In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/1074/2020
('V')

In the matter of an application for Judicial Review

The Queen on the application of
Zeena Hikmat Mahdi Tuaima & Others

Applicants

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Keith

HAVING considered all documents lodged and having heard Mr A Mussa, Solicitor-Advocate, OneLaw Chambers, for the applicants and *Mr Ruck-Keane*, instructed by GLD, for the respondent at a hearing on 10th February 2021

IT IS ORDERED THAT:

(1) The application for judicial review is granted for the reasons in the attached judgment.

(2) The respondent's decision of 20th November 2019, refusing the Tier 1 (Entrepreneur) application and the administrative review decision of 24th December 2019 are quashed, with the agreement of the respondent.

(3) Also with the agreement of the respondent, the respondent shall grant, not later than close of business on 24th February 2021, the applicants further leave to remain as a Tier 1 (Entrepreneur) applicant and dependents, following, and on the basis of, the applicant's pending application made on 23rd January 2020. The respondent has agreed to treat the previous application dated 22nd August 2019 as being varied by the application made on 23rd January 2020, under the same route.

(4) The application for orders seeking to quash the previous refusal decision dated 26th June 2019 and the administrative review decision dated 8th August 2019 is refused.

Costs

(5) The respondent shall pay the applicants' reasonable costs of the application, to be assessed if not agreed. The application for reimbursement of the fees for the 23rd January 2020 application is refused.

Permission to appeal to the Court of Appeal

(6) Neither party has sought permission to appeal to the Court of Appeal in respect of the contested aspect of the orders ((3) and (4) above)). In any event, I refuse permission to appeal to the Court of Appeal for the same reasons that I have made these orders, on the basis that there is no arguable error of law in my reasons.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **24th February 2021**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date):

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR/1074/2020 ('V')

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR
and via Skype for Business

10th February 2021

Before:

UPPER TRIBUNAL JUDGE KEITH

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Between:

THE QUEEN
on the application of
ZEENA HIKMAT MAHDI TUAIMA & OTHERS

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr A Mussa, Solicitor-Advocate
(OneLaw Chambers), for the applicant

Mr D Ruck-Keene
(instructed by the Government Legal Department) for the respondent

Hearing date: 10th February 2021

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J U D G M E N T

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Judge Keith:

The Hearing

1. These are the approved record of the Judgment and reasons which were handed down orally at the end of the hearing on 10th February 2021.

2. Both representatives and I attended the hearing via Skype, while a hearing room remained open for public access at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

Background

3. The applicants applied on 20th March 2020 for judicial review of several decisions, including an administrative review decision dated 24th of December 2019, which had confirmed an earlier decision of 20th November 2019 to refuse the lead applicant's application, with the remainder of the applicants as her dependent spouse and children, for further leave to remain under the Tier 1 (Entrepreneur) visa route.

4. The applicants further specifically sought that not only that these two challenged decisions should be quashed, but that earlier refusals also be quashed (see §7 below). The applicants also sought from this Tribunal an order that the applicants be granted leave to remain exceptionally and be provided with an in-country right of statutory appeal.

5. In the statement of facts and grounds (page 21 of the applicants' bundle, hereafter referred to as 'AB', §§4 to 6) the applicants referred to having initially applied to extend their leave to remain under Tier 1 on 3rd December 2018 and that their application was refused on 4th May 2019 but that upon administrative review, the May 2019 decision was withdrawn. This did not appear to be admitted to in the respondent's Acknowledgement of Service or detailed grounds of defence, but Mr Ruck-Keane confirmed before me that the May 2019 decision had been withdrawn.

6. The withdrawal of the May 2019 decision was important because one of the reasons for the renewed application being granted permission on oral renewal by Upper Tribunal Judge Owens on 5th August 2020 was that the judicial review application was arguably not academic, despite a further pending application for leave to remain having been made on 23rd January 2020, because the lawfulness of the earlier decisions refusing leave to remain were relevant to the continuity of the applicants' lawful residence under the Immigration Rules. Put simply, the applicants were on a route to settlement and refusal of the earlier applications might affect that route to settlement.

7. The applicants also sought to challenge an earlier refusal decision dated 26th June 2019 and an administrative review decision dated 8th August 2019 which had maintained the June decision.

8. In broad terms, the applicants asserted that they met the requirements of Appendix A of the Immigration Rules, namely in relation to the points-based system of Tier 1, specifically in relation to job creation. If the respondent had any concerns, she should have sought to interview or make further enquiries of the applicants. In the second alternative, the applicant argued that to the extent that they did not meet the requirements of Appendix A, the respondent should have exercised her

residual discretion, bearing in mind the purpose of job creation under the Tier 1 visa; and the decisions had ignored the applicants' human rights.

9. On 9th June 2020, Upper Tribunal Judge Gill refused permission on the papers (pages 11 and 12 AB). She noted the lack of compliance with the pre-action protocol process. The applicants had left it until five days before the end of the three-month long stop before making the application for judicial review and were now seeking a stay to allow the respondent the opportunity to respond. She regarded the application as academic noting the applicants' further applications of 23rd January 2020 which post-dated the challenged decisions; and she regarded it as not arguable that the respondent was obliged to consider, in the administrative review process, documents which were not before the original decision maker; nor in her view was it arguable that the respondent was required to interview the applicants; nor that the respondent had arguably failed to consider the applicants' rights under Article 8 ECHR, when there had been no application except on the basis of the points-based system.

10. The applicants renewed their application for permission for judicial review on 25th June 2020. At a renewal hearing on 3rd August 2020, Upper Tribunal Judge Owens granted permission on all grounds for review of the decisions to proceed to full judicial review. She regarded elements of the grounds as less strong but concluded that the application was not arguably academic because previous decisions under challenge could have a bearing on the lead applicant's continuity of lawful residence and there were arguable errors in the respondent's alleged failure, in the administrative review decision dated 24th December 2019, to engage with the applicants' argument that the lead applicant had created two full-time jobs lasting for over six months and therefore met the Immigration Rules: in particular one job as a full-time waiter and a further part-time waiter/cashier job, as well as a part-time chef job. The decisions arguably did not address whether the chef job could be considered as a part-time job and combined with a part-time waiter/cashier role to amount to a full-time job. It was also arguable that the respondent had not given sufficient weight to the fact she had already accepted on 8th August 2019 that a specific employee had been employed as a part-time cashier for a period of 12 months.

11. The application was later automatically struck out for non-payment of a continuation fee, with notification on 8th September 2020. On 10th September 2020 the applicants' solicitors applied to reinstate the judicial review proceedings. That application was granted by Mr A Hussain, Upper Tribunal Lawyer under delegated judicial powers in a decision dated 16th September 2020.

12. The respondent lodged additional grounds of defence, pursuant to the directions of Upper Tribunal Judge Owens, on 8th October 2020. She continued to resist all the grounds, which were, in summary, as follows:

    a. Ground (1) - the respondent had failed to apply the Immigration Rules and her policy correctly. The sole refusal was based on the lead applicant satisfying row four of Table five of Appendix A in relation to job creation. This states:

"The applicant has (a) established a new business or businesses that has or have created the equivalent of at least 2 new full time jobs for settled workers…"

b. Ground (2) – the respondent had failed to exercise her discretion properly based on information known to her. The applicants asserted that the respondent ought to have conducted an interview with the lead applicant should she have any concerns. Where the respondent had accepted a specified employee as a cashier in an earlier decision of 8th August 2019, she ought to have considered this in the subsequent application, even if the subsequent application was erroneous in specifying the employee as a waiter.

c. Ground (3) – Exceptional and compelling circumstances - the applicants' human rights including their good character, compliance with the visa system and payment of taxes, the investment of substantial sums of money, should have been considered. While the information regarding how the creation of jobs requirement was met could have been presented better to the respondent, (page 32 AB) the respondent had failed to carry out a proper analysis of the evidence.

d. Ground (4) - Article 6 ECHR - the respondent's process had breached the applicants' rights to a fair process in accordance with article 6 ECHR as the lack of opportunity to address the concerns meant that further applications in the future would be similarly rejected. The applicants had also been deprived of the opportunity of a statutory right of appeal before a First-tier Tribunal.

e. Ground (5)- Article 8 ECHR - a refusal under the points-based system could engage article 8 ECHR, noting the authority of Onwuje & Anor v SSHD [2018] EWCA Civ 331. The respondent ought to have considered the applicants' Article 8 rights including the establishment of a private and family life in the UK.

13. While the respondent had until the Hearing before me disputed all the above grounds for detailed reasons which, for the sake of brevity I do not set out, by the time of the Hearing, and following 'without prejudice' discussions between the applicants and respondent on the morning of the Hearing which resulted in me delaying the start of the Hearing, (for which I make no criticism of either party) the respondent's position had substantially changed.

The respondent's revised position at the Hearing

14. Whilst the changed position did not result in the terms of an agreed consent order, because not all the points could be agreed, nevertheless, the respondent accepted that the decisions of 20th November 2019 and the administrative review decision of 24th December 2019 should be quashed.

15. On the basis that the respondent no longer resisted the applications in respect of these two elements of the orders sought, I regarded it as appropriate to make them. Mr Mussa had also initially identified at the Hearing that he was seeking a decision on whether the applicants continued to have lawful residence, which Mr Ruck-Keane

regarded as both unnecessary and inappropriate, but after considering the agreement by the respondent, (§3 of the Order) that the respondent had agreed to treat the previous application dated 22nd August 2019 as being varied by the application made on 23rd of January 2020 under the same route, Mr Mussa no longer pursued this submission.

Remaining issues in dispute

16. The remaining issues in dispute were whether I should also quash the earlier decisions of 26th June and 8th August 2019 and whether I should order the respondent to reimburse the applicants their fees for the further application for leave to remain on 23rd January 2020.

17. The reasons for my decision can be put briefly. Whilst Mr Mussa asserted that both earlier decisions were in similar terms to the later impugned decisions which have now been quashed, should similarly be quashed. All the refusals had been made on the basis that the applicants did not meet the Immigration Rules. The applicants had consistently asserted that they met the requirements of the Immigration Rules. The applicants ought not to have been put to the expense of making the further application of 23rd January 2020 and in addition to their costs of applying for judicial review, these fees should be reimbursed.

18. In response, Mr Ruck-Keane pointed out that I did not even have a copy of 26th June 2019 before me and the grounds failed to identify in any way what the challenge was to the 8th August 2019 decision. It would be perverse if I were to quash the latter decision when it had been relied upon by the applicants as forming one of the reasons for challenging the later quashed decisions, because the respondent had accepted the duration of employment of a specified employee in the August 2019, a position which she later tried to resile from. In relation to the claim for reimbursement of visa fees, there was no need for the applicants to have made the further visa application, and an award of these fees would amount to special damages beyond the normal award, in circumstances where the applicants had not complied with the pre-action protocol, as outlined by Upper Tribunal Judge Gill in her decision refusing permission on the papers.

Discussion and conclusions

19. First, I was not prepared to quash a decision, namely the decision of 26th of June 2019 when that decision was not before me. Mr Mussa accepted that no copy had been provided to me and he was unable to explain the lack of production of this document. Whilst I do not doubt in any way Mr Mussa's integrity as a solicitor, I do not regard it as appropriate to quash a decision based on a simple assertion that it was in terms similar to later quashed decisions. Second, I accept Mr Ruck-Keane's submission that the grounds of challenge, while seeking to quash the earlier decisions, in fact contain no substantive reasons for doing so or criticism of these earlier decisions (in contrast to the later quashed decisions). Whilst I have a copy of the second decision, the administrative review decision dated 8th August 2019, (pages 99 to 102 AB), that decision can only be safely analysed by reference to the earlier June 2019 decision, as it is an administrative review of the earlier June 2019 decision. For these reasons alone I decline to quash either of the two decisions. On a more minor note, but still relevant,

I accept Mr Ruck-Keane's submission that the challenge to the 8th August 2019 decision is not consistent with reliance by the applicants upon elements of that very decision to challenge the later impugned decisions, specifically the conclusion in the 8th August 2019 that a specified employee had been employed for a 12 month period. In summary, I am not satisfied that the decisions of 26th June 2019 and 8 August 2019 contain any errors of law on public law grounds, and I decline to quash them.

20. In relation to the issue of costs, §5 of the Order reflects the agreement of the respondent to pay the applicants' reasonable costs of the judicial review application, to be assessed it not agreed. However notwithstanding the applicants' achievement, in large part, of what they were seeking to achieve, it would not be in my view appropriate to make an additional award of the reimbursement of visa fees for making an application for leave to remain on 23rd January 2020. Whilst I do not criticise the applicants for doing so, this was, in essence a "belt and braces" step which was unnecessary to preserve the applicants' legal position, when they had not yet engaged in the pre-action protocol process, for which they can be criticised. In that regard, I noted UT Judge Gill's reflection in her decision dated 9th June 2020 that the applicants had left it until 19th March 2020 to serve the pre-action protocol letter, i.e. five days before the end of the three-month long stop. While they chose to make a further visa application some months before that pre-action protocol correspondence, their success in the judicial review in relation to earlier challenged decisions does make it appropriate to order reimbursement of visa fees for an additional visa application which was still pending at the Hearing before me. I therefore decline to order reimbursement of those visa fees.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **24th February 2021**