



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03548/2013
IA/04480/2013

THE IMMIGRATION ACTS

Heard at Glasgow
On 4 October 2013

Determination Promulgated
On 5 November 2013

Before

MR C M G OCKELTON, DEPUTY PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

MISS RUI QIONG WAN (FIRST APPELLANT)
MR JOSEPH AO JIAN HUNG (SECOND APPELLANT)
(Anonymity order not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Winter, Advocate, instructed by Maguire Solicitors
For the Respondent: Mrs M O'Brien, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) These are appeals with permission against a determination by Judge of the First-tier Tribunal McGrade dismissing appeals against removal. In relation to the first appellant, the appeal was dismissed on the ground that she was not entitled to stay in the UK on the basis of long residence under the Immigration Rules. The second appellant is her infant child. Both appellants are nationals of China.

- 2) It is not disputed that the first appellant arrived in the UK on 14 May 1998 and was given leave to enter as a student until 14 May 1999. She was subsequently given further leave to remain as a student for two additional periods until 31 March 2005. In March 2005 she applied for further leave to remain as a student. According to the respondent this application was refused and, before the First-tier Tribunal, it was the respondent's contention that the first appellant was served with a form IS.151A, informing her of her liability to removal on 30 October 2006. The appellant denies that she was served with this form.
- 3) The significance of this arises from paragraph 276B(i)(b) of the Immigration Rules, which was the relevant provision in force at the time the first appellant made her application for leave to remain on the grounds of long residence on 18 May 2012. Under this provision an application for indefinite leave to remain on the grounds of long residence may be made on the grounds of 14 years continuous residence in the UK, excluding any period spent in the UK following service of notice of liability to removal. Accordingly, if a notice of liability to removal was served on the first appellant in 2006, then she cannot rely on 14 years continuous residence as a basis for indefinite leave to remain. It is apparent from the decision of the Judge of the First-tier Tribunal that this was the only objection raised by the respondent to the application on the basis of long residence under the Immigration Rules.
- 4) The Judge of the First-tier Tribunal accepted that the appellant was served with the form IS.151A in October 2006 notifying her of her liability to removal. The judge did not accept as credible the appellant's denial of this service. Permission to appeal was granted on the basis that arguably the judge's reasoning on which these findings were based was inadequate. In addition, the copy of the IS.151A allegedly served by the respondent was incomplete.
- 5) At the hearing before us Mrs O'Brien stated that further investigation had been made following the grant of permission to appeal. Although the respondent's computerised data base indicated that it was the intention to serve a form IS.151A on the first appellant in 2006 there was no substantive evidence of service, in the form, for example, of a recorded delivery number or a covering letter. It was accordingly accepted that the respondent could not show that the IS.151A form had been served as claimed.
- 6) As was noted by the Court of Appeal in E v SSHD [2004] EWCA Civ 49 and R v SSHD [2005] EWCA Civ 982 unfairness resulting from a mistake of fact will be an error of law where it is established that the error arose as follows:
 - i) There must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;
 - ii) It must be possible to categorise the relevant fact or evidence as "established" in the sense that it was uncontested and objectively verifiable;

- iii) The appellant (or his advisors) must not have been responsible for the mistake;
 - iv) The mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.
- 7) We are satisfied that the mistake as to a material fact in respect of the alleged service of a notice of liability to removal falls within the above categories. The unfairness arising from the factual error over the alleged service of this document amounts to an error of law, in consequence of which the decision of the Judge of the First-tier Tribunal is set aside.
- 8) It falls to us to re-make the decision. So far as the first appellant is concerned, the only issue on which the respondent founded against her under paragraph 276B of the Immigration Rules was the alleged service of the notice of liability to removal (IS.151A) in October 2006. As it has not been shown that this document was served, as the appellant previously contended, then the first appellant will succeed in her appeal under paragraph 276B.
- 9) This leaves the position of the second appellant, who is the 3 year old son of the first appellant. His position was considered by the respondent in terms of Appendix FM of the Immigration Rules, in terms of a refusal letter of 14 January 2013. The position of the second appellant was treated this way on the basis that paragraph 276B made no provision for dependants who had not lived in the UK for the required period.
- 10) The respondent noted that the first appellant had provided no evidence that she has a partner in the UK who met any of the requirements of Appendix FM which would have enabled the first appellant to apply for leave to remain as a partner. Indeed, we note that according to the first appellant's application form she gives no details of any partner. We proceed on the basis that the appellant is a single parent with sole responsibility for her son.
- 11) We do not consider it to be disputed by the respondent that were the first appellant to qualify for indefinite leave to remain under paragraph 276B on the basis of 14 years continuous residence, then the second appellant would be permitted to remain with her as her dependent child. The position of the second appellant does not appear to have been considered under Appendix FM because, in the view of the respondent, the first appellant could not succeed with her application. Accordingly we have little evidence before us as to whether the second appellant would be eligible to succeed under Appendix FM. Although the first appellant put on the application form as her net income a figure of £400 per week, which would bring her close to the financial requirements in E-LTRC 2.1 in respect of leave to remain for a child, there is not sufficient evidence for us to be satisfied that this requirement is met.
- 12) Nevertheless, having regard to the best interests of the child in terms of Article 8 of the Human Rights Convention and to an acknowledgement on behalf of the respondent that the circumstances of the second appellant would follow those of the first

appellant, we have no difficulty in concluding that it would not be proportionate for the second appellant to be separated from the first appellant, the first appellant having established her right to remain in the UK under the Immigration Rules. Accordingly both appeals will be allowed.

Conclusions

13) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. We set aside the decision.

14) We re-make the decision in the appeals by allowing them.

Anonymity

The First-tier Tribunal did not make a direction for anonymity pursuant to Rule 45(4)(i) of the Asylum & Immigration Tribunal (Procedure) Rules 2005. We do not consider that any order for anonymity is necessary in the circumstances of this appeal.

Fee Award (Note: This is not part of the determination)

According to the First-tier Tribunal no fee was paid or was payable in relation to these appeals and no application for a fee award has been made to us. Accordingly we make no fee award.

Signed

Date

Upper Tribunal Judge Deans