ASYLUM AND IMMIGRATION TRIBUNAL

AA (paras 131A-I: switching) Nigeria [2009] UKAIT 00055

THE IMMIGRATION ACTS

Heard at: Procession House Date of Hearing: 22 September 2009

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Grubb

Between

AA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr E Ifere, IEI Solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

Paragraphs 131A-I of HC395 do not prohibit "switching". In particular, (1) the reference to a particular immigration category is a reference to the category the applicant had or has before the present application, not to the category that will persist if the present application is successful; (2) there is no requirement that current leave be in the same category as the leave that will result from the application's being successful.

DETERMINATION AND REASONS

1. The appellant is a national of Nigeria. She appealed to the Tribunal against the decision of the respondent on 4 March 2009 refusing to vary her leave in order to enable her to remain as a work permit holder. An Immigration Judge dismissed her appeal. The appellant sought and retained an order for reconsideration. Thus the matter comes before us.

2. The appellant entered the United Kingdom on 13 October 2000 in possession of entry clearance as a student valid until 31 October 2003. On 7 November 2003 she was granted leave to remain as a student until 31 December 2006. On 18 January 2007 she was granted leave to remain as what is described as a "dependant student". Mr Deller was unable to explain what that meant, but it appears that leave was granted outside the rules to the appellant on the basis of a relationship she then had with another person who may or not have been a student. In conjunction with the termination of that relationship, the appellant obtained a job offer and a work permit, and applied for leave to remain as a work permit holder.

3. The original application was made during the course of existing leave, but was apparently treated as invalid because of some difficulty about tendering the fee. Questions relating to whether that application was valid were, however, apparently resolved in the particular circumstances of this case. We say that because the respondent clearly treated a subsequent application as a variation of the original one, against the refusal of which a right of appeal lay.

4. The relevant immigration rules for an extension of stay for work permit employment are in paragraphs 131-135 of the Statement of Changes in Immigration Rules HC395. Paragraphs 131 and 131A-131I set out different provisions for those seeking to remain for work permit employment after entry in various categories. Para 131 is the general provision relating to those who enter the United Kingdom as work permit holders. Paragraphs 131A-I relate to other specific categories. The wording of paras 131A-I is far from clear, and we think it must have misled the Immigration Judge. There are two points of importance in this appeal, and by way of example we set out the wording of para 131A; the wording of the other paragraphs is, so far as relevant, identical.

> "131A The requirements for an extension of stay to take employment (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules) for a student are that the applicant:
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> i. entered the United Kingdom or was given leave to remain as a student in accordance with paragraphs 57 to 62 of these Rules; and
> ii. has obtained a degree qualification on a recognised degree course at either a United Kingdom publicly funded further or higher education institution or a bona fide United Kingdom private education institution which maintains satisfactory records of enrolment and attendance; and
> iii. holds a valid Home Office immigration employment document for employment; and
> iv. has a written consent of his official sponsor to such employment if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and
> v. meets each of the requirements of paragraph 128(ii) to (vi)."

5. The first question is the meaning of the phrase “For a student”. Does the paragraph relate to employment by those who are currently students, or does it relate to employment by those who have been students? The phrase “for a student” would suggest the former; but we are sure that the latter is what is intended. We derive that from the fact that para 131A(ii) is in essence a requirement that the individual’s studies have ceased. The meaning of the phrase “for a student” is, as can been seen from the wording of all of paras 131A-I, a reference to the category in which the applicant entered the United Kingdom.

6. The other question that arises is whether it is necessary for the applicant to have, at the time of the application, leave in any particular category in order to meet the requirements of paras 131A-I. It does not appear to us that that is a requirement of the rules. When the rules require existing leave, they say so. Examples, if they are needed, are found in para 69P (“has leave to enter or remain”, five times) and 284 (“has limited leave to enter or remain”, and other conditions are specified). Nothing of the sort appears in the rules now under consideration. What is required is that, as paragraph 131A(i) requires, the applicant *entered* the United Kingdom or *was* given leave to remain as a student. The rule contains no requirement as to existing leave. (For the avoidance of doubt we should add that, although that is the characteristic of the rule, an applicant who has no leave at the time of the application will have no right of appeal if the application is refused, because in such circumstances a refusal is not an “immigration decision” within the meaning of section 82 of the 2002 Act.)

7. The Immigration Judge took the view that the appellant could only meet the requirements of the rules if, at the date of her application, she had current leave to remain as a student or one of the other categories mentioned in paras 131A-I. In our judgement that was a condition not imposed by those rules. The Immigration Judge materially erred in law in imposing it on the appellant.

8. The facts of the present case are not in dispute, and in particular it is not suggested that the appellant has other than an impeccable immigration history. She met and meets all the requirement of para 131A. We substitute a determination allowing her appeal.

C M G OCKELTON
DEPUTY PRESIDENT