IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/00848/2014
OA/00849/2014
OA/00850/2014
OA/00851/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th November 2015	**On 17th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS FATMA SENKOY
MS
AS
ACS
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - ISTANBUL

Respondent

Representation:
For the Appellants: Miss Nassar, Solicitors
For the Respondent: Ms Sreeranam, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The appellants are citizens of Turkey and are mother and children with the first appellant born on 1st May 1977. The subsequent appellants were born on 5th November 1998, 14th June 2006 and 21st November 2009. They made an application under Appendix FM to join the husband and father Mr Senkoy. That application was refused under paragraph EC-P.1.1(c) of Appendix FM of the Immigration Rules and with particular reference to S-EC.2.2(a). In respect of the suitability requirements the Entry Clearance Officer referred to Mrs Senkoy's previous application in 2010 in which she had stated that she had not visited the United Kingdom in the preceding ten years. It was when the parentage of her third child was questioned that she admitted she had entered the UK illegally in 2008. In respect of the suitability requirements the Entry Clearance Officer was not satisfied that her relationship with her husband was genuine or subsisting or that they intended to live together.

2. In the event there was an Entry Clearance Manager's review dated 8th October 2014 where it was accepted on the basis of the additional evidence that the remaining issue was whether there is a genuine and subsisting relationship between the sponsor and Mrs Fatma Senkoy. The Entry Clearance Manager in his review stated

> "In any event it is respectfully requested that if the Immigration Judge is satisfied that the relationship is genuine and subsisting (and her illegal entry/exit to/from the UK forms part of reaching that conclusion) then the application is remitted back to post in order to consider the applications again with specific regard to any clandestine activity and some intention to significantly frustrate the Immigration Rules."

3. The judge found that there was a genuine and subsisting relationship and noted the submissions at paragraph 30 that if he was minded to allow the appeal he was invited to remit the matter back to the Entry Clearance Manager and he was referred to paragraph 320(11) of the Immigration Rules by the Presenting Officer.

4. By way of counter submission the appellant's representative stated that the Tribunal had no power under the Rules to remit the matter back to the Entry Clearance Officer.

5. At the hearing Ms Sreeranam accepted that the Entry Clearance Officer had not in fact recorded a reference to paragraph 320(11) in the initial refusal notice and accepted that the factual basis had been before the Entry Clearance Officer in which to make a discretionary ruling under paragraph 320(11) but it was not raised by the Entry Clearance Officer.

6. Miss Nassar stated that the judge was not invited to consider 320(11) as it was not in the refusal letter and it was only now that the Entry Clearance Officer wanted to attempt to re-refuse on the facts. She took issue with the grounds because the judge was never invited to address the question of applicability of paragraph 320(11) as alleged and that was the full reason for permission to appeal being granted and as such could not stand

and no other grounds could now be argued. If the judge's failure to remit was being permitted to be argued despite not being pleaded then paragraph 320(11) could not apply to the children as they had not breached the UK immigration or other law and it could not apply to them either as there were no aggravating factors. It was not open to the Entry Clearance Officer to re-refuse under paragraph 320(11) now as the evidence was known to the Entry Clearance Officer at the time of decision and should be considered at the time and in the event the failure to remit the matter had made no material difference to the outcome. The power to remit was a discretionary power and not mandatory and hence not material to an error of law it was simply a non-exercise of discretion.

7. In conclusion I find that the issue in the Entry Clearance Officer's refusal related to EC-SC2.2 not to paragraph 320(11). There was no challenge to the finding that the couple were in a genuine and subsisting relationship and although there was merely an invitation by the Entry Clearance Manager to remit the matter back to the ECO the judge chose not to do. I fail to see that there is any error of law in this judge's determination. The failure of the judge to remit the matter back to the Entry Clearance Officer for reconsideration is not pleaded but in any event does not amount to a material error of law. The Entry Clearance Officer did not address the issue of frustration of the Rules and it was merely a suggestion by the Entry Clearance Manager to that affect. There was no refusal by the Entry Clearance Officer on the basis of 320(11) and the judge cannot be criticised for failing to take the point that the Entry Clearance Officer did not exercise his discretion when he could have done so on the factual basis before him.

8. Even if the judge could have considered "the question of paragraph 320(11)" as this could not apply to the children as they had not breached any Immigration Rules and it is clear from the government guidance at RFL7.1 in respect to "frustrating the intentions of the Immigration Rules" that there should be aggravating circumstances as well as being an immigration offender or in breach of UK immigration or other law.

9. The aggravating circumstances which I accept are just a list but not an exhaustive list and do not in fact identify that the appellant has been and gone as an illegal entrant. Paragraph S-EC.2.2(a) refers to the following:

> "S-EC.2.2. Whether or not to the applicant's knowledge –
>
> (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or
>
> (b) there has been a failure to disclose material facts in relation to the application."

That does not relate to past applications and was not raised as part of the application for permission to appeal.

10. I do not find that it is for the judge to search out for the question of the applicability of paragraph 320(11) in these circumstances. It was a matter raised after the refusal and as Ms Sreeranam points out the Entry Clearance Manager review is to either concede or take forward grounds on which the Entry Clearance Officer relied. As such I find there is no error of law in the decision of Judge Clarke

11. The point was taken that there was no specifically pleaded aspect to the application for permission to appeal on the judge's failure to remit the decision back to the Entry Clearance Officer.

12. Nonetheless for clarity, there is no error of law and the decision shall stand.

No anonymity direction is made.

Signed Date 4th December 2015

Deputy Upper Tribunal Judge Rimington