



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/39430/2014
IA/39433/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11th September 2015

Decision & Reasons Promulgated
On 22nd September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MRS PARISHABEN KEYUR PATEL
MR KEYUR BALUBHAI PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Jafar, Counsel instructed by Mayfair Solicitors, Hounslow
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of India whose dates of birth are recorded as 27th August 1987 and 23rd July 1984 respectively. On 29th May 2012 the First Appellant was granted limited leave to remain in the United Kingdom until 29th 2014. On 15th May 2014 she made an in time application for variation of her leave. However a decision was made to refuse the application, dependent as it was upon the success of the

Second Appellant's application. The decision made reference to paragraph 319E of HC 395 (as amended) which provides that in the case of an application for indefinite leave to remain as the partner of a relevant points-based system migrant, an applicant must meet certain requirements which essentially include her partner's application being successful. Pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006 a decision was also made to remove the First Appellant in line with her partner. Although no point was taken, I note that the decision itself appears undated.

2. The history of the Second Appellant is important. He entered the United Kingdom on 2nd October 2006. Further leave was granted following various applications until on 15th May 2014 he made an in time application for leave to remain under the settlement provisions for Tier 1 (General) Migrant visas (under the points-based system). This was however, refused. In refusing the application the Secretary of State placed reliance on paragraph 322(1A) and 322(2) of HC 395 (as amended). The Secretary of State upon making enquiries which gave the Secretary of State grounds for believing that the Second Appellant's declared earnings of £30,799 were significantly less. It was his case that in error, he had not declared a second income.
3. The Appellants and each of them appealed to the First-tier Tribunal and on 20th February 2015 the matter came before Judge of the First-tier Tribunal Suffield-Thompson sitting at Columbus House, Newport. Placing the burden of proof upon the Appellants and accepting the submissions made on behalf of the Respondent that paragraph 322(1A) did not require an intention to deceive, notwithstanding finding that there was no deliberate falsehood by the Appellants, the judge went on to dismiss the appeals.
4. Not content with those decisions, by Notice dated 16th March 2015 the Appellants made application for permission to appeal to the Upper Tribunal. On 4th May 2015 Judge of the First-tier Tribunal McDade granted permission thus the matter comes before me.
5. Paragraph 322(1A) provides:

"Where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application",

refusal of leave to remain, variation of leave to enter or remain or curtailment of leave applications are to be refused.

6. Both Mr Jafar and Mr Wilding agreed that there had been a misapplication of the law by the judge. At paragraph 34 of the statement of reasons there was a clear finding that there had been no deliberate falsehood by the Appellants.

7. The Upper Tribunal in **FW (Paragraph 322: untruthful answer) Kenya [2010] UKUT 164** had stated that:

“When a direct question is asked, and answered untruthfully, there is both a false representation and a non-disclosure; and it is not open to an Appellant who gives an untruthful answer to a direct question in an application form to say that the matter was not material”.

However, the Grounds of Appeal to the Upper Tribunal quite properly point to the guidance of the Court of Appeal in **A -v- Secretary of State for the Home Department [2010] EWCA Civ 773** in which the Court of Appeal was clear that dishonesty had to be established. Given the finding by the judge that there had been no dishonesty the Secretary of State’s contentions under paragraph 322(1A) and 322(2), the burden being upon her, were clearly not made out.

8. That error impacts on the judge’s findings at paragraph 43 in which was said,

“The Appellant has been here for ten years but I find that the Appellant [Second Appellant] is not able to apply for indefinite leave under the ten year Rule as he did not qualify for the appropriate points in 2012 due to the discrepancies in his documentation submitted to the HMRC and the Respondent”.

9. Again both Mr Jafar and Mr Wilding were in agreement that the judge was simply wrong. The Second Appellant had demonstrated ten years’ continuous residence because there was no finding open to the judge which would have broken the period of continuity.
10. I am satisfied that there has been a material error of law in the Statement of Reasons. The appeals to the Upper Tribunal are to be allowed. The Decisions of the First-tier Tribunal are set aside and remade such that they are allowed on the basis that the Decisions of the Secretary of State are not in accordance with the law. The Secretary of State will need to consider paragraphs 276B and 276A1 of the Immigration Rules.
11. Without the Secretary of State having considered the position of the Second Appellant any decision in relation to the First Appellant also cannot stand and so too, for the avoidance of doubt her appeal is remade on the same basis.

Notice of Decision

The appeals to the Upper Tribunal are allowed. The decisions of the First-tier Tribunal in relation to each Appellant are set aside and remade such that they are allowed on the basis that the Decisions of the Secretary of State are not in accordance with the law.

Signed

Date

Deputy Upper Tribunal Judge Zucker

TO THE RESPONDENT
FEE AWARD

As incorrect information was given to the Secretary of State justifying her putting the Appellants to proof I have decided not to make any award.

Signed

Date

Deputy Upper Tribunal Judge Zucker