



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

Appeal Number: IA/28814/2014  
& IA/28819/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 19 January 2016**

**Decision and Reasons  
Promulgated  
On 9 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

**M C  
M A  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: No Representation

For the Respondent: Ms Fijiwala, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants are citizens of Bangladesh. The Second Appellant is the wife of the First Appellant and his dependant. Their dates of birth are 3 December 1990 and 1 January 1989. They appeal against the decisions of the Respondent dated 25 June 2014 refusing the First Appellant's

application for further leave to remain in the United Kingdom as a Tier 4 Student Migrant and refusing the Second Appellant's application as his dependant. The First Appellant's application was refused under Paragraphs 322(1A) and 322(3) of the Immigration Rules. The basis for the refusal was that the First Appellant had worked in breach of the conditions of his Student Visa and had failed to disclose this on a subsequent application form. Because of this the Respondent contended that the First Appellant had failed to meet the requirements of Paragraph 245ZX(a). Removal Directions were also issued. The appeals were heard by Judge of the First Tier Tribunal Shamash on 18 May 2015. She dismissed the appeals under the Immigration Rules and relating to Section 47 of the Immigration Asylum and Nationality Act. She found that Paragraphs 322(1A) and 322(3) apply. Her decision was promulgated on 3 July 2015.

2. An application for permission to appeal was lodged and this was allowed by Judge of the First Tier Tribunal Zucker on 8 October 2015. The reason for permission being granted was that Judge Shamash at paragraph 26 of her decision placed the burden of proof on the Appellants with respect to Paragraph 322(1A) and erred in so doing.
3. There is a Rule 24 response which states that the Respondent accepts that there is an error at Paragraph 26 of the decision in respect of Paragraph 322(1A) but it is not material to the outcome of the appeal. The response states that the Judge at Paragraphs 33 to 38 makes a series of very damaging credibility findings and at Paragraph 33 states that she did not find either of the Appellants credible or honest. The response states that the Respondent contends that the Judge was fully aware of the facts and legal issues before her and Paragraph 26 was potentially a typographical error and further, or alternatively, that any Judge properly directing himself on the facts as found by the Judge, would have reached exactly the same conclusion.
4. A letter was received by Universal Solicitors dated 13 January 2016 which states that they have been unable to contact the Appellants and they will therefore not be appearing on their behalf at this Hearing.
5. There was no appearance at the Upper Tribunal Hearing either by the Appellants or by their representatives. This is the Appellants' appeal but as the Appellants were not in attendance I asked the Presenting Officer if she wished to make submissions and she did so.
6. She submitted that credibility is an issue in this claim and when the First Tier Tribunal's decision is considered it was open to the Judge to come to the decision she did, based on the evidence before her.
7. I was referred to Paragraph 33 of the decision in which the Judge states: "In dealing with credibility I considered the documentation and the evidence as a whole. I did not find the First Appellant or the Second Appellant to be credible or honest witnesses." The First Tier Judge goes on

to state that the First Appellant's and his wife's evidence was not corroborated in any way, for example the First Appellant provided a copy of a letter dated 4 July 2012 which he said he had sent to UKBA when he did not receive his Biometric Residence Permit but there was no proof of postage with the letter and similarly his letter of resignation to Starbucks could have been generated at any point. There was no evidence that the First Appellant had actually handed in his notice to Starbucks.

8. The Presenting Officer then referred to Paragraph 32 of the decision which states that the First Appellant asserted that his solicitor had known from the outset that his partner had signed for the letter. This was not in the grounds of appeal. His solicitor indicated that this was correct and the Judge invited him to consider whether he wished to submit an Affidavit explaining the position about when he had received these instructions from his client. The Judge gave Mr Hossain, the representative, ten working days to submit this but no documentation was sent and there was no further communication from Mr Hossain.
9. The Presenting Officer then referred me to Paragraph 26 which is incorrect as it states that the burden of proof is on the Appellant relating to paragraph 322. She submitted that this is not material in the circumstances. There was no evidence before the First Tier Judge that the Biometric Residence Permit was not received by the First Appellant. She submitted therefore that the burden of proof was not discharged by the Appellants. She submitted that the Respondent discharged the burden of proof relating to this. It was not believed by the Judge that the Second Appellant received the Biometric Residence Permit and signed for it and did not give it to the Appellant.
10. The Presenting Officer submitted that there was sufficient evidence before the Judge to find that the Respondent had discharged the burden of proof in this claim. She submitted that it is clear that the First Appellant knew that he had worked in breach of the terms of his visa so he made misrepresentations to try to cover this up. She submitted that even had he not done so he worked against the terms of his visa and failed to discharge the evidential burden on him.
11. With regard to Article 8 the Presenting Officer submitted that there is no merit in any Article 8 claim. She referred me to the case of ***Patel and Others [2013] UKSC72***. She submitted that she is relying on Paragraph 57 of this case which states that Article 8 is not a general dispensing power. It has to be distinguished from the Secretary of State's discretion to grant leave to remain outside the rules which may be unrelated to any protected human right. She submitted that having been educated for a period in the United Kingdom is not sufficient for a successful private life claim. She submitted that although the grounds refer to Article 8, based on what was before the judge any Article 8 claim could not have succeeded.
12. I was asked to dismiss the appeal.

## **Decision**

13. The permission states that there is an error of law at paragraph 26 of the First Tier Judge's decision. That is true, there is an error.
14. I have to decide if this is a material error and I have considered the evidence which was before the Judge and the fact that the Appellants were unable to corroborate their statements relating to the letter sent to the First Appellant, by the Respondent, restricting his right to work. This letter was dated 8 May 2012. It is clear that the First Appellant worked until 13 October 2012. The Appellant stated that his representative would support his account that his wife had received this letter and had not given it to him but Mr Hossain was given the chance to produce an Affidavit to this effect and was given ten days to do so but he did not.
15. I have noted that the First Tier Judge found that the Appellants were not credible and were not honest. She gives reasons for this and states that it is clear from the documentation from UKBA that the letter containing the Biometric Residence Permit was a letter which had to be signed for and the Post Office will have details of that letter. She found that it was open to the Appellant to provide confirmation that his partner's signature was on this letter which, although this would not have been decisive, would have provided some support for his account. The Judge states that she finds the First Appellant stopped working in October 2012. She finds that the First Appellant knew, when he filled out his application form in 2014, that he had, for a limited period of time, worked in breach of his Visa requirements and so when he answered question J16 and did not admit this, this was a misrepresentation.
16. Based on what was before the Judge it is clear that she was entitled to find that the Appellant, having worked in breach of the conditions of his Tier 4 Student Visa falls within one of the general exceptions under Paragraph 245Z(a). The decision that the Appellant should not be granted a further sixty days in which to find another college where he can study must be correct based on what was before her.
17. There is an error at Paragraph 26 of the decision but I find that this is not a material error. Had there not been this error I find that the Judge's decision would have been the same.
18. At paragraph 40 the First Tier Judge states that, in line with her decision to refuse the appeal, she upholds the Removal Directions relating to the Appellants under Section 47 of the Immigration, Asylum and Nationality Act. She was entitled to do this.

## **Notice of Decision**

19. I find that there is no material error of law in the First Tier Judge's decision and that her decision, promulgated on 3 July 2015 dismissing the appeal under the Immigration Rules and under Section 47 of the Immigration,

Asylum and Nationality Act and finding that Paragraph 322 of the Immigration Rules applies, must stand.

20. Anonymity has been directed.

Signed

Date

Deputy Upper Tribunal Judge Murray