IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47223/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 November 2014	**On 31 December 2014**
Oral judgment	

Before

THE HON. LORD BURNS
UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Applicant

and

MARGARITA BILLONES
(Anonymity direction not made)

Respondent

Representation:
For the Applicant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr A Burrett, Counsel, instructed by Saracens Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Kanagaratnam promulgated on 11 September 2014 following a hearing at Hatton Cross on 15 July 2014. The Appellant, a Philippino national born on 26 April 1984, appealed against the decision of the Secretary of State dated 23 October 2013 to refuse to grant her leave to remain in the United Kingdom as an overseas domestic worker

under the provisions of paragraph 159D of the Immigration Rules HC 395 (as amended).

2. This Tribunal is grateful to the advocates for the way in which they have engaged with this matter which has enabled the Tribunal to focus upon what is a narrow but important issue. It is not disputed that the Appellant's (Ms Billones') immigration history is as set out in the determination and it is not disputed that she submitted an application from outside the United Kingdom which resulted in the grant of entry clearance valid from 2 January 2013 until 23 July 2013.

3. The limited issue upon which this Tribunal is required to make a finding is whether the application made prior to the refused application was a fresh application, which therefore meant the Appellant entered the United Kingdom under the provisions of the Rules in force after 6 April 2012, or whether it was an extension of an earlier grant in which case the Appellant is able to rely upon the provisions in force prior to 6 April 2012, which are less stringent.

4. The starting point has therefore to be the application that was made to the UK Border Agency appearing at page 84 of the Appellant's bundle provided for the purpose of the hearing before the First-tier Tribunal. That is an application for United Kingdom Entry Clearance and is described as such because it is an application that was made by the Appellant from her home state having returned there for a visit or in accordance with the terms of her employment and status. The purpose of the application is described as employment on a non-points based system basis and the type of visa a work visa. The type of application: overseas domestic worker in a private household.

5. This Tribunal have been referred to the reply given by the Appellant to question 90 of the application form in which she was asked to give details of any job offers including salary and the type of job that she hopes to takes in the United Kingdom.

6. The response from the Appellant was that she is already working with the family in the UK, has obtained a visa to do so, and that this is an extension. It is clear that what the Appellant intended to make was an application for an extension to her pre-existing visa to allow her to return to the United Kingdom to continue working within the same family unit. We have not been referred to any material suggesting there was a separate application form for an extension and so one assumes that the application form completed was the only form that was available to an applicant at that time.

7. It does, however, appear from the purpose of the application and type of application that what was being sought was in fact not an extension but a fresh grant of leave to enable the Appellant to return to the United Kingdom as an overseas domestic worker.

8. We have been referred by Mr Burrett to the Domestic Workers in Private Household Guidance based on the Immigration Rules, version v11 valid, from 6 Novembver 2014. It has not been suggested this contains material that was not applicable at the time the decision was made.

9. At the bottom of page 5 of that guidance is a heading in bold “Extension requirements for applicants who apply to enter the UK before 6 April 2012”. It is submitted this fits the Appellant's circumstances.

10. In page 6, within the text, the requirements are set out. The first of these is that the applicant must have entered the UK with valid entry clearance as a domestic worker in a private household under the Rules in place before 6 April 2012, have continued to be employed for the duration of leave granted as a full-time domestic worker in a private household, continues to be needed for employment for the period of extension sought as a domestic worker in a private household under the same roof as their employer or in the same household the employer has lived in, and where evidence of this in the form of written terms and conditions of employment in the UK as set out in Appendix 7 with evidence that the employer resides in the UK and that the applicant reached the requirements of paragraph 159A(i)(vii).

11. There are two prohibitions which do not apply to this the Appellant. During the course of our discussions following the closure of submissions, this Tribunal has considered the importance of the term that an applicant must have entered the United Kingdom. The question we have asked ourselves is whether that indicative of a requirement that not only must the applicant have entered the United Kingdom but clearly be making an application for an extension within the period of time that she remains in the United Kingdom or not. If that is the case the Judge has materially erred and this application must fail, because the Appellant had returned home and make the application from overseas.

12. Having considered that factor together with the nature of the application form, the change to the Immigration Rules reflected and accepted by both parties and the failure of Judge Kanagaratnam to engage fully with the difference between the application as submitted and as alleged, we do find that the Judge has made a material legal error such that the determination must be set aside.

12. We feel we are able to go on and remake the decision as it turns on this narrow point in relation to which the parties have made their submissions and it is conceded before us that if our finding is that the leave granted and valid from 2 January 2013 was a new grant of leave rather than extension, that the Appellant cannot meet the requirements of paragraph 159D of the Rules and on that basis the appeal must be dismissed.

13. It is our finding on this primary point that the application for entry clearance that led to the period of leave valid from 2 January 2013 was a fresh application, in law and in form, notwithstanding the Appellants stated intentions, and that a decision was made to grant a fresh period of entry clearance to allow her to enter the United Kingdom. Whatever the Appellant thought, there is insufficient evidence to enable us to find as we have been invited to do by Mr Burrett on the facts that this was an extension.

14. The Appellant therefore entered the United Kingdom under the provisions of the post-April 2012 Rules. In respect of the application she made for further leave, which was the application that was the subject of the appeal to the First-tier Tribunal, it was necessary for her to prove she could meet the requirements of paragraph 159D. It is conceded on facts as accepted that she is unable to do so and so we have no option other than to dismiss the appeal.

Decision

15. The First-tier Tribunal Judge materially erred in law. We set aside the decision of the original Judge. We remake the decision as follows. This appeal is dismissed.

Anonymity

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date 31st December 2014

Upper Tribunal Judge Hanson