Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04478/2014

THE IMMIGRATION ACTS

Heard at Taylor House	**Decision & Reasons Promulgated**
On 8 October 2015	**On 14 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

MISS KALYANI SIVANATHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pararajasingam of Freedman Alexander LLP Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

The History of the Appeal

1. The Appellant, a citizen of Sri Lanka, appealed against the refusal of the Respondent to grant her entry to the United Kingdom on the basis that, although she had previously held a Tier 2 (General) UK residence permit, her leave under it had been curtailed. Her appeal was heard by Judge Richards-Clarke sitting at Hatton Cross on 29 January 2015. Both parties were represented, the Appellant by Ms Pararajasingam. In a decision of 7th, promulgated on 26th, February the 2015 appeal was dismissed under the Immigration Rules and under Article 8 of the 1950 Convention.

2. Permission to appeal was granted to the Appellant on 23 June 2015 by Judge Nicolson who, after extending the time for appeal, wrote:

> "5. In this case the appellant had been granted a Tier 2 visa valid until 10 July 2016 to work as a business development manager at the Fer View Residential Care Home. The evidence indicates that in August 2013 the respondent was informed by the residential care home that the appellant was not employed there, that in December 2013 the appellant travelled to Sri Lanka, that her leave was curtailed on 21 January 2014 to take effect on 22 March 2014 and that the appellant was then refused leave to enter when she arrived back in the UK on 1 February 2014 on the ground that she no longer held a valid visa. (The respondent's bundle includes a second notice of refusal/cancellation of leave dated 25 March 2014 pointing out that she had never worked in the employment covered by the Tier 2 visa although that was not the decision under appeal).
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> 6. The grounds contend that the respondent had failed to provide evidence to show that the appellant had not worked for the care home. However, there was ample evidence before the judge to show that the appellant had not worked for the care home – the respondent's bundle included an immigration officer's note that the officer spoke to the care home owner, who said she had never heard of the appellant, and an interview record in which the appellant admitted she had been working for TK Max because there was no work for her at the care home.
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> 7. The grounds also contend that the judge should have allowed the appeal against the decision of 1 February 2014, taken on the basis that the had had no leave, because the appellant's leave was extant when she arrived back in this country as the respondent had failed to serve the notice of curtailment on the appellant prior to her return. It is concluded that, if nothing else, the decision of 1 February 2014 was not in accordance with the law.
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> 8. The judge found at paragraph 23 that, since the appellant was effectively seeking leave to enter for a purpose other than that specified in her original entry clearance, section 89(1) of the 2002 Act (which excluded a right of appeal save on human rights grounds) applied. In the light of **R (on the application of Aiyegbei) v SSHD (2009) EWHC 1412** (admin) the judge arguably erred in that conclusion. In those circumstances, it is arguable that the decision taken on 1 February 2014 to refuse the appellant leave to enter on the basis that she did not have existing leave was not in accordance with the law because she did have leave as there was no evidence the notice of curtailment had been served upon the appellant and, in any event, the notice only curtailed leave from 22 March 2014 anyway.
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> 9. As evidence shows that the appellant entered the UK as a Tier 2 migrant with leave to do a specific job, that she did not do it, that she breached the

terms of her visa in doing another job and that the basis of her original entry clearance/leave no longer exists, the appellant's ultimate prospects of success appear to be very limited indeed. Nonetheless, since there was an arguable error of law in relation to the validity of the decision of 1 February, permission is granted. I do not refuse permission on the remaining grounds despite their relative lack of merit."

3. In a Rule 24 response of 7 July 2015 the Respondent submitted that the decision should be upheld. Under Section 8ZB, within paragraph 4, of The Immigration (Leave to Enter and Remain) (Amendment) Order 2013 the curtailment notice, having been sent by post to a UK address on 21 January 2014, was deemed, unless the contrary was proved, to have been served two days later, and so on Thursday 23 January 2014. Thus the Appellant had no entry clearance or leave to remain under Article 13(3) of that Order when she attempted to re-enter the UK on 1 February 2014.

4. The hearing before me took the form of submissions, which I have taken into account. I reserved my decision.

Determination

5. In submissions both representatives accepted that the matter turned upon whether the notice curtailing the Appellant's leave to remain in the UK was served upon her.

6. Being outside the UK, the Appellant did not attend the hearing. I do not observe within the evidence any statement from her. There was in evidence before Judge Richards-Clarke a skeleton argument of her solicitors. This argues at paragraphs 13 and 14 that although the Refusal Letter states that the Appellant was informed on 27 August 2013 that her employment had been curtailed, there was no documentary evidence to support this, and that the Respondent bore, and had not discharged the obligation of evidencing the cancellation and curtailment of her leave. This skeleton argument is dated 27 January 2015, which is two days before the date of the hearing, so it is unlikely that the Respondent became aware of this issue until the hearing.

7. At paragraph 13 of the decision the judge recorded the submission on behalf of the Appellant that she did not know, when she returned to the UK on 1 February 2014 and was notified of it, that her leave to enter had been curtailed on 21 January 2014 with an expiration date of 22 March 2014. At paragraph 14 he recorded the counterpart submission of the Respondent that the curtailment of leave on 21 January 2014 was not in dispute. This suggests that until hearing the submissions on behalf of the Appellant the Respondent had not been aware that this was an issue.

8. At paragraph 22 the judge found that when the Appellant sought to enter the UK on 1 February 2014 she did not have a valid UK residence permit or visa as her leave had been curtailed. On that basis he upheld the Respondent's decision. Thus he was impliedly rejecting the submission on behalf of the Appellant that she had been unaware of the curtailment of her leave.

9. The judge did reach findings, at paragraph 21, about the termination of the Appellant's employment. However he did not give reasons for rejecting the submission on behalf of the Appellant that she had been unaware of the curtailment of her leave to remain. He was entitled to reject this submission, but was required to give reasons for so doing. The omission to give reasons was an error of law, material because it was capable of affecting, as it did, the outcome of the appeal. On that basis I set the decision aside.

10. At the error of law hearing, Mr Tarlow submitted the results of two searches which he had made the previous day. One, on the Home Office system, shows a curtailment notice having been despatched to the Appellant on 21 January 2014 with an expiry date of 22 March 2014. The second, of the Royal Mail Track and Trace System, shows, against the allocated reference number, which corresponds with that in the Home Office record, that the item, sent by Royal Mail Signed For Service, was not recorded as having been signed for.

11. These two items of evidence came into being after the hearing, on the initiative of Mr Tarlow. They record the position at the date of the hearing. They relate to an issue which arose only at the hearing. The Respondent, who knew the allocated Royal Main reference number, did not know of the issue and so had no reason to initiate this search before the hearing. The Appellant had no reason to initiate it, and did not know the reference number. I accordingly admit this evidence, properly initiated by the Respondent, in fairness to the Appellant.

12. The 2013 Order provides for deemed service two days after despatch by postal service unless the contrary is proved, which I find from the evidence that it is. I accordingly find that the curtailment notice had not at the date of the hearing, and has not still, been served upon the Appellant. Hence it is for the Respondent to decide whether to serve a new notice.

Decision

13. The original decision contained an error of law, and is set aside.

14. The appeal is allowed under the Immigration Rules.

Signed Dated: 13 October 2015

Deputy Upper Tribunal Judge J M Lewis