IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/52999/2013
IA/53023/2013
IA/53015/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 May 2015	**On 19 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS SIBI PLAVUNILKUNNATHIL SAMUEL – FIRST APPELLANT
MR SAMSON SAMUEL – SECOND APPELLANT
MISS STREEVA SAMSON – THIRD APPELLANT
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms F Allen Counsel instructed by Paul John & Co Solicitors
For the Respondent: Mr A Tarlow, Specialist Appeals Team

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal dismissing their appeals on the ground that the Tribunal had no jurisdiction to hear the appeals, as there was no relevant immigration decision for them to appeal

against. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellants should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The appellants are all nationals of India. The first appellant is the wife of the second appellant, and the third appellant is their child born on 12 July 2006. As the first appellant is the lead appellant, I shall hereafter refer to her simply as the appellant save where the context otherwise requires.

3. The appellant arrived in the United Kingdom on 29 September 2009 with valid entry clearance as a Tier 4 (General) Student Migrant. The visa was valid until 31 July 2011. Her husband and daughter joined her in the United Kingdom as student dependants on 11 July 2010. On 6 September 2013 the appellant gave birth in the UK to a son.

4. The appellant came to study a level 3 course in health and social care. After successfully completing this course, she enrolled at the same institute to follow a level 7 course in leadership and management. She had leave to remain as a Tier 4 Migrant till 30 September 2013 to study at Park Royal College Ltd. The licence for this college was revoked by the Secretary of State on 5 June 2013, and the appellant's leave to remain was curtailed so as to expire on 26 August 2013. The appellant managed to complete her level 7 course, and to secure admission to follow a BSc (Hons) nursing studies course of pre-sessional English at the University of Bedfordshire.

5. This institution issued her with a CAS, upon which the appellant relied in her application for further leave to remain as a Tier 4 (General) Student Migrant. As far as she and her representatives were concerned, she applied for further leave to remain before her visa expired. This was by making an online application through her representatives on 23 August 2013.

6. However, the Home Office treated the appellant has having made her application out of time. On 25 November 2013 the respondent gave her reasons for refusing the application. The Secretary of State was not satisfied that she had a valid CAS because the reference number submitted with her application had been withdrawn by the sponsor. The CAS checking service was checked on 25 November 2013, and it confirmed that the CAS had been withdrawn. She had made her application on 29 August 2013, but her leave to remain had expired on 26 August 2013. She therefore did not have leave to remain at the time of her application, and so there was no right of appeal against the decision.

The Hearing Before, the Decision of, the First-tier Tribunal

7. The appellant's appeal came before Judge Henderson sitting at Hatton Cross in the First-tier Tribunal on 30 September 2014. Both parties were legally represented. In her subsequent decision, Judge Henderson found that the respondent had attempted to move the goal posts. The Home Office had previously contended the application was made after the expiry of the visa, but by letter dated 22 January 2014 they were

now asserting that the application procedure which had been followed prior to that date was not valid.

8. The judge found at paragraph [27] that the appellant had made a valid application using the correct online procedures on 23 August 2013. Indeed, all three appellants had made a valid application for leave based on the production of the online application forms which she had seen.

9. The judge went on to consider an argument advanced by the Presenting Officer that she had no jurisdiction to consider the appeals as there was no immigration decision.

10. The judge noted that although there were letters giving reasons for refusing the applications in respect of all three appeals, none of the three files contained a "notice of immigration decision". The judge was unclear whether this was a result of an error by the respondent on making the decision or whether the notices were simply not sent out.

11. The judge went on to refer to **Singh v Secretary of State for the Home Department [2014] EWCA Civ 438**. She said that in that case the Court of Appeal said it was important that Immigration Judges ensured that there was an immigration decision in existence when considering an appeal or an application for permission to appeal. The refusal letter was not the notice of immigration decision and it did not generate a right of appeal. The notice of immigration decision had to comply with the provisions of the Immigration (Notices) Regulations 2003. The Court of Appeal held:

> If there is no immigration decision the appeal is usually been able to be disposed of immediately by a decision that the Tribunal has no jurisdiction to hear the appeal.

The Application for Permission to Appeal

12. Ms Allen, who did not appear below, settled the appellant's application for permission to appeal to the Upper Tribunal. She stated that Judge Henderson had misapplied **Ved and Another (appealable decisions; permission application; Basnet) [2014] UKUT 00150 (IAC)** to which she had referred at paragraph [32].

The Grant of Permission to Appeal

13. On 19 February 2015 First-tier Tribunal Judge Nicholson granted permission to appeal. If the judge was correct, then the appellants were still awaiting service of a lawful decision on their application. No doubt the expedient way forward, given the judge's findings, was the respondent to have issued a formal notice of decision, so that the appeal could proceed from there by way of agreement.

14. The passage quoted by the judge did not in fact come from the case of **Singh v SSHD [2014] EWCA Civ 438**. Although, in broad terms, the passage was correct and a refusal letter, which did not comply with the notices and Regulations, is not necessarily an immigration decision, it was arguable that a letter which complied with those Regulations could constitute an immigration decision and that strict

compliance can in any event be waived by the appellants: see **DJ [2004] UKIAT 00194** (Ouseley J and Ockleton).

The Rule 24 Response

15. On 24 March 2015 a member of the Specialist Appeals Team settled a Rule 24 response on behalf of the respondent. Having found that the appellant had made an in time application, the refusal of her application constituted an immigration decision under Section 82(2)(d) of the Nationality, Immigration and Asylum Act 2002, in substance rather than form. On this basis, the judge erred in concluding there was no jurisdiction to hear the appeal.

The Hearing in the Upper Tribunal

16. At the hearing before me, Mr Tarlow initially adhered to the position taken in the Rule 24 response. This was that the appeal should be remitted to the First-tier Tribunal for a hearing on the merits.

17. I explored with Ms Allen the appellant's case on the merits. She drew my attention to paragraph [10] of the appellant's witness statement dated 25 September 2014 in which she said as follows:

> Once you receive the refusal letter we have contacted the sponsor and they have informed us that since they came to know that we have applied for the further leave to remain after the completion of our valid stay. They expected a refusal for the application and therefore they withdraw the CAS.

18. In the same statement at paragraph [15], she asked that the appeal be allowed and that they be given 60 days' time to produce a new CAS letter and the required maintenance.

19. Ms Allen also drew my attention to an email from John Driver sent on 1 April 2014 to the appellant in response to an email enquiry from her. John Driver is a representative of the University of Bedfordshire, as is apparent from his email address [-]. He said as follows:

> My belief is that the university withdrew your CAS as your application for a visa under our sponsorship was submitted after your previous leave to remain had expired. As this was the case, the university would not have been permitted to register you until after you had successfully obtained your visa. Visa processing times were such that your visa would have been obtained too late for you to register. It would therefore have been inappropriate for the university to continue with assigning the CAS to you, knowing that the university would not be able to register you for the course stated on the CAS.

20. Ms Allen submitted that the decision appealed against was not in accordance with the law in the light of the above evidence, and also because there were deficiencies in the refusal letters addressed to the second and third appellant. These deficiencies were discussed by Judge Henderson in paragraph [27] of her decision.

21. Mr Tarlow agreed that in the circumstances the fair outcome was for the matter to be remitted to the Secretary of State for a lawful decision to be made on all three applications, and that a decision should not be made on the applications before 60 days had elapsed, so as to give the appellant the opportunity to obtain a new CAS.

Reasons for Finding an Error of Law

22. The judge erred in law for the reason succinctly stated in the Rule 24 response. Although the refusal letter directed to the appellant was not intended to be an appealable immigration decision, it was in fact an appealable immigration decision as, contrary to what was asserted in the refusal letter, the appellant had made her application when she still had valid leave to remain. So she had continuing leave at the date of refusal pursuant to Section 3C. Thus the effect of the refusal letter was to refuse to vary her leave to remain, with the result that she no longer had leave to enter or remain. This was an immigration decision carrying a right of appeal to the First-tier Tribunal, pursuant to Section 82(2)(d) of the 2002 Act.

The Re-making of the Decision

23. By the date of decision, the Sponsor had withdrawn the CAS, and so the application was rightly refused under the Rules. But the evidence that was before the First-tier Tribunal, which is not challenged by Mr Tarlow, establishes on the balance of probabilities that the appellant has been a victim of common law unfairness.

24. Although it is not specifically alleged by Mr Driver, I infer that the sponsor withdrew the CAS on the prompting of the Home Office. My reasoning is that the sponsor would not have understood from the appellant that she had made an application out of time, as the appellant's understanding was always that her application had been made in time. So only the Home Office could have prompted the sponsor to believe incorrectly that she had made her application *after* her visa had expired. The result is palpably unfair to the appellant. Were it not for the false assertion by the Home Office that she had made her application out of time, the CAS would not have been withdrawn by the sponsor without her knowledge. As it was withdrawn without her knowledge, she did not know and had no reason to know that her application was doomed to fail and she was deprived of the opportunity to make representations to the Home Office before a decision was made on her application.

25. The deficiencies in the refusal letters directed to the second and third appellants highlight the fact that the respondent did not give proper consideration to their applications.

Conclusion

The decision of the First-tier Tribunal contained an error of law, and accordingly the following decision is substituted: the appellants' appeals are allowed on the ground that the decisions appealed against are not in accordance with the law, and a lawful decision on their applications remains outstanding.

Their applications are remitted to the Secretary of State for fresh consideration, provided that no decision shall be taken on their applications until 60 days have elapsed from the date of the promulgation of this decision so as to enable the first appellant to obtain a new CAS.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson