



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08164/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21st March 2018

Decision & Reasons Promulgated
On 17th July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. RAJA MANI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Habteslasie, Counsel, instructed by Imran Khan & Partners

For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal ("FTT") Judge Amin promulgated on 24th April 2017. The Judge dismissed the appellant's appeal against the respondent's decision of 3rd March 2016 refusing his application for leave to remain in the UK as the spouse of a British Citizen.

2. The appellant is a national of India. In August 2010 the appellant entered the United Kingdom with entry clearance as a Tier 4 Student with leave valid until 30th March 2012. On 13th March 2012, the appellant applied for leave to remain as a Tier 1 Highly Skilled Post Study Worker. He was granted leave to remain until 24th July 2014. On 21st July 2014, the appellant applied, in-time, for leave to remain as a Tier 4 student. That application was rejected on 15th September 2014. On 10th October 2014, the appellant made a further application for leave to remain in the UK as a Tier 4 General Student. That application was refused on 5th November 2014 with no right of appeal. Nevertheless, on 18th November 2014 the appellant appealed to the FfT. The appeal was heard on 25th September 2015 and dismissed for the reasons set out in the decision of FfT Judge Bennett promulgated on 9th October 2015. The appellant applied for permission to appeal to the Upper Tribunal but that application was withdrawn. A Notice was sent to the parties on 18th January 2016 confirming that the appellant has withdrawn the application for permission to appeal, and the Tribunal is satisfied that the application has been withdrawn. I shall return to the decision of FfT Judge Bennett in the course of my decision.
3. On 6th February 2016 the appellant applied for leave to remain in the UK on the basis of his marriage to Megan Louise Harmer. He was married to Ms Harmer on 27th February 2015. It was the refusal of that application for the reasons set out in the respondent's decision of 3rd March 2016, that gave rise to the appeal before FfT Judge Amin.

The decision of FfT Judge Amin

4. The appellant's immigration history is set out at paragraph [7] of the decision. It is inaccurate in parts, but in my judgement nothing turns on those inaccuracies. For example, FfT Judge Amin states "*... He was granted leave to remain for post-study work until 24 July 2012 on 24 July 2013 ...*". Plainly that cannot be correct. Importantly, the Judge noted that on 21st July 2014, the appellant applied for leave to remain as a student and that application was rejected on 15 September 2014. The Judge states "*... The appellant's section 3C leave therefore expired on 17 September 2014 ...*". The Judge

notes that the appellant made an application on 10th October 2014 that was refused on 5th November 2014 with no right of appeal, but that an appeal was nevertheless heard, and dismissed by FfT Judge Bennett on 9th October 2015.

5. At paragraphs [8] to [12] of his decision, the Judge refers to the respondent's reasons for refusing the appellant's application for leave to remain in the UK and at paragraphs [13] to [14], the Judge identifies the evidence before him.
6. The Judge noted, at [16] and [17], that there was an issue between the parties as to whether the appellant has had valid leave to remain in the UK since 17th September 2014. The Judge noted that the respondent proceeds upon the basis that the appellant had no valid leave to remain since 17th September 2014, whereas the case advanced on behalf of the appellant is that the appellant enjoyed leave to remain for 28 days after he withdrew his application for permission to appeal, following the dismissal of the appeal before FfT Judge Bennett.
7. The Judge had been provided with a copy of the decision of FfT Judge Bennett. At paragraph [20] FfT Judge Amin states:

"The immigration Judge's findings are clear - the appellant had no right of appeal against the refusal made on 15 September 2014 and the Appellant's section 3C leave therefore expired on 17 September 2014. I do not accept the novel arguments advanced by Mr Bellara today that the permission to appeal against Immigration Judge Bennett's decision, launched on 21 October 2015 and withdrawn on 16 January 2016 means that the Appellant's leave to remain was extended for 28 days by virtue of section 3C and therefore the *application (sic)* made on 6 February 2016 was made in time. There was no decision to appeal as Immigration Judge Bennett had found above. Also, the appellant did not withdraw his appeal but he withdrew his permission to appeal that decision. Although the appellant has not provided any explanation of why he withdrew his application for permission to appeal, it is clear that reading Immigration Judge Bennett's decision there was no right of appeal to exercise."

8. FfT Judge Amin proceeds to determine the appeal on the basis that the appellant has not satisfied the immigration status requirements of the rules, and consequently also fails to meet the financial requirements of the rules for the reasons stated by the respondent. At paragraphs [22] to [42], the Judge addresses the Article 8 claim outside the rules.

9. The Judge adopted the five-stage approach set out in **Razgar**. The Judge was satisfied that the appellant enjoys a family and private life with his wife. At paragraphs [38] to [42], the Judge considered whether the decision is proportionate to the legitimate end sought to be achieved, taking into account the statutory provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002. The Judge concluded that the decision to refuse the appellant leave to remain is proportionate in all the circumstances.

The appeal before me

10. The appellant contends in the grounds of appeal that FfT Judge Amin erroneously focused upon paragraph [4] of the decision of FfT Judge Bennett in which he said “..I am not satisfied that the appellant had leave when he applied for leave or, therefore, that he has a right of appeal.”. He claims that notwithstanding what is said at paragraph [4], FfT Judge Bennett went on at paragraphs [9] to [13] of the decision to determine the appeal under the immigration rules and on Article 8 grounds outside the rules. At paragraph [14] FfT judge Bennett stated, “For both of these reasons, the appeal is dismissed and no fee award is made ...”. The appellant relies upon the decision in Basnet (validity of application – respondent) [2012] UKUT 00113 (IAC) in support of his claim that FfT Judge Bennett had reached his conclusion in the form of a determination, and the appeal is therefore a valid appeal. The appellant contends that as there was a valid appeal against the respondent’s decision of 5 November 2014, the appellant enjoyed s3C leave until he withdrew his application for permission to appeal to the Upper Tribunal on 16th January 2016. The applicant made his application for further leave to remain on 6th February 2016 and he should not therefore, have been treated as having been in the UK as an overstayer since September 2014.
11. Permission to appeal was granted by Upper Tribunal Judge Grubb on 25th January 2018. He noted that it is arguable that the Judge may not have approached the issue of lawful leave (based upon the appellant’s appeal history) accurately. The appeal comes before me to determine whether there is an error of law in the decision of FfT Judge Amin and if there is, to remake of the decision.

Discussion

12. Before me, Mr Habteslasie departs from the grounds of appeal set out in writing, but maintains that the appellant enjoyed s3C leave until 18th January 2016. He submits that the appellant had a right of appeal against the decision of 15th September 2014 on the basis that the appellant was challenging the respondent's decision to treat the in-time application made on 21st July 2014, as invalid. He submits that the application subsequently made on 10th October 2014 was in substance, the same application, and the appellants appeal against the decision of 5th November 2014 should be considered in that light. Mr Habteslasie submits that the appellant therefore had leave by operation of s3C of the 1971 Act until the withdrawal of his application for permission to appeal on 15th January 2016. It follows that the application made on 6th February 2016, that was made within 28 days of the s3C leave coming to an end, should have been considered in that light and on a proper application of the requirements of the immigration rules, the requirements were met by the appellant. The question at the heart of this appeal is whether the circumstances here fall within the scope of the decisions in Basnet (validity of application – respondent) [2012] UKUT 00113 (IAC) and Ved and another (appealable decisions; permission applications; Basnet) [2014] UKUT 00150 (IAC).
13. Attractively as Mr Habteslasie puts the appellant's case, on a proper application of the facts here, I am unable to agree with him. On 21st July 2014, the appellant made an in-time application for leave to remain as a Tier 4 student. The background to the respondent's decision of 15th September 2014 to reject that application is helpfully set out at paragraphs [5] and [6] of the decision of F&T Judge Bennett as follows:

"5. The respondent wrote to the appellant on 15th September 2014 telling him that she had rejected his application because he had failed to provide biometrics, in accordance with the Immigration (Biometric Registration) Regulations, and that he must attend at a participating post office to provide his biometrics. She also said that she had written to him on 29th July 2014, and again on 19th August 2014, telling him that he must go to a participating post office to provide his biometrics and that her records showed that he had not yet done so. She also said that she was rejecting his application as being invalid and that the date of any fresh application would be the date on which the fresh application was submitted.

6. The appellant mentioned this letter in his grounds of appeal and did not dispute having received it. His solicitors attached a copy of it to his notice of appeal.....”

14. Although the appellant had in his appeal before FfT Judge Bennett denied that he had received a request for him to have his biometrics taken, FfT Judge Bennett was not satisfied that the appellant did not receive the respondent’s letters. In reaching his decision, FfT Judge Bennet considered the decision in Basnet (validity of application – respondent) [2012] UKUT 00113 (IAC).
15. In my judgement, it was open to the respondent to reject the appellant’s application made on 21st July 2014, as invalid on 15th September 2014. Mr Habteslasie's reliance on the decision in Basnet does not avail him. In Basnet, the Tribunal concluded that where the respondent asserts an application was not accompanied by a fee and so was not valid, the respondent bears the burden of proving that fact. The Tribunal concluded, on the facts, that the respondent had failed to discharge that burden and that led the Tribunal to conclude that the FfT had been wrong to find that Mr Basnet did not have a right of appeal to the FfT.
16. In Ved, the Upper Tribunal considered the scope of the decision in Basnet. The Upper Tribunal held that a decision that no valid application has been made and no immigration decision is required to respond to it, is not itself an appealable decision. There is no jurisdiction in the FfT Judge to examine the facts for himself, and conclude that as a valid application had in fact been made, there ought to have been an immigration decision in response to it.
17. If the original application made on 21st July 2014 was valid, then s3C would have applied to extend the appellant's leave until the application was decided. However, the application was rejected by the respondent because the appellant had failed to provide biometrics, in accordance with the Immigration (Biometric Registration) Regulations, despite two invitations to do so. The decision of 15th September 2014 was not challenged by the appellant, but on 10th October 2014, he made a further application for leave to remain in the UK as a Tier 4 Student.

18. I reject the submission that the July 2014 application and the October 2014 application made by the appellant were in substance, the same application. The respondent's letter of 15th September 2014 made it clear that the July 2014 application is rejected as being invalid, and that the date of any fresh application, would be the date on which the fresh application was submitted. A fresh application was made by the appellant on 10th October 2014, by which time the appellant had no extant leave to remain.
19. The application made on 10th October 2014 was decided by the respondent's decision of 5th November 2014. The respondent had stated in the decision that the appellant had no right of appeal. Nevertheless, an appeal was lodged by the appellant to the FfT, and as FfT Judge Bennett records in his decision, the appeal appeared in his list on 25th September 2015. At paragraph [4] of his decision, FfT Judge Bennett said that he was not satisfied that the appellant had leave when he applied for leave or, therefore, that he has a right of appeal. The Tribunal has no jurisdiction to determine the substantive merits of an appeal in circumstances where there is no statutory right of appeal. The appellant's reliance, in the grounds of appeal, upon the decision in Basnet does not assist him. As I have already set out, in Basnet, the Upper Tribunal concluded, on the facts, that the respondent had failed to discharge the burden that the appellant had not paid the fee and that led the Upper Tribunal to conclude that the FfT had been wrong to find that Mr Basnet did not have a right of appeal to the FfT. Here, the July 2014 application was rejected because the appellant failed to register his biometrics and in any event, FfT Judge Bennett was not satisfied that the appellant did not receive the respondent's letters inviting him to register his biometrics.
20. S3C Immigration Act 1971 operates to extend leave in the event that a person's leave expires whilst they await a decision upon any application made whilst the person has extant leave, until such time as a decision is made or while they are exercising a right of appeal against a decision. Here, properly understood, the appellant's leave to remain was extended until his July 2014 was rejected by the respondent on 15th September 2014. It follows that in my judgment, the decision of FfT Judge Amin, at

[20], to proceed upon the premise that the appellant's s3C leave expired on 17th September 2014 is not infected by an error of law. It was therefore open to the FfT Judge to find that the appellant fails to meet the financial requirements of the Immigration Rules.

21. In considering whether the respondent's decision is unlawful under s6 of the Human Rights Act 1998 on Article 8 grounds, the FfT Judge adopted the step by step approach referred to by Lord Bingham in Razgar -v- SSHD [2004] UKHL 27.
22. The issue in the appeal, as is often the case, was whether the interference is proportionate to the legitimate public end sought to be achieved. Although the appellant's ability or inability to satisfy the Immigration Rules was not the question to be determined by Judge, it is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. The judgments of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 and in MM (Lebanon) establish that the fact that the rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules.
23. In reaching his decision, the Judge carefully considered the evidence before him and taking all the relevant factors into account including those in S117B of the 2002 Act, was not satisfied, on the facts here, that the decision to remove the appellant is disproportionate to the legitimate aim of immigration control. The Judge was not satisfied that the decision to remove the appellant would be in breach of Article 8. That in my judgement, was a decision that was open to the Judge and Mr Habteslasie has not sought to persuade me otherwise.
24. It follows that the appeal before me is dismissed.

Notice of Decision

25. The decision of the FtT Judge is not infected by an error of law and the appeal is dismissed.
26. No anonymity direction is made.

Signed

Date

25th May 2018

Deputy Upper Tribunal Judge Mandalia