



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06546/2013

THE IMMIGRATION ACTS

Heard at Field House
On 7 November 2013

Determination Promulgated
On 14 November 2013

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SUMER SINGH
(Anonymity Direction Not Made)

Respondent

Representation

For the appellant: Mr E Tufan a Senior Home Office Presenting Officer

For the respondent: Ms J Simcock as a Mackenzie friend

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department I will refer to her as the Secretary of State. The respondent is a citizen of India who was born on 1 January 1984. I will refer to him as the claimant. The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Cohen ("the FTTJ") who allowed the claimant's appeal against the Secretary of State's decision of 12 February 2013 to refuse to vary his leave to remain in the UK and to grant him indefinite leave to remain as a Work Permit Holder.

2. The claimant first entered the UK on 3 July 2007 with leave to enter as a work permit holder until 27 November 2007. There was an error in the decision which was subsequently amended to grant him leave until 27 May 2012. He submitted the application for indefinite leave to remain on 11 June 2012. The application was refused on the basis that it had been made after his leave to remain expired and he had only been legally resident in the UK as a work permit holder for four years and 10 months rather than the required five years. Because of a discrepancy in the documents submitted the Secretary of State took issue with the claimant's income and also concluded that he had not satisfied the English language requirements. The application was refused under the provisions of paragraph 134 of the Immigration Rules and on human rights grounds.
3. The appellant appealed. At the hearing before the FTTJ the Secretary of State was not represented. The appellant, who works in a horse racing stables David Simcock Racing Limited, was assisted by the representative of his employer Ms Simcock. The FTTJ allowed her to assist the appellant as a Mackenzie friend as I do.
4. The FTTJ found the claimant and Ms Simcock to be credible witnesses. He gave detailed reasons for concluding that the appellant was paid at or above the appropriate rate for the job and met the English language requirements. These conclusions have not been appealed by the Secretary of State. In short, the FTTJ found that the only outstanding issues related to whether the claimant had made his application before his leave expired and whether he had achieved the necessary five years in the UK. He accepted Ms Simcock's evidence that she had had telephone conversations with the Home Office seeking advice as to how to proceed where, if he made his application before his leave expired he would not have achieved five years in this country whilst if he applied shortly after his leave expired he would have achieved five years. She asked whether the claimant should apply for a further one-year work permit, apply before the expiry of leave or apply on or after 6 June 2010. The FTTJ also accepted that Ms Simcock was given conflicting advice, on one occasion that the claimant should make his application after he had been here for five years; on another that the Secretary of State had a discretion to grant indefinite leave to remain if the application was made within three months of the five-year period and thirdly that there was no such discretion. In the light of this advice the claimant followed the course of waiting until the permit had expired without realising that the advice was incorrect and had led to the claimant becoming an overstayer.
5. The FTTJ found that "she only following (sic) this course of action following receiving advice from the Home Office. I therefore find that the respondent cannot hold this against the appellant and nor do I. Whilst the appellant did not have excellent (sic - presumably extant) leave at the time that he applied for indefinite leave to remain due to these problems, I find that the respondent had discretion to consider the appellant's application exceptionally..... As the

appellant's application was submitted whilst he had no valid leave to remain in the UK, I cannot allow the appellant's appeal outright under the Immigration Rules but noting that the respondent did not exercise discretion appropriately I remit the application to the respondent for full and detailed consideration. I allow the appeal under the Immigration Rules on this limited basis."

6. The Secretary of State's grounds of appeal in relation to this part of the decision are that the FTTJ erred in law by failing to give any or adequate reasons and that there is a lack of clarity because he both allowed the appeal under the Immigration Rules and also remitted it back to the Secretary of State. I find no merit in these grounds. Whilst at the very end of the determination the FTTJ said; "the appeal is allowed under the Immigration Rules" it is clear by reference back to paragraph 13 that what the judge was doing was; "I remit the application to the respondent for full and detailed consideration. I allow the appeal under the Immigration Rules on this limited basis." I also find that the FTTJ gave clear and sufficient reasons for this decision which was open to him on all the evidence. If any further support is needed for the FTTJ's acceptance of the evidence that Ms Simcock was told by the Home Office that there was a relevant discretion it may be gleaned from the Home Office guidance produced by Mr Tufan at the hearing before me entitled "Indefinite leave to remain - calculating continuous period in UK." This includes the passage; "the period between entry clearance being issued and the applicant entering the UK may be counted towards the qualifying period, as long as it does not exceed 90 days. This can occur if the applicant is delayed travelling to the UK. Provided the period of delay does not exceed 90 days, it will not be counted as an absence." Whilst the guidance I have been shown is said to be valid from 28 August 2013 Mr Tufan thought that there might be an earlier guidance in similar terms, although he had not been able to find it. I find that the Secretary of State's first ground of appeal discloses no error of law.
7. The FTTJ also allow the appeal on Article 8 human rights grounds. The Secretary of State argues that he erred in law in doing so because the claimant's private life ties could be replicated in India through visits and modern means of communication and that his skills are transferable. The FTTJ should have applied CDS (PBS "available" Article 8) Brazil [2010] UKUT 305 (IAC) (25 August 2010). Having heard Mr Tufan's submissions I understand that the passage on which the Secretary of State relies is encapsulated in the part of the head note which states; "Article 8 does not give an Immigration Judge a free-standing liberty to depart from the Immigration Rules, and it is unlikely that a person will be able to show an Article 8 right by coming to the UK for temporary purposes. But a person who is admitted to follow a course that has not yet ended may build up a private life that deserves respect, and the public interest in removal before the end of the course may be reduced where there are ample financial resources available."

8. Mr Tufan also argued that the claimant was not entitled to succeed on Article 8 human rights grounds on the basis of a "near miss". The near miss was that he did not submit his application until some ten days after his leave expired. I accept that this near miss element was one of the factors relied on by the FTTJ in his reasoning. However, it was not the only reason. The FTTJ took into account and was entitled to take into account that some of the responsibility for this should be laid at the door of the Secretary of State. Unlike CDS, whilst this claimant had come to the UK for temporary purposes his application, which would otherwise have succeeded, was for indefinite leave. It was open to the FTTJ to find that the claimant had established a strong private life in this country. At first sight it might appear surprising that the FTTJ found that the claimant's work colleagues in this country were tantamount to his family but not when this is taken in the context of the fact that they are a group of racing stable workers who have worked together in Bangalore and Dubai even before they came to the UK. The FTTJ did not suggest that the claimant had a conventional family life in the UK. It is relevant that the claimant's income in this country is sufficient for him to remit funds to maintain his wife and both his parents and to contribute to supporting his brother's family. He would not be able to do if he was employed in similar work in India. His skills are transferable, but at a considerably lower rate of pay. The FTTJ's conclusion that the appeal should be allowed on Article 8 human rights grounds is generous but was open to him on all the evidence. The grounds of appeal do not disclose an error of law.
9. I have not been asked to make an anonymity direction and see no good reason to do so
10. I find that the FTTJ did not err in law and I uphold his decision.

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Signed
Upper Tribunal Judge Moulden

Date 8 November 2013