Neutral Citation Number: [2020] EWCA Civ 1389

Case No: C5/2019/1403

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE RIMINGTON
Appeal No. IA/33837/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 October 2020

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE PETER JACKSON
and
LORD JUSTICE LEWIS

- -

MARISSA CANTOS MUSICO	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

Mr James Collins (instructed by **Douglass Simon Solicitors**) for the **Appellant**
Ms Jennifer Gray (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 20 October 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Wednesday, 28 October 2020.

Lord Justice Lewis:

INTRODUCTION

1. This is an appeal against a decision of the Upper Tribunal given on 14 May 2019. The Upper Tribunal held that a decision of the respondent dated 25 April 2014 refusing the appellant leave to remain in the United Kingdom was not an immigration decision within the meaning of section 82(2)(d) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Consequently, the appellant had no right of appeal against the 25 April 2014 decision.

2. In summary, the appellant sought to come to the United Kingdom in 2009 to work as a domestic worker at the Lebanese Ambassador's residence in the United Kingdom. An entry clearance officer in the Philippines concluded that the appellant was exempt from immigration control and stamped her passport as visa exempt. The exemption was to last until the expiry of her passport on 8 January 2014. The Upper Tribunal held that the entry clearance officer was correct in classifying the appellant as exempt from immigration control in 2009. The Upper Tribunal held, however, that by 16 August 2013 at the latest the appellant's circumstances had changed and she was no longer employed by the Lebanese Embassy but was employed by the Ambassador personally. The appellant, therefore, ceased to be exempt from immigration control. Thereafter the appellant was treated as having leave to remain for 90 days pursuant to section 8A of the Immigration Act 1971 ("the 1971 Act"). That leave had expired by the end of December 2013 at the latest. The appellant did not, therefore, have any subsisting leave to remain when she applied for leave on 12 March 2014. As a result, the 25 April 2014 decision refusing leave to remain was not an appealable immigration decision as it was not a decision refusing to vary leave to enter or remain.

3. The appellant submits that the Upper Tribunal erred in holding that the entry clearance officer had correctly classified her as exempt in 2009 and that, subsequently, her circumstances changed with the consequence that she ceased to be exempt from immigration control. Rather, the position was that the entry clearance officer had mistakenly granted her exempt status which was to last until the expiry of her passport on 8 January 2014. That was a mistake on the part of the entry clearance officer and the appellant had not misled him in any way. In those circumstances, the appellant submitted that she was entitled to be treated as exempt until the expiry of her passport on 8 January 2014 and to be treated as having 90 days leave to remain thereafter. Consequently, she submits that the 25 April 2014 decision did amount to a refusal to vary her existing leave to remain and was an immigration decision against which she had a right of appeal by virtue of section 82(2)(d) of the 2002 Act.

THE LEGAL STRUCTURE

4. The 1971 Act sets out a framework governing immigration control for those seeking to enter and remain in the United Kingdom. Section 3(1) of the 1971 Act provides that:

> "(1) Except as otherwise provided by or under this Act, where a person is not a British citizen

> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under this Act;
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period…..".

Exemptions from Immigration Control

5. Provision is made for the Secretary of State to exempt by order any person from any of the provisions of the 1971 Act: see section 8(2). Further, there is provision for the exemption of members of a diplomatic mission (and family members who are part of their household) and administrative, technical and service staff employed by the diplomatic mission. Section 8(3) of the 1971 Act provides that:

> "(3) Subject to subsection (3A) below, the provisions of this Act relating to those who are not British citizens shall not apply to any person so long as he is a member of a mission (within the meaning of the Diplomatic Privileges Act 1964), a person who is a member of the family and forms part of the household of such a member, or a person otherwise entitled to the like immunity from jurisdiction as is conferred by that Act on a diplomatic agent."

6. Section 8A of the 1971 Act deals with persons ceasing to be exempt and provides, so far as material, that:

> "8A.— Persons ceasing to be exempt.
>
> (1) A person is exempt for the purposes of this section if he is exempt from provisions of this Act as a result of section 8(2) or (3).
>
> (2) If a person who is exempt—
>
> (a) ceases to be exempt, and
>
> (b) requires leave to enter or remain in the United Kingdom as a result,
>
> he is to be treated as if he had been given leave to remain in the United Kingdom for a period of 90 days beginning on the day on which he ceased to be exempt.
>
> (3) If—
>
> (a) a person who is exempt ceases to be exempt, and
>
> (b) there is in force in respect of him leave for him to enter or remain in the United Kingdom which expires before the end of the period mentioned in subsection (2),
>
> his leave is to be treated as expiring at the end of that period."

Domestic Workers in a Diplomatic Household

7. The relevant immigration rules provide for the grant of leave to enter or remain for certain categories of workers including domestic workers in diplomatic households. These are persons employed by diplomats personally (not persons employed by the diplomatic mission itself who are exempt from immigration control). This category

includes domestic workers employed by an ambassador to work in the ambassador's residence. Since November 2008, those rules have been contained within the provisions of Tier 5 (Temporary Worker) of the Points Based System.

Domestic Workers in a Private Household

8. Paragraphs 159B to 15EB(i) of the Immigration Rules provide for leave to enter and remain for domestic workers in a private household. These would include persons employed to work for private citizens such as businessmen or women.

Rights of appeal

9. At the time of the appeal to the First-tier Tribunal in this case, section 82 of the 2002 Act conferred rights of appeal against certain specified immigration decisions (the provisions of section 82 have now been amended). The material provisions of section 82 then applicable provided that:

> "(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this part "immigration decision" means –
>
> …..
>
> (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain
>
> …..".

THE FACTS

The application for entry clearance

10. The appellant is a national of the Philippines who was born on 11 June 1980. She made an application to an entry clearance officer in the Philippines with a view to being able to come to the United Kingdom to work as a domestic worker at the residence of the Lebanese Ambassador to the United Kingdom.

11. The entry clearance officer concluded that the appellant was exempt from immigration control by reason of section 8 of the 1971 Act. Her passport was accordingly stamped "Visa exempt". The exemption was to last until her passport expired on 8 January 2014.

12. No copy of the application itself is available. There is a record of the details contained in the application and of the entry clearance officer's understanding of the position. That record notes that the appellant is:

> "To work in Lebanese Ambassador's residence as a domestic – gets exempt visa for up to 5 years – see extract from DSP – have given her to the end of her [passport] validity which is just under 5 years as no end of contract date given".

13. The record notes that the sponsor was the Embassy of the Lebanon.

The appellant's arrival in the United Kingdom.

14. The appellant came to the United Kingdom on 16 April 2009. It is accepted that she commenced employment as a domestic worker at the residence of the Lebanese Ambassador to the United Kingdom and that she was employed by the Ambassador personally not by the Embassy.

The appellant's application for leave to remain.

15. On 16 August 2013, solicitors for the appellant wrote to the respondent. The letter is headed:

> "Application for an extension of stay in the United Kingdom as a domestic worker in a private household pursuant to paragraph 159E of the Immigration Rules".

16. The letter stated that the appellant:

> "entered the United Kingdom on 16th April 2009 as a domestic worker in a private household working for the Osseiran household (incidentally, the Lebanese Ambassador)".

17. The letter enclosed an application form, Form FLR (O), signed by the appellant and dated 10 July 2013. Form FLR (O) is a form for applications for leave to remain in the United Kingdom not covered by other application forms. The letter also enclosed two letters signed by the Lebanese Ambassador, one dated 4 July 2013 and the other 13 August 2013, confirming that the appellant had been employed by the Ambassador as a domestic worker since 16 April 2009. The letter also enclosed a statement signed by the appellant and dated 25 June 2013. In her statement, the appellant said that the documentation for the 2009 application to the entry clearance officer had been provided by the Lebanese Ambassador and the Embassy and she did not know the basis upon which that application had been made. She confirmed that her passport had been endorsed "Visa Exempt". She confirmed that she came to the United Kingdom in April 2009 to work as a domestic worker for Mrs Osseiran, the Lebanese Ambassador, and had continued to do so. The appellant said at paragraph 11 of the statement:

> "11. I have completed 5 years in the United Kingdom working as a domestic worker for Mrs Osseiran at the Embassy of Lebanon in London. Upon obtaining legal advice, I have been informed that my visa has been granted on an exceptional basis and I am not entirely sure what the basis of my leave to remain [is]. I have completed five years in the United Kingdom under the employment category and I therefore wish to apply for indefinite leave to remain. I believe that I should have been granted leave to remain as a domestic worker in a diplomatic household. Under this category, I would have now qualified for indefinite leave to remain."

18. Pausing there, the appellant had spent just over four years, not five, in the United Kingdom at the date of the statement. She would not have qualified for indefinite leave to remain at that stage even if she had been granted leave to enter in 2009 as a domestic worker in a diplomatic household.

19. By letter dated 25 November 2013, the respondent stated that she was returning the application as it was invalid. It stated that:

> "Your client must make the application or claim using the current version of the correct specified form. Which is **PBS TIER 5 not FLR (O) Form.**"

20. By a further letter, also dated 25 November 2013, the respondent wrote to the appellant's solicitors saying:

> "Thank you for applying above person for leave to remain in the United Kingdom as a domestic worker at the Ambassador of the Embassy of Lebanon in London.
>
> We have been checked with the Foreign and Commonwealth Office in London they have been confirmed that this above applicant, her salary is paid personally by the Ambassador not the Embassy.
>
> Therefore this application has been rejected and she should apply on PBS Tier 5 from not FLR (O) form."

Subsequent applications by the appellant for leave to remain

21. It is clear from the above that the appellant was told to apply under Tier 5 for leave to remain as a domestic worker in a diplomatic household. The appellant did not, however, make an application on that basis. It is not apparent from the evidence, and we were not told, why she did not do so. It is, therefore, not known whether she had ceased to be employed by the Lebanese Ambassador or whether she failed to satisfy other Tier 5 criteria such as, for example, the provision of a certificate from a sponsor.

22. Instead, by letter dated 27 November 2013, the appellant's solicitors wrote re-submitting the original application. They said that the appellant was "working as a Domestic Worker in a private household for the Lebanese Ambassador" and maintained that the correct form was the FLR (O) form. They asked the respondent to consider the application on the FLR (O) form.

23. By letter dated 18 December 2013, the respondent wrote confirming that the correct form was the PBS Tier 5 form, not the FLR (O) form, and that the writer of the letter had taken advice from a senior case worker who had confirmed that to be correct.

24. On 2 January 2014, the appellant's solicitors made another application for an extension of leave to remain in the United Kingdom as a domestic worker in a private household pursuant to paragraph 159EA of the Immigration Rules. The letter again enclosed a Form FLR (O) signed by the appellant and dated 2 January 2014. The letter was in materially identical terms to the letter of 16 August 2013 save for the final paragraph which stated that:

> "We note that our client's application has previously been returned stating that she should apply under Tier 5 of the PBS. As we have stated and as confirmed by our client's employer, our client is employed as a Domestic Worker in a Private Household. We would therefore urge you to consider this application under the Rules for Domestic Workers in Private Households."

25. Once again, by letter dated 11 February 2014, the respondent informed the appellant's solicitors that any application to remain in the United Kingdom as a domestic worker had to be made on the appropriate application form which was the Tier 5 form. The letter continued by stating that the application had been rejected and the appellant should apply on the PBS Tier 5 form not FLR (O) form.

The 12 March 2014 Application

26. On 12 March 2014, the appellant's solicitors wrote again referring to the letter of 11 February 2014 returning the application. It enclosed the application for an extension of leave to remain on the FLR (O) form signed and dated 2 January 2014 and the supporting documentation. It again said that the appellant:

> "was applying for an extension of her Leave to Remain as a Domestic Worker in a private household and therefore the correct application form is indeed the FLR (O) form."

27. By letter dated 25 April 2104, the respondent notified that appellant that her application for leave to remain as a domestic worker in a private household had been refused. The material reasons were:

> "You entered the United Kingdom on 16 April 2009 with a visa exemption valid to 08 January 2014. This leave was granted as you were a domestic worker for the Ambassador of Lebanon and therefore a domestic worker in a diplomatic household and therefore have never had leave in the United Kingdom under paragraph 159D or 159EA and do not met the immigration rules stated above.
>
> "On 27 March 2014 UKVI Tier 5 teams received an e-mail from the Lebanese embassy stating that you were no longer employed or sponsored by the embassy. Therefore it can not be seen that you are employed as a domestic worker and do not meet the sections of the immigration rules as stated above."

The appeal to the First-tier Tribunal

28. The appellant appealed to the First-tier Tribunal against the 25 April 2014 decision. That tribunal considered that the appellant had a right to appeal the 25 April 2014 decision as it was an immigration decision within the meaning of section 82 of the 2002 Act. The First-tier Tribunal, however, dismissed the appeal.

The Appeal to the Upper Tribunal

29. The appellant appealed, with permission, to the Upper Tribunal. By a decision dated 16 November 2018 the Upper Tribunal found that there had been an error of law on the part of the tribunal below. That tribunal had failed to consider whether the 25 April 2014 decision was, in fact, an appealable immigration decision for the purpose of section 82 of the 2002 Act. In particular if, as the appellant submitted, she had never qualified as an exempt person under the 1971 Act, the question arose as to whether she had, in fact, ever been given leave to enter the United Kingdom and whether the 25 April 2014 decision was a "refusal to vary a person's leave to enter or remain in the United Kingdom." The Upper Tribunal adjourned that matter to a further hearing.

The decision under appeal

30. By a decision dated 11 March 2019, the Upper Tribunal held the following. First, it held that there was no evidence that the appellant had misled the entry clearance officer in 2009. Secondly, it held that the entry clearance officer did not make a mistake in classifying the appellant as being exempt. The reasoning for that appears at paragraph 14 of the judgment. The Upper Tribunal noted that the sponsor's name was recorded as the Embassy of the Lebanon not the private name of the Ambassador. Further the entry clearance officer had had access to the contract of employment and had recorded and detailed the basis of the application with care. On that basis, the entry clearance officer

had operated on the information he had been given by the Lebanese Embassy and there was no basis for concluding that he had been mistaken. Thirdly, the Upper Tribunal held that, at least by 16 August 2013, the appellant's circumstances had changed and she was no longer exempt as she was no longer employed by Embassy. The Upper Tribunal judge, therefore, said at paragraph 17 of her judgment that:

> "17. I find that the appellant was given exempt status in 2009 for the validity of her passport only, rather than conferring 'leave', but, prior to the expiry of her passport, her circumstances must have changed. From the time that she was no longer exempt she had 90 days from 16th August 2013 (at the latest) to make a **valid** application for leave. She did not do so. Under Section 8A of the Immigration Act 1971 she was to be
>
> '*treated as if he had been given leave to remain in the United Kingdom for a period of 90 days beginning on the day on which he ceased to be exempt*'.

31. Finally, the Upper Tribunal held that the 90 day period had expired by the end of December 2013 at the latest. Consequently, when the appellant applied on 12 March 2014 for an extension of leave to remain, she did not in fact have any existing leave to remain in the United Kingdom. As the 25 April 2014 decision was not a refusal to vary a person's leave to enter or remain in the United Kingdom it was not an immigration decision within the meaning of section 82(2)(d) of the 2002 Act. There was no right to appeal to the First-tier Tribunal which had had no jurisdiction to entertain an appeal against the 25 April 2014 decision.

THE ISSUES

32. Against that background, and having regard to the grounds of appeal and the written and oral submissions of the parties, the following issues arise:

(1) Did the Upper Tribunal err in holding that the entry clearance officer correctly categorised the appellant as a person exempt from immigration control in 2009 and that her circumstances changed subsequently?

(2) If so, and if the entry clearance officer incorrectly categorised the appellant as a person exempt from immigration control in 2009, what were the consequences of that mistake in respect of the appellant's subsequent immigration status at 12 March 2014 when she applied for leave to remain in the United Kingdom?

THE FIRST ISSUE – THE BASIS OF THE ENTRY CLEARANCE OFFICER'S DECISION

33. Mr Collins for the appellant submitted that the Upper Tribunal erred in finding that the entry clearance officer was correct in concluding that the appellant was exempt from immigration control. On the evidence, the appellant had always been employed personally by the Lebanese Ambassador to the United Kingdom not by the Lebanese Embassy. On that basis the appellant was not a person who was exempt under section 8(3) of the 1971 Act. Further, the representative for the respondent had accepted that was the position in his written submissions dated 21 December 2018 to the Upper Tribunal where he said that the respondent "is minded to accept that as a matter of fact

the appellant was only ever employed on a personal basis by the Ambassador and not as a member of Embassy staff".

34. Ms Gray on behalf of the respondent, submitted that, on a balance of probability, the entry clearance officer did not make a mistake when concluding on the basis of the information provided to him that the appellant was exempt from immigration control as a person employed by a diplomatic mission. The entry clearance officer noted that the sponsor was recorded as the Embassy of the Lebanon not the Ambassador. Further, the entry clearance officer had had access to the contract of employment. In those circumstances, the decision of the entry clearance officer was correct. Therefore, when the appellant came to the United Kingdom a few months later in April 2009 and was employed by the Ambassador personally (not the Embassy) she was a person who at that date ceased to be exempt and who was then treated as having been given 90 days leave to enter pursuant to section 8A of the 1971 Act.

Discussion

35. In my judgment, the Upper Tribunal did err in its consideration of whether the entry clearance officer was correct in concluding that the appellant was an exempt person within the meaning of section 8 of the 1971 Act. First, the fact that the *sponsor* was the Lebanese Embassy does not indicate whether the Embassy or the Ambassador was to be the *employer* of the appellant. Secondly, so far as the entry clearance officer had access to the contract of employment, the description is at least consistent (and arguably more consistent with) the appellant being employed as a domestic worker in a diplomatic household. The record notes that the appellant is to "work in Lebanese Ambassador's residence as a domestic". That could mean that the appellant was to be employed by the Ambassador or by the Embassy to work in the Lebanese Ambassador's residence. The factors relied upon by the Upper Tribunal, therefore, do not indicate that the entry clearance officer was correct in considering that the appellant was exempt from immigration control as she was employed by a diplomatic mission.

36. The likelihood is that, on a balance of probability, there was some misunderstanding or mistake on the part of the entry clearance officer in reaching that conclusion. The evidence is the appellant was only ever employed by the Ambassador personally (not by the Embassy) after she came to the United Kingdom in April 2009. The appellant's statement, and the letters from the Lebanese Ambassador dated 4 July and 13 August 2013 confirm that the appellant was employed by the Ambassador personally from 16 April 2009. The respondent, in her written skeleton argument for this hearing, accepts that at least from the appellant's arrival in the United Kingdom on 16 April 2009, the appellant was in fact employed by the Ambassador personally not by the Embassy. There is no evidence that the arrangements for her employment changed between making the application to the entry clearance officer and her arrival in the United Kingdom. In the circumstances, there is no basis for considering that the entry clearance officer was correct in his classification of the appellant as a person exempt from immigration control. The likelihood on the evidence is that there was a mistake and the entry clearance officer wrongly characterised the appellant as a person who was exempt from immigration control.

THE SECOND ISSUE – THE CONSEQUENCES OF THE MISTAKE MADE BY THE ENTRY CLEARANCE OFFICER.

37. The next issue is what consequences flow from the fact that the entry clearance officer mistakenly regarded the appellant as exempt from immigration control and that she was permitted to enter the United Kingdom on that basis?

38. Mr Collins submitted that the appellant had been categorised as visa exempt until the expiry of her passport, that is until 8 January 2014. She ought therefore to be treated as visa exempt until that date and treated as having leave for a further 90 days from 8 January 2014, by reason of, or by analogy with, section 8A of the 1971 Act. In addition, the appellant would have been allowed a further 28 days before she was regarded as an overstayer in order to enable her to regularise her immigration status. That, he submitted, followed from the decision in *R v Secretary of State for the Home Department ex parte Ram* [1979] 1 W.L.R. 148. In those circumstances, the appellant should be treated as a person who had leave to remain when she applied for an extension of leave on 12 March 2014. Accordingly, the First-tier Tribunal had jurisdiction to hear an appeal against the decision of 25 April 2014 refusing that application. Alternatively, the appellant should be treated as being exempt until the respondent notified her that she should no longer proceed on the basis that she had exempt status. That only occurred, at the earliest, on 25 November 2013 when the respondent rejected the 16 August 2013 application and informed her that its checks showed that she was employed by the Ambassador personally not by the Embassy. The appellant should therefore be treated as having 90 days leave from that date and, with the additional period of 28 days given to persons to regularise their immigration status, the appellant should not therefore have been treated as an overstayer on 12 March 2014. The First-tier Tribunal, therefore, did have jurisdiction to entertain an appeal against the refusal of that application.

39. Ms Gray submitted that, on the hypothesis that the entry clearance officer had made a mistake, the appellant should be treated as if she were exempt under the 1971 Act but the respondent would not be required to treat her better than she would have been treated under that Act. In that case, the appellant would have been treated as exempt until she knew that she did not in fact meet the requirements for exempt status. That occurred in either June 2013 or, at the latest, on 16 August 2013 when she applied for leave to remain on a basis (as a domestic worker in a private household) which was different from the basis on which she would have been exempt from immigration control. In those circumstances, even if the appellant were treated as if she had the equivalent of 90 days leave to remain, and was given a further 28 days to regularise her position, she did not have leave to remain and was an overstayer on 12 March 2014. Accordingly, the Upper Tribunal was correct to find that the First-tier Tribunal had no jurisdiction to entertain an appeal against the 25 April 2014 decision.

Discussion

40. First, the appellant was not, in fact, a person who had ever been exempt from immigration control by virtue of section 8 of the 1971 Act. Consequently, she was not in fact a person who ceased to be exempt from immigration control and therefore section 8A of the 1971 Act did not apply to her.

41. Secondly, the conclusion of the entry clearance officer in 2009 that the appellant was exempt was mistaken or based on a misunderstanding of the position. The appellant was not responsible for that error. On the findings of the Upper Tribunal, the appellant

did not mislead the entry clearance officer. The error was not induced by any fraud or dishonesty or misrepresentation by the appellant.

42. The question then is whether the principles of procedural fairness, or any general common law obligation of fairness, would operate to mitigate the effects of the mistake of the entry clearance officer. There is an argument that, on the facts of the present case, fairness would require that the appellant be treated as if she were a person who was exempt under section 8 of the 1971 Act. The argument is that that position should continue until it could be demonstrated that the appellant knew that she was not entitled to be treated as a person exempt from immigration control. That would be analogous to the situation provided for by section 8A of the 1971 Act where a person ceased to be exempt. That would frequently occur when the individual knew that he had lost his exempt status, for example, when his employment with a diplomatic mission terminated. The respondent would not necessarily be aware that circumstances had changed and that the individual had ceased to be exempt from immigration control. In those circumstances, the individual would be treated as if he had been given 90 days leave. That would give him a period of time to enable him to regularise his immigration status.

43. The appellant could be treated in an analogous way. She could be treated as exempt until the time when she knew that she was not entitled to be treated as exempt. Thereafter, she could be treated as if she had the equivalent of 90 days leave to remain and should not be treated as an overstayer or a person without leave to be in the United Kingdom during that period. If that were done, then during that 90 day period (and, it would seem, the 28 day additional period during which persons are not treated as overstayers), she would be able to regularise her immigration position by applying for leave on any basis which she considered was applicable. Whether fairness required that that approach should be taken would depend upon a careful analysis of the decision of the Supreme Court in *R (Pathan) v Secretary of State for the Department* [2020] UKSC 41, delivered after the hearing in this case. In the circumstances of this case, however, it is not necessary to consider or reach a conclusion on that issue for the following reason.

44. Fairness would not in any event require, as Mr Collins submitted, that the appellant be treated as if she had been recognised as having exempt status until the expiry of her passport on 8 January 2014 (and then treating her as if she had leave to remain for 90 days). Nor would fairness require that there be any need for any formal decision by the respondent notifying her that she could no longer proceed on the basis that she had exempt status. That would be to treat the appellant more favourably than she would have been treated if she had, in fact, originally been exempt from immigration control. No such notification would be required when a person ceased to be exempt.

45. In the present case, as appears from her statement, the appellant knew by 25 June 2013 that she did not qualify for exempt status and she should have been granted leave to enter as a domestic worker in a diplomatic household. Certainly, by 16 August 2013, the appellant knew that she did not meet the requirements for exemption from immigration control and did in fact apply for leave to remain. As I have indicated, there are arguments as to whether fairness would require that the appellant should not be treated as an overstayer or a person in the United Kingdom without leave until 90 days (together with the additional 28 day grace period) had passed after she realised that she did not satisfy the requirements for exemption from immigration control. That would

have enable the appellant to make an application for leave to remain (as she in fact did albeit her application was refused as it was invalid). That period had, however, expired well before 12 March 2014. The period would have expired by the end of October or November 2013 at the latest. The Upper Tribunal was, therefore, correct in concluding that the 25 April 2014 decision was not an immigration decision within the meaning of section 82(2)(d) of the 2002 Act as it was not a refusal to vary the appellant's leave to enter or remain in the United Kingdom. The fact is that the appellant did not have leave to enter or remain as at 12 March 2014 and there was no basis for treating her as if she did have such leave. Consequently, the Upper Tribunal was correct to conclude that the appellant had no right to appeal against that decision to the First-tier Tribunal.

46. Mr Collins relied in particular on the decision in *R v Secretary of State for the Home Department ex parte Ram* [1979] 1 W.L.R. 148. There, the claimant came to the United Kingdom from India. He presented his passport to the immigration officer at Heathrow Airport. He told the immigration officer that he was coming to the United Kingdom to attend a wedding. He did not make any misrepresentations. The immigration officer placed a stamp in the claimant's passport to the effect that he had been given indefinite leave to remain. On subsequent occasions when the claimant left the United Kingdom and returned, the last occasion being in February 1977, the claimant did not make any misrepresentation to the immigration officer. He presented his passport and that was again stamped with a stamp stating the claimant had been granted indefinite leave to remain. Mr Collins submitted that the appellant in the present case should be granted exempt status in the same that the claimant in *Ram's* case had been treated as having been granted indefinite leave to remain.

47. The decision in *Ram* is not in fact applicable to this case. In *Ram,* the Divisional Court held that the immigration officer had granted the claimant indefinite leave to remain in the exercise of powers given to him by section 4 of the 1971 Act. He had the power to grant indefinite leave and had done so, albeit that he had failed to appreciate that the circumstances were such that the claimant should have been granted limited leave not indefinite leave. In the present case, the question of whether the appellant was entitled to exemption from immigration control depended on a state of facts, namely that she was employed by a diplomatic mission. She was not so employed. She was not, therefore, exempt from immigration control. There was no question of her being granted a status by the entry clearance officer in the exercise of a statutory power. Further, there was no need on the part of the respondent to revoke or terminate any such status.

48. The parties referred to, upon, amongst others, the decisions in *Mangoo Khan v Secretary of State for the Home Department* [1980] 1 W.L.R. 569, *R v Secretary of State for the home Department ex parte Bagga* [1991] 1 Q.B. 485, *Secretary of State for the Home Department ex parte Mowla* [1992] 1 W.L.R. 70 and *R (B and others) v Secretary of State for the Home Department* [2016] UKUT 00135 (IAC). None of those decisions on analysis assist in resolving the issues in the present case.

CONCLUSION

49. The Upper Tribunal erred in finding that the entry clearance officer had not made a mistake when he concluded that the appellant was exempt from immigration control in 2009. The Upper Tribunal was correct, however, in concluding that the appellant did not have leave to remain in the United Kingdom when she applied for an extension of

leave on 12 March 2014 and there was no basis for treating her as if she had such leave. In those circumstances, the 25 April 2014 decision refusing that application was not an immigration decision within the meaning of section 82(2)(d) of the 2002 Act. The appellant, therefore, had no right of appeal against that decision. I would therefore dismiss the appeal against the decision of the Upper Tribunal for that reason.

Lord Justice Peter Jackson

50. I agree.

Lord Justice Underhill

51. I also agree.

ORDER

UPON HEARING Mr James Collins (instructed by Douglass Simon Solicitors) for the Appellant and Ms Jennifer Gray (instructed by The Government Legal Department) for the Respondent at the hearing on 20 October 2020

IT IS ORDERED THAT:

1. The appeal is dismissed.
2. The Appellant is to pay the Respondent's costs of the appeal, to be the subject of detailed assessment if not agreed.

Dated 28 October 2020