Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA102132015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th May 2016	**On 9th June 2016**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS OLUFUNILAYO OLUSOLA IGE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Karen Pal, Senior Presenting Officer
For the Respondent: Mr D Coleman instructed by Paul John & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Majid) who, in a determination promulgated on 1st October 2015, allowed her appeal against the decision of the Secretary of State to refuse her application for leave to remain as a Tier 1 Migrant under the Immigration Rules (HC 395 (as amended)).

2. Whilst the Appellant is the Secretary of State, for ease of reference I intend to refer to the parties as they were before the First-tier Tribunal.

3. The immigration history of the Appellant can be stated briefly. The Appellant arrived in the United Kingdom on 25th November 2008 with entry clearance as a Tier 1 (General) Migrant and was granted leave to enter until 7th November 2011. On 6th November 2011, she submitted an application for leave to remain as a Tier 1 Migrant and was granted leave to remain until 21st August 2014.

4. On 21st August 2014 the Appellant made an application for indefinite leave to remain in the United Kingdom as a Tier 1 (General) Migrant. The application was considered by the Secretary of State and in a notice of decision of 30th January 2015 the Secretary of State refused that application and a decision was made to refuse to very leave to remain in the United Kingdom and to remove by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

5. The reasons for that decision are set out in the accompanying reasons for refusal letter of the same date. As the applicant was applying for indefinite leave to remain as a Tier 1 (General) Migrant, paragraph 245CD applied. At paragraph 245CD[h] the Appellant was required to have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL of the Rules unless the applicant could meet the conditions in [f] and [i]-[iii] which provide for an exemption. As set out in the decision letter, the applicant was required to demonstrate sufficient knowledge about life in the United Kingdom that was to be demonstrated if the applicant had passed the test known as the "Life in the UK test" administered by Learn Direct Limited. The decision letter stated that the Appellant had not provided any evidence that she had passed that test or that she should be exempted from the requirement therefore she had not satisfied the requirements of paragraph 245CD[h].

6. At paragraph [6] of the reasons for refusal letter, it made reference to Article 8 but noting that whilst it was implied in the application that she wished to rely on family and private life established in the United Kingdom under Article 8 of the ECHR, if an application was to be considered by the Secretary of State, it must be made in a separate application. Thus the application was refused.

7. Following the refusal the Appellant filed Grounds of Appeal under cover of letter of 13th March 2015 which included a witness statement referring to the late submission of the appeal and formulaic grounds making reference to the decision not being in accordance with the Immigration Rules and also raising Article 8 of the ECHR.

8. Three days before the hearing on 18th September 2015 an appeal bundle was provided which included a witness statement of the Appellant, copy of the Appellant's Life in the UK pass notification and documentary evidence about her university degree.

9. In a decision promulgated on 1st October 2015 Judge Majid allowed the appeal. The reasons given for allowing the appeal are set out at paragraphs [10]-[18] which records as follows:-

> "10. In this decision I am confining my reasons to the dispositive aspects of the case. I have carefully perused the Appellant's statement of 18th September 2015 and the other documents to reach my decision. Ms Shaw, very helpfully, conducted an oral examination of the Appellant in which she said 'I was not advised by any lawyer. I went to the Home Office website and did not tick the correct section of the form; now I believe that I should have ticked the section asking for ILR because I am entitled to that due to my relevant lawful time in this country.'
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> 11. Mr Staunton drew my attention to the reasons in the refusal letter of 30th January 2015 and invited me to dismiss the appeal.
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> 12. Ms Shaw said that the appeal should be allowed because the Appellant had made a genuine mistake. Also one should bear in mind that she is not only entitled to remain in this country with the type of status of ILR under the relevant Immigration Rules.
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> 13. I am grateful to Ms Shaw for pointing out the fact that due to lack of sound advice the Appellant had made a mistake, ticking the wrong section. However, as it is clear from looking at the form, the Appellant changed it by tipex. Ms Shaw indicated that an alternative route for the grant of ILR is also available to this Appellant as at the date of the hearing. Further, the Appellant was not a burden on the public funds since she was earning about £40,000 a year.
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> 14. I must say that the 'rule of law' demands that a person should be able to benefit from the ECHR as long as the UK remains a party to that Convention. Furthermore it should be remembered that again and again judges are told that the new changes automatically take into account the considerations relevant to ECHR. In this case the Appellant should have the benefit of discretion and it should be in line with the spirit of the ECHR.
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> 15. An explanatory Memorandum was submitted by the Home Office to Parliament when it introduced radical and material changes to the Immigration Rules on 9th July 2012. Inter alia this Memorandum said 'The new Immigration Rules will reform the approach taken as a matter of public policy towards ECHR Article 8, the right to respect for family and private life in immigration cases ...Failure to meet the requirements of the Rules will normally mean failure to establish an Article 8 claim.'
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> 16. I must say that I am conducting an appeal and not a judicial review and therefore cannot restrict myself in conducting a proper evaluation of the evidence on the matters of fact; if a factual issue is properly raised before the Respondent the evidence surrounding that issue can always be taken into account. My consideration of this appeal is not confined to points of 'law'. Of course, if I am sitting in an Appellate Court, I would have to be concerned only with the point of 'law'.

17. I am fully conscious of the 'legal requirements' stipulated by immigration law. It is incumbent upon me to advert to the new Rules giving respect to the animus legis dictated by the supremacy of parliament. The rule of law demands that this appellant should succeed under the Rules. She is not a burden on the public funds and is making a worthwhile contribution to the economy of this country as a Highly Skilled Migrant.

18. In the circumstances, in the view of my deliberations in the preceding paragraphs and having taken into account all the oral and documentary evidence as well as submissions at my disposal, cognisant of the fact that the burden of proof is on the Appellant and the standard of proof is the balance of probabilities, I am persuaded that the Appellant comes within the relevant immigration law, as amended."

The Secretary of State sought permission to appeal that decision and permission was granted by the First-tier Tribunal (Judge Colyer) on 8th March 2016.

10. Thus the appeal came before the Upper Tribunal. Ms Pal relied upon the grounds and submitted that there was a complete absence of findings relating to the application made under Tier 1 and that the losing party was entitled to understand why they had lost the appeal and that could not be discerned from the determination of the judge concerned.

11. She referred to the refusal letter and the basis given by the Secretary of State for refusing the application namely paragraph 245CD[h] and that the judge failed to consider the Rules including the documents required. She submitted that he should have considered whether the Secretary of State had seen the relevant documentation and that if a document had been missing or not in the correct format whether there was an issue under paragraph 245AA but none of those issues featured in the determination and there were no proper findings of fact or reasons given and that the only way it could be corrected would be by way of a complete rehearing.

12. Mr Coleman on behalf of the Appellant submitted that it was clear from paragraph 2 of the decision that he had the forefront of his mind the refusal letter and that he was aware of the basis upon which the application had been refused. He submitted that it was not incumbent upon a judge to go into every detail when making an assessment of the evidence. He made reference to paragraph 14 that the judge appeared to allow the appeal under Article 8 and that she should have the benefit of the discretion of the ECHR. He reminded the Tribunal that he had considered her oral evidence and written evidence and had accepted it and therefore found in her favour.

13. At the conclusion of the submissions, I indicated to the parties that I had reached the conclusion that the decision of Judge Majid disclosed material errors of law and that the decision should consequently be set aside. I gave my brief reasons at the hearing and I now give my full reasons for reaching that view.

14. The decision made by the Secretary of State was set out in the decision of 30th January 2015 supported by the reasons for refusal letter namely that the Appellant was

required under paragraph 245CD[h] to have sufficient knowledge of the English language and sufficient knowledge about Life in the United Kingdom in accordance with Appendix KoLL unless the applicant met the conditions which gave her an exemption. The refusal went on to state that the Appellant had not provided evidence that she has passed the "life in the UK test" or that she should be exempt from the requirement that she had not demonstrated that she met the requirements of paragraph 245CD[h] of HC 395 (as amended).

15. As the grounds set out, the judge made no clear reference to the decision under challenge under the Immigration Rules and whilst Mr Coleman submitted that the judge made reference to the refusal letter and thus the decision at paragraph 2, in my judgment it is plain from reading the determination as a whole that the judge wholly failed to engage with the nature and the contents of the refusal under paragraph 245CD[h] and the issue of the failure to provide the relevant document and the Appellant's evidence set out in her witness statement that she had taken the test and passed it six months later in July.

16. Nor does the judge set out how the Appellant was able to establish that she had met the Immigration Rules (if that indeed was the basis of the decision to allow the appeal).

17. The judge made reference to the submissions made by the Appellant's representative who appeared to advance her case on the basis that the appeal should be allowed because she had made a genuine mistake in ticking the "wrong box" (paragraphs [12] and [13]). However the judge wholly failed to explain how that would meet the Immigration Rules and on what basis he allowed the appeal.

18. Indeed I accept the submission made by Ms Pal that there is a complete lack of reasoning and it is wholly unclear on what basis he allowed the appeal; whether under the Immigration Rules relating to Tier 1 or under the Rules relating to Article 8 or outside of the Rules under Article 8 of the ECHR. The references made to the ECHR are set out at paragraphs [14]-[17] and make reference to the Appellant who should have the "benefit of discretion and should be in line with the spirit of the ECHR" (see paragraph [14]). The decision gives the appearance of having been allowed on Article 8 grounds. However if the judge was purporting to allow the appeal under Article 8 outside of the Rules it was incumbent upon him to say on what basis such an application could succeed.

19. Consequently the decision of the judge cannot stand and should be set aside.

20. As to the remaking of the decision, Mr Coleman on behalf of the Appellant submitted that this was a case in which the correct course was for it to be remitted to the First-tier Tribunal for a fresh hearing to include all matters including the issues of Article 8. Ms Pal was in agreement with this course as the correct course to be adopted. Therefore the case will be remitted to the First-tier Tribunal in accordance with Section 12[2][b] of the Tribunals, Courts and Enforcement and paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

Notice of Decision

The First-tier Tribunal made an error of law and the decision is set aside. The appeal is to be remitted to the First-tier Tribunal at Taylor House for a hearing in accordance with Section 12[12][b] of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

No anonymity direction is made.

Signed Date 9th May 2016

Upper Tribunal Judge Reeds