Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/17145/2018
HU/17153/2018, HU/17152/2018
HU/17151/2018, HU/17148/2018

THE IMMIGRATION ACTS

Heard at Field House
On 7 May 2019

Decision & Reasons Promulgated
On 17 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ENTRY CLEARANCE OFFICER

Appellant

and

AYDA [A]
MOHAMED [A]
[M A]
[A A[1]]
[A A[2]]
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr C Appiah of Counsel, instructed by Vine Court Chambers

DECISION AND REASONS

Introduction

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1. This is an approved transcript of the extempore judgment given at the hearing.

2. For ease of reference I shall refer to the Appellant before the Upper Tribunal as the Entry Clearance Officer and the Respondents as the Claimants.

3. The Entry Clearance Officer seeks to challenge the decision of First-tier Tribunal Judge O'Hagan ("the judge"), promulgated on 22 February 2019, by which he allowed the Claimants' appeals against the Entry Clearance Officer's decisions of 29 July 2018, refusing their respective human rights claims, which in turn had been made on 24 August 2016.

4. I summarise a history of this matter as it has a direct bearing on the outcome of this challenge. The Claimants, all of whom are stateless, made applications for entry clearance (deemed to be human rights claims) in order to join the first Claimant's husband in the United Kingdom. He is a recognised refugee in this country. As part of that application certain documents were submitted. These included an entry of marriage certificate and live birth certificates for all four children.

5. The applications were originally refused by the Entry Clearance Officer on 19 October 2016. It was asserted that the documents mentioned above were "not genuine" and DVR reports were provided in support of the allegation. Paragraph 320(7A) of the Immigration Rules ("the Rules") was relied on.

6. The Claimants appealed against that original refusal and their appeal was heard by First-tier Tribunal Judge Robertson. Having considered the evidence before him, including the documentary evidence and the DVRs provided by the Entry Clearance Officer, Judge Robertson concluded that the documents in questions were genuine and reliable and that the Entry Clearance Officer had failed to make out his allegation of deception. The appeals were duly allowed. The Entry Clearance Officer did not challenge Judge Robertson's decision nor was that decision implemented by way of granting entry clearance to the Claimants.

7. Some time passed and the Entry Clearance Officer then re-refused the Claimants' original applications. It was said that "new" and "specific" DVRs had been obtained in relation to the documents submitted with the original application. Paragraph 320(7A) of the Rules was once more relied upon. The Claimants then appealed and the matter came before Judge O'Hagan on 18 February 2019.

8. There was no appearance on behalf of the Entry Clearance Officer at the hearing before the judge. The judge noted that there had been no application made in advance or indeed on the day of the hearing to adjourn the appeal. He noted that there was no appeal bundle from the Entry Clearance Officer and that the DVRs referred to in the latest refusal letter had not been provided. There had been no explanation for the non-production of what would have appeared to have been the core evidence in the case against the Claimants.

9. The judge proceeded to determine the appeal in the absence of a representative for the Entry Clearance Officer.

10. He allowed the appeals essentially on the basis that the Entry Clearance Officer had failed to provide relevant evidence to make out the serious allegations against the Claimants and on the basis that the well-known principles in Devaseelan applied, with reference to the decision of Judge Robertson.

11. The Entry Clearance Officer applied for permission to appeal to the Upper Tribunal. His grounds are concise and narrow in focus. It was said that the judge had materially erred in law by failing to adjourn the hearing in order to allow for a further opportunity to produce the relevant evidence (that being the "new" DVRs). The grounds assert that the judge had failed to expressly consider his discretion to proceed and whether or not it was in the interests of justice to do so given the absence of a representative for the Entry Clearance Officer.

12. In a detailed grant of permission dated 26 March 2019, First-tier Tribunal O'Callaghan listed the omissions on the Entry Clearance Officer's part and confirmed that having checked the Tribunal's files there was no record of an adjournment application ever having been made prior to or on the day of the hearing before the judge. Notwithstanding that history, Judge O'Callaghan deemed it arguable that the judge had failed to give any or any adequate consideration to the discretionary power under rule 28 of the First-tier Tribunal's Procedure Rules.

13. In advance of the hearing, Ms Isherwood had confirmed by way of two email dated 3 May 2019 that she sought permission for the "new" DVRs to be admitted in evidence and that this evidence not be disclosed to the Claimant or their representatives (apparently because the reports contained contact details of the source of relevant information).

The hearing before me

14. I indicated to Ms Isherwood at the outset that in light of the narrowly-drawn grounds of appeal, the DVRs would only potentially become relevant if I were to find that the judge had materially erred in law. She did not demur from this.

15. Ms Isherwood relied on the grounds of appeal. She emphasised the importance of the allegation being made against the Claimants and the fact that the refusal letter had expressly confirmed that there was new evidence in the form of DVRs which were of great significance in this case. Ms Isherwood emphasised the judge's failure to have considered the interests of justice.

16. Mr Appiah noted the failure of the Entry Clearance Officer to have made any adjournment application. He submitted that the judge had, in all the circumstances, acted fairly.

17. In reply Ms Isherwood noted that the Claimants and indeed the judge would have been on notice of the existence of the new DVRs as this was expressly pointed out in the refusal letter.

Error of law decision

18. I conclude that there are no material errors of law in the judge's decision. I say this for the following reasons.

19. Without wishing to unnecessarily labour the point, the Entry Clearance Officer's conduct during the course of the appellate proceedings has been, to put it somewhat mildly, extremely poor.

20. First, he declined to challenge the decision of Judge Robertson.

21. Second, he failed to implement Judge Robertson's decision, choosing instead to apparently obtain what has been described as "new" and "specific" DVRs relating to the very same documents that had previously been found to be genuine and reliable by Judge Robertson.

22. Third, having re-refused the Claimants' original applications and relying solely on the more recently obtained DVRs, the Entry Clearance Officer then failed to produce any appeal bundle contrary to the directions sent out by the First-tier Tribunal.

23. Fourth, the DVRs themselves were never produced, even in redacted form. There had never been any explanation as to why the DVRs had not been provided, as to why they could not be provided in redacted form, or whether a procedure under section 108 of the Nationality, Immigration and Asylum Act 2002 could not have been undertaken. There was in effect complete silence on what was clearly the cornerstone of their case against the Claimants.

24. Fifth, I am fully satisfied that there had been no application for an adjournment in advance of the hearing before the judge. There was no application on the day of the hearing itself (although there was no Presenting Officer on the day it would have been possible for the Presenting Officer's Unit to have made such an application given that they clearly had notice of the hearing itself).

25. In light of all of this it would seem somewhat surprising that the Entry Clearance Officer then complained that the judge had failed of his own volition to have simply adjourned the case.

26. I take into account the fact that a judge can exercise discretion to adjourn of their own volition, but in view of the particular circumstances of this case, as accurately set out by the judge in para. 8 of his decision, I conclude that his decision to proceed was entirely fair and justified. In saying this, I emphasise that the issues of fairness and the interests of justice in respect of rules 2 and 28 of the Procedure Rules are always touchstones when considering proceedings in the First-tier Tribunal.

27. Fairness of course applies to *both* parties. In this case, on the one hand, the Entry Clearance Officer had failed to do anything to prosecute his case against the Claimants in respect of the very serious allegations made against them. On the other hand, the Claimants, who had already waited some nine months for their appeal to be heard by the First-tier Tribunal, had attended and were ready to proceed.

28. In respect of the “interests of justice” limb under rule 28, it is right that matters concerning allegations of the obtaining of false documents is of serious concern, in any particular case, and on a wider basis as well. However, it is clearly also in the interests of justice to deal with cases efficiently and effectively, by reference to the overriding objective, and of course the duty on *both* parties to assist the Tribunal. This is a case in which, in my view, the Entry Clearance Officer has conspicuously failed to assist the Tribunal and has failed to adduce evidence underpinning the core allegation made against the other party.

29. I would accept that the judge has not referred in terms to rules 2 and 28 of the Procedure Rules. However, with reference to the clear factual matrix which was before him and bearing in mind what he says at para. 8, in my view what the judge goes on to say in para. 9 is more than enough to show that he at least implicitly considered whether it would be right to proceed with the appeal in the absence of a representative for the Entry Clearance Officer. Indeed, on the facts before him it is rather difficult to see that he could have done anything else other than proceed to determine the appeals given the inaction of the absent party up until and at the date of the hearing before him.

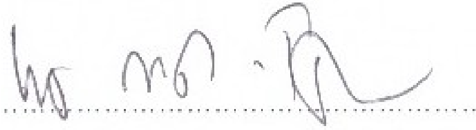
30. I would add a final point. The grounds assert that the judge had effectively “utilised the decision” (which I assume relates to the judge’s decision) to “punish” the Entry Clearance Officer. In my view that is an entirely misconceived comment. The judge was clearly deeply dissatisfied with the conduct of the Entry Clearance Officer and expressed this view in robust terms (see para. 10 of his decision). However, there was nothing in my view to indicate that he was in any way punishing the losing side. What he was doing, it seems to me, was simply reflecting the factual history of the case and nothing more.

Notice of Decision

The decision of the First-tier Tribunal does not contain material errors of law and it shall stand.

It follows that the Entry Clearance Officer’s appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed  Date: 15 May 2019

Deputy Upper Tribunal Judge Norton-Taylor