Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/23908/2015
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 December 2017	**On 12 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

AASTHA JOSHI
SWADHIN BATAJOO
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr. K. Manzur-e-Mawla, Lexpert Solicitors
For the Respondent: Mr. I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Seifert, promulgated on 17 March 2017, in which he dismissed the Appellants' appeals against the Respondent's decision to refuse to grant leave to remain.

2. Permission to appeal was granted as follows:

"It is arguable that, as the Appellants were victims of fraud regarding their

documentation, it was unfair to then find against them in relation to the lack of a CAS that depended on that fraudulent documentation and could not be obtained because of it, without them having a chance to rectify the problem. All grounds may be argued."

3. The Appellants attended the hearing. I heard oral submissions from both representatives following which I reserved my decision.

Submissions

4. Mr. Jarvis submitted at the outset that the Judge was wrong in saying that there was no mandatory refusal under paragraph 322(1A).

5. Mr. Manzur-e-Mawla relied on the grounds of appeal. In relation to the CAS he submitted that the Judge had not considered the information in the grounds of appeal and application form. On page 6 of the application form the Tier 4 Sponsor details had been given. The Judge was aware of this information which was in the bundle. No findings were made on this. The first Appellant was not in a position to provide a CAS because of what had happened in the previous application. The Appellants had been victims of fraudulent activities which had had a bearing on the first Appellant's application.

6. The first Appellant had varied her Tier 2 application as the COS was not valid. She made a subsequent application for a Tier 4 visa. She asked for some time. She had a conditional offer from a Sponsor. The Respondent, having noted the conditional offer, could have asked for verification of the position.

7. These were unique circumstances. There had not been a fundamental breach of the rules by the Appellants. There were only two paragraphs dealing with the CAS issue. The Judge had not considered the material facts. Mr. Manzur-e-Mawla confirmed that the appeal was only under the immigration rules. No human rights grounds had been raised at the appeal. He submitted that the Judge should have made a decision that the Respondent's decision was not in accordance with the law. The Judge should have found that the Respondent should have exercised her discretion and allowed the first Appellant more time.

8. In response Mr. Jarvis submitted that the grounds were legally flawed. Setting aside the issue of mandatory refusal raised in the Rule 24 response, the only way in which the first Appellant could have been given more time was if the underlying decision of the Respondent was not in accordance with the law. However, there was no CAS so the decision was in accordance with the immigration rules. As to whether the decision was not in line with common law fairness, the Appellants would have to show that the Respondent acted contrary to common law principles. This was not the case. It was not a "60 day" case of the type when an applicant had under 60 days' leave remaining and could not obtain a CAS.

9. On 29 April 2014 the issue of curtailment had been raised internally with the Respondent. On 19 May 2014 a curtailment decision was made. The Appellant's leave to remain expired on 22 July 2014. The Appellant had made an in-time Tier 2 application with a forged document. Before that application was decided, the Appellant made an application varying her Tier 2 application to a Tier 4 application. It was the same application, but varied. I was referred to the case of JH (Zimbabwe) [2009] EWCA Civ 78.

10. I was referred to the case of EK (Ivory Coast) [2014] EWCA Civ 1517, and the judgment of Lord Justice Briggs at [54] and [55]. The issue was whether the Respondent was to blame for the unfairness. There was nothing said in the application to vary about the situation surrounding the false COS. There was no reference to the circumstances of the provision of the false document.

11. He acknowledged that the first Appellant was in a "bit of a bind" due to the actions of her legal representatives. Her COS was fake and she had no CAS. The first Appellant was not personally responsible, but it was not the Respondent's actions that had led to this position. Had the Respondent been told of the circumstances, she may have chosen to exercise discretion. However the rules required refusal under paragraph 322(1A). No explanation had been made for the first Appellant's difficulties. She could not meet the Tier 4 requirements, and a false document had been provided.

12. Mr. Jarvis referred to the case of EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 00143 (IAC), paragraph [46] for an example of how a rule 24 response could be used. He submitted that he was able to raise the issue of the legal mistake made by the Judge in relation to the application of paragraph 322(1A). I was referred to paragraph 67 of AA [2010] EWCA Civ 773. There had been a false representation. The Judge had been wrong to consider whether or not the Appellant had been aware of that.

13. If the Appellant had wanted to raise the details regarding the COS, she should have set them out when she varied her application rather than just stating that she did not have a CAS. The point of the immigration rules was that they should be consistently and predictably applied.

14. There had been no claim under Article 8, and there was no claim now. There was no prospect of success under the immigration rules, and the decision was ultimately correct.

15. In response Mr. Manzur-e-Mawla submitted that the first Appellant had not provided an explanation to the Respondent regarding the forged COS because she had been to the police. Reasonable steps had been taken by the first Appellant. She had gone through the correct procedures to address the issue. The Tier 2 application had been made in June 2014.

The application had been varied in September 2014. He accepted that she had not had a CAS when she varied the application. However, the application contained information about her prospective sponsor, and the Respondent should have considered this as a matter of discretion.

16. This situation could be distinguished from EG and NG. The rule 24 response had been made after the decision of the First-tier Tribunal. The challenge by the Respondent went to another limb of the decision. The Judge considered paragraph 322(1A) and gave reasons why he did not find dishonesty. The burden of proof was on the Respondent. The Judge correctly found that the Appellant played no part in the dishonesty or deception. The Appellant believed that the representative had been working with them. There was no error in the Judge's consideration of paragraph 322(1A).

Error of law

17. The Judge dismissed the Appellants' appeals because the first Appellant did not provide a valid CAS with her application. He states at [13] and again at [46] that it was "common ground" that the application did not meet the requirements for a Tier 4 visa as she had not provided a valid CAS in support of her Tier 4 application. At [47] he states:

"I find that Mrs Joshi failed to meet the requirements of paragraph 245ZX(c) and was correctly awarded zero points in that category. Further, Mrs Joshi failed to meet the requirements of paragraph 245ZX(d) because zero points were awarded for Maintenance (Funds) for the reasons stated in the reasons for refusal letter."

18. It was again acknowledged before me that the Appellant had not provided a valid CAS in support of her application. Therefore the appeal could not succeed under the immigration rules, and there can be no error in the Judge's finding that the requirements of the immigration rules were not met.

19. It was submitted on behalf of the Appellants that the Judge should have allowed the appeal as not being in accordance with the law, as the Respondent had failed to exercise discretion and grant the Appellant a further 60 days in which to find a valid CAS.

20. From reading the decision and the submission made by Mr. Dey set out at paragraph [14], it does not appear that it was submitted that this should be done, but rather the emphasis was on the Respondent's decision to refuse the application under paragraph 322(1A). "If paragraph 322(1A) did not apply the appellants would be able to make future applications." It appears that the main reason for bringing the appeal was to overturn the Respondent's decision under paragraph 322(1A) in order that future applications could be made.

21. In any event, whether this course of action was proposed in the First-tier Tribunal or not, I find that it would not have been right for the Judge to find that the Respondent's decision was not in accordance with the law in relation to an alleged failure to grant the first Appellant a further 60 days in which to find a CAS. The obligation on the Respondent to issue a "60 day" letter only arises when it is due to some action on the part of the Respondent that the applicant is in the position of not having a valid CAS.

22. Paragraph [38] of EK states:

> "But that requirement was found to arise where there had been a change of position of which the Secretary of State was aware, and indeed which she had brought about, in circumstances in which the students were not themselves at fault in any way, but had been caught out by action taken by the Secretary of State in relation to which they had had no opportunity to protect themselves. In the present case, by contrast, the Secretary had no means of knowing why the Appellant's CAS letter had been withdrawn and was not responsible for its withdrawal, and the fair balance between the public interest in the due operation of the PBS regime and the individual interest of the Appellant was in favour of simple operation of the regime without further ado."

23. Paragraph [59] states:

> "Secondly, like Sales LJ, I consider that a fairness principle which would lead to success for the applicant in the present case would make too great an inroad into the simplicity, predictability and relative speed of the PBS process, contrary to the thrust of the PBS regime as laid down by the Immigration Rules, particularly in a situation such as the present, where the Secretary of State bears no responsibility at all for the mistake or the lack of communication of it, which led to the unfair outcome for the Appellant."

24. In the first Appellant's case the Respondent bore no responsibility for the fact that the first Appellant did not have a valid CAS. This was therefore not a case where the Respondent should have issued a 60 day letter. The Respondent's decision was in accordance with the law on this point.

25. In relation to whether the Respondent should have exercised discretion under paragraph 322(1A), given that the Respondent had no knowledge of the circumstances which led to a false COS being provided, it is difficult to see how she could have exercised discretion differently in this regard. The first Appellant did not give the Respondent any information about the false COS. It is submitted that the Appellants took appropriate steps by going to the police, but they did not tell the Respondent that they had gone to the police. There can have been no expectation that the police would tell the Respondent, even had they known that there was an outstanding application before the Respondent. There was no failure on the part of the

Respondent to exercise discretion due to the circumstances of the COS if she was unaware of those circumstances.

26. It was also submitted that the Respondent should have exercised discretion and made enquiries about the proposed sponsor. There is no obligation on the Respondent to do this. It was not the Respondent's fault that the offer from the sponsor was only conditional. Had she known about the circumstances of the COS, she may have acted differently, but she did not know about these circumstances.

27. I therefore find that there is no error in the Judge's dismissing the appeal under the immigration rules, and no error in his failure to allow the appeal on the grounds that the Respondent's decision was not in accordance with the law.

28. In relation to the point raised by Mr. Jarvis regarding the consideration of paragraph 322(1A), the Judge found that there was no ground for refusal of the application under paragraph 322(1) [45]. Mr. Jarvis submitted that this was wrong.

29. As stated above, this point was not cross-appealed. Mr. Jarvis submitted that I could consider it with reference to the case of EG and NG. Paragraph [46] states:

"Suppose a man seeks entry clearance as a husband and suppose that the Entry Clearance Officer finds that he has not shown that he can be either accommodated or maintained in accordance with the rules. A First-tier Tribunal Judge may decide, arguably wrongly, that the husband can satisfy the accommodation requirements but not the maintenance requirements. In that event the judge would dismiss the appeal. The Entry Clearance Office would have no interest in appealing. He is content with the decision to dismiss the appeal. The husband however may want to challenge the decision. He might want to argue that the decision that he did not satisfy the maintenance requirements was wrong in law and he may be given permission to appeal. In that event the Entry Clearance Officer may well want to argue not only that the decision that the husband did not meet the maintenance requirements was right but that the decision that he did meet the accommodation requirements was wrong. In short, without wanting to appeal the decision, the Entry Clearance Officer may want to rely on a ground that failed before the First-tier Tribunal. Rule 24 permits the Entry Clearance Office to give notice of his intention to raise such a point in a reply. In short rule 24 does have a meaning that does not depend on Ms Dubinsky's premise and we reject the construction that she urged on us. Rule 24 does not create a right of appeal to a party who has not asked for permission to appeal. Rule 24 is not in any way to do with seeking permission to appeal and it is not an alternative to seeking permission where permission is needed. It is to do with giving notice about how the respondent intends to respond to the appeal that the appellant has permission to pursue. If a respondent wants to argue that the First-tier

Tribunal should have reached a materially different conclusion then the respondent needs permission to appeal."

30. I find that the example set out in EG and NG is on all fours with the Respondent's approach here. The rule 24 response gives notice that the Respondent intended to respond to the appeal by reference to the mandatory refusal point under paragraph 322(1A).

31. Rule 322 is headed "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom ***are*** to be refused" (my emphasis).

32. Rule 322(1A) provides that an application is to be refused "where false representations have been made or false documents or information have been submitted (whether or not material to the application, and ***whether or not to the applicant's knowledge***), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application" (my emphasis).

33. Paragraph 67 of AA states:

"First, "false representation" is aligned in the rule with "false document". It is plain that a false document is one that tells a lie about itself. Of course it is possible for a person to make use of a false document (for instance a counterfeit currency note, but that example, used for its clarity, is rather distant from the context of this discussion) in total ignorance of its falsity and in perfect honesty. But the document itself is dishonest. It is highly likely therefore that where an applicant uses in all innocence a false document for the purpose of obtaining entry clearance, or leave to enter or to remain, it is because some other party, it might be a parent, or sponsor, or agent, has dishonestly promoted the use of that document. The response of a requirement of mandatory refusal is entirely understandable in such a situation. The mere fact that a dishonest document has been used for such an important application is understandably a sufficient reason for a mandatory refusal. That is why the rule expressly emphasises that it applies "whether or not to the applicant's knowledge"."

34. It was not in dispute that a false document in the form of the COS had been provided with the application. The Tier 2 application was varied to a Tier 4 application. The Tier 4 application was not a fresh application, and indeed it was not argued by Mr. Manzur-e-Mawla that it was. As stated in JH (Zimbabwe):

"As a matter of language, there is no reason why a later application should not also be treated as a "variation" of the first application even if it is for a different purpose. I do not accept that a variation can only arise where the later application is for the same purpose but with different details" [37].

35. Therefore the COS was provided "in relation to the application". The Respondent was entitled to take the provision of a false document into account. The Appellant was unaware of it at the time, but rule 322(1A) is clear that it applies whether or not the applicant was aware of it.

36. I therefore find that the appeal fell to be refused in relation to paragraph 322(1A), which is a mandatory ground for refusal. I find the Judge erred in finding that the application should not have been refused under paragraph 322(1A). However, this error is not material as he dismissed the appeals in any event for lack of a CAS, and I have found above that there is no error of law in this decision.

Decision

37. While the decision of the First-tier Tribunal involves an error of law in relation to paragraph 322(1A), this error is not material as the Appellants' appeals were dismissed in any event. There is no error of law in the decision to dismiss the Appellants' appeals and the decision to dismiss the appeals stands.

38. In relation to paragraph 322(1A), I remake the decision and find that the Respondent was correct to refuse the Appellants' applications with reference to paragraph 322(1A).

39. No anonymity direction is made.

Signed Date 12 January 2018

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

The appeals are dismissed and therefore there can be no fee award.

Signed Date 12 January 2018

Deputy Upper Tribunal Judge Chamberlain