Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01127/2015
IA/01273/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 October 2015	**On 21 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

Mrs SOUMYA SAYINI &
Mr ANIL KUMAR SAYINI
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H. Kannangara, counsel instructed by Legend Solicitors
For the Respondent: Ms A. Fujiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The first Appellant is a national of India, born on 28 February 1991. The second Appellant is her husband, born on 12 March 1984. On 23 September 2013, the first Appellant applied for Tier 4 (General) student leave in order to do an MBA at Anglia Ruskin University. She was granted leave until 15 July 2014 and the second Appellant was granted leave as her dependent. On 20 March 2014, the first Appellant applied for further Tier 4 leave but this

application was refused on 16 May 2014. On 19 June 2014, the first Appellant took an English language test and made a further application for leave to remain on 14 July 2014. She was interviewed on 26 August 2014 and her application was refused on 19 November 2014. She appealed against this decision with her husband as her dependent and the appeal was listed for hearing on 14 May 2015. In a decision dated 18 May 2015 and promulgated on 26 May 2015, First Tier Tribunal Judge Rodger dismissed the appeal in respect of the Immigration Rules and on human rights grounds.

2. On 10 June 2015, the Appellants' solicitors made an application for permission to appeal out of time. The grounds in support of the application asserted that the Judge failed to consider the principles of fairness *cf.* Mushtaq IJR [2015] UKUT 224 (IAC) and the Judge made the finding against the first Appellant based solely on the questions and answers in the interview and the finding that she is not credible is based on minor and insignificant matters. There was no case to show that the first Appellant is unfit to study the proposed course.

3. In a decision dated 10 August 2015, permission to appeal was granted by First Tier Tribunal Judge White on the basis that the Judge had arguably made an error of law in finding that the Appellant was not a genuine student [33] and in so doing failed to apply the guidance in Mushtaq with regard to the interview of 26 August 2014 and it was notable that the interviewer did not indicate that he or she doubted that the First Appellant genuinely intended to study but rather that the Appellant was not of sufficient or claimed standard of English. It was also notable that at the time of the interview the First Appellant had already started her course and was continuing to study at the time of the appeal hearing. Judge White also extended time for permission to appeal as he was satisfied it was in the interests of justice to do so.

Hearing

4. At the hearing before me, Mr Kannangara sought to rely on the grounds of appeal. He drew my attention to the interview with the first Appellant on 26 August 2014 at page 50 of 77 and the fact that the question: '*Was the customer credible at interview?*" was answered "*yes*." He submitted that the box had not been ticked with regard to the question of the Applicant not genuinely intending to study the course and that the crucial factor is that concern was raised only with regard to the standard of English language. In respect of the interview, he submitted that there was a mistake as to the date the course started. At the date of the hearing she had embarked on the course and has now completed it and obtained a certificate. He confirmed that the interview had taken place on 28 August 2014 and the course began on 28 July 2014 and finished in July 2015.

5. He submitted that the Judge, she was relying on certain issues in the interview at Q's 17, 18 and 30, which relate to why the First Appellant chose the course, how it related to her previous course and her long terms aims. The first Appellant had already given her reasons: from her perspective Meridian Business college was highly trusted; she wanted to do the Level 7 diploma as it

is relevant to her previous studies and then do the MBA. She scored 5.5. for both listening and writing. The issue of her genuineness did not arise out of the interview as the interviewing officer did not have an issue about her genuineness, but the caseworker came to a different conclusion. The Judge should have found the purpose of the interview was to test her genuineness.

6. Mr Kannangara also pointed out that the MBA was also Level 7 and there was nothing to say that the First Appellant was not in a position to do an MBA and she had been granted entry clearance to do this and the ECO had no issue with her qualifications. She did not change her path after she came to the United Kingdom because what she is doing is relevant and the Judge's finding at [32] (i) was wrong. He submitted that the CAS would not have been issued if the first Appellant's English had not been not good enough, however, she obtained 5.5. in the IELTS. He submitted that the Judge had not followed the principles in Mushtaq where the Upper Tribunal gave clear guidance as to how interviews should be conducted and in failing to follow that guidance the Judge made a material error of law.

7. In reply, Ms Fijiwala sought to rely on the rule 24 response. She submitted that the grounds amounted to no more than a disagreement with the Judge's findings of fact and Mr Kannangara had sought to attempt to re-argue the case today. It was clear that the interview record was before the Judge. Upon being shown the interview record, which was not in her papers, Ms Fijiwala accepted that at the last page of the interview record the interviewing officer did not check the "not genuine" box, but it was open to the caseworker to refuse the application.

8. Ms Fijiwala submitted that the grant of permission to appeal was misconceived. The maintenance issue had been conceded. In respect of paragraph 3c of the grant of permission, she submitted that the Appellant was studying at the time of interview and at the time of the appeal hearing but the Judge was precluded from considering this by virtue of section 85A of the NIAA 2002. The Judge was aware that she had started the course on 28.7.14 [17]. She submitted that the decision in Mushtaq was irrelevant because the Judge was considering both pieces of evidence together. At [31] the Judge found that taking all the evidence together as a whole the Appellant was not credible. He considered the start date of the course and the oral evidence, which differed: [31] and [32]. This did not sit well with the decision that she came to the UK to study. It was a relevant consideration for the Judge that the first Appellant was pregnant and due to give birth without family in UK or care arrangements for the child and these were not actions that would be taken by a genuine student. It had clearly been open to him to make these findings based on oral evidence and there were no errors in the determination.

9. Mr Kannangara then responded submitting that with regard to section 85A(4) of the NIAA 2002 the Judge can consider evidence at the time of the hearing as this was not relevant to the points scoring aspect of the case and thus he could have looked at her studies at the date of hearing. The fact that there was a mistake as to when she started the course was irrelevant given that she was 10 months into the course at the date of hearing. In respect of the

English language requirements, the first Appellant had failed the pre-sessional course. She had 5.5. for each component which was B2 but she needed to do degree level or above. She had the BTEC requirement even though she failed the pre-sessional course. In respect of the finding at 32(g) the Appellant was still a student. She has not started her professional career yet. She applied for an extended diploma. Because of pregnancy related issues and the fact that she failed pre-sessional English, she studied for an extended diploma instead of an MBA. He submitted that he was not seeking to re-argue the case but setting out the undisputed facts.

Decision

10. I reserved my decision which I now make, with my reasons. I find that First Tier Tribunal Judge Lamb erred materially in law in dismissing the first Appellant's appeal and by extension that of her dependent husband, the second Appellant. One of the bases of refusal, that of maintenance, was conceded by the Presenting Officer before the First Tier and Ms Fijiwala did not seek to resile from that concession. Therefore, the only issue was whether the first Appellant is a genuine student. The First Tier Judge found against the first Appellant for reasons set out at [31] and [32] of his decision. The Judge himself acknowledged at [31] that the "examples" he gave for not accepting the first Appellant as a credible witness "*may in themselves seem minor and insignificant*" and I find that that is so. I do not consider that in respect of [31](a) that the fact that at interview the first Appellant gave a start date for her course 1 week later than the date she had given in her application form is material, given that the first week may have been an induction week and in any event, the difference is very slight. [31](b) and (d) concern the pre-sessional English course. The Judge found that the first Appellant had been inconsistent in respect of whether or not she had passed the course and as to the writing element of the course but I find that, whilst the first Appellant failed the pre-sessional English course she passed the IELTS English language course and scored 5.5. in writing and I consider the Judge rather than the first Appellant has merged the two and become confused. I do not consider that [31](c) regarding the inconsistency between the first Appellant's witness statement and her oral evidence as to why she did not start her MBA course in March 2015 is sufficient to found a negative credibility finding, not least because, given her child was born on 10 February 2014, her pregnancy cannot be the reason why she was unable to begin her MBA in March 2015 and her witness statement is in accurate in this respect.

11. Judge Rodger at [32] provided 14 reasons as to why he was not satisfied the first Appellant was a genuine student. Out of those reasons I do not consider that (a) her age (b) her lack of previous employment (c) the nature of an MBA course (d) the fact she had married and had a child and (g) her personality are materially relevant to a finding that she is not a genuine student. The remainder of the points raised against the first Appellant essentially relate to the interview record but I find that at no time does the Judge consider the first Appellant's answers at interview alongside the fact that at the end of the interview the interviewing officer found that she was credible and thus a genuine student. In those circumstances I find that compelling

reasons needed to have been provided by the decision-maker, who did not interview the first Appellant, to justify refusing the application on the basis that the first Appellant was not a genuine student. I further find that the fact that the first Appellant was granted entry clearance was indicative of the fact that the Entry Clearance Officer also accepted that she was a genuine student. Much of the focus of the Judge at [32](h)-(n) was on the Appellant's proposed study for an MBA whereas in fact the decision under appeal related to her application for a BTEC Level 7 Extended Diploma in Strategic Management and Leadership and it was this course that should have been the focus of the Judge's consideration and not the MBA. Thus the only remaining criticism of the first Appellant was that she was vague. This is an insufficient basis to find that she is not credible.

12. I have had regard to the decision of the President of the Upper Tribunal in R (on the application of Mushtaq) v Entry Clearance Officer of Islamabad, Pakistan (ECO – procedural fairness) IJR [2015] UKUT 00224 (IAC) however, it is not of particular relevance to this case, given that the refusal decision of 19 November 2014 was, unlike in Mushtaq, based on the responses of the first Appellant at interview. I have found at [11] above, that decision is in itself flawed because it fails to take account of a material consideration *viz* the fact that the interviewing officer found the first Appellant to be credible and thus a genuine student. I have also had regard to section 85A of the NIAA 2002, which precludes consideration of evidence adduced by the Appellant unless it was adduced in support of and at the time of the application, however, given that the evidence and submissions focused on the interview with the first Appellant which is relied upon by the Respondent in her refusal decision, the section 85A principle did not arise. Whilst at the time of the application the first Appellant had not started the BTEC Level 7 diploma course this was the reason for her making an application to extend her leave and was the subject of the refusal decision of 10 November 2014, at which time the Respondent was aware that she had commenced the course because this post dated her interview on 28 August 2014. The first Appellant has not sought to adduce new evidence that was not before the decision-maker *cf.* Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC) at [5] but was simply relying on the fact that she was studying on the course for which she had applied to extend her leave.

13. For the reasons set out above, I find that First Tier Tribunal Judge Rodger erred materially in law in dismissing the appeal on the basis that the first Appellant was not a genuine student.

Notice of Decision

14. The appeal by the Appellants is allowed.

No anonymity direction is made.

Deputy Upper Tribunal Judge Chapman

3 December 2015