



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35790/2013
IA/35792/2013
IA/35800/2013
IA/35803/2013

THE IMMIGRATION ACTS

Heard at Field House
On 7 October 2014

Determination Promulgated
On 30 October 2014

Before
UPPER TRIBUNAL JUDGE JORDAN

Between

Binu Venattuipe and others

Appellants

and

The Secretary Of State For The Home Department

Respondent

Representation:

For the Appellant: Mrs H. Pryce, Counsel instructed by Morgan Mark Solicitors
For the Respondent: Mr P. Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first-named appellant ('the appellant') and her dependent husband and their two children are all citizens of India appealing against the decisions of the respondent of 2 and 16 August 2013 refusing to grant them leave to remain under the Tier 1 (General) Migrant provisions of the Points Based System. The appellant first entered the United Kingdom on 15 May 2006 with entry clearance as a student which was subsequently extended to permit study as a student nurse and thereafter as a Tier 1 (General) Migrant until 22 June 2013. A further application was made but refused on 16 August 2013 accompanied by removal directions under s.47 of the Immigration, Asylum and Nationality Act 2006 upon which the respondent no longer seeks to rely.

2. The substantive refusal under the Rules was restricted to a challenge in relation to her claim for 40 points on the basis of previous earnings. The respondent awarded the appellant 35 points but this was some five points short of the overall total of 80 required. The appellant claimed earnings of £65,000 odd for the period 1 December 2011 to 13 November 2013 during which period she was on maternity leave from 10 December 2012 until 10 May 2013. Wrongly, the respondent claimed a payslip of November 2011 was not within 12 months the subject of the claim and therefore could not, according to the respondent, be included. The reality was that the appellant did not include a November 2011 payslip and made no claim based upon the submission of such a payslip. The only intelligible inference is that the decision maker was looking at the payslip for November 2012 which the appellant did submit. The respondent also alleged that the payslips from January 2013 to 26 April 2013 were payslips within the dates the appellant was claiming deferment due to maternity leave.
3. Doubtless these were complex provisions which few understood. In the First-tier Tribunal, Judge Malins in a determination promulgated on 11 April 2014, concluded that the appellant had failed to discharge the burden of proof in relation to employment or self-employment and that he did not believe the appellant worked the hours claimed in a year during which she gave birth. He did not accept private care appointments would have resulted in payment in cash or that her work could be classified as that of a highly skilled migrant. He concluded: "*By a wide margin, the first appellant's appeal must fail*".
4. Unsurprisingly, the grounds of appeal to the Upper Tribunal asserted that the sole basis of the respondent's refusal related to the appellant's previous earnings for which she was awarded 35 points and not 40.
5. When the matter came before me on 4 August 2014 I was unable to determine what requirements within the Immigration Rules the appellant was expected to meet and for what period or how the appellant alleged those requirements were met. Accordingly, I provided the directions that are set out in the Appendix to this determination.
6. In apparent compliance with those directions, the appellant provided a document in narrative form, making apparent reference to all relevant documents as to how she claimed the requirements were met in order to score 40 points. Unfortunately, in breach of my directions, the respondent failed to respond to the appellant's narrative nor did she set out which parts of the narrative she accepted, which parts she rejected and her reasons. Nor did the response set out whether the Secretary of State accepted the First-tier Tribunal erred in law in approaching the appeal as the Judge did.
7. By this narrative process, it would become possible to reveal how the respondent erred in refusing the application and, therefore, how the First-tier Tribunal Judge

erred. Those claims and assertions have not been answered by the respondent and, short of seeking an adjournment (which Mr Deller did not pursue), there is no reasoned challenge to the appellant's claim.

8. There is nothing within the submissions made by the appellant which permit me to approach them critically or entitle me to reject them.
9. The fact is that the Secretary of State has not provided a challenge to the detailed grounds which have now been advanced by the appellant. I am far from suggesting that a failure to comply with a direction operates as an automatic bar to the respondent from challenging the appellant's case. There will be many instances where the public interest in refusing the claim will far outweigh the disadvantage to the appellant in being unable to benefit from the respondent's failure. Thus, in the case of a deportation appeal involving a serious offender sentenced to a lengthy period of imprisonment, the failure of the Secretary of State to comply with a direction will almost certainly not result in the appellant's challenge to the deportation decision succeeding for that reason alone. There will, however, be other cases where the public interest is much more limited. In such a case, it may be appropriate to prevent the respondent from advancing a challenge to the appellant's claim in breach of directions made against the Secretary of State.
10. I cannot gainsay that the appellant has satisfied the requirements of the Immigration Rules. The appeal should succeed for that reason alone. There is therefore no public interest in relieving the respondent of the consequences of his failure to comply with directions.
11. At the conclusion of the hearing, Mr Deller on behalf of the respondent, proposed that he withdraw the decision and committed the respondent to remake it in terms that the appellant would be granted leave to remain. Whilst this proposal acknowledges that (a) the appellant met the requirements of the Immigration Rules and (b) the decision challenged in the appeal to the Tribunal was not in accordance with the law and (c) the First-tier Tribunal Judge erred in law in dismissing the appeal, I see no reason in law why the Upper Tribunal should not acknowledge these matters by allowing the appeal here and now. I do not doubt Mr Deller's good faith in the course he has proposed or the fact that, in carrying through the proposal, he would then commit the Secretary of State to granting leave in accordance with his proposal. My view may well have been different if the respondent had written to the Upper Tribunal before the hearing that the decision had been withdrawn and the appellant had been granted the leave sought in the application. In the circumstances, Mr Deller's proposal was in essence a withdrawal of the respondent's case, rather than a withdrawal of the decision. Indeed, that course of action was thrust upon him by reason of his being unable to pursue a challenge given the failure to comply with the directions which had offered the respondent an opportunity to articulate a challenge fully and intelligibly. In particular, Rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 requires both a notice of withdrawal to be provided on

notice prior to the hearing and the Upper Tribunal's consent, neither of which has occurred.

DECISION

The Judge made an error on a point of law and I re-make the decision in the following terms:

The appeal is allowed under the Immigration Rules.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
20 February 2015

Appendix

4 August 2014
DIRECTIONS

1. The appellant, Binu Venattuip, is to set out in narrative form but with reference to all relevant documents:
 - i. what requirements of the Immigration Rules she claims she was required to meet and for what period
 - ii. how she met those requirements, providing all necessary calculations;
 - iii. how the respondent erred in refusing her application;
 - iv. how the First-tier Tribunal Judge erred.
2. The appellant is to file and serve a bundle of documents restricted to those she is permitted to produce in an appeal on the Points Based System.
3. The appellant is to set out what she considers the issues to be.
4. The above are to be filed and served within 28 days of today.
5. The respondent is to respond to the appellant's narrative stating which parts she accepts and with which parts she disagrees and, in the case of a disagreement, stating her reasons for so doing.
6. The response is to include her reasons for asserting
 - i. the First-tier Tribunal Judge made no error of law;
 - ii. the reasons why the appellant failed to meet the requirements of the Immigration Rules;
 - iii. any objections to the admissibility of evidence on which the appellant seeks to rely.
7. The Secretary of State is to respond within 56 days of today.
8. The appeal is to be re-listed before me on the First Available Date after 29 September 2014, time estimate 1 hour, no interpreter when the hearing of the appeal will be resumed. If an error on a point of law is found, the hearing will proceed immediately to the re-making of the decision.