



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/25145/2013

THE IMMIGRATION ACTS

Heard at Field House

On 27 June 2014 and 5 August 2014

**Determination
Promulgated**

On 06th Aug 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR PADAM SHARMA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr N Bramble (27 June) and Mr P. Duffy (5 August),
Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against the decision by the respondent to refuse to grant him further leave to remain as a Tier 4 (General) Student Migrant. The First-tier Tribunal did not make an anonymity order,

and I do not consider that such an order is required for these proceedings in the Upper Tribunal.

2. The appellant had leave to enter the United Kingdom as a Tier 4 (General) Student Migrant until 23 February 2013. Before the expiry of his leave, he attempted to apply for leave to remain. His Tier 4 application was acknowledged by a letter from the UK Border Agency dated 11 February 2013. On 26 February 2013 he was notified by letter that his application was invalid, and that UKBA were returning the application form and supporting documents which they had received from him. The ground of invalidity was that he had not made any payment and had not completed the payment page of the application form. Accordingly, the specified fee had not been paid in connection with his attempted application which he had made by post on 8 February 2013.
3. The appellant made a second application on 28 March 2013 which was also rejected on invalidity grounds. On this occasion, the application was rejected on the ground that, although credit/debit card details had been provided, the issuing bank rejected the payment.
4. The appellant made a third application on 24 April 2013. His Tier 4 sponsor was Spinnaker College in London. He was studying for an extended diploma in business management. The course began on 29 March 2013 and ran until 5 September 2014.
5. On 10 June 2013 the Secretary of State gave her reasons for refusing the application. The Secretary of State was not satisfied he had a valid CAS because the Tier 4 Sponsor Register was checked on 10 June 2013, but Spinnaker College was not listed as of this date. Therefore he had not met the requirements to be awarded 30 points under Appendix A of the Rules. Furthermore, as he had failed to provide a valid CAS in support of his application, the Secretary of State was unable to assess the amount of funds he was required to show in support of his application. So he also did not achieve 10 points under Appendix C.
6. The appellant originally asked for an oral hearing, but his solicitors notified the Tribunal on 26 March 2014 that he wished to convert his oral hearing into a paper hearing. At the same time, they attached a witness statement signed by the appellant on that date. He contended that he had entered the correct details of his bank account in his original application. Someone might have entered some digits wrongly. The onus of proof was on the respondent to prove invalidity. As a result of his original application being wrongly returned as invalid, he had been treated as an overstayer and as having no right of appeal.
7. On 8 August 2013 the First-tier Tribunal issued the following notice to the appellant and respondent:

Following the decision in **Basnet (Validity of application - respondent) [2012] UKUT 00113 (IAC)** the onus of proof is on the respondent to show that the correct fee was not paid. It is therefore directed the appeal be

listed for a substantive hearing; that at that substantive hearing the issue of validity be decided; that at least fourteen days prior to the substantive hearing the respondent lodge with the Tribunal and serve upon the appellant any information showing that the correct fee was not paid.

The Decision of the First-tier Tribunal

8. The appellant's appeal came before Judge Meates sitting at Taylor House on 26 March 2014. There was no appearance by the appellant, but there was an appearance by Miss Jones, Counsel, instructed on behalf of the respondent. The judge received submissions from Miss Jones who acknowledged that the onus was on the respondent to show the correct fee had not been paid. She could not provide the court with any information to show that the correct fee had not been paid. But she asked that the judge dismiss the appeal in any event.
9. In his subsequent determination, Judge Meates held that the respondent had failed to discharge the burden upon her to show that the appellant's application was not accompanied by a fee, and so was not valid. But that was not the end of the matter. While the burden was on the respondent, it was clearly also open to the appellant to show by way of evidence that he had completed the fee payment page providing the correct bank details by way of production of the relevant page of the application form. The appellant had not done this.
10. The appellant had also failed to provide an explanation as to why he had not taken any steps to resubmit the application within 28 days, his application having not been resubmitted to the respondent until 24 April 2013, which was almost two months after its original rejection. Had he done so, he would have been afforded a right of appeal against any further refusal. Accordingly, the judge concluded there was no valid appeal before the Tribunal.

The Application for Permission to Appeal

11. The appellant applied for permission to appeal, arguing that the judge had erred in law by blowing hot and cold. At one stage the judge found that the respondent had failed to comply with directions. The judge also found that the appellant failed to discharge the burden on him. The judge did not take into account that the appellant could not furnish the particular payment page to prove that his application was accompanied by the necessary payment details, as the respondent would not return the payment page back to the appellant. It was for that reason that the direction was made to the respondent, which the respondent had failed to comply with.

The Grant of Permission to Appeal

12. On 12 May 2014 First-tier Tribunal Judge Colyer granted permission to appeal for the following reasons:

It is arguable that the judge may have made an error with regard to the failure of the respondent to comply with directions from the Tribunal regarding the production of evidence of payment or non-payment of fees and resulting evidential consequences as outlined by the appellant's representative. The grounds disclose an arguable error of law on this aspect.

The Rule 24 Response

13. On 4 June 2014 Mr Tom Wilding of the Specialist Appeals Team settled the Rule 24 response opposing the appeal. The reason why the application made "in time" was not valid was down to the appellant not providing payment details at all and this was something that he, and he alone, was solely responsible for. The First-tier Tribunal Judge was therefore correct in finding that the first application was invalid and therefore there was no right of appeal.

The Error of Law Hearing in the Upper Tribunal

14. At the hearing before me, there was no appearance by the appellant's legal representatives for funding reasons.
15. Mr Bramble took a different line from that taken by Mr Wilding. He conceded that the judge had erred in law in finding that the original application was invalid.

Reasons for Finding an Error of Law

16. While the stance taken by Mr Bramble was not determinative of the issue before me, I have exercised my own independent judgment on the matter, and consider that the concession was reasonably open to Mr Bramble, albeit that his colleague took a different line.
17. The respondent had been specifically directed to provide documentary evidence to show that the first application had been validly rejected, and the production of the payment page by the respondent would have resolved the question one way or the other. Having found that the respondent had failed to comply with directions, and thus to discharge the burden of proof, the judge ought to have resolved the question of invalidity in the appellant's favour. It was wrong and procedurally unfair to resolve the issue against the appellant on the ground that the appellant had failed to discharge the onus of proof, when it was accepted that the onus of proof lay with the respondent.
18. Accordingly, I find that the decision of the First-tier Tribunal contains an error of law, such that it should be set aside and remade.

Reasons for the Directions given on Future Disposal

19. In the ordinary course of events, the proper course would be to remit the appeal to the First-tier Tribunal, as the appellant has been deprived of a

fair hearing on the merits. But a de novo hearing is not necessary, as Mr Bramble accepts that the original application was valid, and that therefore the appellant enjoyed 3C leave from the date of the expiry of his existing leave to remain. Accordingly, he was not an overstayer at the date of the third application, and nor was he an overstayer at the date of decision. Although he did not have a valid CAS at the date of decision, the appellant is potentially eligible for relief on common law fairness grounds: that is to say, it is arguable, depending on the precise facts, that instead of making the adverse immigration decision, the respondent should have given the appellant 60 days to find a new Tier 4 sponsor and to obtain a new CAS.

20. It appears from the respondent's bundle that the appellant notified the Secretary of State before the date of decision that there had been a material change of circumstances. I also note that the CAS document in the respondent's bundle contained the following information: current CAS status: cancelled; current CAS status date: 7 May 2013; date CAS assigned: 26 March 2013.
21. The information in the CAS raises two questions. The first question is whether the appellant had obtained a valid CAS before making his first application? The second question is when the appellant became aware that the licence of the college had been revoked, and whether the appellant should have sought to vary his application? It is not clear from the change of circumstances document that the appellant was doing anything more than notifying the respondent that he had instructed Legend Solicitors as his representatives. It is regrettable that the appellant was not present at the hearing before me, as if he had been, he would have been able to answer these questions and it would have been possible to remake the decision without a further hearing. However Mr Bramble asked me not to remake the decision without giving the appellant an opportunity to provide further evidence to show that he should be granted relief on common law fairness grounds.

Directions given

22. The directions I made were as follows:

There will be a further hearing in the Upper Tribunal to remake the decision, which will take place on 5 August 2014 with a time estimate of one and a half hours.

Not less than seven days before the resumed hearing, the appellant shall serve on the Upper Tribunal and on the Specialist Appeals Team a copy of the first application, and details of the CAS (if any) he relied upon for the first application.

I also give permission to the appellant to adduce additional evidence supportive of his claim to be entitled to relief on common law fairness grounds. Any such additional evidence, and any further written representations from his legal representatives, should be served on the

Upper Tribunal and the Specialist Appeals Team not less than seven days before the resumed hearing.

Subsequent Developments

23. The day before the hearing the appellant's solicitors informed the Upper Tribunal that they no longer acted for the appellant, and notified a change of address on the part of the appellant.

The Resumed Hearing

24. At the resumed hearing, Mr Duffy produced a copy of the letter dated 16 April 2013, and other documents showing that the appellant had made three applications altogether. No further documents were received from the appellant.

Remaking

25. When conceding an error of law, Mr Bramble was not aware of the failed application referred to in paragraph 3 above, evidence of which only emerged today. The significance of the new evidence is that it lends support to the respondent's contention that the first application was not accompanied by any payment details, as this would be consistent with the fact that the appellant then re-submitted his application with the missing payment details. Although the second application now contained payment details, the Home Office was unable to collect the fee. While it is possible that the appellant could have been a victim of misfortune on two successive occasions (i.e. he had the misfortune to have his application wrongly rejected on invalidity ground A followed by his application being wrongly rejected on invalidity ground B) it cannot be said to be a likely scenario.
26. Mr Duffy does not however invite me to set aside my error of law ruling, but instead he invites me to dismiss the appeal on the merits.
27. The appellant has had ample opportunity to provide evidence to show that he has been a victim of common law fairness, and he has not taken this opportunity. While it was reasonable for his solicitors not to attend at the previous hearing for reasons of cost, there was no good reason for the appellant's personal non-attendance. The fact that his solicitors have now withdrawn their representation also does not excuse his non-attendance today.
28. The appellant has not shown that he is eligible for relief on common law fairness grounds and he has thus not discharged the burden of proving that the decision appealed against was not in accordance with the law.

Decision

29. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal is dismissed.

Signed

Date

Deputy Upper Tribunal Judge Monson