



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

Appeal Number: IA/16081/2014

THE IMMIGRATION ACTS

**Heard at : Field House
On : 6 October 2015**

**Determination Promulgated
On : 8 October 2015**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MD RUHUL QUDDUS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Hossain, instructed by Liberty Legal Solicitors
For the Respondent: Mr K Norton, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh born on 13 March 1988. He has been given permission to appeal against the decision of First-tier Tribunal Judge Rothwell who found that there was no valid appeal before her with respect to the respondent's decision to refuse his application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points- based system.

2. The appellant entered the United Kingdom on 3 October 2009 with leave to enter as a Tier 4 (General) Student Migrant until 30 January 2012. On 8 October 2011 he was granted leave to remain as a Tier 1 (Post Study) Migrant

until 8 October 2013. On 8 October 2013 he submitted an application for leave to remain as a Tier 1 (Entrepreneur) Migrant. That application was, however, rejected as invalid on 5 December 2013 on the basis that he had failed to provide his biometric information as requested in the respondent's letter of 14 October 2013 and again in a letter of 6 November 2013. On 3 January 2014 he re-submitted his application. However that application was also rejected as invalid, on 9 January 2014, on that occasion owing to his failure to pay the specified fee. The respondent advised the appellant in her letter of 9 January 2014 that, whilst credit/ debit card details had been provided, the issuing bank had rejected the payment.

3. On 16 January 2014 the appellant re-submitted his application. His application was refused on 11 March 2014, partly on the basis that it had been made more than 28 days from the expiry of his previous leave, under paragraph 245DD(g) of the Immigration Rules. The appellant was advised that he had no right of appeal against that decision, the application having been made after the expiry of his leave.

4. The appellant, however, lodged a notice of appeal, asserting in his grounds of appeal in regard to the first attempted application that he did not receive the letters of request for his biometric information and with respect to the second attempted application that he had sufficient funds in his bank account and that the inability of the Home Office to take the payment was due to their own technical problems. Reliance was placed upon the decision in JH (Zimbabwe) v Secretary of State for the Home Department [2009] EWCA Civ 78 in asserting that his leave was extended by virtue of section 3C of the Immigration Act 1971, the initial application having been made when he had extant leave, and he was thus entitled to a right of appeal.

5. The appellant's appeal came before First-tier Tribunal Judge Rothwell on 16 December 2014. The judge noted that directions had previously been issued to the respondent to provide evidence of the correct fee not having been made, pursuant to the guidance in Basnet (validity of application - respondent) Nepal [2012] UKUT 113. The respondent had not responded to those directions, but the judge found that the burden of proof had been discharged by the respondent as the appellant's bank statement showed that he had insufficient funds in his bank account between 3 and 6 January 2014 which must have been the time when the respondent sought to take the funds. She therefore concluded that the application submitted on 3 January 2014 was not a valid one, that the appellant had made a valid application only after the expiry of his leave and that there was accordingly no valid appeal before her.

6. Permission to appeal that decision was sought by the appellant on the basis that the respondent would not have sought to take the fee until 6 January 2014 or thereafter, at which time there were sufficient funds in his account, and that the judge had therefore made an error in her findings of fact and had misapplied the principles in Basnet.

7. Permission was initially refused by First-tier Tribunal Judge Andrew on 20 February 2015 on the grounds that, even if the judge had arguably erred on that basis, that was immaterial given that the appellant's leave ended on 8

October 2013 and he therefore had no leave when he submitted the application on 3 January 2014.

8. Permission was, however, subsequently granted by Upper Tribunal Judge Grubb on 28 May 2015 on renewed grounds, on the basis that the validity of the first decision had still to be considered.

Appeal Hearing

9. At the hearing Mr Norton produced copies of the respondent's letters of 14 October 2013 and 6 November 2013 in regard to the request for the appellant to provide his biometric information, together with CID notes.

10. Mr Hossain accepted that the respondent's first invalidity decision was correct. However his submission was that the judge had failed to consider the findings in JH, according to which the appellant's leave was extended beyond 8 October 2013 by virtue of section 3C of the Immigration Act 1971, since he had rectified his error within 28 days by making the second application. His leave was extended until the decision was made on 11 March 2014 and the application was therefore made at a time when he had extant leave. UTJ Grubb had therefore misdirected himself in his grant of permission. Mr Hossain submitted further that FTTJ Rothwell had misdirected herself in relation to Basnet and that the respondent had failed to discharge the burden of proving that the funds were not available to pay the application fee.

11. Mr Norton submitted that FTTJ Rothwell was entitled to make the findings that she did in relation to Basnet and the validity of the second application, but even if she had erred in that respect that was immaterial since the appellant's leave had already expired on 8 October 2013.

12. Mr Hossain reiterated his previous submissions in response.

Consideration and Findings

13. It is apparent from the appellant's Lloyds Bank statements before FTTJ Rothwell that the balance of his account was insufficient to meet the fee payment for his application for leave to remain between 3 January and 6 January 2014, as the judge found. It was only later on 6 January 2014 that the balance increased to an amount sufficient to meet the fee payment. As such the judge was entitled to conclude that the respondent must have attempted to take payment for the application fee between 3 January and the early part of 6 January 2014. She properly recognised that the burden of proof lay upon the respondent, as stated in Basnet, but she was entitled to distinguish the appellant's circumstances from those in Basnet, in that the appellant in that case had provided evidence of having the required funds in his account at all material times, whereas this appellant had not. In such circumstances she was entitled to find that the appellant's application submitted on 3 January 2014 was not a valid one.

14. However, even if FTTJ Rothwell was wrong in finding that the Basnet principles did not apply and even if the respondent had failed to show that the appellant's application submitted on 3 January 2014 was invalid, it is the case, as recognised by FTTJ Andrew in her decision of 20 February 2015 refusing to

grant permission, that the appellant was still without any leave at the time he made that application. His leave had expired on 8 October 2013 and accordingly he had not made an in-time application giving rise, on refusal, to a right of appeal.

15. In granting permission, UTJ Grubb recognised that FTTJ Andrew's view depended upon an assumption that the first invalidity decision of 5 December 2013 was correct, yet no findings had in fact been made in that regard.

16. Mr Hossain, however, did not dispute that the invalidity decision of 5 December 2013 was incorrect. He accepted that it was correct. His submission was that the appellant had corrected the omission leading to the invalidity within the permitted 28 day period and that his leave to remain was therefore extended beyond 8 October 2013 by virtue of section 3C of the 1971 Act in accordance with the principles in JH.

17. However I fail to see how the principles in JH assist the appellant and consider that Mr Hossain has misunderstood the findings in that decision. The appellant, whilst claiming not to have received the letters of 14 October 2013 and 6 November 2013, has failed to provide any explanation why he did not do so, when both letters were sent to the solicitors acting for him at the time. He has produced no evidence of having made a complaint to or against the solicitors for failing to pass the letters on to him and to advise him accordingly and I therefore do not accept that he was not aware of the requirement for him to have his biometric information taken. As the letter of 14 October 2013 advised him, he was given 15 working days in which to submit his biometric information. He failed to do so and was given a further 17 working days, as advised in the respondent's letter of 6 November 2013. Having provided the appellant with ample opportunity to rectify his omission the respondent was then perfectly entitled to reject his application as invalid on 5 December 2013. Indeed the appellant does not challenge that invalidity decision.

18. There is nothing in the decision in JH to suggest that an invalid application, albeit made prior to the expiry of leave to remain, can extend that period of leave under s3C of the 1971 Act. On the contrary, paragraph 13 of JH makes it clear that the application, in order to extend leave under section 3C, has to be a valid one. In JH it was found that the application was a valid one. In the appellant's case before me, it clearly was not.

19. Accordingly, whether or not the application submitted on 3 January 2014 was wrongly rejected as invalid on the basis of non-payment of the fee, the fact is that the application was made at a time when the appellant had no extant leave and that he did not make any valid application for further leave to remain prior to the expiry of his leave to remain. He was therefore not entitled to a statutory right of appeal against the decision of 11 March 2014 or indeed against any decision made on an application submitted after 8 October 2013. FTTJ Rothwell was accordingly entitled to find that there was no valid appeal before her.

DECISION

20. The making of the decision of the First-tier Tribunal did not involve an error on a point of law such that the decision has to be set aside. I uphold the decision. There was and is no valid appeal before the Tribunal.

Signed

Upper Tribunal Judge Kebede

Dated: