Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/27817/2014
IA/27819/2014
IA/27821/2014
& IA/27822/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14th April 2015	**On 17th April 2015**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LTG (1)
LJG (2)
LAG (3)
LBG (4)
(ANONYMITY ORDER MADE)

Respondents

Representation:
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Ms U Miszkiel, Counsel instructed by S Satha & Co

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State but I will refer to the parties as they were before the First-tier Tribunal.

2. The first appellant is a citizen of the Philippines born on 12th April 1972. The other appellants are also citizens of the Philippines. The second appellant is her dependent husband born on 15th October 1971, the third appellant is her dependent son born on 3rd March 2000, and the fourth appellant is her dependent son born on 25th March 2002. The second, third and fourth appellants have been in the UK as dependents of the first appellant since 19th June 2010.

3. The first appellant came to the UK on 18th September 2008 with leave to enter as a student, she remained in this capacity and then as a Tier 4 student migrant until 31st July 2011. She was then granted further leave to remain as a Tier 1 post-study work migrant until 24th August 2013. She was then given leave as a Tier 2 general migrant until 14th May 2014.

4. On 13th May 2014 she made an application to extend her leave as a Tier 2 general migrant, but this application was refused on 20th June 2014 as she was not awarded full points under Appendix A as she could not satisfy the requirement that the resident labour market test had been met. Her appeal against the decision to refuse was allowed under the Immigration Rules by First-tier Tribunal Judge Robinson in a determination promulgated on the 18th December 2014.

5. Permission to appeal was granted by Judge of the First-tier Tribunal Ransley on the 10th February 2015 on the basis that it was arguable that the First-tier judge had erred in law in finding that the first appellant did not have to meet the resident labour test on the basis that she had been last given leave as a post-study work migrant when in fact this was not the case as the last leave granted to the appellant was as a Tier 2 general migrant.

6. The matter came before me to determine whether the First-tier Tribunal had erred in law

Submissions – Error of Law

7. Ms Miszkiel had not been provided with the Secretary of State's grounds of appeal so at the start of the hearing she was given these and time to read them. She requested anonymity for the appellants. Ms Isherwood did not object to this so I agreed to this request.

8. Ms Isherwood relied upon the grounds of appeal. It was clear that the first appellant had last been granted leave as a Tier 2 general migrant and thus it was an error of law to find that the first appellant was

exempt from the resident labour market test under paragraph 78B of Appendix A on the basis of having last been granted leave as a Tier 1 post study work migrant.

9. Ms Miszkiel argued that the Judge Robinson had been aware of the appellant's immigration history and had none the less decided that the appellant qualified for an exemption from the resident labour market test.

10. I informed the parties that I found that Judge Robinson had erred in law and that the decision would be set aside in its entirety for the reasons set out below. The parties were both content to proceed immediately with the remaking of the appeal.

Conclusions – Error of Law

11. The First-tier Tribunal erred in law as a reading of the findings at paragraphs 21 to 29 of the determination appears to conclude that the appellant was exempt from the resident labour market test because she had last been granted leave on the basis of post-study work which it is agreed by all was not the case. Whilst it is true that Judge Robinson sets out the correct immigration history for the appellant at paragraph 4 of his determination and thus seems to be fully aware that she had last been granted leave as a Tier 2 general migrant, and refers to this at paragraph 26, there is no reasoning in paragraph 26 to enable the reader to understand why he therefore concluded that the appellant qualified for the exemption from the resident labour market test which was based on a past grant as a Tier 1 post-study work migrant.

Evidence and Submissions – Re-making

12. The first appellant gave evidence.

13. She confirmed her two statements were true and correct and her evidence to the Tribunal. In brief summary in these statements she says she came to the UK as a student and completed a Masters degree in business administration at the University of Wales. She was then granted leave as a post-study work migrant. She worked as a marketing officer for Glyndwr University from January 2012. They applied for her to remain as a Tier 2 general migrant. However Glyndwr University only provided her with the COS number and not full details of the application they made on her behalf. She was shocked when she got her permission to stay back and it was only for nine months. Her boss explained that her job was in fact just a maternity cover post. Although initially he assured that her work would be extended this turned out not to be the case, and her contract with Glyndwr University was terminated to end on 30th April 2014 by notice given on 10th April 2014.

14. The first appellant found another institution, Opal College, needed a marketing officer so she applied immediately and they issued her with a COS. Opal College decided that she did not need to meet the Tier 2 resident labour market test and she trusted them. In her first application as a Tier 2 general migrant she was exempt from the resident labour market test. She therefore did not understand why it had been applied and used as the basis of her refusal in this instance.

15. Both Glyndwr University and Opal College have since had their Tier 4 sponsor licences suspended.

16. The first appellant had been lawfully resident throughout her stay in the UK and the refusal had cost her loss of earnings and legal expenses. The refusal has also affected the third and fourth appellants (her children) who are in full time education.

17. In oral evidence, in summary she added that the second appellant (her husband) is working in the UK but has not been able to accept a promotion because of their immigration difficulties. She had no evidence for the Tribunal about his earnings however. She thought she would need at least a month to find a new sponsor if her appeal were allowed. She clarified that the Home Office had granted the length of leave Glyndwr University had requested for her. She was very frustrated by the fact she was only given 9 months however as she had believed it would be for 3 years. She had worked for Glyndwr University for two years and had a nice position and thought it would continue. She had understood she was in the UK in a temporary capacity but also knew if she had five years leave as a Tier 2 migrant she could qualify for indefinite leave to remain.

18. The first appellant explained that the third and fourth appellants (her children) were very anxious because of the immigration situation of the family. It would be difficult for the family to return to the Philippines as they had no house and she and the second appellant had left their jobs there to come to the UK. Her parents were retired and could not financially support them, and it would not be easy to get jobs in the Philippines.

19. Ms Isherwood submitted that she relied upon the reasons for refusal letters. The refusal letter awarded the first appellant no points for sponsorship under Appendix A as the appellant had moved employer from Glyndwr University to Opal College and therefore had to meet the resident labour market test under Appendix A. This had not been met in the way required by Appendix A (advertising in Jobcentre Plus etc) and so no points could be awarded for sponsorship. All other points were awarded under Appendix A, B and C. The second, third and fourth appellants were refused as dependents as the first appellant had not been granted leave as a Tier 2 general migrant.

20. Ms Isherwood also submitted that the COS is clear that advertisement of the job had not taken place: the first appellant was simply said to pass the resident labour market test because she had a Masters degree. She also took me to the relevant Immigration Rules regarding points under Appendix A and the resident labour market test, and its exemptions. She argued that the appellant failed therefore at paragraph 245HD (f) and therefore any issue of the ambiguity of paragraph 245HD (k) or with respect to appropriate salary rates at 14 of Appendix J was irrelevant as the appellant had already failed under the Rules at an earlier stage. The Immigration Rules under which the appellant failed were not unclear or ambiguous.

21. In relation to Article 8 ECHR the appellants could not succeed under the Immigration Rules at paragraph 276ADE as they had ties with the Philippines with relatives still living there. This was not a family life case as all members of the family would be removed together. Further when looked at outside of the Immigration Rules there was no "historic injustice" to the appellant by the Home Office: her employer Glyndwr University had asked for permission for nine months for the appellant and this had been granted. There was no good reason to look at this matter outside of the Rules. However when s.117B of the Nationality, Immigration and Asylum Act 2002 was examined the appellants simply had precarious private life which should be given little weight and had not shown that they could financially support themselves. The appellants had all previously had accommodation, jobs and education in the Philippines and this could happen again.

22. Ms Mizskiel submitted that she relied upon her skeleton argument and made oral submissions. In summary she submitted, in what she accepted was a complex submission, that paragraph 245HD (b) of the Immigration Rules regarding those with previous leave as Tier 2 migrants was internally inconsistent with paragraph 245HD (k), and that (k) was ambiguous. She submitted that because of this the resident labour test should not be applied to the first appellant even though she had previous leave as a Tier 2 general migrant. It was notable that the appellant's previous Tier 1 post-study work status continued to regulate her ability to satisfy the Rules with a new entrant salary for 3 years and one month of her time with leave as Tier 2 migrant in accordance with paragraph 14(d) of Appendix J of the Immigration Rules. It was illogical if the lower salary rate continued to apply to the first appellant on this application a she was within this time band that a resident labour market test should be applied. It had been Opal College's view that such a test did not apply to the first appellant because of her Master's degree and this was evidence of the Rules being impossible to understand; and in accordance with Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304 it was right not to apply such a test.

23. Ms Mizskiel also argued that the appellants should be allowed to remain under Article 8 ECHR. She accepted that the appellants could not meet the requirements of the Immigration Rules at paragraph 276ADE or Appendix FM. She said that the first appellant had been treated unjustly by both Glyndwr University and by Opal College. This historic injustice and the best interests of the children to continue with their education in the UK meant that the family should be allowed to remain. She relied upon Ferrer, Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 and R (on the application of) New College London v SSHD [2011] EWHC 856 (Admin) in holding that the system of sponsorship should not be brought into disrepute, and that the misleading behaviour/ advice of both sponsoring colleges was therefore relevant to the Article 8 ECHR consideration of this matter. She maintained that the appellants had not been precariously in the UK as Tier 2 migrant leave can lead to settlement after five years, and that the second appellant had a job and potential promotion so the family were financially self-sufficient.

24. At the end of the hearing I reserved my determination on remaking.

Conclusions – Remaking

25. The case of Ferrer is authority for the principle that if provisions of the Immigration Rules are ambiguous or obscure then it is legitimate to interpret those Rules as not treating a limited class of persons unfairly unless there are policy reasons disclosed for that unfairness. However it is also clear that the ordinary principles of statutory interpretation are not displaced. If the plain and ordinary meaning of the Rules is clear then considerations of fairness cannot produce a different interpretative result, see paragraph 55 of the determination.

26. I accept that aspects of the Immigration Rules relating to Tier 2 migrants differ in the impact of a past grant of Tier 1 post-study work leave. This past grant has an effect on salary under Appendix J which lasts for a period of 3 years and one month as a Tier 2 migrant, and thus continued to benefit this appellant in her second application for leave as a Tier 2 (general migrant) as her first grant had only been for nine months. In contrast the provisions regarding exemption from the resident labour market test at paragraph 78B of Appendix A cease to apply once a second application for Tier 2 general migrant leave is made, as a current or last grant of leave as a Tier 2 migrant does not appear on the list at paragraph 78B (b) of Appendix A to the Immigration Rules.

27. It is not clear to me why this situation should be considered unfair. I do not find it ambiguous. It may be complex, and it may have been what confused Opel College, but I do not see that on fairness grounds it is open to challenge.

28. The provisions for a grant of leave as a Tier 2 general migrant are set out at paragraph 245HD. The first appellant is able to satisfy 245HD (a) and (b) which it is accepted are clear. Provisions at (c), (d) and (e) are not relevant to the first appellant. 245HD (f) is the provision that states the first appellant must have a minimum of 50 points under paragraphs 76 to 79D of Appendix A, which is where the resident labour market test and its exemptions are set out, and where the respondent argues she fails. Provisions at (g) and (h) do not apply to the appellant, and (i) and (j) concern points under Appendices B and C which she is awarded and satisfies.

29. It is true that the wording of 245HD (k) is odd saying that an applicant must not have had leave as a Tier 2 migrant during the 12 months before the date of application unless, and then one option is, the last grant was as a Tier 2 migrant. It seems to suggest it would not fulfil this provision if an applicant had leave as a Tier 2 migrant and then afterwards in some other capacity all within the past twelve months. However this arguably obscure provision is not one in which the first appellant is caught up. She clearly falls within 245KH (k)(i) and so is able to satisfy the provision without any confusion. I see no reason to think that any obscurity for other applicants under this provision aids an argument that the first appellant does not need to satisfy the resident labour market test as set out in Appendix A.

30. I therefore find that the first appellant does not meet the requirements of the Immigration Rules as she was required to meet the resident labour test at paragraph 78 of Appendix A as none of the exemptions applied at paragraphs 78A, 78B and 78C and because the methods of satisfying the test set out in paragraph 78 had not been carried out by Opal College. She therefore failed to acquire the necessary 50 points needed and was correctly refused for failing to meet paragraph 245HD(f) of the Immigration Rules. The second, third and fourth appellants were therefore also correctly refused as dependents under paragraph 319 of the Immigration Rules.

31. It is accepted by the appellants that they cannot meet the Article 8 ECHR Immigration Rules at paragraph 276ADE and in Appendix FM.

32. It is argued that I should look at Article 8 ECHR outside of these Rules as not all aspects of their case are considered under the Rules so I have done this.

33. I am satisfied that the appellants have private life in the UK and that removal from the UK would interfere with that private life: the first appellant has lived in the UK for six and a half years and the other appellants for almost five years. The first and second appellants have worked in this country and the third and fourth appellants attended school. As none of the appellants can meet the Immigration Rules the interference with their right to respect for private life would be in

accordance with the law. The respondent justifies this interference with the Article 8 ECHR rights of the appellants as in the economic interests of the UK through application of a consistent policy of immigration control.

34. I must finally consider whether the interference with the private life rights of the appellants which will result on their removal is proportionate given the public interest in their removal. I must have regard to all the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002 in determining whether the respondent's decision is proportionate. I note that immigration control is in the public interest. I do not find that the status of the appellants until the refusal in June 2014 was precarious. I thus conclude that the majority of their time in the UK has been spent with non-precarious status. I am also satisfied that they have been, and if they were allowed to remain they would be, financially independent and all speak good English and thus would not be a burden on taxpayers and would be able to integrate in the UK.

35. I accept that the third and fourth appellants are doing well at St Marks Academy as I have read letters from their schools. I accept that the first appellant was poorly treated by Glyndwr University and badly advised by Opal College, however I do not find that these experiences strengthen her private life ties to the UK or provide reason why she should be allowed to remain here. As Ms Isherwood submitted the Secretary of State is not at fault in providing a poor service to the appellants in this case. Ultimately I find that all the appellants can reasonably be expected to resume their private lives in the Philippines where they lived together accessing work, accommodation and schools until 2008. The information before me is that the first, third and fourth appellants are all very intelligent people. The second appellant is said by the first appellant to have recently acquired a promotion at work and thus I assume he is likewise normally able and adaptable. I accept that it may be unsettling, disappointing and disruptive in the short term to have to relocate to their country of nationality but I was provided with no reason to believe that they would not successfully re-establish their private lives in the Philippines.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I re-make the decision in the appeal by dismissing it under the Immigration Rules and on human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper

Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a possibility of serious prejudice arising to the first appellant should she seek further employment in the UK in the future.

Signed: Date: 15th April 2015

Upper Tribunal Judge Lindsley

Fee Award Note: this is **not** part of the determination.

There can be no fee award as I have dismissed the appeal.

Signed: Date: 15th April 2015

Upper Tribunal Judge Lindsley