



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/41453/2013

THE IMMIGRATION ACTS

Heard at Manchester  
On 5 August 2015

Decision & Reasons Promulgated  
On 14 August 2015

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MUHAMMED FAZEEL ARSHAD

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Salam (Salam & Co Solicitors)

For the Respondent: Ms Johnstone (Home Office Presenting Officer)

DECISION AND DIRECTIONS

1. The appellant is a national of Pakistan. There was no application for anonymity and I can see no reason to anonymise this decision.
2. The issue before the First-tier Tribunal was a narrow one and related to whether or not there was a valid appeal.

Background

3. This is an appeal that has been considered by a number of Judges over an extended period of time but the relevant background can be summarised quite easily.

4. The appellant made an application to extend his Tier 4 (General) leave on 15 February 2013. He completed the relevant FLR(O) form together with the payment page (comprising 12 parts). That page clearly demonstrates that the appellant properly and accurately completed the form save for part 5. This states *“amount–please tick the amount you are paying”*. There then follows eight boxes. It is accepted that none of these boxes were ticked.
5. On 22 February 2013 the SSHD refused to accept the application as valid on the basis that the appellant *“has not made any payment and has not completed the payment page of the application form”*. The application was resubmitted on 27 February and then varied on 16 April 2013. Although a further refusal decision was made on 7 May 2013, this did not address the variation to the application. In a decision dated 30 September 2013 the SSHD refused the varied application for two reasons. First, it was said that the appellant had overstayed his leave, which expired on 22 February 2013. For completeness, the appellant had been granted further leave to remain until 19 February 2013 but this was extended by virtue of section 3C until the application was treated as invalid on 22 February 2013. Second, it was said he did not have a valid CAS. This decision stated that there was no right of appeal as the appellant did not have leave at the time of the application dated 26 April 2013.
6. When the matter came before Judge Gladstone on 19 June 2014 both parties accepted that the sole question to be considered was whether the decision dated 30 September 2013 should be treated as a decision refusing to vary leave (which carries with it a right of appeal under s 82(2) of the NIAA 2002) as opposed to a refusal of leave (which does not carry with it a right of appeal as it is not an immigration decision for the purposes of the 2002 Act). It was also agreed that the answer to this question turned on whether or not the SSHD was correct to treat the 15 February 2013 application as invalid. If valid, leave was extended by virtue of section 3C pending the final determination of the matter. If invalid, leave expired on 22 February 2015. The parties before me accepted that this was the correct way to approach this case.
7. Judge Gladstone carefully recorded the competing submissions [34-37] and directed herself to **Basnet (validity of application – respondent)** [2012] UKUT 00113 (IAC). She concluded that [39] *“the appellant had not completed the payment page in full as he failed to tick the amount he was paying and thus the respondent was unable to take the fee as it had not been authorised by the appellant.”* She went on to say [40]:

*“On that basis, I find that the application of 15 February 2013 was not accompanied by a fee as it was not*

‘accompanied by such authorisation...as will enable the respondent to receive the entire fee in question, **without further recourse having to be made by the respondent to the payer** [her emphasis] given that no amount was specified and thus not authorised.”

8. Judge Gladstone therefore found that there was no valid application and no valid appeal before her.
9. In grounds of appeal prepared by the appellant, it was argued that **R (Zinyemba) v SSHD** [2014] EWHC 2237 (Admin) contained persuasive reasoning that in circumstances similar to the instant case the SSHD has not displaced the burden of establishing the application to be invalid. In a decision dated 12 December 2014 Judge Grubb considered this to be an arguable point and granted permission to appeal.
10. The matter now comes before me to decide whether Judge Gladstone’s decision contains an error of law.

### Hearing

11. Mr Salam relied upon his grounds of appeal and provided a copy of **Zinyemba** to Ms Johnstone. Ms Johnstone submitted that Judge Gladstone was correct and the observations in **Zinyemba** failed to appreciate that there was no mandate to process the fee without the relevant box being ticked.
12. I indicated that the decision contains an error of law such that the First-tier decision is set aside, and my reasons are set out below.
13. Both representatives accepted that as the substantive issue under appeal had not been considered by the First-tier Tribunal it was appropriate for the appeal to be remitted to the First-tier Tribunal. I agreed that this is the most fair and proportionate way in which to deal with this case having regard to para 7.2 of the relevant *Senior President’s Practice Statement*. I therefore gave directions for the future conduct of the appeal.

### Findings

14. This is a case in which it is accepted by the SSHD that the only reason that the application was treated as invalid is because of the failure to tick the box at part 5 in order to indicate that the amount to be paid was £561 (because the appellant was a single applicant with no dependents). The SSHD has accepted that the burden is upon her to establish that the fee could not be taken, in accordance with **Basnet**. The SSHD does not contend that there were insufficient funds or that an attempt was made to take the

funds but that it was successful. The SSHD simply submits that no attempt was made because the relevant box was not ticked. The SSHD's reasoning is difficult to follow. It is not disputed that the only possible box applicable to the appellant was the £561 one. No other box could apply because the appellant had no dependents and the application was postal, not premium. Indeed the SSHD has accepted this was the only possible relevant box when it was said in the letter dated 22 February 2013 "*the fee specified for an application made on this basis is £561*". There was therefore very little room for any doubt that by completing the payment form and the FLR(O) in the manner that he did, the application was accompanied by an authorisation to process the relevant fee of £561. To use the wording in **Basnet** the SSHD was in a position "*to receive the entire fee in question, without recourse having to be made by the [SSHD] to the payer.*"

15. That analysis is supported by the observations of James Lewis QC, sitting as a Deputy High Court Judge in **Zinyemba**. These observations were not available to Judge Gladstone as the hearing before her took place shortly before the hearing in **Zinyemba**. This case was different to the instant one because the relevant payment form was unavailable and it was found that the SSHD had not discharged the burden that the claimant was inaccurate in her evidence that she ticked the relevant box. By contrast in this case it is accepted that the relevant box was not ticked. However Judge Lewis went on to observe that even if he was wrong to reach that conclusion [15]:

"there is force in the claimant's submission that all the information was available to deduct the correct fee. The defendant says that the payment processor would not know that, but I am unimpressed by that argument. Implicit in any finding that the correct box was ticked would be the evidence of the caseworkers of the defendant carrying out a double check whether the payment processor had made a mistake. In that process, had it occurred, it would have been clear to the caseworker what the correct fee was even if it was not clear to the payment processor so that it could have been withdrawn in accordance with the claimant's mandate to do so. That would have been the common sense and fair thing to do given the clear importance and consequences of rejection of the application."

16. These observations are of course not binding upon me but I entirely agree with them. Judge Lewis made these observations having considered detailed evidence regarding the SSHD's processes for considering applications such as these. This evidence was apparently relied upon in order to address the

claimant's submission that there could be no misunderstanding of what the correct fee was on any reasonable reading of the form – a similar argument deployed before Judge Gladstone.

17. I am satisfied that Judge Gladstone made an error of law in determining that it would have been necessary for the SSHD to clarify with the appellant precisely which fee he wished to be taken. The relevant fee was absolutely obvious and the only possible one, as acknowledged by the SSHD, as was the clear mandate provided by the appellant. Even if I am wrong about that the SSHD has not provided any caseworker notes to set out what happened in this case and why it was believed that the correct fee to be taken was not the patently obvious one. In the absence of such evidence Judge Gladstone erred in law in finding that the SSHD had displaced the evidential burden. There was simply no evidence to establish that the mandate was unclear. In all the circumstances of this case the completion of the relevant forms was sufficiently clear to provide the mandate notwithstanding the failure to tick a box at part 5.
18. It follows that I remake the decision by finding that the SSHD has offered no evidence to support the assertion that the fee could not be taken. The evidence that is available - the forms - are sufficient to indicate that the relevant fee of £561 was the obvious and only possible one and could have been taken without recourse to the appellant. On the evidence available, the application was accompanied by the specified fee, and was validly made. It follows that there is consequently a right of appeal to the First-tier Tribunal. The SSHD did not seek to argue that there should be any other outcome if I was of the view that the 15 February 2015 application was accompanied by the relevant fee.
19. There remains a dispute as to whether in any event the application to vary leave should have been granted as there remains a dispute regarding the validity of the CAS provided. Neither party had the relevant material to argue this issue and as there has never been a substantive hearing in the First-tier Tribunal it was agreed that the appropriate way forward bearing in mind para 7.2 of the relevant *Senior President's Practice Statement*, is for the matter to be remitted to that Tribunal to determine the appeal.

### Decision

20. The decision of the First-tier Tribunal contains an error of law and is set aside.
21. The appeal is remitted to the First-tier Tribunal.

## Directions

22. Both parties agreed that there remains one outstanding issue in dispute – the validity of the CAS relied upon by the appellant at the relevant date in 2013 and I have therefore given directions to ensure that this issue can be resolved either between the parties and if not, by the Tribunal as efficiently as possible, given the delay in this matter.
- (1) Before 12noon on 19 August 2015, the appellant's solicitors shall file and serve a summary of the appellant's position concerning the CAS as at the date of the application dated 15 February 2013 and any other date considered to be relevant. This shall cross-refer to pages within an indexed and paginated bundle containing relevant documents, rules, policy and case law.
  - (2) Before 12noon on 2 September 2015 the SSHD shall file and serve its position in response together with any material relied upon. This shall include a clear indication as to whether the decision dated 30 September 2013 in relation to the CAS is maintained or withdrawn with reasons provided for the course taken.
  - (3) The appeal shall be listed in the First-tier Tribunal on the first available date with a time estimate of one hour, in order to consider the only remaining issue in dispute – the validity of the CAS relied upon.

Signed:

Ms M. Plimmer  
Judge of the Upper Tribunal

Date:  
6 August 2015