Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number:
IA/04261/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th March, 2016	**On 2nd June, 2016**
Given extempore	

Before

UPPER TRIBUNAL JUDGE CHALKLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MS A KYRYCHENKO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr O Chirico, Counsel instructed by Global Immigration Solutions

DECISION AND REASONS

1. In this appeal the Secretary of State is the appellant and to avoid confusion I shall refer to her as being, "the claimant".

2. The respondent is a citizen of Ukraine, who was born on 17th May, 1991. The respondent entered the United Kingdom on 6th February, 2011 as a Tier 4 (General) Student and extended her leave to remain in this capacity until 11th February, 2014.

3. On 23rd January, 2014, the respondent made a further application for leave to remain in the same capacity and whilst awaiting a decision she married a gentleman with settled status in the United Kingdom on 3rd September, 2014. On 8th September, 2014 she made an application to vary her previous, and as yet undetermined, application for leave to remain on the basis of her marriage. That application was refused on 14th January, 2014.

4. The respondent appealed and her appeal was heard by First-tier Tribunal Judge Gibbs, sitting at Hendon Magistrates' Court, on 28th July, 2015. Unfortunately, the Immigration Judge and the parties appeared to have overlooked the fact that on 19th January, 2015 the Secretary of State, the claimant in this appeal, made a decision under Section 10(8) of the 2002 Act to cancel the respondent's leave. The First-tier Tribunal Judge went on to allow the respondent's appeal on the basis that she was entitled to a grant of settlement as the spouse of someone settled in the United Kingdom.

5. The claimant was dissatisfied with this decision, because she alleged the respondent had used deception in an earlier application. The judge recorded at paragraph 3 of her determination that the claimant had discovered that the respondent's English test results taken on 19th October, 2011 were cancelled, because the results indicated the presence of a proxy taker. The respondent accepted that she had not taken the test. The claimant suggested that the judge should have refused the respondent's appeal, because of the use of this test certificate and claimed that the same ETS TOEC certificate which had been relied upon in the 2012 Tier 4 application was the same certificate relied upon by the respondent in her marriage application. I would note in passing that it has been pointed out to me quite properly by Mr Wilding, that in fact the same test certificate was ***not*** used, the respondent having subsequently sat and been awarded a valid English test certificate and it was the second certificate which the respondent submitted..

6. This morning I was given a copy of an email sent by Mr Wilding to the correspondence section at the Upper Tribunal at 15:03pm on Friday last. In it, or attached to it, is an application by the claimant to amend her grounds of appeal.

7. I want to make it abundantly clear that in what I am about to say I make no criticism at all of Mr Wilding. He has been exceptionally helpful to me today and I am grateful to him and to Counsel for their submissions.

8. It is appropriate that I set out the application. It reads as follows:

> "*An application to amend her grounds of appeal*
>
> 1. This is an application by the Secretary of State to amend her grounds of appeal in this appeal, which is listed to be heard on Monday, 7th March at Field House.
>
> 2. Despite this application being made out of time, permission is requested for time to be extended and permission to be granted on this point given:

a. It appears to have been missed by the Claimant's representatives, the Secretary of State's representatives at the First-tier Tribunal, the First-tier Tribunal Judge who heard the appeal, the Senior Presenting Officer who drafted the original grounds of appeal and the First-tier Tribunal Judge who granted permission; and

b. Of crucial importance to the lawful disposal of this appeal given the immigration decision which is under appeal.

Ground of Appeal – material misdirection in law

3. The First-tier Tribunal Judge who allowed this appeal solely focused on whether the false ETS certificate had been submitted with the application or not. She did not consider the fact that the immigration decision itself was a decision to administratively remove the claimant under s.10(1)(b) of the Immigration and Asylum Act 1999, namely that:

> '10(1) A person who is not a British citizen may be removed from the UK in accordance with directions given by an immigration officer, if –
>
> ...
>
> (b) he uses deception in seeking (whether successfully or not) leave to remain.'

4. It is clear in this decision that the grounds for taking this decision were 'there is substantial evidence to conclude that your certificate was fraudulently obtained', thereby clearly notifying the claimant that the SSHD considered that she had used deception.

5. The effect of this decision is that it invalidates any leave to enter or remain in the United Kingdom which she had previously been given (as per s.10(8) of the 1999 Act). This means that the claimant could not satisfy the eligibility requirement of Appendix FM:

> 'E-ELTRP.2.2. – the applicant must not be in the UK –
>
> 1.(a) on temporary admission or temporary release, unless –
>
> 1.(i) the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application; and
>
> 2.(ii) paragraph EX.1.1. applies; or
>
> 2.(b) in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1.1. applies.'

6. Therefore the claimant could only succeed if she could demonstrate that she met the provisions of EX.1.1, because her leave has been cancelled and as a result she is in the UK in breach of Immigration Rules, and has been since 2012. The authority from the Court of Appeal on this is clear, in *Mehmood & Anor v Secretary of State for the Home Department [2015] EWCA Civ 744*.

> '35. The provision in section 10(8) of the 1999 Act that the notification 'invalidates any leave... previously given to him' is to make it clear that its effect is that, from the date of the notification, that which had previously been done is undone. It is not implicitly drawing a distinction between leave pursuant to Section 3 and leave pursuant to Section 3C. Such a distinction would, as the Secretary of State submitted below and as the Deputy Judge accepted (see [33]) produce arbitrary results. On the interpretation for which Mr Malik contended, the Secretary of State's power to remove pursuant to Section 10(1) on the basis of deceit would depend upon whether the alleged deceit was uncovered during the primary period of leave or after a decision to extend a person's leave, or during the statutory extension of the primary period of leave pending any decision on the person's application to vary the leave.
>
> 36. I do not consider Mr Malik gets any assistance from Section 47 of the 2006 Act. It is dealing with an entirely different situation. That is the removal of people who

have complied with the terms of their leave but whose application for a variation of their existing leave has been or will be refused before the expiry of that leave, for example, because they no longer fit the criteria for leave. It is not dealing with people who have broken the conditions of their existing leave or used deception, whose existing leave Lord Hughes in *R (George) v Secretary of State for the Home Department [2014] UKSC 28* reported at [2014] 1 WLR 1831 described as 'seriously flawed'. Their position is very different. It does not follow from a failure to make provision invalidating the existing leave of a person who has complied with all requirements that Parliament would not empower the Secretary of State to made a Section 10 decision invalidating the remainder of the existing leave of those who are in breach and giving them only an out-of-country appeal: see my reference at [47] below to the statement of Stanley Burnton LJ in the Court of Appeal in George's case that Parliament would not have provided for retrospective effect 'at least in a case where leave was ***not*** obtained fraudulently or by misrepresentation.' [Emphasis added].

37. I also consider that Mr Malik's criticism of the Deputy Judge's reliance (at [32] of her judgment) on the statement of Pill LJ in *QI (Pakistan) v Secretary of State for the Home Department [2011] EWCA Civ 614* at [14] that leave varied under Section 3C is 'a statutory extension of the original leave', not 'a new or different species of leave' is misplaced. He submitted that what he described as her 'analogy' was 'implausible' because (a) *QI (Pakistan)'s* case was primarily concerned with the construction of paragraph 245ZX(l) of the Immigration Rules and not Section 10(8) of the 1999 Act; (b) there was common ground and therefore no argument as to the construction of paragraph 245ZX(l), and (c) there was no analysis of what are described as 'the contrasting' words used in Section 3 and 3C of the 1971 Act and Section 10(8) of the 1999 Act. He argued that Pill LJ's statement that the leave extended is not 'a new or different species of leave' is not inconsistent with the construction for which he contended. I consider that, notwithstanding the different context, his statement is not consistent with Mr Malik's submissions in these appeals. Pill LJ's statement simply reflects what is, for the reasons I have given, the clear meaning of Section 3C.'

Therefore Section 10(8) invalidates the leave previously given, certainly any leave which resulted from the deception, in this case that is from February 2012.

7. This means that the claimant was not lawfully in the UK at the time of her application, and means that in order to qualify under Appendix FM she had to demonstrate that EX.1.1 was met. The First-tier Tribunal Judge did not consider this and this failure is a material error of law. For the avoidance of doubt this ground <u>does not</u> say that the appeal is an out of country one, <u>the appeal is in country</u> due to the human rights claim which was made prior to the decision being made.

8. The Tribunal is invited to extend time and to grant permission to appeal."

9. I have heard lengthy submissions from both Mr Wilding and from Counsel. Mr Wilding suggests that the error on the part of, not simply the judge, but everybody who has played a part in the proceedings to date, was Robinson obvious *(R (on the application of) v Secretary of State for the Home Department & Anor* [1997] EWCA Civ 3090).

10. He suggests that EX.1.1. needs to be considered and the appeal needs to be re-heard so that proper findings can be made.

11. I believe that the time limits for seeking permission to appeal were reduced in 2005. I may be wrong in the year, but I do recall that they were reduced to their current level of fourteen working days at the insistence of the Home Office. This, of course, does quite properly focus

the parties' minds and the reason for having strict time limits is that there must be a time when litigation ends.

12. It seems to me that if the current time limits are adequate for an appellant to make application for permission to appeal, then they certainly should be more than adequate for the claimant, with all the resources available to her. The Tribunal have always been slow to extend the time limits and good reasons for doing so are required to be demonstrated.

13. The claimant's original application for permission to appeal met the time limits and it was submitted on 15th September last by a Specialist Appeals Team. It was considered by a First-tier Tribunal Judge on 27th January, 2016. In has to be born in mind that the First-tier Tribunal Judge will have been considering a number of other applications on the same day. Although those drafting applications do not seem to be aware of it, before a judge can decide whether or not to grant permission it is necessary for the judge to read the determination, so that the grounds of application only need be very brief. All they need do is simply identify the alleged error of law. The grounds submitted on behalf of the claimant were refreshingly brief. Unfortunately, as we have now discovered they were wrong.

14. I make no criticism of Mr Wilding for having submitted the application on Friday. I do not know, but I suspect that he started preparing the case sometime late last week, realised that errors had been made and set about trying to correct the situation.

15. Before I can grant permission, I have to be satisfied as to the reasons for the delay.

16. I have not actually been given any explanation and I suspect that the matter was simply missed by the Specialist Appeals Team and not picked up until more recently by Mr Wilding. However, the claimant has had ample opportunity to take this application since September 2015. The respondent in this appeal would not have known until late on Friday or possibly until this morning that the application was going to be made by Mr Wilding.

17. Earlier I invited both representatives to apply for an adjournment if they felt they needed more time to consider their positions and neither did. I have concluded that it would be entirely wrong of me to grant leave to the claimant to amend the grounds of appeal at this very late stage.

18. The claimant could and should have reviewed this decision earlier. The application to amend is effectively more than five months out of time. In my view that is far too long for me to grant an extension of time; I am afraid I refuse to grant extra time in which to submit the application.

19. Having refused to extend the time limits I refuse to grant permission to appeal.

20. It follows that since Mr Wilding is no longer relying on the grounds on which permission was granted, the appeal is dismissed.

Notice of Decision

The making of the decision by the First Tier Tribunal involved the making of no error on a point of law.

Signed Date 2nd June 2016

Upper Tribunal Judge Chalkley