Upper Tribunal
(Immigration and Asylum Chamber)

US and MV (PBS – applicants from same family) Malaysia [2010] UKUT 167 (IAC)

THE IMMIGRATION ACTS

Heard at Procession House

On 17 November 2009

Before

Mr C M G Ockelton, Vice President

Senior Immigration Judge Nichols

Between

US

MV

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Miss C Physsas, instructed by Joseph Thaliyan Solicitors

For the Respondent: Mr J Gulvin, Home Office Presenting Officer

There is no proper basis for the Secretary of State to treat a valid application as invalidated by the presence in the same envelope of an invalid application by a member of the same family.

DETERMINATION AND REASONS

1.
The Appellants are nationals of Malaysia, husband and wife. They appealed to the Asylum and Immigration Tribunal against the decision of the Respondent on 8 June 2009 refusing the first Appellant leave as a Tier 1 (post-study work) migrant, and the second Appellant leave as his dependent wife. Immigration Judge Jhirad dismissed their appeals. The Appellants sought and obtained an order for reconsideration. By virtue of the provisions of paragraph 4 of Schedule 4 to the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010, the reconsideration continues as an appeal to this Tribunal.

2.

The Appellants' difficulty arises from the detailed provisions of the points-based scheme and the way in which the Respondent applies them. We can, however, set out the history and substance of this case without any detailed reference to those provisions.

3.
The Appellants came to the United Kingdom in 2003. At that time the second Appellant was a student, and the first Appellant was her dependant. Their daughter was also a dependant. They have been here with leave ever since. The first Appellant began his studies in November 2004 and in due course the second Appellant and their daughter obtained leave as his dependants. That leave was due to continue until 31 May 2009. On 26 March 2009 the first Appellant made applications for himself, his wife and his daughter to remain in the United Kingdom under the points-based scheme. The applications were rejected on the ground that they were not accompanied by the appropriate payment. The first Appellant re-submitted his applications immediately, but by then the rules had changed.

4.
There is no doubt that the Appellants cannot meet the requirements of the rules as changed. There appears to be no doubt that their earlier applications would have been granted if they had been accompanied by the correct payment.

5.
It is fair to say that there is considerable doubt whether the applications were accompanied by the correct payment, for the following reason. As we have said, the Appellants applied together with their daughter. The forms of application were as required by the Respondent: the applications by the Appellants had to be made together, because the fee regime is more beneficial for spouses than for other independent adults. But the application for the Appellants' daughter had to be made, and paid for, separately. The applications made to the Secretary of State in the present case were accompanied by a fee which was correct for the first and second applicants, but was not sufficient to cover the application by their daughter.

6.
An application not accompanied by the correct fee is invalid. The Secretary of State treated all three applications as invalid, because, taken together, they were not accompanied by the correct payment. The Appellants' case is that their application was accompanied by the correct payment: it was their daughter's application which was not.

7.
The Appellants' daughter put in a Notice of Appeal to the Asylum and Immigration Tribunal, but then left the United Kingdom. The Immigration Judge recognised that that caused her appeal to be treated as abandoned, but decided nevertheless that the applications had to be considered together and dismissed the appeal on the ground that the Appellants' first application was invalid, whilst the second could not succeed.

8.
The same arguments were raised before us. Mr Gulvin told us that, after taking legal advice, but without giving any indication to the public, the Secretary of State has a practice of treating as a whole, applications by members of the same family that are made at the same time. After taking instructions, he said that "it is a practice we feel is rational and appropriate".

9.
We disagree.

10.
There is no reason why a practice of that sort cannot be published in the apparently comprehensive guidance which applicants are expected to follow to the letter. There is no reason why the Secretary of State should treat a properly funded application as invalidated by the existence of an invalid application in the same envelope. There is no reason why the Secretary of State, on receiving together applications only some of which are valid, should not enquire whether the applicants wish to have only some of them processed or whether they wish to have them all treated as invalid.

11.
The Appellants' application was accompanied by the appropriate payment, and there appears to us to have been no proper reason to treat it as invalid. If the Appellants' daughter's application was invalid, so be it: but the Appellants were entitled to their leave and, given that they had made their application in such good time before their original leave expired, their daughter might have been able to make a separate application afterwards. Whether or not that is so, it appears to us that the Appellants' application should have been granted, and the Immigration Judge erred in concluding that it should not.

12.
We allow the Appellants' appeal.

Signed

Mr C M G Ockelton

Vice President of the Upper Tribunal, Immigration and Asylum Chamber