



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number:

IA/48253/2013

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THE IMMIGRATION ACTS

Heard at Field House

**Decision and
Reasons
promulgated**

On 17 October 2014

On 20 October 2014

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

**(1) Eranga Dulmali Jayasuriya
(2) Kasun Sameera De Silva Kadupiti
(No anonymity directions made)**

Respondents

Representation

For the Appellant: Mr. S. Whitwell, Home Office Presenting Officer.

For the Respondents: Ms. G. Peterson of Counsel instructed by Lloyds PR Solicitors.

DECISION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Deavin promulgated on 6 February 2014, allowing Ms Jayasuriya's and Mr Kadupiti's appeals against the Secretary of State's decisions dated 2 November 2013 to refuse to vary their leave to remain as, respectively, a Tier 1 (Post Study Work) Migrant and her dependant, and to remove them from the UK.

2. Although before me the Secretary of State is the appellant and Ms Jayasuriya and Mr Kadupiti are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mrs Jayasuriya and Mr Kadupiti as the Appellants and the Secretary of State as the Respondent.

Background

3. The Appellants are nationals of Sri Lanka born on 20 March 1982 and 23 October 1982. They are wife and husband. At all material times Mr Kadupiti (the Second Appellant) has been treated for immigration purposes as the dependant of his wife and has been granted leave 'in line' with her. The outcome of his appeal depends upon the outcome of Mrs Jayasuriya's (the First Appellant's) appeal.

4. The Appellants entered the UK on 15 March 2010 with leave valid to 2 April 2011 - the First Appellant as a Tier 4 (General) Student migrant, the Second Appellant as her dependant. A further period of leave was granted to each of them until 27 August 2012.

5. On 5 April 2012 the First Appellant made an application to vary leave to remain as a Tier 1 (Post Study Work) Migrant. (The Second Appellant also made a further application as his wife's dependant.) The First Appellant relied, in part, upon having secured a BA (Hons) degree in International Business from the City of London College. However, the degree was not awarded until 6 June 2012. In the circumstances the Respondent refused the First Appellant's application for reasons set out in a combined Notice of Immigration Decision and 'reasons for refusal' letter ('RFRL') dated 2 November 2013 with particular reference to paragraphs 245FD(c) and 245FD(d) of the Immigration Rules - essentially because she had not been awarded her degree by the date she submitted her application. (For completeness I note that there was an earlier refusal of the application in September 2012, but the Respondent's decision was subsequently withdrawn.)

6. The Second Appellant was refused 'in line' with his wife.

7. The Appellants appealed to the IAC. The First-tier Tribunal Judge allowed the appeals under the Immigration Rules for reasons set out in his determination.

8. The Respondent sought permission to appeal to the Upper Tribunal which was initially refused by First-tier Tribunal Judge Chambers, but subsequently granted by Upper Tribunal Judge Freeman.

Error of Law

9. In respect of the award of the First Appellant's degree postdating the making of her application for variation of leave to remain, the First-tier Tribunal Judge summarised the parties' respective positions: the Appellants' at paragraphs 20, 21, and 29 – essentially *“An application is open and can be varied, up until the date of decision”* (paragraph 21); the Respondent's at paragraph 27 – *“The Appellant must be awarded the qualification at the date of application”*. At paragraph 31 the Judge decided in favour of the Appellants: *“It is open to the [First] Appellant to amend her application before it is considered and this is what she did by sending her degree award to the Respondent as soon as it came into her possession”*. The appeals of both Appellants were allowed in consequence.

10. Upper Tribunal Judge Freeman addressed the matter succinctly in granting the Respondent permission to appeal: *“The (main) appellant made her application on 5 April 2012, but was not awarded her degree till 6 June: as the renewed grounds themselves point out, it was held in Raju and others [2013] EWCA Civ 754, that the necessary qualification must be obtained before an application is made as a post study work migrant”*.

11. Ms Peterson without expressly conceding the appeal on this point nonetheless very properly acknowledged the difficulty the case of **Raju** and the case of **Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610 (IAC)** presented the Appellants, and did not seek to advance any submissions in defence of the First-tier Tribunal Judge's reasoning in this regard.

12. I find that the Judge was plainly in error for the reasons identified by Judge Freeman. The Judge misdirected himself in respect of the Rules, and his decision in this regard must be set aside accordingly.

Re-making the Decision

13. In light of **Raju** only one outcome is feasible in remaking the decision under the Rules. The First Appellant did not satisfy the requirements of the Rules: the Respondent's decision was in accordance with the Immigration Rules. The concomitant decision to refuse the Second Appellant variation of leave was also in accordance with the Rules. The Appellants' appeals are dismissed under the Rules accordingly.

14. Ms Peterson did not seek to dispute this outcome, but rather invited me to permit the Appellants an opportunity to advance evidence and arguments in respect of Article 8 of the ECHR by reference to their private lives. (In respect of family life, I note that the First Appellant was delivered of a child 3 weeks ago. However, any removal of the Appellants in consequence of the Respondent's decision will be as a family unit, and as such it is not to be contended that there would be any interference with their mutual family lives.)

15. The Appellants' grounds of appeal to the First-tier Tribunal comprise 19 paragraphs, only one of which makes reference to the ECHR. Paragraph 18 is in these terms: "*The removal decision is not in accordance with the law and is in breach of the appellant's rights under the Human Rights Act 1988 and the European Convention of the Human Rights. (ECHR)*". No specific article of the ECHR is identified; far less is any attempt made to particularise this ground of appeal.

16. Nor is it apparent that there was any attempt to develop or amplify ECHR grounds in the hearing before the First-tier Tribunal. Only brief evidence was heard from the First Appellant (determination at paragraph 7), and no submission is recorded as having been made in reliance upon Article 8 in the alternative to the submission in respect of the Rules (paragraphs 28-29). The Appellants have not made a cross-appeal in respect of the First-tier Tribunal's approach to the ECHR, and no Rule 24 response has been filed inviting the Tribunal to uphold the Judge's decision on an alternative basis. Yet further, no materials have been filed, pursuant to the Directions issued by the Upper Tribunal to the effect that the parties should prepare for today's hearing on the basis that the Upper Tribunal would be able to consider any further evidence that the parties might wish to rely upon in remaking the decision in the appeal.

17. I invited Ms Peterson to identify what matters the Appellants might wish to advance if they were permitted time to prepare evidence and submissions in respect of Article 8 beyond the length

of time they had been in the UK, the First Appellant's studies and the Second Appellant's employment. She acknowledged that there was "*hardly a surfeit of information*"; essentially time was sought to permit Ms Peterson's instructing solicitors to take instructions from the Appellants and file evidence. Ms Peterson reminded me that some of the appellants in **Nasim and others (Raju: reasons not to follow?)** had indeed been afforded a further hearing to air Article 8 issues (paragraphs 115-117). However, in this latter context I note that the relevant appellants had "*done so in the previous course of proceedings in their appeals or by responding to the directions given by the Upper Tribunal*" (paragraph 115). No such reliance had been made herein before the First-tier Tribunal Judge, and there had been no indication of a wish to advance matters relevant to Article 8 in response to the Directions previously given by the Upper Tribunal, or otherwise prior to today's hearing.

18. The difficulty in relying upon Article 8 as a person with leave to study in the UK is highlighted in **Patel and others [2013] UKSC 72** (see in particular per Lord Carnwath at paragraph 57) and also in **Nasim and others (Article 8) [2014] UKUT 00025 (IAC)**.

19. In my judgement the Appellants have had more than adequate opportunity to put before the Tribunal any evidence upon which they might wish to rely in this regard, and also to formulate any relevant submissions. To date no such evidence has been filed, and no such submissions have been formulated. Moreover Ms Peterson was not in a position to summarise the substance of any claim that might give rise to any prospect of success in this regard. I have noted Ms Peterson's reference to the fact that the earlier decisions refusing the Appellants' applications were withdrawn, but in all of the circumstances I do not consider this circumstance is of any great significance in advancing an Article 8 claim based on the potential interference with their respective private lives were they now required to quit the UK: more particularly, it does not warrant extending further time to prepare their case in this regard in circumstances where the Appellants have already had adequate time.

20. Accordingly, in circumstances where no Article 8 case was advanced before the First-tier Tribunal, and no Article 8 case has been formulated for consideration by the Upper Tribunal, I am not minded to find any material error in respect of the First-tier Tribunal's failure expressly to address Article 8, and I do not consider it appropriate for the Upper Tribunal to permit further exploration of that aspect of the appeals. Were it otherwise, and were I prepared to consider Article 8, the cases would fall to be determined on the basis of the available materials, which in my judgement demonstrate nothing that would take the Appellants

beyond the restrictive scope of the decisions in **Patel** and **Nasim and others (Article 8)**.

21. There is no other challenge to the section 47 removal decisions.

Notice of Decisions

22. The decisions of the First-tier Tribunal Judge were each based on a material error of law and are set aside.

23. I re-make the decisions in the appeals. The appeals are dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 17 October 2014