



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

Appeal Numbers: IA/33813/2015
IA/33814/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 22 September 2017**

**Decision & Reasons
Promulgated
On 29 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

**MR VIRENDRA KUMAR SIMRYA (FIRST APPELLANT)
MRS VINITA SIMRYA (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Claire, Counsel instructed by Farani Javid Taylor Solicitors

For the Respondent: Mr Armstrong, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The First Appellant is a citizen of India born on 4 December 1979. His wife, also a citizen of India, was born on 12th November 1981. They appealed the decisions of the Secretary of State made on 19th October

2015 to refuse the First Appellant's application for leave to remain in the United Kingdom as a Tier 2 (General) Migrant under the points-based system. The Second Appellant's appeal is entirely dependent upon that of the First Appellant.

2. There were two matters before the judge at first instance, Judge Rayner, who heard this appeal on 12th December 2016 at Taylor House. The first was whether or not the Certificate of Sponsorship relied upon in the application was genuine, and the second was whether or not if a finding was made favourable to the First Appellant that the appeal could succeed in any event with reliance upon that Certificate of Sponsorship which contained a number of errors and therefore was not valid. There was a third issue which related to human rights, but that is not pursued before me.
3. Judge Rayner resolved the deception or fraud point in favour of the First Appellant, but having found that the Certificate of Sponsorship was invalid from its inception, dismissed the appeal having regard to the Immigration Rules. However, no-one has suggested before me, nor was it suggested in the grounds that an invalid Certificate of Sponsorship could be relied upon, but rather the First Appellant complains now that the Secretary of State ought to have given to the First Appellant the opportunity, given that the Certificate of Sponsorship was not obtained by fraud or deception, to obtain another Certificate.
4. In the event, not content with the decision of Judge Rayner, by Notice dated 17th January 2017 the appellant made application for permission to appeal to the Upper Tribunal. The grounds run to eight paragraphs, but in short the point which was pursued before me was one of evidential flexibility and the unfairness on the part of the Secretary of State, it was contended, not to have given the First Appellant the opportunity to remedy the situation which he faced; namely that the Certificate of Sponsorship was in relation to a company which, by the date of decision, no longer existed, putting aside any issue relating to the numbers etc. which were noted upon the face of the document.
5. On 12th July 2017 Judge Shimmin granted permission, thus the matter comes before me. Mr Claire for the Appellants was not able to assist me as to whether or not the point now being relied upon was in fact raised before the judge. It is to be remembered that although the judge at first instance is concerned with whether or not the Secretary of State made a decision which was lawful, I am concerned with whether or not the judge at first instance erred, but that is a different consideration. The judge at first instance is obliged to make findings and deal with issues which are put before him. It is of note that at paragraph 28 of the decision the judge says:

"It was not suggested to me that the respondent was under a duty to carry out any enquiries of Mr Simrya before considering the application".

Those words taken together with Mr Claire's very candid admission that he cannot recall whether or not the point was taken before the judge leads me to the conclusion that the point was not taken. In those circumstances it cannot be said that the judge erred.

6. However, that the point was not taken before the judge is not material, because this appeal would not have succeeded in any event. The burden of proof was upon the Secretary of State to establish whether or not there had been fraud or deception. That was resolved in the First Appellant's favour, but that did not relieve the First Appellant from proving his case. He was required to prove, on balance of probabilities, that as at the date of decision he had a valid Certificate of Sponsorship. He did not have one. He points through Mr Claire to unfairness, but there was no unfairness in my judgement. Mr Simrya, it would appear, made all sorts of efforts to advance his case and I refer to paragraph 24 of the decision in which the judge noted the active way in which Mr Simrya was pursuing the Respondent, including involving a member of Parliament which, it was said, he would have been unlikely to have done if the Certificate was a fraud. It is of note however, that the judge was far from entirely impressed by the evidence of Mr Simrya because he said it was far from compelling and he could have done more to explain how the false particulars had found their way into the Certificate of Sponsorship (here I refer to paragraph 25). Be that as it may, the matter was resolved in the First Appellant's favour on the deception point.
7. It is a general maxim applicable in all jurisdictions unless there is some legal basis for the contrary that he who asserts must prove. If the Certificate of Sponsorship was one upon which the First Appellant was entitled to rely, then it was for him to prove it. He was unable to do so. Ought then the Secretary of State, in any event, to have taken steps to inform the First Appellant that the prospective employer was no longer in a position to issue a Certificate of Sponsorship? The answer to that question, in my judgement, is "No"; it was for the First Appellant to make the assertion that at the time of the decision the prospective employer was in a position to offer employment; he was relying on the document, it was he who was looking for that work, and it was he who should have kept in touch with those prospective employers to satisfy himself that at all material times there was a Certificate of Sponsorship before the Secretary of State, such that if that company was no longer in a position to offer a Certificate he, the First Appellant, would have informed the Secretary of State prior to a decision being made.
8. I am reinforced in that view by what appears at the end of paragraph 28 of the decision which relates to the policy guidance of the Secretary of State which at paragraph 184 states:

"A Certificate of Sponsorship can be withdrawn or cancelled at any time by either the Home Office or your sponsor. Where your application relies on a Certificate of Sponsorship that has been either withdrawn or cancelled, your application will be refused".

Paragraph 287 states:

“If you submit an application using a Certificate of Sponsorship that is invalid, the application will be refused. You must get a new Certificate of Sponsorship from your sponsor”.

9. That reads to me that either it is incumbent upon the First Appellant to do the same within the currency of an existing application, or make a fresh application, but I do not find anywhere any obligation on the Secretary of State to make the enquiry that is being suggested. This is not a case, for example, where in a series of bank statements there is one missing.
10. In all the circumstances, this appeal fails and fails because the point was not taken before the First-tier Tribunal, but I thought it right that the parties should be aware that the appeal would have failed in any event.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Zucker