Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29685/2014
IA/29929/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 10 March 2015	**On 29 May 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR JIJU RAVINDRANATH
MR OMKAR VISHNU JIJU

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms Marion Cleghorn of Counsel, instructed by Alex Bell Immigration Law
For the Respondent: Mrs H Rackstraw, Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellants are a father and son. They are both nationals of India. They appeal against a decision by Judge of the First-tier Tribunal Duff dismissing their appeals under the Immigration Rules and under Article 8.

2) The Judge of the First-tier Tribunal records that the first appellant came to the UK in September 2006 with entry clearance as a work permit holder.

This leave was extended and in February 2011 he was granted leave to remain as a Tier 2 (General) Migrant. Leave was further extended from August 2013 until January 2016. On 12 December 2013, however, the respondent wrote to the first appellant at his employer's address stating that because the sponsor licence of his employer had been revoked, his leave was curtailed so as to expire on 10 February 2014. Shortly prior to the expiry the first appellant applied for indefinite leave to remain as a Tier 2 (General) Migrant, with the second appellant as his dependant. This application was refused in a decision dated 12 July 2014 because the sponsor in respect of the first appellant's most recent grant of leave no longer held a Tier 2 sponsor licence, this having been revoked.

3) The first appellant's argument before the First-tier Tribunal appears to have been essentially that as he was continuing to do the same job in the same restaurant his employment had not changed – only the identity of his employer had changed. However that would not avail the first appellant as in terms of paragraph 245HF(d)(i) of the Immigration Rules, the first appellant had to show that the sponsor issuing the Certificate of Sponsorship in respect of his last grant of leave still held, or had applied for a renewal of, a Tier 2 sponsor licence in the relevant category. The first appellant could not show this. An attempt was made to argue on behalf of the first appellant that he would benefit from the Transfer of Undertakings (Protection of Employment) Regulations 2006 but at the hearing itself it was acknowledged that as all the companies who had employed the first appellant had gone into liquidation or had their licences revoked, the first appellant could not succeed under the Immigration Rules and the argument was therefore restricted to Article 8.

4) In his evidence before the First-tier Tribunal the first appellant stated that he had never seen the letter of 12 December 2013 from the respondent curtailing his leave. The judge expressed some doubt about this in view of the timing of the application of 30 January 2014 to extend leave but the judge nevertheless accepted that the first appellant was unaware of the curtailment of his leave.

5) At the hearing before the First-tier Tribunal it was acknowledged on behalf of the appellants that their appeals would not succeed under Appendix FM or paragraph 276ADE. The judge looked at the application of Article 8 outwith the Rules, having regard to section 117B of the Nationality, Immigration and Asylum Act 2002 and found that their removal would not be disproportionate.

6) The application for permission to appeal pointed out that the first appellant had without his knowledge been working illegally between January 2014 and July 2014 under the misapprehension that his employer had the correct authorisation for him. When he realised on receipt of the respondent's refusal decision that his employer did not have a valid licence to sponsor him, he immediately resigned. It is acknowledged that the employer had gone to various lengths to avoid its immigration responsibilities but this was not known to the first appellant.

7) It is further stated in the application that the letter of 12 December 2013 was addressed to the first appellant but sent to the business address of his previous employer, which was a company which had gone into liquidation. All other correspondence had been sent to the first appellant at his home address. The first appellant did not receive this letter and was unaware that his leave had been curtailed.

8) It is then submitted that the Judge of the First-tier Tribunal erred by not engaging with the curtailment letter of 12 December 2013. This letter informs the first appellant of his situation and allows him 60 days to obtain other employment with an employer holding the necessary sponsorship. If the first appellant was unable to find alternative employment within this period he would lose his right to a Tier 2 visa. It was argued for the first appellant that as he did not receive this letter he was deprived of the opportunity of finding a new employer holding a certificate of sponsorship. This was the issue which the Judge of the First-tier Tribunal should have addressed but failed to do so. Although the respondent's refusal decision was made in reliance upon paragraph 245HF(d)(i) of the Immigration Rules, it was clear from the Tier 2 Policy Guidance that a change in employer was permitted. This was provided for at paragraph 229 of the guidance where leave was curtailed. In addition, it is pointed out that the letter curtailing leave was unsigned. Not only did the Judge of the First-tier Tribunal fail to deal adequately with the issue of curtailment of leave but his assessment of proportionality was flawed by a failure to take into account the way in which leave had been curtailed without the knowledge of the first appellant.

9) Permission to appeal was granted on the basis that the judge arguably erred in failing to deal with the lack of effective service of the notice of curtailment upon the appellant.

10) A rule 24 notice was lodged on behalf of the respondent stating that the rule authorising curtailment placed no obligation on the respondent to provide any period of time before leave was curtailed. In any event this issue was not material as the first appellant was not working for an employer with a valid sponsor licence so the relevant requirements of the Immigration Rules could not be met.

11) At the hearing Ms Cleghorn referred me to the decision of the Upper Tribunal in Thakur (PBS decision – common law fairness) Bangladesh [2011] UKUT 151. This concerned a Tier 4 applicant who was unaware that his college had lost its sponsor's licence and the applicant had no adequate opportunity of finding an alternative place to study. He had difficulty obtaining another place because of uncertainty over whether he had leave. This applied *mutatis mutandis* to a person in employment. Ms Cleghorn also referred to the case of Patel (revocation of sponsor licence – fairness) [2011] UKUT 00211.

12) Reference was made to the curtailment letter of 12 December 2013 addressed to the first appellant at the office of his former employer and

sponsor, Seama Group Ltd, whose address was given as India House, Church Street, Gateshead, NE8 2AT. Ms Cleghorn submitted that the requirements for service of this notice were to be found in the Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161. This set out at article 8ZA the manner of giving notice of a grant, refusal or variation of leave. Reference was also made to the Immigration (Notices) Regulations 2003, SI 2003/658.

13) Ms Cleghorn submitted that the first appellant's former employer, Seama Group Ltd had gone into liquidation from 1 March 2014. The Secretary of State should have sent the letter of curtailment to the usual address the appellant used for correspondence.

Discussion

14) The first issue for me to decide in this appeal is whether there was service of the letter of curtailment upon the appellant in accordance with the relevant legislative requirements. I note that in terms of article 8ZA.(2) of the Immigration (Leave to Enter and Remain) Order 2000 notice may be –

a) given by hand;

b) sent by fax;

c) sent by postal service to a postal address provided for correspondence by the person or the person's representative;

d) sent electronically to an e-mail address provided for correspondence by the person or the person's representative;

e) sent by document exchange to a document exchange number or address; or

f) sent by courier.

The article then continues as follows:

(3) Where no postal or e-mail address for correspondence has been provided, the notice may be sent –

(a) by postal service to –

(i) the last-known or usual place of abode, place of study or place of business of the person; or

(ii) the last-known or usual place of business of the person's representative; or

(b) electronically to -

(i) the last-known e-mail address for the person (including at the person's last-known place of study or place of business); or

(ii) the last-known e-mail address of the person's representative.

15) Article 8ZA then further provides at (4) that where attempts have been made to give notice in accordance with sub-paragraphs (2) and (3) but this was either not possible or the attempts have failed, then when the decision maker records the reasons for this and places the notice on file the notice shall be deemed to have been given. It is then provided by sub-paragraph (5) that where a notice is deemed to have been given in accordance with paragraph (4) and then subsequently the person is located, the person shall as soon as practicable be given a copy of the notice and details of when and how it was given.

16) Article 8ZB then contains provisions about deemed receipt. Where the notice is sent by post it is deemed to have been given to the person affected on the second day after it was sent by postal service in which delivery or receipt is recorded if sent to a place within the United Kingdom unless the contrary is proved.

17) I accept the submission by Ms Cleghorn that it is article 8ZA of the Immigration (Leave to Enter and Remain) Order 2000 which applies to service of this notice rather than the Immigration (Notices) Regulations 2003. This is because the Notices Regulations apply where the decision being served carries a right of appeal, which this notice of curtailment did not. I am satisfied that the notice was served in accordance with Article 8ZA.(3) because the notice was sent by postal service to the last-known place of business of the first appellant. Although subsequent correspondence was sent to the first appellant at the address given by him in his application for indefinite leave, this correspondence appears all to post-date the notice of curtailment of leave dated 12 December 2013.

18) Matters do not rest there, however, because the Judge of the First-tier Tribunal made a specific finding at paragraph 19 of the determination that the first appellant did not know about the notice of curtailment of leave. In other words he never received it. Article 8ZB raises a presumption that a notice sent in accordance with article 8ZA is deemed to have been given to the person affected unless the contrary is proved. In this instance the first appellant has proved that he was never given the notice.

19) This issue, however, is not determinative of the appeal. The fact that the first appellant was not given notice of the curtailment of leave may be relevant to the issue of fairness and perhaps also to any assessment under Article 8 but it will not assist the first appellant under the Immigration Rules. In January 2014 the first appellant made an application for leave to remain but this was refused because the appellant's employer did not hold a Tier 2 sponsor licence as required by paragraph 245HF(d)(i). The application made by the first appellant could not succeed under the Immigration Rules. The finding to this effect was made by the Judge of the First-tier Tribunal at paragraph 6 of his determination and it appears to have been accepted on behalf of the appellants by Ms Cleghorn at the hearing before the First-tier Tribunal.

20) The first appellant sought to argue in the application for permission to appeal that in terms of the respondent's policy in respect of Tier 2 the first appellant should have had the opportunity to change his employer. The first appellant was unable to avail himself of this opportunity, of course, because he was unaware of the curtailment of leave. The possibility that had the appellant been aware of the curtailment of leave he might have sought and obtained a new employer with Tier 2 sponsorship is only hypothetical. The actual application made by the first appellant in January 2014 was refused by the respondent in terms of the Immigration Rules because it did not meet the requirements of paragraph 245HF(d)(i).

21) It is understandable that the first appellant should feel that he has been let down in these circumstances. This, however, is not the fault of the respondent. The first appellant's former employer, Seama Group Ltd, omitted to inform him of the loss of its Tier 2 sponsor licence and appear to have closed its office without making any arrangements for the forwarding of mail, including the notice of curtailment addressed to the appellant at its office. The appellant's new employer, who had taken over the business where he worked, then failed to inform him that they did not have a sponsor licence and allowed him to carry on working for them seemingly in the knowledge that not only were they misleading the first appellant but they were allowing him to work illegally without his knowledge. The first appellant may well feel aggrieved by this combination of circumstances but it does not follow from this that the respondent has a duty to the first appellant to put matters right.

22) Ms Cleghorn argued before me that in terms of Thakur fairness required that the first appellant be given the opportunity to obtain alternative employment from an employer with a proper sponsor licence. However on the facts of this appeal it is difficult to see any unfairness on the part of the respondent. The notice of curtailment of 12 December 2013 informed the first appellant that his leave would not expire until 10 February 2014, which gave him the opportunity to make a further application. This notice was sent to the appellant in accordance with article 8ZA.(3) and the respondent had no way of knowing prior to the hearing before the First-tier Tribunal that the notice had not been received. This was not the situation envisaged in article 8ZA.(4) and (5) where service has taken place on the file. To the extent that the first appellant has been treated unfairly he has been treated unfairly by his two previous employers, who failed to inform him of his situation following the loss of the sponsor licence by the first employer and the transfer of the first employer's business to the second employer, who held no licence, but failed to inform the first appellant of this. Accordingly I find no breach of a duty of fairness on the part of the respondent.

23) This leaves the claim to private or family life. Before the First-tier Tribunal it was acknowledged that neither appellant would succeed under Appendix FM or paragraph 276ADE. Before me it was contended on behalf of the appellants that the Judge of the First-tier Tribunal did not properly consider Article 8 outside the Rules because he failed to have regard to the

circumstances regarding the curtailment of leave and the transfer of the first appellant's employment.

24) The Judge of the First-tier Tribunal set out the circumstances of the appellants' private and family life. The first appellant has a wife in India from whom he is estranged. He has two daughters who live with his wife and whom he supports. His wife will not consent to a divorce because she fears social stigma. The first appellant has a girlfriend in the UK but she does not meet the definition of a partner under Appendix FM. The first appellant was not aware that he was working for his employer in breach of his leave and as soon as he ascertained this he resigned, which is very creditable.

25) The second appellant has been unable to attend university in the UK because he was told he would have to return to India and apply as a foreign student and pay fees accordingly. He has, however, received the benefit of a secondary education in the UK. He appears also to have commenced an apprenticeship here. He claims that he would find it difficult to study at university in India, in part because of language difficulties, although the judge expressed reservations about this contention. The judge accepted, however, that the second appellant was integrated into his school and into society in the UK and there was nothing which made the presence of either appellant in the UK undesirable. At the same time the judge found there was "nothing remarkable or especial about the position of either appellant and the relationship with the first appellant with Ms Loughram is relatively short lived." On the basis of the facts as found and having regard to section 117B there is no other decision the judge could reasonably have reached under Article 8.

Conclusions

26) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

27) I do not set aside the decision.

Anonymity

28) No order for anonymity was made by the First-tier Tribunal. No application for anonymity was made before me and in the circumstances of the appeal I see no reason for making such an order.

Signed Date

Judge of the Upper Tribunal