



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/06956/2016
HU/06961/2016
HU/06965/2016
HU/06971/2016

THE IMMIGRATION ACTS

Heard at Field House
On 24 January 2019

Decision & Reasons Promulgated
On 18 February 2019

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

S G
S A V
AS
ES

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr S Whitwell, Senior Presenting Officer

For the Respondents: Mr D Coleman, instructed by Paul John & Co Solicitor

Anonymity Direction

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure of any material that may lead to the identification of the respondents' child who would be referred to as AS and ES in these proceedings. Any failure to comply with this direction may result in contempt of court proceedings.

DECISION AND REASONS

1. The respondents in this case are nationals of India. The second named respondent is the husband of the first and the third and fourth respondents are their children.
2. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Swaney who for reasons given in a decision dated 28 August 2017 allowed the respondents' appeals on human rights grounds. The respondents had appealed the Secretary of State's decisions dated 1 March 2016. In respect of the first respondent he had made a decision refusing to vary her leave and to remove her in response to an application that she had made dated 18 June 2015 as a Tier 2 (General) Migrant. The other respondents, her dependants, were refused in line.
3. The first respondent's application was refused with reference to paragraph 322(2) and paragraph 245HD(a) of the Immigration Rules. This was on the basis that her presence in the United Kingdom was not conducive to the public good having fraudulently obtained a TOEIC Certificate in relation to a Tier 4 application dated 16 August 2013. The Tier 2 limb of the application was refused on the basis that the London School of Marketing at which she had obtained her qualification was not a UK recognised or listed body or education provider with reference to a degree certificate and diploma supplement for a Master of Arts in Marketing Innovation awarded by Anglia Ruskin University that had been provided. London School of Marketing were removed from the Tier 4 sponsor register on 5 September 2014. The diploma supplement relied on had been awarded on 5 December 2014. In addition, the first respondent was not awarded any points in respect of attributes on the basis that the sponsor had not performed an appropriate Resident Labour Market Test as defined in Appendix A to the Rules although she was able to demonstrate the requisite points for the appropriate salary, English language and maintenance requirements.
4. The Secretary of State confirmed that all respondents had the right to appeal the decisions. They did so. Judge Swaney recorded in his decision an agreement between the parties that in the event of a positive finding in the first respondent's favour, the matter would be remitted to the Secretary of State for assessment of the application under the Immigration Rules.
5. Although the judge found that the Secretary of State had discharged the burden of establishing possible fraud to the generic evidence in the lookup tool relating to the first respondent's test results she found that the Secretary of State had failed to discharge the burden of establishing that there was in fact fraud on the first respondent's part who had established on the balance of probabilities a reasonable excuse i.e. that she spoke English.
6. At [16] of her decision, the judge acknowledged that it was not open to her to allow the appeals under the Immigration Rules which she considered a compelling reason

to consider Article 8 outside those Rules. This led to her decision that the appeals were unlawful under section 6 of the Human Rights Act 1998 as contrary to the respondents' rights under Article 8 of the Convention.

7. Permission to appeal was granted by Judge I Boyes. He considered the grounds arguable on the basis the judge appeared to have accepted the first respondent's current language ability, a complete defence to the assertions raised. Furthermore, he considered the judge had dealt with the requisite burdens of proof in a confused manner and that the Article 8 assessment arguably lacked reasons.
8. This appeal first came before me on 14 August 2018 when it was adjourned for further submissions on whether the First-tier Tribunal had jurisdiction to hear the appeal. It appeared that the application for variation of leave to remain had been made after the new provisions in the Immigration Act 2014 had come fully into force on 6 April 2015. The application did not contain a Human Rights claim.
9. In response to directions I made at that hearing, Mr Sharma who had been instructed by the respondents on that occasion promptly responded on 15 August 2018. In summary, his contention was that the respondents had made a human rights claim. Although the decision related to an application made in June 2015, that application was actually a variation of a FLR (FP) application made prior to expiry of the respondents' leave on 22 August 2014. He contended that the underlying application was a human rights claim. It had not been withdrawn but replaced by the application which led to the Secretary of State's refusal.
10. Among the documents submitted with Mr Sharma's e-mail were copies of two letters dated 18 June 2015. The longer is addressed to Priority Service Applications at a post office box in Sheffield. The second is addressed to UK Visas and Immigration. Both are from the respondents' solicitors Paul John.
11. The longer of the two letters addressed to Priority Service Applications explains that the firm was instructed to act on behalf of the first respondent regarding her application for further leave to remain as a Tier 2 (General) Migrant. The letter explains that she is currently in the United Kingdom as a Tier 4 Student Migrant. The documentation submitted with the application is listed and there follows these paragraphs:

"Our client's Tier 4 General visa was curtailed to expire on 22/08/2014. Prior to the expiry of her leave, she applied a valid application [sic] for further leave to remain FLR (FP) which is still pending consideration with the Home Office (Ref No: S1506315) (Case Id: 018397037).

Our client hereby inform you [sic] that she wishes to vary her previous FLR (FP) application and proceed with this application for leave to remain in UK as a Tier 2 (General) Migrant. We would like to point out that she should be considered as having

extant leave until then by virtue of her previous application which was under your consideration until now. Under these circumstances we request you to kindly accept this application for consideration.”

The letter concludes with some non-material observations.

12. The shorter letter addressed to UK Visas and Immigration is in these terms:

“Thank you for your letter dated 4th September 2014 regarding the application by the above named person for leave to remain in uk [sic] FLR (FP). A copy of your letter is enclosed for your ease of reference.

Our client wishes to inform you that she is varying the current FLR (FP) application which is pending consideration to a Tier 2 (General) Migrant application which is sent to the Home Office on 19th June 2015 by special delivery bearing no: ZW 5627 4935 3GB.

Accordingly we request you to stop considering her FLR (FP) application [Home Office Ref: S1506315] and consider her new application for Tier 2 (General) Migrant.

In this regard we request you to kindly refund the amount of £1803 paid for the FLR (FP) application to us.

If you require any further information or assistance regarding this matter; please do not hesitate to contact us.”

13. Mr Coleman had not seen these letters prior to addressing me at the outset of the hearing. Having considered them, he said that he could not argue that a request to the Secretary of State to stop consideration of an earlier application amounted to a variation application. He accepted that because the first respondent had made a new application rather than had sought to vary the earlier application, he was unable to rely on the human rights aspect and the application made in August 2014 which included a human rights claim. He also acknowledged that the new application under Tier 2 could not be seen as amounting to a human rights application. He acknowledged that human rights had not been raised.
14. Both parties accepted therefore that despite the Secretary of State having indicated the respondents had a right of appeal, they did not.
15. Even if I were persuaded that the Tier 2 application made in June 2015 could be understood as a variation on the FLR (FP) application made in August 2014, the difficulty for the respondents is that the two letters of 18 June 2015 indicate that the FLR (FP) application was in terms withdrawn before the Tier 2 application was made.

16. Section 3C of the Immigration Act 1971 is in the following terms, relevant to this matter:

“3C Continuation of leave pending variation decision

(1) This section applies if –

- (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
- (b) the application for variation is made before the leave expires, and
- (c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when –

- (a) the application for variation is neither decided nor withdrawn,

...

(4) A person may not make an application for variation of his leave to enter or remain

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

...”

17. As the letter addressed to UK Visas and Immigration withdrew the pending application which might otherwise have been susceptible to variation, the continuing leave by virtue of Section 3C(ii) came to an end before the Tier 2 application was made. Accordingly, the respondents are unable to rely on the August 2014 application as their human rights claim.
18. The grounds on which the Secretary of State was granted permission in this case did not deal with the point on which it has been conceded the First-tier Tribunal did not have jurisdiction. As I have explained even if I were persuaded that the respondents could have varied the original application in fact this is not what happened. The application which had all the features of a human rights claim was withdrawn before the application with no such characteristic was made. Thus the decisions under challenge were not a rejection of a human rights claim.
19. Accordingly, there was no right of appeal to the Tribunal under section 82 of the 2002 Act against the Secretary of States decisions dated 1 March 2016. The decision of the First-tier Tribunal is set aside for want of jurisdiction. That brings these proceedings to an end in the Upper Tribunal.

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20. By way of foot note it will be open to the respondents to now make a human rights claim. I record Mr Whitwell's acceptance that no point will be taken on delay if they decide to challenge the March 2016 decisions by other means.

Signed

Date 14 February 2019

UTJ Dawson

Upper Tribunal Judge Dawson