Asylum and Immigration Tribunal **Appeal Number IA/07813/2009**
and **Appeal Number IA/07821/2009**
and **Appeal Number IA/07830/2009**

THE NATIONALITY, IMMIGRATION & ASYLUM ACTS 1971 – 2004

Heard at: Taylor House **Determination Promulgated**
On: 22 May 2009
Prepared: 22 May 2009 .....

Before

Immigration Judge PETHERBRIDGE

Between

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:
For the Respondent: Mr N Evans (Home Office Presenting Officer)

DETERMINATION AND REASONS

THE APPEAL PROCEEDINGS

Details of the Appellant and nature of appeal

1. The Appellants are all citizens of India. The First-named Appellant was born on the . The Second-named Appellant, the First-Appellant's husband was born on the . The Third-named Appellant, the child of the First and Second named Appellants was born on the .

2. The Appellants appeal against the refusal decision of the Respondent dated the 13th February 2009 refusing the First-named Appellant further leave to remain in the United Kingdom under the Highly Skilled Migrant Programme ("HSMP").

3. The Respondent refused the First-named Appellant's application under paragraph 322 (1A) of HC395 (as amended) ("the Rules") that she had made a false representation in her application form in stating that she was not claiming public funds when, in fact, as revealed by her bank statements in support of her application it had been shown that she had been receiving Child Benefit, which is a public fund – paragraph 6 of the Rules.

4. The applications by the Second and Third named Appellants were refused because in the light of the refusal of the First-named appellant's application, the Respondent was not satisfied that they were the spouse and child of the person who was being granted leave to remain as a highly skilled migrant. Full reasons for the refusal were set out in the Notice of Decision and the present appeal is against those refusals.

5. The appeals are under Section 82 of the Nationality, Immigration and Asylum Act 2002. The burden of proof is on the Appellants to show on the balance of probabilities that all the requirements laid down in the relevant provisions of the Rules are fulfilled.

6. Paragraph 322 of the Rules is as follows:-

"322 In addition to the grounds for refusal of extension of stay set out in Part 2 – 8 of these Rules, the following provisions apply in relation to the refusal of an application for variation of leave to enter or remain or, where appropriate, the curtailment of leave:

(1) N/A;

(i) (a)where false representations have been made or false documents 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

that is a ground upon which leave to remain in the United Kingdom is to be refused."

7. On file was the Respondent's bundle containing the applications, the Notices of Decision and the Notices of Appeal. Also enclosed were documents that accompanied the applications. The Appellants provided a bundle of documents for the Hearing, including a Statement by the First-named Appellant hereafter referred to as "Dr J".

8. Dr J is the main Appellant. If her appeal succeeds then so does her husband, Dr R ("Dr R") and their child Miss A ("Miss A") also stands to succeed in their appeals.

Dr J's Immigration History

9. Dr J was initially granted leave to enter and remain in the United Kingdom on the 5th October 2003 until the 18th March 2004, to complete the PLAB test. Thereafter, Dr J applied for further leave to remain as a Post-Graduate doctor and obtained further leave to remain in this capacity until the 31st August 2006.

10. On the 7th June 2006, Dr J "switched" to the category of Highly Skilled Migrant under the HSMP scheme in force at the time.

11. Dr J's present application for further leave to remain under the HSMP scheme was refused because it stated that Dr J failed to disclose a material fact, when applying for an extension of further leave to remain, that she had received Child Benefit. The basis for that refusal was paragraph 322 (1A) of the Rules.

12. The Respondent's refusal letter stated that Dr J had failed to maintain and accommodate herself without recourse to public funds and the Respondent was not prepared to exercise her discretion in Dr J's favour.

The Appellants' Case

13. Dr J pleads that she was advised on the birth of Miss A to apply for Child Benefit and also for a Child Trust Fund payment. She believed that advice to be correct, as Miss A had been born on the 1st March 2007 in the United Kingdom and that she became automatically eligible for Child Benefit. Dr J has never associated Child Benefit as being "public funds".

14. As soon as Dr J became aware that she may not be entitled to claim Child Benefit she contacted the Department of Work and Pensions and notified them that that was the case and she has made arrangements for the reimbursement of all Child Benefit and the Child Trust Fund payment to be made.

15. It is also pleaded on behalf of Dr J that her last Child Benefit payment was in April 2008 and that when she made her further application for leave to remain on the 6th June 2008 she was no longer in receipt of public funds.

16. It is submitted that there was no deception by Dr J. She submitted her bank statement that showed that she had previously been in receipt of Child Benefit. It is argued that the Respondent's decision is not in accordance with the law.

17. It is also submitted that paragraph 322 (4) provides that ground upon which leave to remain should normally be refused include failure by the person concerned to maintain or accommodate himself or any dependants without recourse to public funds. It is accepted that Dr J had sufficient funds from employment, but the Respondent has deemed her as being unable to accommodate herself without public funds because she received Child Benefit. That is considered to be irrational on the basis that many working mothers received Child Benefit, a universal benefit without means testing. It is argued that all mothers would be unable to maintain themselves and their children without recourse to public funds.

18. It is further submitted that where Dr J has repaid the Child Benefit and the Child Trust Fund payment in full she cannot be said to have had recourse to public funds.

19. Alternatively, paragraph 322 (4) of the Rules is discretionary and it is given that the Child Benefit was awarded in error and repaid in full, that the Appellants' case is a case where discretion ought to be used in their favour.

The Proceedings

20. The proceedings were attended by the Appellants. Oral evidence was given by Dr J. She confirmed that her witness statement of the 21st May 2009 was correct in all respects. She adopted it as her evidence in chief.

21. Dr J said in oral evidence that she first became aware that Child Benefit was a public fund when she was investigating the Tier 1 application on the Website. That was in June 2008. She had last received a Child Benefit payment on the 29th April 2008. There had been a difficulty in paying the Child Benefit because she had moved address on three occasions. She said that she had first gone to Glasgow on the 29th November 2007 – she had moved to a property in Swansea on the 29th August 2008 and then to her present address on the 28th November 2008.

22. HMRC had difficulty tracing Dr J and hence the withholding of the payment of Child Benefit from the 29th April 2008. Dr J also said that she had been in India for some time in May/July 2007.

23. In his submissions, Mr Evans said that he had nothing to add to the Refusal Notice.

24. I indicated to the Appellants' representative that I was minded to allow the appeal.

25. I found Dr J to be an entirely genuine and compelling witness of the truth.

26. I accept the content of her witness statement. I accept her evidence that following the birth of her child, Miss A, on the 1st March 2007, she received advice to apply for Child Benefit. It would appear that the application for Child Benefit does not seek to establish the actual immigration status of the applicant. Had it been enquired of Dr J what was her immigration status at the time that her child was born, I was satisfied that she would have explained that she had limited leave to remain and that, accordingly, she was not entitled to have recourse to public funds such as Child Benefit. That was not, though, the case.

27. I accept what Dr J says that in respect of the application form for further leave she was asked the question "is the applicant receiving any public funds". At the time that she made her further application – the 6th June 2008 – she was not, in fact, in receipt of Child Benefit. The last payment had been received on the 29th April 2008.

28. I accept Dr J's evidence that she earns £60,000 per annum and has savings of over £90,000. I accept also that her husband earns approximately £60,000 per annum in his own right.

29. There is no evidence upon which the Respondent can rely upon paragraph 322 (4) of the Rules. It is very clear from the evidence before me that Dr J and her husband are well able to maintain and accommodate themselves and their child without recourse to public funds.

30. I accept Dr J's evidence that when she first became aware of the fact that she was not entitled to Child Benefit or the Child Trust Fund payment, she made immediate steps to repay those monies and there is confirmation from HMRC that those monies have been repaid in full.

31. I do not accept that the Respondent can rely upon paragraph 322 (1A) insofar as when Dr J made the application for further leave, she was not then in receipt of public funds. It was, though, that she had received public funds in the past but that was not the case at the time she made the application. She was, therefore, entitled to say in the application in answer to question posed at AA1 of the application form (page A29 of the Respondent's bundle):

> ***"Is the applicant receiving any public funds?" to which she answered:***
>
> ***"No".***

32. If I was to be wrong as a matter of law in allowing the Appellants' appeal that the refusal of the Respondent under paragraph 322 (1A) was not in accordance with the law, I would then go on to consider whether the Respondent's decision was a breach by the Respondent of the Article 8 rights of the Appellants.

33. As regards Article 8 of the Human Rights Convention, I am satisfied that both Dr J and Dr R have established private life in the United Kingdom as trainee GPs. They are both clearly well settled in their medical professions. Dr J and Dr R are both dedicated members of the medical profession. In view of the commitment that both Dr J and Dr R have made with regard to their commitment to train and practice as medical practitioners in this country, there is no question that their removal in consequence of the immigration decisions would be an interference with their right to respect for their private life and that potentially engages the operation of Article 8. If insofar as there has been a breach of the Rules by Dr J, that breach was immediately remedied upon her being notified of the same and she has forthwith repaid all the Child Benefit and Child Trust Fund payment to the Revenue. I would, therefore, consider it to be disproportionate for the Appellants to be removed where a technical breach of the Rules may have been committed, but which has been immediately made good upon realisation that there would be the loss to this country of two trained doctors – the cost of which itself has been borne by this country – and the removal of a child who herself is a British citizen having been born in this country.

34. Clearly, therefore, in the light of the circumstances in this case, I would consider that any enforced removal of the Appellants on account of what might have been a technical breach of the Rules would be wholly disproportionate to the legitimate aim of immigration control.

Decision

35. I would, therefore, allow the appeals under the Rules. I would allow the appeal under Article 8 of the Human Rights Convention.

Signed **Dated**

Immigration Judge PETHERBRIDGE