Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33837/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th March 2019	**On 21st March 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MARISSA CANTOS MUSICO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Collins of Counsel, Douglas Simon Solicitors (Earl's Court)
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. I refer to my Error of Law decision promulgated on 22nd November 2018 (attached) in which I directed the parties to file submissions on the question of jurisdiction of the Immigration and Asylum Tribunal.

2. The facts and law are set out in detail in my decision of 22nd November 2019 and I shall not repeat them here save to note that the appeal was dealt with by First-tier Tribunal Judge Lingam whose engagement with the aspect of

jurisdiction was limited to consideration of whether the notice of appeal was properly completed. That was insufficient. At paragraph 25 the judge did acknowledge that the Tribunal had been directed to consider the validity of the appeal as a 'mixed question of fact and law… it was not suitable to deal with it as a preliminary consideration without full…evidence and or submission'.

3. The judge proceeded at [31] to record

> 'I am satisfied that the essential details were included in the appeal notice that incorporates a human rights ground, signed by the appellant's legal representative. I am satisfied that those representing the appellant have also paid the requisite fee of £140 for an oral hearing. On those basis (sic) I am satisfied that the appellant's appeal notice is valid'.

4. That analysis was incomplete, and I directed both representatives to make written submissions solely on the jurisdiction point.

5. In writing, Mr Deller on behalf of the Secretary of State accepted that the appellant may have been employed on a personal basis as a matter of fact but it was unclear as to the decision under challenge. As he set out, the Appellant's case was that the document issued by the Entry Clearance Officer had the effect of conferring leave to enter until 8th January 2014 (when her passport expired) and that the appeal was brought against an 'immigration decision' as defined in section 82(2) of the 2002 Act as saved by the Commencement Provisions for the 2014 Act. Even if the appellant had been employed personally by the Ambassador of Lebanon from the outset the leave given would only have attracted, under paragraph 152 and 153, up to 12 months leave. In no circumstances would leave have been granted for five years (see Article 3 of the Immigration (Leave to Enter and Remain) Order 2000). The appellant did not have leave to enter until January 2014. She was either exempt from control or was miscategorised as such. The Secretary of State's position was that she could not have had leave to enter or remain at 8th January 2014 notwithstanding any indication that she had; if she was in fact a private servant in a diplomatic household, she should have been issued with entry clearance. She was not so issued.

6. In written submissions Mr Collins noted that the decision under challenge was that of the 25th April 2014 which stemmed from an application of 12th March 2014. He asserted that the appellant had leave from the date she entered on 16th April 2009 to 9th January 2014 (the date her passport expired) and her leave was extended by virtue of Section 3C of the Immigration Act 1971 because of the application she made. The Tribunal was referred to **BJ (Singh explained) Sri Lanka** [2016] UKUT 00184 (IAC) such that where there was leave and a valid application and a person receives a negative decision that person has a right of appeal to the First-tier Tribunal and will retain Section 3C leave. Where such a decision is made the appellant may waive the requirements of the Notices Regulations.

7. For the reasons I give below I find that as the appellant did not have leave and **BJ** and cannot assist the appellant.

8. At the hearing on 11th March 2019 Mr Collins made oral submissions and I was referred to **R v Secretary of State for the Home Department ex parte Ram** [1979] WLR February 16. This held that where an Entry Clearance Officer has not been misled by the applicant into stamping the passport with leave to enter indefinitely, the onus was on the Secretary of State to show that the applicant was an illegal entrant. In that case, the fact that the Entry Clearance Officer had mistakenly stamped the passport of the applicant who did not come within the categories of lawful entrants did not vitiate the officer's authority under Section 4(1) of the Immigration Act 1971 to grant leave to enter the United Kingdom and the applicant was lawfully in the United Kingdom pursuant to that grant of leave.

9. I was also referred to **R (on the application of B) v Secretary of State for the Home Department (recording of leave - date stamps) IJR** [2016] UKUT 00135 (IAC) decided by the now President, Mr Justice Lane. This held that someone who, by misrepresentation, induces an immigration officer to proceed (to grant leave) on a mistaken basis is not automatically entitled to succeed, (for example a date stamp recording a grant of leave under the Immigration Act 1971) merely because a mistaken decision has been formally recorded. By contrast even a blameless individual will be unable to obtain benefit from a stamp where there is no practice on the part of the Secretary of State of using a date stamp to record a grant of leave.

10. Mr Jarvis noted that much evidence had come 'after the event' of the grant of exempt status. Mr Deller was not identifying a mistake by the Entry Clearance Officer but that, on the information the appellant had supplied at the time, she was considered visa exempt. Subsequently, it would appear she may have been miscategorised, but not on the application itself. Subsequently, she did not make an application within the permitted time limit of 90 days (with the possible 28 day waiving where she had overstayed). Her leave had expired mid November 2013 (90 days after she had represented that she was working in a private capacity). Her application and the ensuing refusal would have been considered under the 'old' appeal regime, and, as she was visa exempt, she had no leave when she applied.

11. On the basis of the information supplied to the Entry Clearance Officer she was visa exempt. The decision of the Entry Clearance Officer as annotated demonstrated she was clearly visa exempt. With regards the case of **Ram**, the Entry Clearance Officer had treated her as visa exempt and there was no avenue in law that the applicant could 'undo' that grant. In any event, even if she had been given 'leave' the most the appellant could have obtained was Leave to Enter for 12 months. An applicant cannot request a visa to be classified as a different visa retrospectively in this way. There was no challenge

at the time and that would have been the avenue or remedy for the appellant to follow at the time.

12. Mr Collins stated that the appellant had leave and was in the United Kingdom lawfully. Mr Jarvis responded that she was in the United Kingdom with evidence of entitlement to exemption until her change of circumstances.

Analysis and Conclusion

13. The decision under challenge is that of 25th April 2014. That was confirmed in the Notice of Appeal to the First-tier Tribunal. Both Mr Jarvis and Mr Collins agreed with that summation.

14. I am not persuaded that **Ram** or **R (B)** assist the appellant. I do not consider that there is evidence the appellant misled the Entry Clearance Officer or that there is a mistake in the type of classification of the application; rather the reverse and it is clear from the application details recorded by the Entry Clearance Officer, and the only documentation available, that the 'EC Type' is classified as 'D' and the payment detail was 'Gratis: 7.4(a) Persons who are exempt' - the appellant was not placed in a fee category consistent with 'diplomatic' exemption. The sponsor's name was recorded on the application details as the 'Embassy of Lebanon', not a private name of the Ambassador, and it would also appear that the Entry Clearance Officer had access to the contract. The annotated notes show that the Entry Clearance Officer also applied the guidance. The applicant was also considered to be 'Biometrics Exempt'. It is not therefore a question of the applicant misleading the Entry Clearance Officer as in **R (B)**. The Entry Clearance Officer operated on the information he was given, which came from the Lebanese Embassy (see below) and appeared to record and detail the application with some care.

15. Once granted, at no point did the applicant challenge her 'exempt status' and she travelled in and out of the United Kingdom with her exempt status. By 2013, however, her solicitors applied on her behalf for leave to remain, but it was evident that by this time she was legally represented, and submissions made that she was employed privately and no longer exempt. For the reason given in my error of law judgment from Paragraph 67 onwards it was evident that her solicitors had reported on 16th August 2013 (and see page 382 of the Appellant's Bundle), in the first application on behalf of the appellant, that she was a worker in a private household, employed personally and thus no longer exempt. Indeed, in her witness statement dated 25th June 2013, the appellant stated that she was

> '*not entirely sure on what basis [she was] making the application as all the documents were completed on [her] behalf by the Lebanese Embassy*'.

16. The letters dated 4th July 2013 and 13th August 2013 from the Ambassador, accompanying the August 2013 application, do not undermine the approach

taken by the Entry Clearance Officer, when the appellant's status/exemption from leave was originally given in 2009.

17. I find that the appellant was given exempt status in 2009 for the validity of her passport only, rather than conferring 'leave', but, prior to the expiry of her passport, her circumstances must have changed. From the time that she was no longer exempt she had 90 days from 16th August 2013 (at the latest) to make a **valid** application for leave. She did not do so. Under Section 8A of the Immigration Act 1971 she was to be

> '***treated as if he had been given leave to remain in*** *the United Kingdom for a period of 90 days beginning on the day on which he ceased to be exempt'.*

18. Mr Jarvis accepted that she may have made an application even within a 28-day period after the 90-day period, but she did not. Her representatives persisted in making an application on FLR (O) despite being told that the correct application was on a Points Based System Form under Tier 5. By the close of 2013 the appellant was an overstayer. The Secretary of State **repeatedly** told the appellant through her representatives, that the FLR (O) was not the correct application and that a Tier 5 application should be made. In **BJ**, that application was not required to be made on a specific form and there was no suggestion that the application was not valid. That was not the case here. The Secretary of State's response dated 25th November 2013 to the application of August 2013 was clear that the application, in line with paragraph 34 of the Immigration Rules, should be made on the correct specified form PBS Tier 5 not FLR (O) form. That advice was in bold. Her application was rejected. The Secretary of State again on 18th December 2013 confirmed that there was no error in the rejection and that the Rules changed in November 2008 and the correct form was PBS Tier 5 form not the FLR (O) form. A yet further application was filed on 3rd January 2014 and this once again was rejected and voided as an 'inappropriate application' on 11th February 2014. The applicant was given numerous opportunities to rectify her application and comply with the Rules.

19. The appellant had no leave by, at the very latest, the end of December 2013. Despite the application being made under Paragraph 159 on 12th March 2014 and which generated the current decision asserted to be under challenge, she could not have fulfilled the requirements because she was never given paragraph 159 leave in the first place. By that time, she had no leave.

20. It was accepted by both parties that the right of appeal was governed by the Nationality, Immigration and Asylum Act 2002 as it applied prior to April 2015 regime. Section 82 stated that where an 'immigration decision' is made in respect of a person he may appeal to the Tribunal

> *Section 82(2) 'In this part 'immigration decision' means-*
>
> …

(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain

(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain.

21. Neither 82((2)(d) nor 82((2)(e) could apply to the appellant. She did not have Section 3C leave because she had not made a prior valid application. Even if she were given a type of leave, through the 90-day grace period, and which Mr Jarvis doubted, by the date of her application in March 2014 she was an overstayer.

22. There was, as a result, no immigration decision and she had no right of appeal.

23. For these reasons, I am not persuaded that either the First-tier Tribunal nor the Upper Tribunal has jurisdiction.

There is no valid appeal before either the First-tier Tribunal or the Upper Tribunal.

Signed *Helen Rimington* Date 11th March 2019

Upper Tribunal Judge Rimington