms of this letter make no reference to the issue of unfairness or conspicuous unfairness.

11. An Entry Clearance Manager responded to this letter on the 8 August 2013. I do not need to set out the contents of this decision in its entirety, only that which is said in its last paragraph:

> "I note that the initial application was made 3 years ago and whilst I accept that the Immigration Judge found that the refusal in the latter application under 320(7b) was unfounded I am not prepared to overturn a previous decision to refuse an application made in 2010 that an Entry Clearance Manager at the time decided to uphold and it would be for your client to submit a fresh application ensuring that they still meet the criteria for entry clearance as a Tier 1 (General) Migrant and then this application will be assessed on its own merits."

12. I pause once again to note that this letter contains a clear misunderstanding of the position because by this time the entry clearance route as a Tier 1 (General) Migrant had been closed for some years.

13. Moving on, on 10 September 2013 the applicant's solicitors made a request for further reasons to be provided. This received a response in an undated letter, which was received by the applicant's solicitors on 26 September 2013. This being one of the key documents in this case, I shall read out the entirety of the two key paragraphs therein:

> "I have considered the findings of the Immigration Judge as set aside in the determination and I agree that the circumstances surrounding this case are exceptional. I have noted the Immigration Judge's findings that the original refusal on the grounds of false representations were unfounded however, unfortunately, the Tier 1 (General) Migrant route is now closed for all new applicants from outside the UK. Even if I were to accept the fact that entry clearance should now be issued, it would not be possible to do so whilst this route remains closed. Furthermore, your client's own circumstances will no longer be

the same as they were at the time of her original application in 2010 and her sponsorship would also no longer be valid for the purpose of entry clearance. Such material changes in her circumstances would mean it would not be possible to issue entry clearance at such a late stage after the original decision was made. The usual procedure in such a situation would be for your client to submit a fresh application now that her refusal under paragraph 320(7A) has been overturned at appeal. Regrettably, she cannot do this as the Tier 1 (General) Migrant category is currently closed.

Under the circumstances and whilst the Tier 1 (General) Migrant route remains closed to entry clearance applicants, I can't offer any other alternative. I can however confirm that the refusal under paragraph 320(7A) no longer stands and our records are accordingly noted of this. Your client is free to submit any future applications without prejudice of being refused under paragraph 320(7B). In addition, she is of course also free to apply under any of the other entry clearance categories without prejudice to her previous refusal under paragraph 320(7A)."

14. The instant application for judicial review was subsequently lodged on 7 November 2013.

15. The grounds as originally pleaded are difficult to understand and decipher. However, in his skeleton argument drawn for the purposes of this hearing Mr Vokes has marshalled the challenges into effectively one issue, that being:

> "Whether, given the respondent appears to accept that the applicant in fact qualified for entry as a Tier 1 (General) Migrant and was wrongly refused entry clearance on 13 September 2010, the lack of a present remedy is irrational or unfair."

16. Mr Vokes continues in his skeleton argument by broadly submitting that fairness dictates that executive discretion should have been exercised in the applicant's favour and that

she should have been treated as if she were a qualifying Tier 1 (General) Migrant.

17. In support of this submission reliance is primarily placed on what is referred to as the line of authority in Rashid/S, this being reference to two judgments of the Court of Appeal, the first being Rashid v Secretary of State for the Home Department [2005] EWCA Civ 744 and the second, R(S) v Secretary of State for the Home Department [2007] EWCA Civ 546.

18. There was also brief mention in the skeleton argument, and more detailed reference in a supplementary skeleton argument handed to me in the morning of the hearing, to a further line of recent authority from the President of this Tribunal, which includes the decisions in MM (unfairness; E & R) Sudan [2014] UKUT 105 and Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 515.

19. Dealing with these latter decisions first, these all relate to procedural unfairness of one type or another. I can identify no procedural unfairness in the Entry Clearance Officer's treatment of this applicant's case in 2013 or indeed at any time prior to that. No particularised procedural unfairness has been pleaded in the grounds and, in my conclusion, pursuing this line of argument as a self-standing submission, if that is what is intended, is entirely misconceived on the facts of this case.

20. I move on to the Rashid/S line of authority, which relates to a claim of conspicuous unfairness and/or irrationality in the Entry Clearance Officer's final position.

21. At the hearing Ms Patry handed up a copy of a further decision of the Court of Appeal on this issue, S H Q [2009] EWCA Civ 142. In this decision Goldring LJ helpfully summarises both

the facts and legal principles to be derived from the judgements in Rashid and R(S). I refer to and rely upon Goldring LJ's distillation of these authorities below.

22. Mr Rashid was an Iraqi Kurd. His claim for asylum was refused by the Secretary of State and on appeal, at a time when there existed a Home Office Policy to the effect that internal relocation in the Kurdish Autonomous Area of Iraq would not be relied upon as a reason to refuse refugee status. The policy was in force between December 2001 and 21 March 2003. On 12 March 2003 Mr Rashid's solicitors wrote to the Secretary of State, both drawing attention to the policy and explaining how it had been applied by the Secretary of State in two other cases procedurally linked to Mr Rashid's. The Secretary of State responded in January 2004. In the light of the policy's withdrawal the Secretary of State refused to grant asylum and ILR.

23. As Lord Justice Pill identified in Rashid itself, the facts of that case were striking. At paragraph 36 he said as follows:

> "I agree with the judge's conclusion that the degree of unfairness was such as to amount to an abuse of power requiring the intervention of the court. The persistence of the conduct, and lack of explanation for it, contribute to that conclusion. This was far from a single error in an obscure field. A state of affairs was permitted to continue for a long time and in relation to a country which at the time would have been expected to be at the forefront of the respondent's deliberations."

24. In his judgment in Rashid Lord Justice Dyson agreed that there had been flagrant and prolonged incompetence by the Secretary of State. Lord Justice May agreed with the reasoning of Lord Justice Pill.

25. In R(S) the respondent was from Afghanistan. He claimed asylum in 1999, at a time when there existed a policy of

granting 4 years ELR to a category of person that S fell within. In January 2001, in pursuance of a public service agreement with the Treasury, the Secretary of State put on hold all claims made prior to January 2001. That was to meet a target agreed with the Treasury of deciding 60% of all claims submitted after 1 January 2001 within 61 days. In January 2002 S was told that his claim had been put on hold. It was only considered in March 2004 by which time the policy had been withdrawn and his asylum application was refused. The policy was not applied to a consideration of his application. The Court of Appeal held that by agreeing with the Treasury to put on hold all pre-January 2001 claims the Secretary of State had unlawfully fettered his discretion since it precluded him from considering individual cases on their merits and allowed treatment of applications to be dictated by another government body.

26. The Court held that there had been conspicuous unfairness amounting to abuse of power. It was in this context that the court considered the scope for the judgment in Rashid.

27. In his judgment in R(S) Lord Justice Carnwath (as he then was) said as follows 34:

> "In analysing the judgments in Rashid, it is important in my view to bear in mind that there were logically two distinct questions:
>
> i) Were the decisions made between 2001 and 2003 legally flawed, because of a failure to apply the correct policy?
>
> ii) If so, what was the relevance (if any) of that finding to the legality of, or the court's powers in respect of, the 2004 decisions, made when the policy was no longer in force?"

28. He continued at paragraph 41:

> "The court's proper sphere is illegality, not maladministration. If the earlier decisions were unlawful, it matters little whether that was the result of bad faith, bad luck, or sheer muddle. It is the unlawfulness, not the cause of it, which justifies the court's intervention and provides the basis for the remedy."

29. It is clear to me that I must first ask myself whether the decision of the Entry Clearance Officer of 13 September 2010 was unlawful on public law grounds. Although Mr Vokes sought to submit that this was not the case and that the two questions identified by Carnwath LJ in his decision in R(S) could be conflated, or "wrapped up" into one question, he quite candidly accepted that he could not draw my attention to any authority to support such proposition.

30. I am bound by the decision of Carnwath LJ in R(S). As identified above, in my conclusion that requires me to first consider whether the decision of 13 September 2010 can be impugned on public law grounds. Mr Vokes' submission is a step too far in my view, and is not only inconsistent with the decision in R(S), but also later decisions of the Court of Appeal, which gave approval to Lord Justice Carnwath's interpretation and application of the decision in Rashid.

31. Moving on to a determination of this core issue, I conclude that it has not been established that the decision of 13 September 2010 was unlawful on public law grounds. The fact that a Judge of the First-tier Tribunal has concluded in relation to a different application and decision that the Entry Clearance Officer had not proven, in the context of an appeal against this later decision, that the applicant had acted with dishonesty in 2010, does not mean that the ECO's conclusion in September 2010 was not one open to her on all of the available evidence. Neither does it mean that the ECO committed any other public law error in coming to her

conclusions in such decision. Indeed, during the course of his submissions Mr Vokes accepted that there was no self-standing public law error in the decision of 13 September 2010.

32. I find that this conclusion of itself entirely disposes of the challenge brought in reliance on the Rashid/S line of authority.

33. However, if I am wrong about this and the applicant is not required to establish that there is a public law error in the decision of 13 September 2010 for it to be demonstrated that conspicuous unfairness exists I, nevertheless, conclude - having taken into account all the facts of this case in the round - that there has not been any conspicuous unfairness so as to call for a corrective remedial action on the Entry Clearance Officer's part.

34. I observe from the court's decision in S H Q, 47 & 48 that (i) it is not for the court to dictate to the Secretary of State how she should administer her immigration system and (ii) that the court should only intervene in extreme cases where the Secretary of State, or in this case the Entry Clearance Officer, could only have reached one conclusion having had proper regard to the facts i.e. a conclusion in the applicant's favour. That is plainly not the case here.

35. One of the relevant features in a consideration of whether there has been a conspicuous unfairness is the promptness of applicant's actions in this regard. That this is so can be seen from paragraph 34 of Goldring LJ's decision in S H Q, citing from the earlier decision of the Court of Appeal in ZK (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 615.

36. In the instant matter the applicant's Tier 1 application was refused over four years ago. Whilst the applicant sought an

administrative review of that decision and although she has received no reply to such request and the Entry Clearance Officer cannot provide evidence that such reply was ever sent, on the evidence before me it is clear that she has effectively sat on her hands for nearly three years, not having made any enquiries as to what had happened to such review. Had the applicant made such enquiries she would undoubtedly have been told that her review had been refused and provided with her copy of the relevant decision letter.

37. There was also, contrary to Mr Vokes' submission, a remedy open to the applicant in 2010, or shortly thereafter. She had the option of bringing an application for judicial review against either the September 2010 decision or the failure of an Entry Clearance Manager to undertake a review of it.

38. Mr Vokes' submission that this was not an avenue open to the applicant is difficult to understand – based as it was on the fact that judicial review does not provide a merits-based challenge. This I accept but, nevertheless, judicial review provides an effective remedy against the unlawful actions of a public authority and in this case would have provided an effective remedy against any unlawful decision of the Entry Clearance Officer. Whilst an application for Judicial Review is not generally the correct place for the determination of factual disputes, it is a place where, in limited circumstances, factual disputes can be determined. An example of such a case is that of Beckett v SSHD [2008] EWHC 2002 (Admin), in which Ouseley J heard numerous witnesses over a 4 day period in order to resolve a factual dispute between the parties.

39. Both the delay of the applicant, and the failure to pursue a remedy that was available to her, are matters which weigh against a finding that there has been conspicuous unfairness

caused to her by the Entry Clearance Officer's/Manager's actions in this case.

40. Looking at the circumstances of this case as a whole, I conclude that even if the decision of September 2010 is found to be unlawful on public law grounds or, alternatively that the applicant does not need to establish such unlawfulness, this is not a case where it can be said that there has been any conspicuous unfairness.

41. In any event, as I have already concluded above, it is clear to me that the applicant is required to establish a public law error in the decision of September 2010 before I can conclude there has been any conspicuous unfairness caused by such decision. She has failed to do so.

42. I further do not accept that the Entry Clearance Officer's/Manager's refusal to exercise her executive discretion so as to grant the applicant leave outside of the Immigration Rules in a form akin to that she would have been given as a Tier 1 Migrant is irrational on the facts of this case. Just because the circumstances of the case are found to be exceptional by the Entry Clearance Manager does not mean that it is irrational for her not to grant leave to remain.

43. For these reasons I refuse this application for judicial review.

44. Mr Vokes accepts that the Entry Clearance Officer is entitled to her costs of these proceedings, in a sum to be assessed if not agreed.

45. No application to the Court of Appeal was made and I refuse permission to appeal to the Court of Appeal.~~~*0*~~~~