Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/09451/2013
IA/09447/2013
IA/09450/2013

THE IMMIGRATION ACTS

Heard at Field House
On 12 December 2013

Determination Promulgated
On 20 December 2013

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

RANMUNI PRIYANTHA DHARMAWICKREMA
GEETHAMALI MANORI DANGALLE
THARUN NIMNAHA DHARMAWICKREMA
(No Anonymity Direction Made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: the appellants did not attend and were not represented
For the Respondent: Mr G Saunders a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Sri Lanka. The first two are husband-and-wife and the third is their son. I will refer to them as the father, the mother and the son. They were born on 24 March 1959, 11 October 1959 and 25 December 1999 respectively. They have been given permission to appeal the determination of

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First-Tier Tribunal Judge R R Hopkins ("the FTTJ") who dismissed their appeals against the respondent's decisions of 12 March 2013 to refuse the father leave to remain as a Tier 1 (General) Migrant under the Points-based System with the mother and son as his dependants. There were further decisions to give directions for their removal from the UK under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The applications were made on 8 February 2013. The father needed to achieve 80 points under Appendix A (Attributes), 10 points under Appendix B (English language) and 10 points under Appendix C (Maintenance). He was awarded the necessary points under Appendices B and C but only 60 rather than the necessary 80 points under Appendix A. This was made up as to 35 points for Qualifications and 5 points for UK experience but only 20 rather than 40 points for Previous Earnings. The reasons given by the respondent were that the father had submitted documents which showed a UK income of £24,471 and a Sri Lankan income of £11,774.20. The appellant had applied a multiplier of 5.3 to the Sri Lankan earnings uplifting them to £62,403.26 but there were no provisions within the Immigration Rules enabling him to uplift earnings from abroad at this stage of extension applications. The mother and son were refused in line with the father.

3. The appellants appealed. The appellants and the respondent were represented at the hearing. The father gave brief oral evidence. The respondent's representative withdrew the section 47 removal decisions leaving only the appeals against the refusals to vary leave to remain.

4. The husband's evidence was that on 10 February 2013 he realised that his Sri Lankan business income had been calculated solely on the basis of bank transactions and did not include cash transactions. He asked his accountants in Sri Lanka to rectify this and produce accounts reflecting all transactions. The accountants provided a fresh letter and financial statements which are dated 12 February 2013. This information was forwarded to the father's accountants in the UK. They produced a further letter dated 15 February 2013 giving an increased Sri Lankan income of £37,730.30 and a total combined UK and Sri Lankan income of £65,201.30. The father said that he did not send this additional material to the respondent because he had received a letter acknowledging his application which advised him that he should not send any additional documents until requested to do so by the caseworker. At the hearing before the FTTJ he provided a copy of this acknowledgement letter which is dated 13 February 2013.

5. The FTTJ believed the father's evidence and his explanation as to the error in calculating his Sri Lankan income. The father arranged for the error to be corrected after the applications had been submitted but before the decision was made. The FTTJ accepted that in the letter from the respondent the father was advised not to submit any further documents until asked to do so. He also accepted that the revised documents truly expressed the father's overseas earnings. The father had made a genuine mistake. However, the corrected

documents had not been submitted at the time of the application and, under section 85A of the 2002 Act the FTTJ could not consider these. He was only entitled to consider the documents submitted with the application. These did not show sufficient earnings to achieve the points required under Appendix A. The appellants had failed to satisfy the requirements of the Immigration Rules.

6. The FTTJ went on to consider the Article 8 human rights grounds. He found that family life would not be interfered with because the family would be removed together as a family unit. He doubted that the extent of private life was sufficient to engage the operation of Article 8 but nevertheless concluded that the appellants' remedy lay in making a fresh application. He dismissed all the appeals other than those to give removal directions which had been withdrawn.

7. The appellants applied for and were granted permission to appeal. Before the appeal could be heard the appellants sent an e-mail to the Upper Tribunal dated 4 September 2013 indicating that they wished to withdraw their applications for permission to appeal to the Upper Tribunal. They said that they had decided to leave the UK of their own accord on 15 September 2013. However, by that stage permission to appeal had already been granted and the appeals were listed for hearing. The Upper Tribunal judge who dealt with the applications treated them as a notice of withdrawal of the appellants' case before the Upper Tribunal and consented to this. He went on to treat the determination of the First-Tier Tribunal as unchallenged so that the appeal before the Upper Tribunal would be dismissed without a hearing. The appeals before the Upper Tribunal were dismissed with the effect that the decisions of the First-Tier Tribunal stood in all respects.

8. On 15 September 2013 the father wrote a letter on behalf of all three appellants which was received by the Upper Tribunal on 18 September 2013. He said that having reconsidered their circumstances and especially the education of the son they realised that they had made the wrong decision to withdraw the appeals. They asked to be allowed to proceed with their appeals to the Upper Tribunal. They said that they wished to attend the hearing which had been fixed for 23 October 2013. Subsequently, the appellants applied for an adjournment stating that they were unable to attend the hearing on the date fixed because of "unavoidable family circumstances". The hearing was adjourned and re-fixed for 12 December 2013. I now have an e-mail from the father dated 12 December 2013 in which he states that he could not obtain a representative for the hearing, the appellants would not be attending and he asked that the appeals be determined on the papers. Further documents in support were submitted.

9. Under rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 parties who withdraw their cases may apply to the Upper Tribunal for their cases to be reinstated. Such applications have to be made in writing and received by the Upper Tribunal within one month after the date on which the Upper

Tribunal received the notice withdrawing the cases. Here the applications to withdraw the cases were made by e-mail on 4 September 2013 and the applications for the appeals to be reinstated were made on either 15 September or at the latest 18 September 2013. Mr Saunders did not object to the appeals being reinstated. I conclude that I have a discretion as to whether the appeals should be reinstated which I exercise in favour of permitting this to be done. Extra work has been caused but neither party has suffered any material disadvantage.

10. I have a Rule 24 response from the respondent. The FTTJ was referred to and addressed the case of Naved (Student – fairness – notice of points) [2012] UKUT 14(IAC). The summary, prepared by the President, states; " Fairness requires the Secretary of State to give an applicant an opportunity to address grounds for refusal, of which he did not know and could not have known, failing which the resulting decision may be set aside on appeal as contrary to law (without contravening the provisions of s. 85A of the Nationality, Asylum and Immigration Act 2002)."

11. Mr Saunders submitted that these appeals did not fall within the principles set out in Naved. The appellants knew the amount of money they were required to show and submitted applications which they must or should have known did not show enough. In short the father knew what the requirement was and knew that he had not complied with it. Had it been otherwise he would not have asked the accountants to prepare corrected figures. There has been no unfairness to the appellants. Their remedy, as the FTTJ pointed out, was to make a fresh application as soon as possible. The FTTJ did not err in law.

12. The acknowledgement letter sent by the respondent on 13 February 2013 states; "Thank you for the recent application for leave to remain in the United Kingdom made under the Points-based System. We acknowledge receipt of the application above, and any associated dependent applications made. The application will be passed to a case working team for validation and consideration. We are unable to respond to queries about applications that are within the service standards. Contact information and up-to-date details on our processing times are available on our website....... Please do not send any additional documents to us unless requested to do so by a case worker."

13. This is not a case where there was any reason for the respondent to suppose that any of the documents submitted with the application were incorrect or incomplete. There was not, for example, one document missing from a series. None of the documents were said to be impermissible copies rather than originals. The father is obviously a highly intelligent and qualified man. He should have realised that he was the only person who knew that one of the documents he had submitted was incorrect because it had failed to take into account cash earnings and that he needed to show a larger combined UK and Sri Lankan income. The last sentence in the letter from the respondent was not an invitation to await the almost inevitable refusal before submitting corrected accounts. In any event what the father eventually supplied was not an

additional documents but an amended document. The appellants' remedy would have been to submit the amended document as soon as it became available or to withdraw the applications and resubmit them with the correct documents as quickly as possible.

14. These are not appeals which fall within Naved principles. The grounds of refusal were not grounds which the father did not know and could not have known. On the contrary had the father properly considered the requirements of the Immigration Rules before the applications were submitted he should have realised that the combined UK and Sri Lankan income he was able to demonstrate was inadequate. If he realised very soon after the applications were made that the accounts could be amended to show a greater and sufficient combined income he and he alone knew about this. There was no likelihood of the respondent asking for this information because there was no reason for the respondent to know or suspect that it might be available.

15. The respondent has not failed in any duty of common law fairness to the appellants. I find that the FTTJ reached conclusions open to him on all the evidence. There is no error of law. I uphold the determination.

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Signed Date 18 December 2013

Upper Tribunal Judge Moulden