



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

Appeal Number: IA/23677/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25 November 2015**

**Decision Promulgated
On 3 December 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

VIJITHA RANMAL ALLES

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant appealed against the respondent's decision dated 13 May 2014 to refuse to vary and extend leave to remain to settlement as a spouse and to curtail his existing leave to remain.
2. First-tier Tribunal Judge Howard considered the appeal on the papers without an oral hearing. He dismissed the appeal in a decision promulgated on 05 December 2014. The judge noted that the application

was refused under paragraphs 194(vii) and 322(1C) of the immigration rules relating to general grounds for refusal. He recorded that the respondent relied the fact that the appellant was cautioned by the Metropolitan Police on 31 January 2014 for a domestic incident. The judge set out the wording to the general grounds for refusal contained in paragraph 322(1C)(iv) of the immigration rules:

“322(1C) where the person is seeking indefinite leave to enter or remain:

- (i) they have been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years; or
- (ii) (ii) they have been convicted of an offence for which they have been sentenced to imprisonment for at least 12 months but less than 4 years, unless a period of 15 years has passed since the end of the sentence; or
- (iii) they have been convicted of an offence for which they have been sentenced to imprisonment for less than 12 months, unless a period of 7 years has passed since the end of the sentence; or
- (iv) they have, within the 24 months prior to the date on which the application is decided, been convicted of or admitted an offence for which they have received a non-custodial sentence or other out of court disposal that is recorded on their criminal record.”

3. The judge concluded that a caution involved admission of an offence but was not a sentence. The question he had to determine was whether it was an out of court disposal that is recorded on a criminal record. He found that the burden was on the respondent to show that the caution forms part of the appellant’s criminal record and concluded that she had failed to discharge the evidential burden because there was no evidence to show that the appellant had a criminal record. Having concluded that there was insufficient evidence to justify refusal under paragraph 322(1C) the judge went on to consider whether the appellant met the requirements for further leave to remain under paragraph 194. He concluded that, in the absence of evidence to show that the appellant’s previous grant of entry clearance was as the spouse of a work permit holder, the appellant did not meet the requirements for further leave to remain under paragraph 194(vi), or in the alternative now that his wife had Indefinite Leave to Remain, under paragraph 196D(v).
4. The appellant seeks to challenge the First-tier Tribunal decision on the following grounds.
 - (i) Having found in the appellant’s favour in relation to the general grounds for refusal issue under paragraph 322(1C) and 194(vii) the First-tier Tribunal should have allowed the appeal.
 - (ii) The First-tier Tribunal erred in dismissing the appeal under paragraphs that were not relied upon by the respondent in the

reasons for refusal decision and on the ground that there was an absence of evidence in relation to a factual issue that was accepted by the respondent (the fact that he entered the UK on 10 March 2008 with entry clearance as the dependent spouse of a work permit holder).

(iii) The First-tier Tribunal erred in failing to consider whether removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's right to family life under Article 8 of the European Convention.

5. The respondent's response under rule 24 The Tribunal Procedure (Upper Tribunal) Rules 2008 states: *"The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing."*

Decision and reasons

6. After a discussion with both parties at the hearing it was apparent that the respondent did not oppose the appellant's grounds of appeal. I am satisfied that the First-tier Tribunal Judge ("the judge") erred in seeking to go beyond the limited reasons for refusal in this case by determining the appeal with reference to paragraphs 194 and 196 of the immigration rules without giving notice to either party. For these reasons I conclude that the First-tier Tribunal decision involved the making of a material error of law and I set aside the decision.
7. The respondent did not seek to cross-appeal the First-tier Tribunal's findings relating to the general grounds for refusal under paragraph 322(1C)(iv), which are sustainable and were open to the judge on the evidence. This was the only reason given by the respondent for refusing the application for leave to remain. As such I find that the appeal should be allowed.
8. I am told that the delay caused by the refusal of the application and the subsequent successful appeal has caused uncertainty and some difficulties for the appellant in his professional life. As such I would urge the respondent to action the decision as soon as possible.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

I re-make the decision and ALLOW the appeal

Signed 

Date 26 November 2015

Upper Tribunal Judge Canavan