



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01797/2016
IA/01798/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3 April 2018

Decision & Reasons Promulgated
On 22 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MS SUPREET KAUR
MR BHUPINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Uddin of Counsel, instructed by Ammal Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are linked appeals against the decision of First-tier Tribunal Judge Gandhi promulgated on 11 December 2017.
2. The Appellants are citizens of India and are wife and husband. The First Appellant was born on 5 November 1990 and the Second Appellant on 11 April 1984. They appealed to the IAC against decisions of the Respondent dated 5 April 2016 to refuse further leave to remain and to issue removal directions pursuant to section 47 of the Immigration and Nationality Act 2006.

3. The First Appellant, who has been the principal applicant and appellant in these proceedings, arrived in the United Kingdom in October 2010 with leave to enter as a Tier 4 Migrant. The Second Appellant has at all relevant times been treated as a dependent partner and granted leave 'in line' with his wife, until in due course he was refused leave to remain pursuant to the rejection of his wife's application.
4. The First Appellant's leave to enter was curtailed by decision of 1 May 2014, to take effect on 30 June 2014. An application for further leave to remain was made: the precise date of the application has been the subject of controversy – see below. The application was made to study at Zaskin College in Harrow for a diploma in business administration management. However, by the date of the Respondent's decision the Appellant had no Confirmation of Acceptance for Studies ('CAS'), and her application was refused accordingly. The Second Appellant's application as a dependant was also refused.
5. It would now appear that the Respondent's decisions were first made on 5 August 2015 with no right of appeal. Following a challenge by way of judicial review the decisions were in due course re-issued on 5 April 2016 with a right of appeal. See further below. This circumstance does not appear to have been known to the First-tier Tribunal Judge.
6. The Appellants appealed to the IAC. Although they had initially indicated on their Notices of Appeal that they wanted their appeals dealt with at a hearing, it was subsequently communicated that they wanted the appeals dealt with 'on the papers'. Accordingly in due course the linked cases came before Judge Gandhi to determine without a hearing.
7. Judge Gandhi's Decision rehearses the facts of the case by reference to the materials in the Respondent's bundle. The Judge observes that since the date of the Respondent's decision the only materials filed by the Appellants in the appeal were the Notices and Grounds of Appeal (paragraph 6). Judge Gandhi evaluated the appeals on this basis.
8. The Judge concluded that absent a CAS the First Appellant could not possibly succeed under the Immigration Rules with regard to Tier 4. As regards a suggestion in the grounds of appeal that the Respondent's procedures were unfair, Judge Gandhi relied upon **Marghia (procedural fairness) [2014] UKUT 00366 (IAC)** and concluded that the jurisprudence suggested that a period of 60 days in order to obtain a replacement CAS was fair. In this regard there was on file a copy of a '60 day' letter dated 14 May 2015 together with evidence that it had been signed for upon delivery to the Appellants' address (Annex D of the Respondent's bundle before the First-tier Tribunal).

9. Accordingly Judge Gandhi found that there was nothing in the Appellants' case suggesting procedural unfairness. In this context I pause to observe that Judge Gandhi also stated:

"Further I note the Appellant did not ask the Respondent for any further extension of time beyond the 60 days by explaining why she could not obtain another CAS within the 60 day period. She has provided no explanation of why she did not do so if she was facing difficulties." (paragraph 17).

10. The Judge then went on to consider Article 8. Bearing in mind the limited nature of the evidential material that had seemingly been filed in the appeal, the Judge concluded that the circumstances were such as she could not reach a conclusion favourable to the Appellants: e.g. see paragraph 32:

"It is difficult to see what findings I can make on a claim that has not been pursued in any meaningful way. In this case there is no evidence before me regarding the appellants' social ties and relationships, no evidence of private life, apart from the fact the first appellant is studying in the UK and has been for some time."

11. The appeals were dismissed under the Immigration Rules and on human rights grounds.
12. The Appellants sought permission to appeal, which was granted by First-tier Tribunal Judge Ransley on 30 January 2018. The grounds in support of the application for permission to appeal pleaded that the Appellants had filed an appeal bundle with the Tribunal on 30 June 2017 that contained relevant evidence including a witness statement from the First Appellant and evidence that the couple had been delivered of a child on 25 January 2017. Judge Ransley identified that Judge Gandhi appeared to have had no knowledge of this bundle, appearing to be completely unaware of its contents, and in consequence had not taken into account evidence that had been duly filed.
13. It is indeed the case that there is a bundle from the Appellants stamped as having been received at Hatton Cross on 3 July 2017. It is unclear as to whether this was simply not linked with the file before it was placed before Judge Gandhi, or if it was linked but simply not identified by Judge Gandhi. Be that as it may, it is clear that the Appellants' evidential materials in their bundle were not considered by the First-tier Tribunal for reasons beyond the control of the Appellants.
14. No particular criticism is to be made of Judge Gandhi in circumstances where it is unclear why she was seemingly unaware of this material. Indeed absent the

overlooking of the Appellants' bundle, Judge Gandhi's decision otherwise seems well-reasoned and entirely sustainable. Be that as it may, the Appellants have not had a procedurally fair hearing before the First-tier Tribunal.

15. That said, I gave some consideration as to the extent to which this would have been material in respect of the outcome of the appeal: I am grateful for the assistance and engagement of the parties' representatives in this context.

16. In particular, I gave some consideration to each of the following available grounds of appeal, bearing in mind, as correctly identified by Judge Gandhi (paragraph 10), that this was an appeal that was not subject to the more restrictive regime in terms of available grounds of appeal introduced by the Immigration Act 2014.

(i) So far as the Tier 4 Immigration Rules are concerned it seems to me that the materials filed by the Appellants could not have made any difference to the outcome of the appeal. Put simply, in the absence of a CAS the Appellants could not have succeeded under those Rules.

(ii) However, the matter is not quite so straightforward in respect of the potential for relying upon a ground of 'not in accordance with the law'. For the reasons explored below, there may have been scope for arguing that there had been procedural unfairness.

(iii) In respect of Article 8 it is to be noted that the materials filed by the Appellants were still rather limited. They essentially constituted the First Appellant's witness statement and a birth certificate in respect of the couple's child. Beyond the First Appellant's study nothing meaningful emerges in the witness statement as to the nature of the private life that the couple may have been enjoying in the United Kingdom. Such evidence does not advance much more in respect of the quality of private life enjoyed in the United Kingdom than was covered by Judge Gandhi's observation in respect of study and time passed. The addition of the couple's child does not on its face make any obvious difference to the quality of their private life in the United Kingdom. So far as family life is concerned, it is anticipated that the family would be removed as a unit. So far as private life is concerned the infant child will have an extremely limited private life that in reality goes no further than the bounds of the family unit - being even as of today's date only some 15 months old.

17. However, as I say, it seems to me that there may be something more to be explored in respect of procedural fairness.

18. I have noted above that Judge Gandhi observed that on the basis of the materials before her there was nothing to suggest that the Appellant had asked for a further extension

of time in respect of obtaining a CAS. However, in the witness statement the First Appellant states that she did ask for such an extension in July 2015.

19. Although there is no supporting material in respect of such an application presently available to the Tribunal, the witness statement itself constitutes evidence of such an application having been made.
20. I also note that in later judicial review proceedings (see further below), there is a pre-action protocol letter dated 19 August 2015 which refers to the Appellant having informed her solicitors that she had asked for an extension and had not received a response. This provides a degree of contextual, or circumstantial, support for the notion that an application for more time to obtain a CAS was made.
21. The First Appellant's witness statement refers to the issuing of judicial review proceedings. Notwithstanding, the Appellants' bundle did not include any materials relating to judicial review. However, Mr Clarke has been able to assist from the Secretary of State's file; he provided a copy of the pre-action protocol letter dated 19 August 2015, and a copy of the consent order in the Upper Tribunal (reference JR/12911/2015) in which the applicant in those proceedings (the Appellant herein), was given leave to withdraw the claim for judicial review with no order for costs. I was told that that was on the basis of an agreement that the Secretary of State would reconsider the Appellant's case.
22. What appears to have transpired is that the Appellants' joint application for variation of leave to remain was initially refused with no right of appeal on the basis that it had been lodged out of time. The focus of the judicial review proceedings appears to have been in relation to that decision, and an alleged failure of the Respondent's computer systems in not allowing the First Appellant to lodge an application online when she had attempted to do so. It would appear that the judicial review challenge was, at least in part, settled on this basis.
23. However, as I have also already indicated, the issue as to a further 60 day period of grace to obtain a further CAS also featured in the pre-action protocol. Unfortunately it is not apparent to me to what extent that may or may not have informed the agreement to the consent order - I have not seen anything in writing as to the basis of the consent order and anything that the Secretary of State may or may not have said extending a further period of grace.
24. It follows from the foregoing that as things stand at the moment the First Appellant's case at best raises a suggestion that there may be more to be said on her behalf in respect of procedural fairness. It is certainly, in my judgment, not the case that the Appellants have made good any such point.

25. However, I need to attempt to consider the foregoing from the perspective of the First-tier Tribunal. What might have been the approach if the Judge had seen the Appellants' bundle? It seems to me that I cannot safely assume that the First-tier Tribunal Judge would have proceeded with the appeal in knowledge of the materials now available to me, but might instead have considered that it was appropriate to issue Directions for further clarification of some of these matters.
26. In such circumstances I am not prepared to conclude that the Appellants' bundle could be said to be wholly immaterial to the outcome of the appeal. In this context of course I bear in mind that the bundle having been disregarded completely, the Appellants have not in reality had their case considered by the Tribunal. In my judgement the decision of the First-tier Tribunal should be set aside.
27. That said, on its face the Appellants should anticipate that the next Tribunal is likely also to be unable to find any basis to allow the appeals under the Immigration Rules in the absence of a CAS.
28. I do not issue any specific Directions. I merely make the following observations:
 - (i) In so far as the Appellants may wish to rely on procedural unfairness by arguing that the Secretary of State did not consider an application for an extension of the 60 day period to obtain a CAS, it will be incumbent upon them to file and serve whatever materials may be available to make good the claim that the First Appellant had sought such an extension. In this context and more generally it is up to them to bring forward materials in respect of the judicial review proceedings which may shed some light on the basis upon which the Secretary of State had agreed to re-issue decisions or otherwise reconsider the Appellants' cases.
 - (ii) In respect of Article 8, it is open to the Appellants to file any further evidence that they see fit in accordance with the timetable of standard directions. In this regard the Appellants will no doubt take on board the observations that I have made that the quality of the evidence presently seems to add very little in respect of Article 8 to the quality of the evidence that was before Judge Gandhi. To that extent, again, absent anything further the Appellants may anticipate something of a struggle in respect of Article 8.
29. It is ultimately for the Appellants to decide upon the evidence they wish to file. Neither they, nor the next Judge, should consider there is anything prescriptive or proscriptive in any of the foregoing.

Notice of Decision

30. The decision of the First-tier Tribunal is vitiated for material error of law. The decision of Judge Gandhi is set aside.

31. The decision in the appeal is to be remade following an oral hearing before the First-tier Tribunal, by any Judge other than First-tier Tribunal Judge Gandhi, with all issues at large.

32. No anonymity directions are sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **16 May 2018**

Deputy Upper Tribunal Judge I A Lewis