Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
IA/05610/2015
IA/05620/2015

THE IMMIGRATION ACTS

Heard at: Manchester	**Determination Promulgated**
On: 27th May 2016	**On: 05th July 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Dr Twegise Mugisa
[M M]
(no anonymity direction made)

Respondents

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr Khan, Manchester Associates

DETERMINATION AND REASONS

1. The First Respondent (Dr Mugisa) is a doctor who has applied for leave to remain as a Tier 2 (General) Migrant in order to work in the NHS. The Second Appellant is her minor son, whose own appeal is dependent upon the outcome in hers. They are both nationals of Jamaica.

2. Dr Mugisa came to the United Kingdom in September 2013 as a Tier 4 (General) Student Migrant. She was already a doctor at that point, having qualified in 2006. She came to the UK to undertake post-graduate study, which she paid for privately. She made her application to vary her leave on the 13th December 2014. The application was refused on the 3rd February 2015. The only matter in issue was whether Dr Mugisa would be earning enough in her role as 'Clinical Fellow – Emergency Services and Critical Care'. The NHS Trust which wanted to employ her had completed a Certificate of Sponsorship which stated that her role most closely corresponded to the occupation code 2211 of the Codes of Practice as set out in Appendix J of the Immigration Rules. At the date of the decision the minimum acceptable rate of pay for a 37.5 hour working week in that role was £30,002 per annum. The Certificate of Sponsorship stated that the salary of £30,002 was to be paid for a 48 hour week. That would amount to a salary of £23,439 for a 37.5 hour week. This was below the minimum rate specified in the Codes of Practice and the application was therefore refused.

3. The matter came before the First-tier Tribunal on the 14th August 2015. The First-tier Tribunal had been provided with a letter written by Eleanor Devlin, Assistant HR Director at the Tier 2 Sponsor, Tameside Hospital NHS Trust. Ms Devlin wrote that the Certificate of Sponsorship had contained a mistake and that Dr Mugisa would in fact be working 37.5 hours per week for a minimum salary of £30,002. Ms Devlin highlighted that this would be the very minimum received, and that the pay could be as much as £39,693, depending on Dr Mugisa's experience. Having taken this evidence into account the Tribunal accepted that there was a mistake on the face of the Certificate of Sponsorship, that Dr Mugisa would be earning at least the minimum salary specified in the Code of Practice 2211, and allowed the appeal. The letter from Ms Devlin was dated the 9th February 2014.

4. The Secretary of State has now appealed against that decision. She relies on s85A of the Nationality, Immigration and Asylum Act 2002 to submit that the Tribunal was not entitled to take into account post-application evidence in this Points Based System case.

Error of Law

5. I am not satisfied that there was any error in the First-tier Tribunal allowing this appeal. The premise of the Secretary of State's appeal is that the letter from Ms Devlin should have been excluded as post-application evidence under s85A(2)(3)(b):

> **85A**
> **Matters to be considered: new evidence: exceptions**
>
> (1) This section sets out the exceptions mentioned in section 85(5).

(2) Exception 1 is that in relation to an appeal under section 82(1) against an immigration decision of a kind specified in section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision.

(3) Exception 2 applies to an appeal under section 82(1) if—

(a) the appeal is against an immigration decision of a kind specified in section 82(2)(a) or (d),
(b) the immigration decision concerned an application of a kind identified in immigration rules as requiring to be considered under a "Points Based System", and
(c) the appeal relies wholly or partly on grounds specified in section 84(1)(a), (e) or (f).

(4) Where Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it—

(a) was submitted in support of, and at the time of making, the application to which the immigration decision related,
(b) relates to the appeal in so far as it relies on grounds other than those specified in subsection (3)(c),
(c) is adduced to prove that a document is genuine or valid, or
(d) is adduced in connection with the Secretary of State's reliance on a discretion under immigration rules, or compliance with a requirement of immigration rules, to refuse an application on grounds not related to the acquisition of "points" under the "Points Based System".

6. What the author of the grounds does not appear to have considered is the purpose or significance of the letter in terms of s85A(4)(c). The letter from Tameside NHS Trust, as is made clear on its face, was simply to correct an error of the Certificate of Sponsorship. The correction went to establishing the validity of the offer, and the sponsorship itself. I am satisfied that this 'exception' to Exception 2 therefore applied. The First-tier Tribunal was entitled to take Ms Devlin's letter into account.

7. Although the First-tier Tribunal did not make any reference to it, it is further arguable that paragraph 245AA of the Rules was also pertinent:

(a)Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).

(b)If the applicant has submitted specified documents in which:

(i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
(ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
(iii) A document is a copy and not an original document; or
(iv)A **document does not contain all of the specified information**;

> the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.
>
> (c)Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.
>
> (d)**If the applicant has submitted a specified document**:
>
> (i) in the wrong format; or
> (ii) which is a copy and not an original document; or
> (iii) **which does not contain all of the specified information, but the missing information is verifiable from**:
> (1) **other documents submitted with the application,**
> (2)the website of the organisation which issued the document, or
> (3) the website of the appropriate regulatory body;
> the application may be granted exceptionally,
>
> providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements…

8. There was before the Secretary of State an email from the Tier 2 Sponsor dated 21st November 2014 stating that the salary scale for the role was £30,002 to £47,175 per annum and that this would be for a 40 hour week (i.e. 37.5 paid working hours). There was therefore information before the Secretary of State which provided the full information required. There was no suggestion that any of the documents relied upon were not genuine. In the circumstances the Secretary of State should have applied her own evidential flexibility policy.

Decisions

9. The decision of the First-tier Tribunal does not contain any error such that it should be set aside. The decision is upheld.

10. I was not asked to make a direction for anonymity and in the circumstances I see no reason to do so.

Upper Tribunal Judge Bruce
27th May 2016