Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: VA/13448/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 June 2014	**On 15 July 2014**
Oral determination given following hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ENTRY CLEARANCE OFFICER – MUMBAI

Appellant

and

A S J

Respondent

Representation:

For the Appellant (Entry Clearance Officer): Mr P Nath, Home Office Presenting Officer
For the Respondent: No representation and no appearance

DETERMINATION AND REASONS

1. This is the Entry Clearance Officer's appeal against a decision of First-tier Tribunal Judge Handley. For ease of reference, throughout this determination I shall refer to the Entry Clearance Officer, who was the

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original respondent as "the Entry Clearance Officer" and to A S J, who was the original appellant, as "the claimant".

2. The claimant is a national of India, who was born on 31 May 2011. On 3 June 2011 (when she was 2 years old) an application was made on her behalf for entry clearance to allow her to visit, together with her mother, her mother's sister in the UK.

3. This application, together with that of her mother, was refused by the Entry Clearance Officer and the claimant, together with her mother, appealed against this decision. It should be noted that in the refusal letters sent both to the claimant and her mother, they were each informed that they had a right of appeal. The letter to the claimant stated as follows:

> "**Your right of appeal**
>
> You are entitled to appeal against this decision under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. If you wish to appeal you must complete the attached IAFT-2 notice of appeal form. An information sheet has also been provided …
>
> If you decide to appeal against the refusal of this application, the decision will be reviewed with your grounds of appeal and the supporting documents you provide …"

4. It is not necessary for the purposes of this determination to set out any of the reasons given by the Entry Clearance Officer for refusing the application, for the reasons which appear below. It is sufficient to say that following consideration of the appeal on the papers at North Shields on 18 February 2014, in a determination promulgated on 12 March 2014 Judge Handley allowed the appeals of both the claimant and her mother. He considered that on the balance of probabilities the claimant and her mother had both established that the requirements of the Rules were satisfied and that entry clearance should be granted. Again, it should be noted that no objection was taken before him as to this claimant's right of appeal.

5. Following this decision, however, the Entry Clearance Officer realised that in fact the claimant should not have been told that she had a right of appeal, because, it is now said, the Rules no longer permit this. Prior to 9 July 2012, a visit to an aunt came within the category of a "family visit" such as to give rise to a right of appeal, but on that date the Immigration Appeals (Family Visitor) Regulations 2012 took effect, and by virtue of those Regulations a "member of the family" of the person to be visited is limited to:

> "Spouse, civil partner, father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother or sister … father-in-law, mother-in-law, brother-in-law or sister-in-law … son-in-law or

daughter-in-law; or … stepfather, stepmother, stepson, stepdaughter, stepbrother or stepsister".

In other words, this no longer includes aunt or niece. Accordingly, it is argued that the judge made a material error of law by entertaining the appeal, because he lacked jurisdiction to hear it, and the decision should be set aside for this reason.

The Hearing

6. On behalf of the Entry Clearance Officer, Mr Nath relied on the grounds and submitted that the decision did not attract a full right of appeal because the Regulations had been changed. This was a challenge only to the decision in respect of the claimant; no challenge was made to the decision allowing the claimant's mother's appeal, because she had had a right of appeal.

Discussion

7. The right of an applicant to appeal against an immigration decision is provided under Section 82 of the Nationality, Immigration and Asylum Act 2002 of which the relevant parts provide as follows:

> "**82. Right of Appeal: General**
>
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this part "immigration decision" means –
>
> …
>
> (b) refusal of entry clearance …"

8. By Section 84, it is provided as follows:

> "**84. Grounds of Appeal**
>
> (1) An appeal under Section 82(1) against an immigration decision must be brought on one or more of the following grounds –
>
> (a) that the decision is not in accordance with Immigration Rules;
>
> (b) that the decision is unlawful by virtue of … [the applicable section of the Race Relations Act] …;
>
> (c) that the decision is unlawful under Section 6 of the Human Rights Act … (public authority not to act contrary to Human Rights Convention) as being

incompatible with the appellant's Convention rights …"

9. It cannot be argued that the decision is unlawful by virtue of the Race Relations Act or that the decision is unlawful as being contrary to any Convention right of this claimant, and so accordingly the only ground on which an appeal against the decision could be brought is that the decision was not in accordance with the Immigration Rules (which is the basis upon which the appeal was brought, and allowed). However, such an appeal is subject to the provisions of Section 88A of the Act which provides as follows:

> "**88A. Entry Clearance**
>
> (1) A person may not appeal under Section 82(1) against refusal of an application for entry clearance unless the application was made for the purposes of –
>
> (a) visiting a person of a class or description prescribed by Regulations for the purposes of this subsection, or
>
> (b) entering as the dependant of a person in circumstances prescribed by Regulations for the purposes of this subsection."

10. Section 88A(1)(b) does not apply in this case, and, although prior to 9 July 2012 the claimant would have been permitted to appeal under Section 88A(1)(a) (because a visit to an aunt was until that date prescribed by the Regulations) following that date, the visit to an aunt is no longer prescribed by the Regulations and so technically the Entry Clearance Officer is correct when he argues that this claimant did not in fact have a right of appeal.

11. Accordingly we are in a situation where this claimant brought an appeal because she was told by the Entry Clearance Officer that she had a right to bring such an appeal, where no objection was taken before her appeal was heard to the effect that she did not have a right to bring such an appeal and where, having considered all the evidence put before him, the judge considered that her appeal should be allowed on the merits.

12. In these circumstances, it is in my judgment clear that in light of these factors the Entry Clearance Officer should now grant entry clearance to this claimant because there is no legitimate basis upon which it can now properly be argued that she does not satisfy the requirements under the Rules (a hearing having so decided which hearing only took place after the Entry Clearance Officer had informed the claimant that she had the right to appeal, and for the purposes of which the entry clearance had submitted all documents and other material considered relevant to the appeal).

13. However, notwithstanding that on the merits there is no basis for setting aside the decision, I am nonetheless bound by the decision of the Court of Appeal in *Pavandeep Virk and others v SSHD* [2013] EWCA Civ 652 in the course of which at paragraph 23 Patten LJ, with whose judgment the other members of the court agreed, stated as follows:

> "… The FtT is a creation of statute whose jurisdiction in this case is limited by the terms of s.82 of the 2002 Act. The same goes for the UT. Statutory jurisdiction cannot be conferred by waiver or agreement; or by the failure of the parties or the Tribunal to be alive to the point. Although, as Longmore LJ pointed out, decisions taken without jurisdiction may in due course become irreversible, that point has not been reached in this case. It was, in my judgment, open to either the FtT or the UT to take the point about jurisdiction notwithstanding the failure of the Secretary of State to raise it herself …"

14. It cannot be said in this case that the decision had become irreversible, because the Entry Clearance Officer brought his appeal within the time prescribed within the Rules. Accordingly, in my judgment, the jurisdiction point now having been taken, this Tribunal has no alternative but to find that as a matter of fact, the First-tier Tribunal did not have jurisdiction to entertain this claimant's appeal. It follows that I am bound, however reluctantly, to allow this appeal, although, as I have already indicated, I consider in the circumstances of this case that having now succeeded in establishing this point of principle, it would be improper for the Entry Clearance Officer not now to grant the claimant entry clearance in any event.

Decision

I set aside the determination of the First-tier Tribunal with regard to the claimant (but not her mother, who was the first appellant in that appeal) and substitute the following decision:

The claimant's (but not her mother's) appeal is dismissed, on the basis that the Tribunal lacks jurisdiction to entertain her appeal.

Signed: Date: 9 July 2014

Upper Tribunal Judge Craig