



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/30208/2015
IA/30210/2015
IA/30212/2015

THE IMMIGRATION ACTS

Heard at FIELD HOUSE
On 25th July 2017

Decision & Reasons Promulgated
On 4th August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS BHAVINABEN KAUSHKGIR GOSWAMI
MR KAUSHKGIR CHAMPAKGIR GOSWAMI
& ONE OTHER
(NO ANONYMITY ORDER MADE)

Claimants

Representation:

For the Appellant: Mr P Duffy (Home Office Presenting Officer)
For the Respondent: Mr D Bazini (Counsel)

DECISION AND REASONS

1. The appellant in this matter is the Secretary of State. I shall refer to the parties as the Secretary of State or SSHD and to Mrs Goswami as "the main Claimant". This is an error of law hearing. The Secretary of State has appealed against the decision of the First-tier Tribunal (Judge Norton-Taylor)("FTT") promulgated on 30th November 2016 in which the Claimant's appeal was allowed to the extent that the decisions

made were not in accordance with the law and to be reconsidered by the Secretary of State.

Background

2. The Claimants are citizens of India and the second and third Claimants are dependents and are husband and daughter. The main entered the UK on December 2007 as a student and was granted leave until February 2014. Her subsequent application for leave as a Tier one migrant was refused. It was asserted that the Claimant used a false document, namely a Certificate of sponsorship purporting to be issued by Farringdon Care Homes. The application was refused under paragraph 322(1A) of the Immigration Rules. The Claimant accepted that the document was false but that she had no part in the deception which was facilitated without her knowledge by advisors that she had instructed. Further she had in fact submitted a on line crime report followed by a letter to the Secretary of State in January 2015, which was not challenged by the SSHD. Her case was advanced on the grounds that the decision taken was not in accordance with the law as the Secretary of State failed to take into account the letter dated January 2015 and /or the decision to remove was a breach of the Claimant's Article 8 rights.
3. The FTT found that the main Claimant was an entirely truthful witness and accepted that she had played no part in the deception in respect of which she had been a victim, and furthermore she had notified the Secretary of State of the deception [[33]. There was no evidence from the Care Home and the FTT considered it relevant that the Secretary of State, upon whom the burden was placed, had adduced no evidence of having acted upon the revelation made by the Claimant as to the deception practised [36]. It was agreed that the FTT could make a decision on the limited grounds of not in accordance with the law, because the appeal fell within the transitional provisions of the Nationality Immigration & Asylum Act 2002 ("2002 Act") [13]. The FTT found that the Secretary of State discharged the initial burden to show that there was dishonesty in respect of the false Certificate but that the Claimant adduced good evidence in rebuttal and that the Secretary of State had not discharged the additional burden to show that the Claimant was herself dishonest [39-40].

Grounds of application for permission

4. In her grounds the Secretary of State argued that the FTT erred by misdirecting itself on the law in **AA(Nigeria) v SSHD [2010] EWCA Civ 773** at (67). The FTT conflated false representations and false documentation. In the latter it was mandatory to dismiss the application having found the document to be false.
5. The FTT erred in considering that there was a discretionary power outside of the rules under paragraph 322 and/or that there was no procedural unfairness to render the decision taken as not in accordance with the law (**EK(Ivory Coast) V SSHD [2014] EWCA Civ 1517 (37)**).

Permission to appeal

6. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ Osborne on 5.6.2017. In granting permission the FTJ found that the grounds advanced were arguable and that the Rules require a mandatory refusal when a false documentation has been made “whether or not to the applicant’s knowledge.”

Submissions

7. At the hearing before me no issue was taken as to the correctness of the FTT’s powers to remit the decision on the grounds that it was not in accordance with the law. Mr Duffy relied on the grounds of appeal and argued that the FTT erred by the conflation of the two forms of dishonesty and that where a document is false there is no discretion and it is not a requirement to consider the different legal and evidential burdens.
8. Mr Bazini argued that there was no error as the FTT found that the SSHD had failed to make a procedurally fair decision on all the relevant facts before her. The decision made by the FTT was clearly one that was open to it to make and thus there was no error in law. Alternatively the FTT should be required to consider Article 8 ECHR.

Discussion and conclusion

9. I have considered the UT decision in **Marghia** cited by Mr Duffy in which it is concluded that the unfairness of a decision is in relation to a procedural failure and not to decisions which are unfair per se. There has been no specific argument from Mr Bazini that the decision taken was unfair in the Wednesbury sense that no reasonable decision maker or public body could have arrived at such a decision. His argument is that the decision making procedure was not fairly followed to the extent that the respondent failed to take into account relevant material before her in reaching a decision as to dishonesty. I agree with that submission. In **Shen** the UT endorsed the approach in **Adedoyin** (formerly **AA Nigeria**) in that the reference to “false” must mean “dishonestly” false [25]. If that approach is followed then the stages following an application would be for the SSHD to start by identifying the document/evidence that gave rise to a conclusion that deception or dishonesty had been used. There after it is open to the applicant to provide a plausible explanation in rebuttal and finally if an innocent explanation is established then the SSHD bears a further burden to show that the applicant was dishonest. It is of note that the wording “whether or not to the applicant’s knowledge “ is applicable to both issues of false representation and false documents, which in my view supports the argument pursued by Mr Bazini. There is no provision separating the requirements for the assessment of false representations and false documents and this approach is consistent with **AA** at (71). The material issue is whether the applicant had been dishonest or lied whether that be by documentation or representation. It follows that

the SSHD must consider all available evidence which in this instance included a crime report and a letter setting out a plausible innocent explanation. The failure on the part of the SSHD was found by the FTT to be a procedural and substantive unfairness rendering the decision not in accordance with the law. The FTT was tasked to assess whether or not the decision made by the SSHD could be upheld on the basis of a finding of dishonesty. Accordingly I am satisfied that the decision taken by the FTT was open to it to make and that the decision falls to be reconsidered by the SSHD as to the issue of dishonesty of the Claimant in light of the finding by the FTT that she was not dishonest.

Decision

10. There is no material error of law disclosed in the decision which shall stand.

Signed

Dated 3.8.2017

GA Black

Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

FEE AWARD made by the FTT of repayment of £140.00 is upheld.

Signed

Dated 3.8.2017

GA Black

Deputy Judge of the Upper Tribunal