Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/09799/2014
OA/09793/2014
OA/09794/2014
OA/09796/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 2 December 2015	**On 21 December 2015**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

FAIZA KOKAB
MAIDA ALI
MOAAZ AHMED
WASI AHMED

Appellants

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:
For the Appellant: Mr. E. Nicholson of counsel (direct access)
For the Respondent: Mr. I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

History of Appeal

1. The 1st Respondent, who was born on 23 July 1975, is a national of Pakistan. The 2nd Respondent, who was born on 20 August 2001, the 3rd Respondent, who was born on 30 September 2005 and the 4th Respondent, who was born on 27 July 1999, are the 1st Respondent's children and are also nationals of Pakistan.

2. On 17 June 2014 the 1st Respondent applied for entry clearance as a Tier 1 (Entrepreneur) Migrant and the 2nd, 3rd and 4th Respondents applied for entry clearance as her dependents.

3. On 23 July 2014 the 1st Respondent attended an interview in relation to her application and the Respondents were refused entry clearance on that same day. The Respondents applied against these decisions on 20 August 2014 and their appeal was heard by First-tier Tribunal Judge Maciel on 4 August 2015. She allowed their appeals in decisions, promulgated on 19 August 2015.

4. The Appellant appealed against these decisions and on 7 October 2015 First-tier Tribunal Judge Grant-Hutchison granted her permission to appeal to the Upper Tribunal. At the hearing, counsel for the Respondents provided me with a copy of the Respondents' response to the Appellant's notice of appeal, which was dated 26 October 2015. He also provided me with a copy of the Respondent's bundle, which was not in the Tribunal's file. He also referred me to some documents which were contained in the bundle provided for a judicial review that was also currently before another Upper Tribunal Judge.

Error of Law Hearing

5. On 30 November 2015 counsel for the Respondents faxed a copy of his skeleton argument and a reply from the Home Office to a freedom of information request to the Upper Tribunal. In response, the Home Office Presenting Officer faxed a skeleton argument on behalf of the Entry Clearance Officer to the Upper Tribunal on 1 December 2015. I took time to read these documents before hearing oral submissions from the parties.

6. In his skeleton argument the Home Office Presenting Officer stated that he continued to rely on the grounds previously submitted but that he sought to clarify the first ground. This ground asserted that the First-tier Tribunal Judge had erred in law in allowing the appeal under section 19B of the Race Relations Act 1976 and section 29 of the Equality Act 2010.The ground clarified that at the date of the decision and the hearing section 84 of the Nationality, Immigration and Asylum Act 2002 referred to section 29 of the Equality Act 2010 and not the Race Relations Act, which it had replaced. Counsel for the Respondents did not object to this amendment and I exercised by case management powers under rule 5(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, and permitted the Appellant to make this amendment.

7. The Home Office Presenting Officer also sought to rely on a "new" ground of appeal, which asserted that the First-tier Tribunal Judge had made a material error of law by accepting that the *Guidance Tier 1 (Entrepreneur) – version 6.0* ("the guidance") could be read as stating that it was only those who prima facie meet the points threshold for Tier 1 (Entrepreneur) who would potentially be called for an interview by an entry clearance officer. Counsel for the Respondents argued that I

should not permit this amendment as it meant that he did not have the opportunity to make a Rule 24 response. After hearing further submissions by both parties about the substance of the appeal, I found that this ground merely responded to an integral part of the Respondents' case and that, therefore, the Respondents would not be disadvantaged by its addition. Therefore, I exercise my case management powers again to permit the amendment.

8. I did not admit the reply to the Freedom of Information request, as the statistics attached to it were not before the First-tier Tribunal Judge and were of limited relevance in the light of the decision in *SK (Proof of indirect racial discrimination) India* [2006] UKAIT 00067.

9. As a consequence of Section 88A of the Nationality, Immigration and Asylum Act 2002, the grounds upon which the Respondents could appeal against the decision to refuse them entry clearance were very limited. However, at the date of their appeals they could appeal under section 84(1)(b) of that Act, as then in force, on the basis that the refusal was unlawful under section 29 of the Equality Act 2010.

10. The Respondents original grounds to the First-tier Tribunal were far wider and also referred to section 19B of the Race Relations Act 1976 as well at the Equality Act 2010. They also submitted that they had suffered direct discrimination in the manner in which their applications had been assessed by the entry clearance officer. This ground was not dealt with by the First-tier Tribunal Judge, who found in paragraph 20 of her decision that the 1st Respondent had been indirectly discriminated against.

11. The Respondents also relied on the manner in which the 1st Respondent's interview was carried out. This ground is no longer relied upon but it is the subject of a separate application for judicial review, which has been granted permission in the Upper Tribunal. The grounds also made a number of points which went to the question of whether she could meet the criteria for entry clearance as a Tier 1 (Entrepreneur) which did not attract a right of appeal.

12. In paragraphs 6 and 13 of her decision, First-tier Tribunal Judge Maciel referred to the Respondents having rights of appeal under section 19B of the Race Relations Act 1976, which was no longer in force. However, at the end of paragraph 20 she also mentioned section 29 of the Equality Act 2010 and allowed the appeal under this provision.

13. Counsel for the Respondents argued that this was a decision which was open to the First-tier Tribunal Judge on the evidence before her. However, the First-tier Tribunal Judge did not remind herself of the relevant criteria contained in sections 19 and 29 of the Equality Act 2010. Nor did she consider the evidence in the light of these criteria.

14. Section 19(3) of the Equality Act 2010 outlines the relevant characteristics which may found the basis for a successful claim for discrimination. These include "race" and section 9 of the Equality Act 2010 clarifies that "race" includes "nationality". In paragraph 16 of her decision the First-tier Tribunal Judge noted that "it was contended that [the] requirement for interview is additional as a result of her race which she would otherwise not have had to fulfil". Then at paragraph 20 of her decision she concluded that "persons applying for Entrepreneur visas from Islamabad

will be Pakistani". There was no evidence before the First-tier Tribunal Judge to find that applicants for visas in Islamabad would be exclusively nationals of Pakistan.

15. Section 19(2) requires the Respondent to identify a "provision, criterion or practice" which the Entry Clearance Officer applied which indirectly discriminated against the 1st Respondent. I accept that in substance the First-tier Tribunal Judge identified this as the requirement in the Guidance to interview all Tier 1 (Entrepreneur) applicants if they have sufficient points to qualify for entry clearance.

16. For the purposes of section 19(2)(a) it was also necessary to show that this requirement applied to those who did not share the relevant characteristic because they were not nationals of Pakistan. The First-tier Tribunal Judge did not refer to this requirement but in paragraph 20 of her decision she did not find that this requirement was met. In contrast, she said that "Mr. Nicholson contended that all of the applicants who pass the initial assessment are interviewed. There is no evidence of this before me". Therefore, even if she was applying the substance of this sub-section, she clearly did not find that it was met.

17. Furthermore, the First-tier Tribunal Judge did not refer to sub-section 19(2)(b) which required her to identify how being required to attend an interview would put the 1st Respondent "at a particular disadvantage when compared with person with whom [she] does not share" a relevant characteristic as a national of Pakistan. She merely stated that she found "that had the [1st Respondent] not been interviewed, there would be nothing upon which to base any refusal". This does not amount to a finding of discrimination or meet the requirements of Section 19(2)(b) of the Equality Act 2010. In oral submissions, counsel for the Respondents also argued that selection for an interview on the basis of a local profile amounted to indirect discrimination but failed to identify how this amounted to discrimination on the basis of race.

18. Page 19 of the Home Office *Guidance – Tier 1 (Entrepreneur) – version 6.0*, which was valid from 11 July 2014, states that "if the applicant meets the points threshold for Tier 1 (Entrepreneur) but displays either general or specific risk characteristics, shown on local risk profiles, you must either ask them to submit further information and evidence or invite them for an interview". It also states that "the number of applicants selected for interview or asked for further evidence varies between posts depending on the risk profile of the applicants. The risk and liaison officer network (RALON) teams hold local profiles to support selection for interview". However, the operative phrase is "to support selection for interview", which does not mean that interviews could not be arranged on another basis and to comply with the requirements of the Immigration Rules, referred to below.

19. In addition, paragraph 5.2 of the report of the Independent Chief Inspector of the UK Border Agency on *An Inspection of the Risk and Liaison Overseas Network (RALON) in Islamabad and the United Arab Emirates: January – April 2010* stated that "RALON was not supporting the visa operation in the region as well as it or Visa Services Directorate wanted" and in paragraph 5.3 it said that "visa services were not routinely using risk profiles as part of the decision making process".

20. Furthermore, the guidance had to be viewed in the context of the Immigration Rules themselves. In particular, paragraph 245DB(f) of the Immigration Rules makes it clear that an entry clearance officer will need to consider whether an applicant genuinely

intends and is able to establish, take over or become the director of one or more businesses; genuinely intends to invest the required amount of money and that the money in question is genuinely available to him or her. Sub-section (h) also states that the entry clearance officer reserves the right to request additional information to support the assessment in (f). This additional information may have to be obtained by means of an interview at whatever post an application is made at. In my view this means that an entry clearance officer will retain a discretion to interview over and above any guidance provided to him or her.

21. In paragraph 22 of his skeleton argument Counsel for the Respondents also sought to rely on an unreported case. I considered whether to admit this case in the light of paragraph 11 of Practice Direction, which can be found at pages 604 – 613 of Phelan. I note that counsel has not certified that the proposition he wishes to rely on cannot be found in a reported case. In addition, the case went to the issue of whether an interview process itself was fair not to whether an appellant had been subjected to indirect discrimination.

22. In oral submissions he also asserted that the 1st Respondent had suffered from direct discrimination. This was not a finding by the First-tier Tribunal Judge and was not an argument, which was contained in the Respondents' Rule 24 Response.

23. The First-tier Tribunal Judge's approach to Article 8 of the European Convention on Human Rights was not challenged by the parties.

24. For all of these reasons I am satisfied that there were material errors of law in the First-tier Tribunal Judge's decision and findings and that it should be set aside in its entirety. I am also satisfied that, as there will need to be a complete re-hearing, that this is a proper case for remission to the First-tier Tribunal.

Conclusions:

1. The First-tier Tribunal Judge's decision and findings did include a material error of law.

2. The decision of First-tier Tribunal Judge Macial is set aside.

Directions

1. The appeal be re-listed before a First-tier Tribunal Judge other than First-tier Tribunal Judge Macial.

Nadine Finch

Upper Tribunal Judge Finch Date: 4th December 2015