IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/08812/2014
IA/10399/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 21 January 2015	**On 3 February 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ATHULYA VIJAYAMMA
DILEESH KRISHNA PILLAI

Respondents

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondents: No representative and no appearance

DETERMINATION AND REASONS

1. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge Archer) allowing the appellants' appeals against refusals to grant AV leave as a Tier 2 (General) Migrant under paragraph 245HD of the Immigration Rules (HC 395) as amended and DKP (her husband) leave as her dependant.

2. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellants are citizens of India who were born respectively on 2 May 1983 and 19 May 1982. The first appellant was granted leave to enter the United Kingdom as a Tier 4 (General) Student on 22 September 2010 valid until 19 January 2012. On 26 January 2012, she was granted further leave to remain as a Tier 1 (Post-Study) Migrant until 26 January 2014.

4. The second appellant entered the UK on 20 February 2010 and was granted leave to enter as a Tier 4 (General) Student until 24 December 2014. On 1 March 2012, he was granted further leave as the dependant of the first appellant who, by that time, had leave as a Tier 1 (Post-Study) Migrant. That leave was valid until 26 January 2014.

5. On 22 January 2014, the first appellant applied for further leave as a Tier 2 (General) Migrant and the second appellant applied for further leave as her dependant. The first appellant is a nurse.

6. On 31 January 2014, the Secretary of State refused those applications. The Secretary of State also made decisions to remove each of the appellants by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

7. The basis of the refusal to grant the first appellant leave was that the Certificate of Sponsorship (CoS) stated that the first appellant's salary would be £16,200 whilst para 79A of Appendix A requires a salary of "not less than £20,300". As a consequence, the Secretary of State did not award the first appellant the required 20 points for having the "appropriate salary" and the appellants failed under the Rules.

The First-tier Tribunal's Decision

8. The appellant's appeal to the First-tier Tribunal. In a determination dated 10 September 2014, Judge Archer allowed the appellants' appeals to the extent that the decision to refuse the first appellant leave was not in accordance with the law. Judge Archer seems to have accepted that the first appellant could not meet the requirements of the Rules in respect of the CoS showing the "appropriate salary" of at least £20,300. Nevertheless, apparently in response to a submission made by the appellants that the "evidential flexibility" provision in para 245AA of the Rules applied, he allowed the appeals on the basis that the sponsor should have been given an opportunity to submit a "Sponsor Note" stating (as seems to have been accepted) that the first appellant's salary would rise to £20,300 when she achieved full registration with the Nursing and Midwifery Council when she would be paid at Band 5 rather than, as at present, Band 3.

9. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the first appellant could not comply with the requirements of para 79A(b) of Appendix A because, although her salary was less than £20,300 at present, the CoS

did not state that she would continue to be sponsored as a nurse and after achieving registration with the Nursing and Midwifery Council her salary would be not less than £20,300. The grounds argue that the appeal ought, therefore, to have been dismissed.

10. On 20 October 2014, the First-tier Tribunal (Judge Warren L Grant) granted the Secretary of State permission to appeal on that ground. Thus, the appeal came before me.

The Hearing

11. The appeals were listed at 2pm on 21 January 2015. Neither the appellants nor their legal representatives, Law & Lawyers Solicitors attended. The Tribunal staff contacted the appellants' representatives by telephone. The representatives informed the Tribunal that the appellants would not be attending and they had been told by the appellants not to attend.

12. Mr Richards, who represented the Secretary of State, invited me to determine the appeal in the absence of the appellants. I was satisfied that the appellants and their legal representatives had been given notice of the hearing and, in the light of the fact that the appellants did not wish to attend, I exercised my discretion under rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) to hear the appeals in the absence of the appellants in the interests of justice.

The Submissions

13. On behalf of the respondent, Mr Richards submitted that the first appellant could not succeed under the Immigration Rules as the CoS did not show that she had a salary of at least £20,300 as required by para 79A. Further, the CoS did not state in accordance with para 79A(b), by way of exception to that requirement, that the first appellant was being sponsored as a nurse and would continue to be sponsored as a nurse after achieving Nursing and Midwifery Council registration with a salary of not less than £20,300 once that registration was achieved.

14. Further, Mr Richards submitted that the "evidential flexibility" provisions in para 245AA did not apply. In particular, he submitted that it could not be said that there was any missing information in the CoS.

15. Consequently, he invited me to conclude that the judge had erred in law in allowing the appellants' appeals as not being in accordance with the law.

Discussion

16. The relevant provisions in the Immigration Rules are in Appendix A. Para 70 states that:

> "The points awarded for appropriate salary will be based on the applicant's gross annual salary to be paid by the Sponsor ...".

17. Para 79A states that:

> "No points will be awarded if the salary referred to in paragraph 79 above is less than £20,300 per year, unless: ...
>
> (b) the Certificate of Sponsorship checking service entry records the applicant is being sponsored as a nurse or midwife, will continue to be sponsored as a nurse or midwife by the Sponsor after achieving Nursing and Midwifery Council registration, and a salary will be not less than £20,300 per year once that registration is achieved."

18. I have set out the relevant provisions as in force at the date of the Secretary of State's decisions on 31 January 2014. The provisions have since been amended in particular to increase the salary threshold from £20,300 to £20,500.

19. There is no doubt that the first appellant's CoS did not meet the "appropriate salary" requirement in para 79A. It stated a gross salary of £16,200 and did not record that the first appellant was being sponsored as a nurse and would following registration be employed at a salary of not less than £20,300.

20. The CoS states that the first appellant's "job title" is "a BAND 3 NURSE" and "job type" is "2231 Nurses". Under the heading "Summary of Job Description" the CoS states:

> "Assess, planned implement care for residents. Evaluate care given to residents. Undertake simple dressings and observations supervised by the registered nurse. Manage and supervise carers on a daily basis and ensuring work is delegated and completed. Assist with induction, appraisal and supervision of junior staff. Assist registered nurses with any medical emergencies within the home. Liaise with external health professions and relative, administer medication, supervised by the registered nurse. Obtain IELTs and PR Number of NNC to enable progression onto the ON Programme." (my emphasis)

21. There, as will be seen, reference is made to the first appellant obtaining a registration with the Nursing and Midwifery Council and progressing onto the Overseas Nursing Programme. It appears to have been accepted before the judge that the first appellant would, on registration, be paid at least £20,300. However, since this was not stated in the CoS, the first appellant could not meet the requirements of the Immigration Rules and the judge was correct not to allow her appeal (and that of the second appellant as her dependant) on the basis that they had, in fact, met the requirements of the Rules.

22. The Secretary of State's grounds of appeal appear to have been drafted on the basis that the Judge was satisfied that the first appellant did in fact meet the requirements of Appendix A. That was not his finding. The judge's decision appears to be based rather upon an application of para 245AA of the Rules.

23. That provision provides, so far as relevant to this appeal as follows:

> "(a) where Part 6A of any Appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application and will only consider documents submitted after the application where they are submitted in accordance with sub-paragraph (b).
>
> (b) If the applicant has submitted specified documents in which:
>
> (i) some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing); and
>
> (ii) a document is in the wrong format (for example, if a letter is not on letter head paper as specified); or
>
> (iii) a document is a copy and not an original document; or
>
> (iv) a document does not contain all of the specified information;
>
> The Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within seven working days of the date of the request.
>
> (c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in sub-para (b) will lead to a grant because the application will be refused for other reasons. ..."

24. In allowing the appeal on the basis that the decisions were not in accordance with the law, Judge Archer gave the following reasons at para 21:

> "The difficulty for the respondent is that the reasons for refusal letter states that the salary does not meet the required threshold under Appendix A. That is not consistent with the oral submissions made by Mr Hibbs and is plainly not correct – the COS simply stated the current pre-registration salary. The respondent would have had a stronger case if the wording of the refusal letter had matched the oral submissions made by Mr Hibbs. However, it does not do so and the respondent has failed to make a lawful decision. No valid decision has yet been made in respect of this application."

25. The submissions of Mr Hibbs (who then represented the Secretary of State) are summarised at para 18 of the judge's decision as follows:

> "Mr Hibbs submitted that the salary must be not less than £20,300 once registration is achieved and that information must be in the COS. The Rules are clear, there is no evidence that the salary will rise to £20,300. The submitted COS is not a blank document in terms of salary – the figure is clear."

26. I confess to some difficulty in understanding Judge Archer's reasoning in para 21 responding to the (then) Presenting Officer's submissions made on behalf of the respondent. That submission appears to have been that as the CoS was not a "blank document in terms of salary" there was no missing information.

27. Judge Archer does not set out para 245AA to which he was referred by the appellants' legal representative and in para 21 I can only speculate that Judge Archer considered that the failure to include the information falling within para 79A(b) of Appendix A in the CoS fell within the wording of para 245AA(b)(iv) namely that the CoS did "not contain all of the specified information".

28. With respect to Judge Archer the CoS did set out the information required by paras 79 and 79A namely the first appellant's "gross annual salary". That would appear to have been the point being made by the (then) Presenting Officer that the CoS was "not a blank document in terms of salary". It clearly was not. In my judgment, para 245AA(b)(iv) is not engaged in the circumstances where (assuming the CoS is a specified document for the purpose of para 245AA) a salary figure is included. That is the required information. Had the salary entry been left blank then the CoS would have failed to contain all the required information. What, in effect, occurred here is that the information provided was not wholly accurate. It reflected the present salary but not future salary of the first appellant. To that extent, its inaccuracy was equivalent to a CoS which contained a wrong salary figure. Para 245AA(b)(iv) would not apply in the latter situation and, in my judgment, it does not apply in the former situation either. Para 245AA(b)(iv) applies, in my judgment, where a document fails to contain "specified information" which in its absence would necessarily lead to the application being dismissed as a relevant piece of information has been missed out from the document. Here, relevant information has been provided albeit not sufficient to meet the requirements of para 79A of Appendix A.

29. For these reasons, Judge Archer erred in law in allowing the appeals on the basis that the respondent's decision to refuse leave was not in accordance with the law.

30. That said, it was clearly accepted before the judge that, with the proper documentation, the first appellant would meet the requirements of the Rules. If, in fact, that is indeed the case then it remains open to the appellants to seek to persuade the Secretary of State that they can in fact meet the requirements of the Rules.

31. The appellants did not rely upon Article 8 in the grounds of appeal to the First-tier Tribunal nor was it relied upon at the hearing. In those circumstances, there is no basis for considering whether the respondent's decisions breach Article 8. No material was put before the First-tier Tribunal and, in the absence of the appellants and their legal representatives before me, nothing further was relied upon.

Decision

32. For the above reasons, the First-tier Tribunal erred in law in allowing the appellants' appeals on the ground that the respondent's decisions were not in accordance with the law. Those decisions are set aside.

33. I remake the decisions dismissing the appellants' appeals under the Immigration Rules.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal