



IAC-AH-KRL-V2

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

Appeal Numbers: IA/52393/2013
IA/52395/2013
IA/52394/2013

THE IMMIGRATION ACTS

**Heard at Manchester
On 30th September 2014**

**Decision & Reasons Promulgated
On 22nd October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**A S M (FIRST APPELLANT)
M U M (SECOND APPELLANT)
A A M (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss Hashmi, legal representative
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Pakistan. The first Appellant was born on 18th May 1971. The second Appellant is his wife, born on 25th October 1977. The third

Appellant is their minor child born in July 2007. The First-tier Tribunal made an anonymity order so far as the third Appellant is concerned and no application is made to vary that order. Unless specified to the contrary all references herein are to the first Appellant. The claims of the second and third Appellants rise and fall on that of the first Appellant.

2. The first Appellant's immigration history is extensive. He first arrived in the United Kingdom on 23rd September 2003 subject to a condition prohibiting employment to a maximum of twenty hours per week during term time and prohibiting recourse to public funds. He thus arrived as a student. Extensions were subsequently granted to him on four further occasions, the last extension being until 18th August 2014. His leave however was curtailed by his Sponsor Kinnaird College and his leave thereafter expired on 19th August 2013. On 17th August 2013 the first Appellant's solicitors applied for leave to remain on his behalf. Consideration was given to his family life under Article 8 which from 9th July 2012 fell under Appendix FM of the Immigration Rules. The Appellant's application to vary leave was refused by the Secretary of State on 2nd December 2013.
3. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Malik sitting at Manchester on 2nd April 2014. In a determination promulgated on 15th April 2014 the Appellant's appeals were dismissed on all grounds.
4. On 30th April 2014 the Appellant sought permission to appeal to the Upper Tribunal. On 2nd May 2014 First-tier Tribunal Judge Grant granted permission to appeal. She noted that the Appellants were citizens of Pakistan who initially had applied for leave to remain whilst the first Appellant sat his English language test required before he could be issued with a CAS and then separately applied for leave to remain on the basis of long residence (ten years' lawful residence) and asked that the fees for the first application be offset against the second application which was a variation of the first application. Their appeal was dismissed by the First-tier Tribunal Judge who found their appeals were not valid for non-payment of the required fee. Judge Grant noted that the grounds complained that the judge had failed to make any findings on the issue before her which is the first Appellant's appeal against refusal of permanent residence on the basis of ten years' lawful residence in the United Kingdom under paragraph 276B of HC 395 (as amended).
5. Judge Grant noted that the Appellants applied for leave to remain on 16th August 2013 when the Appellant was six days short of ten years' lawful residence. Soon thereafter when he had completed ten years' lawful residence he applied for leave to remain on the basis of long residence and asked that the fees from the first application be set against the second application and that no decision be taken on the first application.
6. On 2nd December 2013 the Respondent issued a decision against the first application and refused it. The Appellants appealed that refusal. Judge Grant considered it was clear that by virtue of Section 3C leave the first Appellant had accrued ten years' lawful residence by the time of his appeal before the judge. As the correct fee was

paid with the first application which was the subject of the refusal (albeit arguably varied by the second application) he considered there was a valid appeal before the judge. He therefore considered it was arguable that the judge had erred in law becoming confused with the two applications and what was before her. Judge Grant states that he had read the Record of Proceedings and that the judge was not assisted by either of the representatives who appeared before her. What he considered was before her was the appeal against the refusal in respect of the first application, the decision maker having not taken into account the second application at all or as a variation of the first. Consequently he considered that the decision maker did not refer to paragraph 276B in the refusal. He pointed out that a period of Section 3C leave can count towards long residence. Ten years' lawful residence was an issue in the appeal and raised in the grounds. Following *MU ("statement of additional grounds" – long residence – discretion) Bangladesh [2010] UKUT 442 (IAC)* Judge Grant considered that the First-tier Tribunal Judge arguably should have made findings on long residence under paragraph 276B which was raised as a Ground of Appeal before her.

7. On 22nd May 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24. The appeal was opposed and the Rule 24 statement contends that the First-tier Tribunal Judge directed herself appropriately. The notice points out that there was no proper variation of the first application made by the Appellant because he did not pay the appropriate fee for the second application and that the Judge of the First-tier Tribunal was only obliged to consider long residence as an additional ground under Section 120 of NIA 2002 only if the Appellant made a statement under Section 120 to the Secretary of State of which there was no evidence.
8. It is on that basis that the appeals come before me. The Appellants are represented by their legal representative Miss Hashmi. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison.

Submissions/Discussions

9. Mr Harrison submits that it is necessary to look carefully at the dates in this matter and the finding on the Rule 24 statement that the first application was clearly made and that thereafter the Appellant sought to vary that leave but did not pay the full fee. He acknowledges that what the Appellant sought to do was to use the fee for the first application and to pay the difference only when sending in the second application and that no fee was paid in full for the variation application. He submits that where the judge granting permission to appeal is wrong is that the judge has taken (and I use Mr Harrison's words) "a sensible approach of considering that the money for fees should be in one pot," but that that is not the way in which the system works and until the first application is withdrawn and the second application paid for, then the Secretary of State will not consider the second application.
10. Mr Harrison goes on to state that no One-Stop Notice (a Section 120 statement) was made and that no statement was sent in to amend the first application by the Appellant. He reminds me that the second application was made prior to there being

a decision on the first application and that the second application was refused as there was insufficient fee paid. He submits that the judge had before her a valid appeal on the first decision, but that the first decision had to fail and that the second decision was not before the judge as an appeal and that the judge has made findings at paragraph 21 with regard to a lack of exceptional circumstances for granting leave outside the Immigration Rules and that these are findings she was entitled to reach.

11. He acknowledges that the Appellant has fallen foul of a procedural requirement and that the correct approach would be for him to reapply on the correct form with the correct fee and then for the Secretary of State to consider whether or not the Appellant meets the requirements of the Immigration Rules. He submits there is no material error of law in the decision of the First-tier Tribunal and asked me to dismiss the appeal.
12. Miss Hashmi challenges the comments of Mr Harrison contending that when the second application was made the first application was withdrawn and that the difference of fee was paid and therefore the Respondent should not have dealt with the first application as the correct fee had been paid for the second application. Consequently as it was withdrawn the Secretary of State should not have made a decision on the first application.
13. She further points out that if an appeal is to be considered by the Secretary of State then it is necessary for the Secretary of State to look at the correct Rule and in this instance that is when the Appellant has been here for some ten years. She further contends that the position under Article 8 has not been considered appropriately by the judge. She acknowledges that the Appellant had not been in the UK for ten years (by six days) when he submitted his application for variation and that it was clear that the first application was withdrawn and that it was the second application that should have been processed by the Secretary of State. She relies considerably on a detailed letter submitted by Latitude Law (who appeared on behalf of the Appellant before the First-tier Tribunal) explaining the scenario. She asked me to find that there is a material error of law.

The Law

14. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
15. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is

arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

16. The issue effectively upon which I am required to determine is whether or not there was a material error of law in the decision of the First-tier Tribunal Judge due to the judge misinterpreting and misapplying the procedural aspects of this matter. It is difficult in many ways to criticise the judge and if criticism is to be levelled it is to be levelled at the administration process and the manner in which both parties have sought to apply it. However consideration of the papers in this matter does appear to show that on 23rd September 2013 the first Appellant sought to vary his outstanding application for further leave by converting that application into an application for indefinite leave to remain under paragraph 276A-D of the Immigration Rules. It is interesting to note that at the same time an FLR(M) application was submitted in respect of both the second and third Appellants. There was then an exchange of correspondence with the Secretary of State. That correspondence does clearly indicate that by submitting the second application it is inevitable that the first application was effectively withdrawn. In such circumstances there was no appeal extant before the First-tier Tribunal Judge. I am satisfied that the first application was withdrawn on 23rd September. In that case there is a material error of law because there was nothing for the First-tier Tribunal Judge to hear an appeal against and I consequently set aside her decision.

Findings on the Procedural Position

17. It is quite clear that the issues in this matter need to be properly resolved. My finding is that the application that the Appellant sought to have processed both on his own behalf and his wife and child was an application based on ten years' residence and on the basis that he meets the Immigration Rules. It would appear that that application has not been processed. It is equally unclear as to what fees have and have not been returned or are still outstanding. In such circumstances the correct and pragmatic approach is to remit this matter back to the Secretary of State and for consideration by the Appellant's solicitors. If there is lying dormant an application for indefinite leave to remain along with a fee that has been paid then no doubt the Secretary of State will process it. If that is not the case then the correct

approach will be for a fresh application to be lodged by the Appellant and for the correct fee to be paid.

Decision

18. The decision of the First-tier Tribunal contained a material error of law. The decision is set aside and for the above reasons the matter is remitted back to the Secretary of State for further consideration on the basis of the position set out above in paragraph 17.
19. The First-tier Tribunal made an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made and the order therefore remains in force.

Signed

Date 16th October 2014

Deputy Upper Tribunal Judge D N Harris