



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/05449/2013
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THE IMMIGRATION ACTS

Heard at Field House
On 25th September 2013

Determination Promulgated
On 26th September 2013

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR SALIM MUSLIM VEETIL
MRS SULAIKA SALIM
MISS SHABIYANA SALIM
MISS SAFNA SALIM
(ANONYMITY ORDER NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Salim Muslim Veetil in person
For the Respondent: Mr N Bramble (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Appellants against a determination of the First-tier Tribunal (Judge Tootell) promulgated on 29th May

2013 by which she dismissed the Appellants' appeals against the Secretary of State's decision to refuse them leave to remain on Article 8 grounds.

2. The circumstances of this case are that the first Appellant came to the United Kingdom in 2006 with leave to enter as a domestic worker. His wife and two daughters joined him in October 2010 as his dependants. On 4th August 2011 the first Appellant was encountered by UKBA during an enforcement visit working at a petrol service station. The Secretary of State says that the first Appellant admitted he was working as a sole employee and he was thus served with an enforcement notice as a person liable to removal. That was not an immigration decision and therefore not appealable. In August 2011 the Appellants' representatives wrote to UKBA asking that they be permitted to remain on Article 8 grounds. The Secretary of State indicated that such an application needed to be made formally. Following JR proceedings the Secretary of State eventually made a decision refusing the application on 1st February 2013. The Appellants' appeal against that decision came before the First-tier Tribunal on 21st May 2013.
3. On that occasion the Appellants were represented by counsel. The First-tier Tribunal dismissed the appeal both under the Immigration Rules and under the ECHR.
4. The Appellants' representatives drafted an application for permission to appeal to the Upper Tribunal which was initially refused by the First-tier Tribunal but then granted by a Judge of the Upper Tribunal on 25th July 2013. The Upper Tribunal Judge found it arguable that the First-tier Tribunal had erred in indicating that service of the IS151A was an immigration decision that the Appellants had not appealed and that this adversely impacted on the assessment of the Article 8 claim. Upper Tribunal Judge Kekić also noted however that this did not necessarily mean that the result would be different.
5. In the letter sent by the representatives requesting leave to remain on Article 8 grounds the representatives stated that on the day in question in August 2011 the first Appellant had been asked to go to the petrol station by his employer because his daughter was ill. Accompanying that letter was a statement signed by the first Appellant stating that he had spent five years in the UK as a domestic worker and had always worked in that category. He said that he had never breached the conditions of his leave to remain as a domestic worker. His employer had called him to go to the petrol station because his daughter was sick. He had only worked for his employer as a chef and domestic worker.
6. In the Letter of Refusal however the Secretary of State notes that when the Appellant was encountered at the petrol station he admitted working there as the sole employee.

7. Before the First-tier Tribunal the first Appellant repeated his claim that he had been asked to go to the petrol station by his employer but at the hearing told the Judge that there were other staff members at the petrol station and that it was his job to supervise children from the school opposite the petrol station when they came into the shop at school opening and closing times. He stayed only 30 minutes on each occasion going in at 8am and again between 3pm and 4pm. He told the Judge that he had attended the petrol station for that purpose on four occasions in total.
8. At paragraph 61 of the determination Judge says:-

"I also state here that I do not find her (the Appellants' representative) submissions in respect of the Respondent's decision of 4th August 2011 persuasive. I find that this was an immigration decision which does not appear to have been challenged at the time. Furthermore, I find that I am not satisfied by the explanations which were put forward by the first Appellant in this regard which I find to be lacking in credibility."
9. The Judge erred in finding that the decision of 4th August 2011 was an immigration decision. It was not. It did not carry a right of appeal and therefore there was no opportunity for the Appellants to challenge it. In that finding therefore the judge erred. The Judge also rejected the explanations given by the first Appellant in relation to the incident when he was encountered at the petrol station but has given no reasons for doing so. She says they are lacking in credibility but not why. A finding as to whether or not the Appellant was in breach of his leave is crucial to this appeal. If the Appellant was in truth not an employee at the service station and was not in breach of his leave then the family would have continued to be entitled to leave as a domestic worker and his dependants. That would have a considerable impact on the Article 8 decision.
10. For that reason I am satisfied that the error of law renders the determination unsafe such that it is to be set aside.
11. The first Appellant appeared before me unrepresented. However, the grounds were drafted by his representatives and they only came off the record on the morning of the hearing. Those representatives remained instructed at the time permission was granted and directions were given. Directions were given that if it was proposed to adduce any fresh evidence before the Upper Tribunal the appropriate application should be made and the evidence filed. There has been no such application or additional evidence.
12. I therefore proceeded to redecide the appeal on the basis of the evidence that was before the First-tier Tribunal. The first Appellant told me that since the First-tier Tribunal decision his wife and daughters have returned to India and he is the only Appellant still in the UK. Thus in accordance with s104(4) Nationality, Immigration and Asylum Act 2002 the appeals of the second, third and fourth Appellants are abandoned. That leaves only the first Appellant with an extant appeal.

13. With regard to the encounter at the petrol station in August 2011 the only evidence from the Secretary of State is the reference in the Letter of Refusal indicating that the Appellant at that time acknowledged that he was working there as the sole employee. No record of interview in relation to that has been provided by the Secretary of State. In such cases the burden of proof rests with the Secretary of State. It is for the Secretary of State to establish a prima facie case that the Appellant was in breach of his leave. Being encountered working at a petrol station when his leave was as a domestic worker meets that requirement. It is then for the Appellant to show that he was not in fact in breach of his leave. The Appellant's version of events has been inconsistent. From the position of accepting he was the sole employee on the day in question he then said in the letter from his solicitors and in his statement that this was a one-off occasion when he was at the petrol station at the request of his employer because his daughter was ill. The explanation then changed again and is now that he was asked to work there a total of four times to supervise children entering the petrol station at the beginning and end of the school day and he had done that four times and was not the only member of staff there. I notice that there has never been any corroborative evidence from his employer. That would have been easily obtainable if what the Appellant says is true. Given the inconsistent explanations and lack of corroborative evidence I find that the Appellant is incredible in his explanation and the truth of the matter is that despite having leave as a domestic worker he was actually working as a petrol station attendant.
14. The First Appellant cannot meet the Immigration Rules in relation to his family or private life.
15. That leaves the ECHR. Having found as I have in relation to the petrol station the Article 8 assessment relates to an Appellant who has deliberately breached the terms of his leave. All of the other aspects of the Article 8 claim as to his daughters ability to study, his wife's health and difficulties with his daughters being expected to marry early in India are swept away by the fact that they have returned there voluntarily. As the first Appellant's family is in India it is not a breach of his family life for him to be returned there. He has inevitably established a private life in the UK. However he has done so while breaching the terms of his leave as a domestic worker. He has adduced no evidence that he has ever worked as a domestic worker. He can continue a private life in India the country of his nationality, culture, heritage, language and where he lived for 50 years and where his family are living.
16. For the above reasons the first Appellant falls a long way short of establishing that the Secretary of State's decision is a disproportionate interference with his right to a private and family life.
17. The determination of the First-tier Tribunal Judge containing an error of law I have set it aside. I redecide the appeal and dismiss it under the Immigration Rules and under the ECHR.

18. The first Appellant's appeal to the Upper Tribunal is dismissed. The second, third and fourth Appellants' appeals are abandoned by operation of law.

Signed

Date 26th September 2013

Upper Tribunal Judge Martin