IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28373/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th February 2015	**On 16th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MISS SIMRANJIT KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr V Makol (Solicitor)
For the Respondent: Ms J Isherwood (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant's appeal against decisions to refuse to vary her leave and to remove her from the United Kingdom, made on 24th June 2013, was dismissed by First-tier Tribunal Judge O'Garro ("the judge") in a determination promulgated on 19th February 2014. The judge found that the ground of refusal under paragraph 322(1A) was made out and that the appellant could not show that the requirements of the rules were met, in relation to her application for further leave. She also concluded that the requirements of the rules were not met in relation to Article 8 of the

Human Rights Convention and that the adverse decisions were proportionate and lawful.

2. An application was made for permission to appeal, in which it was contended that the Tier 1 application made by the appellant was varied by her, to a Tier 4 (Student) application and that as there was no conclusive evidence (paragraph 7 of the grounds) showing that the appellant herself committed deception or intentionally provided false information "in her current or previous application, which had been varied", the ground of refusal under paragraph 322(1A) was not made out. Similarly, the discretionary ground under paragraph 322(2) was also not made out. It was also contended that the judge failed to indicate that a substantive decision would be made and instead suggested at the hearing that the matter would be remitted to the Secretary of State. A "full-scale determination" (paragraph 9 of the grounds) was not expected.

3. Whereas the judge treated the application for leave made by the appellant as a varied one, from Tier 1 to Tier 4, the proper approach was to treat any deception as limited to the "first application" and not the varied one. It was also contended, in a short paragraph, that the judge failed to carry out a proper proportionality assessment in relation to Article 8 of the Human Rights Convention.

4. Permission to appeal was granted on 18th July 2014, on the basis that it was arguable that the judge ought to have heard more detailed evidence on the issue of dishonesty.

5. The matter came before me on 5th September 2014. The hearing was adjourned, so that a typed copy of the Record of Proceedings could be obtained. The judge helpfully produced a typed copy of her handwritten note and this was made available to the representatives, when the hearing resumed on 17th February 2015.

Background

6. The appellant was given leave to remain as a student, between November 2008 and February 2010. In October the previous year, she was given leave in the Tier 1 (Post-Study Work) category. On 1st April 2011, before expiry of that leave, she made a further application for leave as a Tier 1 (General) Migrant which, on 26th September 2012, she varied so as to seek leave to remain as a Tier 4 (General) Migrant instead.

7. In refusing the application and making the adverse immigration decisions, the Secretary of State noted that the appellant submitted invoices addressed to Power Stream Employment Limited, bearing dates between 3rd May 2010 and 7th March 2011. These documents were false, as shown in the conviction of two men following a trial at Isleworth Crown Court, where both admitted charges of conspiracy to defraud the Secretary of State. It emerged in those proceedings that Power Stream Employment Limited had never participated in any legitimate trade or business in the

United Kingdom. As the appellant relied on false documents in support of her application, the Secretary of State refused it under paragraph 322(1A) of the rules. Refusal was the appropriate course in the varied application, in which the appellant sought leave as a Tier 4 (General) Student Migrant, under paragraph 245ZX(a), (c) and (d).

8. As noted above, the appellant's response, in her grounds of appeal to the First-tier Tribunal, was that she herself had not been involved in any deception. In varying her application in September 2012, she made it clear to the Secretary of State that she had no intention of relying upon the documents forming part of the Tier 1 application as she had simply trusted an agent to make it for her and was horrified when she discovered the Power Stream invoices and other documents.

9. At the Upper Tribunal hearing on 5th September 2014, it was contended that the judge had acted unfairly. In the course of the First-tier Tribunal hearing, she indicated that she was minded to remit the case to the Secretary of State, as the two representatives present on that occasion confirmed. The Presenting Officer representing the Secretary of State prepared a typed note, which recorded the judge's indication to "remit this case back to SoS as this decision is not in accordance with the law". In the same note, the Presenting Officer recorded that the judge "reserved her determination". The appellant's case that the appropriate candidate ground of refusal was paragraph 322(2), a discretionary ground, and not paragraph 322(1A) is also noted, "because the alleged documents were supplied in the previous application not in the current application under T4".

10. In response to case management directions made in September 2014, the solicitor appearing on behalf of the appellant made a short witness statement, exhibiting his note of the proceedings on 24th January 2014. This records the representative raising a preliminary point in relation to the appropriate ground of refusal. The representative's note shows that the argument was indeed that the discretionary ground should have been used as the false documents were "supplied in previous application and not in current Tier 4 application". The representative "argued this point" before the judge. There is then the following:

> "IJ indicated that she cannot consider the Home Office discretion and was minded to send the matter back to Home Office. HOPO did not object to this and was not sure why para 322(1A) was used. Hearing continued. Miss Kaur gave live evidence and simply adopted her witness statement. HOPO asked question in relation to declaration signed on Tier 1 form. Few questions asked by IJ in relation to the previous Tier 1 application. Short submission made by me that no false documents in current Tier 4 application and therefore application does not fall for refusal under para 322(1A). Also relied on skeleton argument. Determination reserved."

11. The judge's typed Record of Proceedings is short. It consists of the following:

"Appellant attended. Appellant adopted her statement as her evidence.

Cross

You explained you signed Tier 1 application when ready. Did you see section 5?

I completely trusted the representative. I didn't see whether it was Tier 1 or Tier 4.

Did you read the document?

No that is my mistake

Submissions-Respond

Rely on refusal and requirements of paragraph 322(2)

Submissions-App

Rely on skeleton argument."

12. The skeleton argument referred to in the representative's record and by the judge in her Record of Proceedings shows that the case advanced on behalf of the appellant before the judge was essentially this. The appellant did not employ deception as explained in her witness statement. Her application did not fall for refusal under paragraph 322(1A) as there was nothing conclusive showing that she had used deception or provided false information. Reliance was placed on a number of well-known authorities, including JC [2007] UKAIT 00027, RP [2006] UKAIT 00086, AA (Nigeria) [2010] EWCA Civ 773 and Kulasekara [2011] EWCA Civ 134.

13. The skeleton argument also contained a case in response to the Secretary of State's finding that no valid CAS was produced by the appellant. In this context, it was contended that the appellant ought to have the benefit of the Secretary of State's policy following revocation of a sponsor's licence and an opportunity to switch to a different sponsor. So far as Article 8 of the Human Rights Convention was concerned, the skeleton argument briefly asserted that the appellant had established a private life in the United Kingdom, having lived here "for a considerable length of time". She wished to study with a Tier 4 sponsor.

Submissions on Error of Law

14. Mr Makol said that the judge's Record of Proceedings made no mention of her indication that she was minded to remit the case back to the Secretary of State. The Presenting Officer and the appellant's representative had mentioned this in their notes. The determination was unexpected, in the light of the indication earlier in the hearing that the judge would remit the case. The additional witness statement made following variation of the application for leave, so that it became a Tier 4 application, was not put to the appellant at the hearing. She took steps to expedite her application,

including seeking judicial review, and this led in due course to the Secretary of State's adverse decision. The appellant made clear in her varied application and subsequently that she did not wish to rely on documents which accompanied the Tier 1 application.

15. Mr Makol submitted that in the light of the appellant's clear indication, the Secretary of State could not properly rely on those documents, concerning Power Stream Employment Limited. Instead, the varied application fell to be considered only on the basis of the documents the appellant submitted at the time of variation. In the determination, the judge found that the appellant deliberately closed her eyes to deception but this was not put to her in the course of the hearing, in evidence. The Record of Proceedings did not show which evidence was considered by the judge or what emerged in evidence-in-chief. The judge's record made no mention of the witness statements made by the appellant or the covering letter and other documents which accompanied the variation of the leave application, in September 2012.

16. Ms Isherwood said that false documents were clearly supplied in support of the application for leave. The judge made a clear finding to this effect at paragraph 30 of the determination. The application for leave was not the first one made by the appellant and the judge dealt with the matter appropriately. The background was that criminal proceedings were brought in relation to a bogus company and the sponsorship licence was withdrawn from the appellant's college. The judge was entitled to find that she put in an application on a false basis, albeit that she relied upon an agent. She then varied her application but it was not open to her to ask for the documents originally submitted to be ignored. The appellant appeared to have been one of about 250 people who relied on false documents apparently emanating from Power Stream Employment Limited. Again, the judge made clear findings on these matters.

17. The Record of Proceedings shows that the appellant accepted that she made a mistake in not reading the application made on her behalf. In the light of that evidence, the judge was clearly entitled to reach the conclusions she did.

18. In a response, Mr Makol said that the appellant had not been asked at the hearing which documents she gave to the agent. In her witness statement, she drew attention to Lloyds Bank statements accompanying the Tier 1 application, whereas her own accounts were held with Barclays and HSBC. The appellant's case was that the varied application was the one that fell to be considered by the Secretary of State. AA (Nigeria) could be distinguished because the appellant in the present case expressly did not rely on the documents submitted with the Tier 1 application. Instead, she relied only on those which supported her Tier 4 application.

19. Mr Makol said that if procedural unfairness were found by the Upper Tribunal, taking into account the lack of detail in the Record of Proceedings, the appeal should be remitted to the First-tier Tribunal and

decided afresh. The case could then be argued properly and in full. This would be the proper course.

Conclusion on Error of Law

20. The critical questions are these: was there procedural unfairness, taking into account the judge's Record of Proceedings, the notes made by the two representatives present at the hearing in January 2014 and the Decision promulgated subsequently? Secondly, was the judge entitled to find that the ground of refusal under paragraph 322(1A) was made out, on the evidence before her? Finally, is there anything else in the grounds in support of the application for permission to appeal or in the Decision itself that shows any material error?

21. I deal first with the contention that there has been procedural unfairness. The notes made by the two representatives do show that the judge, at least early in the hearing, was minded to remit the case back to the Secretary of State, apparently on the basis that the wrong candidate ground of refusal had been chosen by the Secretary of State. It is clear from the grounds of appeal to the First-tier Tribunal that the appellant's case was that she herself had not been involved in submitting false documents, that she had relied entirely on an agent to make her application and that the proper ground of refusal to be considered was the discretionary ground under paragraph 322(2) of the rules, rather than paragraph 322(1A).

22. The judge's Record of Proceedings is brief and makes no mention that she was minded to take any particular course. I do not accept that the parties were in some way taken by surprise at the substantive outcome or that the Decision promulgated by the judge shows any procedural unfairness. After all, each of the notes made by the representatives concludes with the judge reserving the decision. Each note refers to a "preliminary point" that the proper candidate ground was under paragraph 322(2). It is clear, particularly from the note made by the appellant's representative, that the hearing continued, with the appellant giving evidence and adopting her witness statement. There was brief cross-examination. All of this is fully consistent with the Record of Proceedings, where the judge noted that the appellant adopted her witness statement. This appeared in the bundle of documents filed and served shortly before the hearing (and it is referred to in the Presenting Officer's note). She briefly recorded cross-examination in which the appellant said that she trusted her representative, did not "see whether it was Tier 1 or Tier 4" and accepted that she made a mistake in not asking to read the document, meaning here the Tier 1 form of application.

23. It is also clear from the judge's Record of Proceedings and the appellant's representative's note that submissions were made on behalf of the parties. The Presenting Officer expressly relied on the letter giving reasons for the adverse decisions and also on paragraph 322(2), adding

there an alternative case. As noted earlier, the appellant's representative relied on his skeleton argument.

24. Even supposing that the representatives were surprised to receive the Decision, a case was put by each side and supporting evidence adduced by the appellant. The skeleton argument prepared on her behalf builds on the grounds of appeal to the First-tier Tribunal. If the representatives thought that the judge had decided on a particular course, in the light of the "preliminary point", they might reasonably have been expected to raise it with her and as it is clear from the Record of Proceedings and the two notes that the hearing proceeded, in the usual way, beyond a preliminary discussion, with evidence-in-chief, cross-examination and submissions, with the judge then expressly reserving her decision, there really was no sensible scope for professional representatives to conclude that the outcome was predetermined in some way, with remittal of the application to the Secretary of State the inevitable next step. I conclude that there has been no procedural unfairness.

25. Was the judge entitled to find that the ground of refusal under paragraph 322(1A) was made out? Did she err in this context?

26. It is clear from guidance given by the Court of Appeal in AA (Nigeria) that what is required here is dishonesty or deception, rather than inaccuracy or an innocent mistake, "albeit not necessarily that of the applicant himself", to render a "false representation" a ground for mandatory refusal (paragraph 76 of the judgment). The Secretary of State drew attention to invoices addressed to Power Stream Employment Limited, made available on the appellant's behalf in support of the Tier 1 application. The judge took into account the Secretary of State's clear finding that Power Stream Employment Limited had never engaged in any legitimate business and a summary of the criminal investigation which appeared in the respondent's bundle. She noted that this evidence was not challenged by or on behalf of the appellant. She was entitled to accept the respondent's case that the invoices submitted with the appellant's Tier 1 application were false. She directed herself correctly in the light of AA (Nigeria) and found that there was dishonesty present in the application, the origin of which lay in the actions of the agent the appellant relied upon. In making this finding, the judge noted the evidence before her, contained in the witness statement (at paragraph 8 in particular) that the appellant signed the Tier 1 application form while it was not completed and had no idea which documents were sent to the respondent. In this particular context, the judge did not accept that the appellant had no knowledge of the documents to be submitted and it is clear from paragraphs 30 and 31 of her Decision that she took into account the appellant's claim that she did not see whether the application was for Tier 1 or Tier 4 leave and made a mistake in not reading the form. The judge's adverse findings were open to her in the light of the evidence. She had the appellant's case clearly in mind, I find, in the light of the adoption of the witness statement and the brief cross-examination. The fact that dishonesty was present in the actions of her agent, with the appellant having "deliberately closed her

eyes", as the judge found, was no impediment at all to the conclusion that the ground of refusal under paragraph 322(1A) was made out.

27. The variation of the application, in September 2012, with the appellant seeking to show that the requirements of the Tier 4 scheme were met, did not have the effect of giving rise to a separate, second application and the Secretary of State was perfectly entitled to take into account documents submitted in support of the application in its unvaried, Tier 1 form. The judge did not err in the assessment she made in this context. She took into account guidance given by the Court of Appeal in JH [2009] EWCA Civ 78. It is clear from section 3C(5) of the Immigration Act 1971 that an application to vary leave may itself be varied. The important phrase in the section is "variation of the application", which puts beyond any doubt that the application made to the Secretary of State remains intact. Variation does not bring it to an end or give rise to a separate application. In these circumstances, the appellant was of course entitled to invite the Secretary of State not to take into account documents which accompanied the application when it was first made and before she varied it but the Secretary of State was perfectly entitled to take them into account, as showing dishonesty, deception or falsity in the application, including in its varied form. The judge's conclusion that paragraph 322(1A) was made out was open to her and is fatal to any argument that the substantive requirements of the Tier 4 rules were met (at the very least, the requirement of paragraph 245ZX(a) was not met).

28. As noted by the grantor of permission to appeal, and as accepted by Mr Makol, the grounds in support of the application for permission to appeal are lengthy. The contention that paragraph 322(2) was the proper ground of refusal is simply not made out. The judge was entitled to find that paragraph 322(1A) fell to be applied. At paragraph 15 of the grounds, it is suggested that the judge erred in failing "to consider the *mens rea* aspect", as shown at paragraph 32 of the Decision, where she found that "some dishonesty was likely … albeit … by (the) agent". This is disingenuous. The judge was considering here the *appellant's* state of mind and she made a clear finding that reliance upon the Power Stream Employment Limited invoices showed that dishonesty and false documents were present in the application, albeit as a result of the agent's actions. It is briefly contended that the judge failed to carry out a proper Article 8 assessment. This is simply not so. At paragraphs 34 to 36, she properly found that the requirements of the rules were not met in relation to the appellant's claim to have established a substantial private life. There was nothing to show any family life. The skeleton argument relied upon at the First-tier Tribunal hearing and the witness statement made by the appellant on 21st January 2014 assert the thinnest of Article 8 cases and there is nothing to show that any particular ties and associations made here cannot be maintained from abroad. The judge did not err in concluding that the appellant could not succeed under Article 8. In summary, no material error of law has been shown and the decision of the First-tier Tribunal shall stand.

Decision

The decision of the First-tier Tribunal shall stand.

Anonymity

There has been no application for anonymity at any stage in these proceedings and I make no order on this occasion.

Signed Dated **16th March 2015**

Deputy Upper Tribunal Judge R C Campbell