



Upper Tribunal
Immigration and Asylum Chamber

Appeal Numbers: IA/11898/2013
IA/11900/2013
IA/11903/2013
IA/11909/2013

THE IMMIGRATION ACTS

Heard at Field House
On 15 January 2013

Promulgated on:
On 17 January 2014

Before

Upper Tribunal Judge Kekić

Between

**Mrs Thimberripolage Enoka Lakmani Dias
Mr Mahamarakkalage Christanth Milan Dias
Miss Mahamarakkalage Manesha Dias
Miss Mahamarakkalage Emasha Sarah Dias**

Appellants

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation

For the Appellant: Mr Z Malik, Counsel

For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission on 11 November 2013 by First-tier Tribunal Judge Cheales in respect of the

determination of First-tier Tribunal Judge Walters who dismissed the appeal of the lead appellant and her dependants following a hearing at Taylor House on 12 September 2013 by way of a determination promulgated on 18 October 2012.

2. The lead appellant is the wife of the second and the mother of the third and fourth twin appellants and they are all citizens of Sri Lanka born on 24 March 1970, 12 October 1968 and 2 October 2008 respectively. On 28 March 2013 the respondent refused to grant leave to remain to the first appellant and her dependants under the Tier 1 provisions. This was because the appellant had failed to establish all her previous earnings; in particular, because the payslips and bank deposits showing her salary from Moonstone Restaurant and Bistro did not tally with one another. Points were, however, awarded for her employment with EDF.
3. The appellant appealed and argued that her employers had made mistakes which accounted for the discrepancies between some of the payslips and the cheques that had been issued to her and paid into her account. One discrepancy was caused by the payment of a separate £50 cheque from a friend into her account along with her salary cheque. The judge took this explanation into account and was satisfied that the salary was as claimed. However, he found that this explanation had not been provided to the Secretary of State and nor had the additional documentary evidence which was adduced in support of the appeal. He found that in those circumstances, the evidence could not be relied upon to find that the respondent had acted incorrectly in refusing the application. Accordingly he dismissed the appeal.

Appeal hearing

4. At the hearing I heard submissions from the parties as to whether the judge made errors of law.
5. Mr Malik submitted that the requirements of the rules had been met in that in accordance with paragraphs 19(a) and 19 – SD(a) of Appendix A, the appellant had submitted her payslips and personal bank statements. That was what the rules required of her and that had been done. There had been some discrepancies but these had been resolved at the hearing. The Tribunal should therefore have allowed the appeal. His second submission was that the judge had erred in refusing to allow the appeal on the basis of the fresh documentary evidence. He submitted that the letter from the appellant's employer (at page 24 of the bundle) had been before the Secretary of State before the decision was made although he could show no evidence to confirm that or that the judge had been told that was the case. Whilst he argued that the Secretary of State had written to the appellant to ask for further evidence, he conceded that a copy of that letter had not been included in the bundle and

it appeared that it had not been brought to the attention of the judge. He submitted that regardless of that fact, however, the letter from the employer was in the bundle and the judge had not made any finding on it. Further, s. 85A (4)(c) provided for an exception to the rule of refusing to admit documentary evidence submitted after the application. It allowed for the acceptance of evidence “adduced to prove that a document is genuine or valid”. The documents submitted to the Tribunal were to show that the pay slips and bank statements submitted with the application were genuine and valid and so the judge had been wrong to exclude them.

6. For the respondent, Mr Saunders argued that the judge had not made errors. It had been open to him to accept that the appellant had made out her case at the hearing but had not done so when she made her application. He had therefore been right not to allow the appeal. The exception did not apply as the respondent had not argued that the appellant’s documents were invalid or not genuine.
7. In response Mr Malik submitted that the appellant had provided the evidence required of her and once the judge found there was a match between the payslips and her salary, he should have allowed the appeal.
8. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Conclusions

9. I have carefully considered all the submissions and the evidence before arriving at my conclusions.
10. It has to be said that the grant of permission makes little sense. It states that as the judge found that there was no mismatch between the payslips and bank statements, he should have considered and given weight to the appellant’s explanation as to how this disparity had occurred. It is plain from the determination, however, that the judge did indeed consider the explanation. If he had not done so, he would now have reached the conclusion that there was in effect no conflict between the salary and the bank deposits or rather than the apparent disparity had been resolved. The judge’s difficulty was that this information and the subsequent documentary evidence, arising after the date of the decision, had not been supplied to the respondent with the application. As such, he found that the respondent could not be expected to know that the appellant had banked an additional cheque with her salary cheque on one occasion or that her employers accounting was so bad that they made repeated mistakes on other occasions. His reasoning was that as there had been a conflict, the appellant should have sought to clarify the reason when she made her application, not later after the refusal.

11. With respect, having considered the arguments made, I find no merit in Mr Malik's submission that the letter from the appellant's employers had been forwarded to the Secretary of State prior to the decision. There is no evidence that was done and such a submission was not made to the judge. Additionally, the fact that he did not specifically make a finding on this letter does not assist in the appellant's challenge as it would have done no more than reinforce the finding he already made about her salary. She has not therefore been disadvantaged by a lack of finding in this respect.
12. Mr Malik's last submission was, in my view, his strongest. Section 85A of the Nationality, Immigration and Asylum Act 2002 sets out matters to be considered on appeal; i.e. fresh evidence. It also sets out exceptions. Section 85A(4)(c) allows the Tribunal to consider evidence adduced by the appellant if it is adduced to prove that a document is genuine or valid. The argument is that her evidence was designed to support the documents she supplied with her application; that is to say, to support her claimed salary. I note Mr Saunders' resistance to that submission on the basis that the respondent had never maintained that the appellant's documents were not valid or genuine but surely the inference of the rejection of the evidence of the appellant's salary was that something was amiss in respect of the evidence supplied. In that sense the respondent was indeed rejecting the reliability of the evidence.
13. The appellant's subsequent evidence, both documentary *and* oral (the latter not being precluded from 85A(4)(c) focused on clarifying the conflict in the earlier documentary evidence and in establishing that the appellant did indeed earn the salary claimed. The documentary evidence from her employer established that and her oral evidence explained the anomalies between some of the bank deposits and the pay slips. The judge could and should have taken all this evidence into account when deciding whether the appeal could be allowed. I accept he took account of it at the hearing and indeed found that it established that the rules had been met, but he stopped too soon. He should have gone on further and found that it was covered by the exception cited above and that the appeal therefore succeeded.
14. It was not argued by Mr Saunders that because the issue over the exception was not argued before the judge, it could not now be raised. Indeed, it would be difficult to see how he could have made such a submission. The exception is part of statutory law and the judge should have had it in mind when he considered section 85A. It follows that the judge made an error of law in refusing to consider the fresh evidence for the purposes of allowing the appeal. Both parties were in agreement that if an error of law was found, it followed that I would remake the decision and allow the appeal. That I do.

Decision

15. The First-tier Tribunal made an error of law such that the decision is set aside. I remake the decision and allow the appeals on immigration grounds.

Signed:

A handwritten signature in black ink, appearing to read 'R. Kekić' with a small dot at the end.

**Dr R Kekić
Judge of the Upper Tribunal**

16 January 2014