



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/02133/2014

THE IMMIGRATION ACTS

Heard at Field House
On 1st September 2014

Determination Promulgated
On 15th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

MUHAMMAD IRFAN MUGHAL
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim of Counsel instructed by Eden Solicitors
For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Oakley promulgated on 4th June 2014.

2. The Appellant is a male citizen of Pakistan born 12th March 1993 who on 22nd February 2013 applied for further leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant.
3. The application was refused on 17th December 2013 the Respondent having considered paragraph 245ZX(d) with reference to paragraph 13 of Appendix C of the Immigration Rules. In giving reasons for refusal the Respondent contended that the Appellant needed to show that he was in possession of £7,700 for a consecutive 28 day period the end date of which must be no earlier than 31 days before the date of application. The Appellant relied upon his father's bank statement, but the closing date in that statement was more than 31 days before the date of application.
4. In addition the Appellant had not submitted a letter from his father confirming that his funds may be used by the Appellant to study in the United Kingdom, and confirming the relationship between them.
5. The appeal was heard by Judge Oakley (the judge) on 28th May 2014. The judge found that the Appellant had not submitted with his application the required specified documents to prove that he satisfied the requirements of paragraph 245ZX(d). The judge accepted that the Appellant had sent a letter to the Respondent dated 6th March 2013, after his application, which contained further documents. The judge found that he could not take those further documents into account because they had not been submitted with the application.
6. The judge therefore dismissed the appeal under the Immigration Rules, and went on to consider Article 8. The judge found that the Appellant could not satisfy the requirements of paragraph 276ADE and therefore considered Article 8 outside the rules, concluding that the Respondent's decision was proportionate and therefore there was no breach of Article 8. The appeal was therefore dismissed both under the Immigration Rules and under Article 8 of the 1950 European Convention on Human Rights.
7. The Appellant applied for permission to appeal to the Upper Tribunal, and initially permission to appeal was refused by Designated Judge Zucker who found that the grounds pointed to no arguable error of law.
8. The Appellant renewed the application for permission. Firstly it was argued that the judge although restricted from considering the Appellant's evidence submitted after the application by section 85A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) had erred in law because he was not restricted from finding that the Respondent was wrong in law either to ignore or not consider the evidence submitted on 6th March 2013 by the Appellant. It was contended that there was no dispute that the Respondent had the evidence attached to the letter of 6th March 2013 in her possession and therefore was under an obligation and the rules of natural justice and fairness required her to consider that evidence which had been submitted nine months prior to the decision being made on 17th December 2013. It was contended that there is a public law duty on the Secretary of State to act fairly.

9. The second ground contended that the judge had erred in law because there was evidence of the relationship between the Appellant and his father, as a copy of the Appellant's passport had been submitted with the application and was contained in the Respondent's bundle at Annex B. It was submitted that the judge had erred by failing to consider the evidence properly.
10. Thirdly it was contended that the judge had erred in his consideration of Article 8 because he had failed to appreciate that the Respondent's decision was not in accordance with the law, because at the date of hearing the Appellant met the requirements of the Immigration Rules and the judge could take into account the evidence submitted after the application when considering Article 8. It was submitted that the judge had erred in his proportionality assessment as it was unclear how it could be argued that immigration control was maintained when the Respondent had failed to properly consider evidence in her possession, and the Appellant met the requirements of the Immigration Rules at the date of the hearing.
11. Permission to appeal was granted by Upper Tribunal Judge Kebede in the following terms:

Having arguably accepted at paragraph 18 of his determination that additional evidence was submitted to the Respondent prior to the decision, albeit post-application, the judge arguably failed to engage with the point being made that the refusal letter made no reference to that evidence and thus arguably ought to have addressed the question of fairness, as raised in the grounds before him.
12. Following the grant of permission the Respondent issued a response dated 13th August 2014 pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the judge had not materially erred in law. The author of the response noted that permission to appeal had been granted on the basis that the judge had failed to consider the issue of fairness. The author of the rule 24 response had not had access to the Respondent's file, and contended that even if this was an error it was arguably immaterial and the Presenting Officer who attended the First-tier Tribunal hearing and had the evidence before him was of the view that on this evidence the appeal could not succeed.
13. Directions were subsequently issued making provision for there to be a hearing of the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The Upper Tribunal Hearing

Preliminary Issue

14. I explained to both representatives that I had read all the documents on the Tribunal file and enquired whether the representatives had seen the rule 24 response. Neither had, and therefore both representatives were given an opportunity to read that response.

The Appellant's Submissions

15. Mr Nasim relied upon the grounds contained within the application for permission to appeal. He contended that it was clear from the determination that the judge had accepted at paragraph 18 that the Respondent had received the Appellant's evidence sent after the application. On that basis the judge should have found that the Respondent had acted unfairly in not considering that evidence.
16. I was provided with a copy of Naved [2012] UKUT 14 (IAC) and referred to paragraph 15 which confirms that the Respondent is under a common law duty to act fairly in deciding immigration claims properly made to her.

The Respondent's Submissions

17. Ms Pal contended that the judge had not made a clear finding that the further evidence had been sent and received by the Respondent. She referred to the last sentence of paragraph 24 of the determination which for ease of reference I set out below;

"24. He could have asked his father to email the documents to him and he was fully aware of the requirements of the rules under the points-based system that all the documents had to be submitted at the time the application was made and significantly also he has never informed the Respondent that there were some documents outstanding due to the fact that he appeared not to have received them from his father and had had to obtain further copies."

18. Ms Pal contended that paragraph 18 of the determination was not a finding that the additional evidence had been received by the Respondent. She stated that the Appellant's letter of 6th March 2013 and the attached documents were not on the Respondent's file and the Presenting Officer before the First-tier Tribunal had confirmed this. There was no evidence to indicate that those documents had been received by the Respondent.
19. Ms Pal contended that the judge had erred by considering Article 8 outside the Immigration Rules but this was not material because the appeal had been dismissed.

The Appellant's Response

20. Mr Nasim objected to Ms Pal's submissions that the documents sent after the application had not been received by the Respondent and submitted that if this was the case this should have been included in the rule 24 response and in making reference to the Presenting Officer before the First-tier Tribunal and the lack of evidence of these documents, Ms Pal was in effect giving evidence. Mr Nasim submitted that the Appellant was prejudiced by the Respondent contending that the documents had not been served, and if those documents had not been served there would have been reference to this in the determination.

21. Mr Nasim submitted that paragraph 245AA of the Immigration Rules should have been used to assist the Appellant, because if it was the case that documents had not been received, the Respondent was under a duty to notify the Appellant, and he would then have submitted those documents. This is referred to in paragraph 5 of the Appellant's witness statement which for ease of reference I set out below;

"5. However it is apparent that no notice of these documents was taken, neither these documents were linked to my application. As contended in the grounds of appeal that in the points-based system applications, the Respondent had the standard practice of contacting the applicants for any missing documents, however no such request was received by me, wherein I would have had the opportunity to address this that I had already forwarded the documents on 6th March 2013, and I would have enclosed the copies again for ease of reference."

My Conclusions and Reasons

22. The documents that the Appellant submitted with his application for leave to remain did not satisfy the requirements of the Immigration Rules.
23. Firstly the bank statement submitted which belonged to the Appellant's father, had a closing balance dated 4th January 2013. This was more than 31 days before the date of the Appellant's application which was made on 22nd February 2013. Therefore the requirements of paragraph 1A(h) of Appendix C were not satisfied.
24. Secondly, the appellant did not submit with his application any of the specified documents referred to in paragraph 13B of Appendix C such as his birth certificate showing the names of his parents, or a certificate of adoption showing the names of both parents or legal guardian, or a court document naming his legal guardian.
25. Thirdly the Appellant did not send with his application a letter from his father giving written consent for his funds to be used for the Appellant's education in the United Kingdom, and confirming the relationship between them, as required by paragraph 13(ii) and 13B(b) of Appendix C.
26. The judge found that the Appellant had sent a letter to the Respondent's Croydon office dated 6th March 2013 enclosing an affidavit from his father dated 18th January 2013, a form issued by the Pakistan government confirming the Appellant's relationship with his father, and new bank statement from his father showing a closing balance as at 31st January 2013, although the Appellant's letter dated 6th March 2013, which was enclosed in the Appellant's bundle of documents submitted to the Tribunal, made no reference to the bank statement.
27. The judge was correct to find that he could not consider those documents in relation to the Appellant's application under the points-based system. This is because the evidence was not submitted with the application and therefore could not be considered pursuant to section 85A(3)(b) and (4) of the 2002 Act.

28. The judge did not consider whether the Respondent had acted unfairly in failing to consider the evidence submitted to the application because there was no evidence that the letter and enclosures had been received by the Respondent when the decision was made.
29. I do not accept that the judge made a finding that the Respondent had the required evidence in her possession. The judge in paragraph 18 made a finding that further evidence was sent but did not make a finding that the evidence was before the decision-maker. In fact the case put to the judge in the Grounds of Appeal was that it appeared that those documents had not been linked to the Appellant's file. This is specifically stated in paragraph 5 of the grounds in which it is stated;

“It now appears following the rejection of application that the documents sent by the Appellant were not allocated to his file.”

30. In paragraph 7 of the grounds submitted to the First-tier Tribunal it is contended that if the documents had not reached the Respondent, rather than refusing the application, the Respondent could have written to the Appellant requesting the missing information.
31. In my view Ms Pal was perfectly entitled to make the submission that there was no evidence on the Respondent's file that those documents had ever been received by the Respondent until they were included in the Appellant's bundle and lodged with the Tribunal after the Respondent's decision was made.
32. I do not find that the Appellant was prejudiced by Ms Pal taking the stance that the judge had not made a finding that the Respondent had received the documents. It is clear from the grant of permission that Judge Kebede stated that the judge had 'arguably' accepted that additional evidence was submitted to the Respondent, but Judge Kebede did not give any indication that it was accepted that the Respondent had received those documents.
33. Mr Nasim contended that if the Respondent had not received the additional documents, then paragraph 245AA dictated that the Appellant should have been contacted in advised of this. I do not agree. In summary paragraph 245AA states that when specified documents must be provided, the decision-maker will only consider documents that have been submitted with the application, unless sub-paragraph (b) applies.
34. Sub-paragraph (b) is set out below;
- (b) If the applicant has submitted specified documents in which:
 - (i) Some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);
 - (ii) A document is in the wrong format (for example, if a letter is not on letter head paper specified); or
 - (iii) A document is a copy and not an original document; or
 - (iv) A document does not contain all of the specified information;

the Entry Clearance Officer, Immigration Officer or Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.

35. This is not a case where sub-paragraph (b) applies. In this case the Appellant did not submit specified documents which should have been submitted with the application. Sub-paragraph (c) of paragraph 245AA states that documents will not be requested where a specified document has not been submitted.
36. I therefore conclude for the reasons given above, that the judge did not err in failing to consider whether the Respondent had acted fairly. The judge did not make a finding that the documents submitted after the application, were before the decision-maker and had been ignored.
37. The second Ground of Appeal contends that the judge erred in failing to properly consider evidence of the relationship between the Appellant and his father. There is no merit in this ground. Although a copy passport was submitted, this does not satisfy paragraph 13 of Appendix C. The judge did not err on this issue.
38. The third Ground of Appeal to be considered relates to Article 8. Having decided to consider Article 8 outside the rules, the judge did not err in his Article 8 assessment. I find no merit in the Appellant's submission that the judge should have found the Respondent's decision was not in accordance with the law because at the date of hearing the Appellant met the requirements of the Immigration Rules. If this submission was accepted, the requirements of the Immigration Rules would be irrelevant and an Appellant would be able to submit evidence and have this evidence accepted after he had submitted his application and even after the Respondent had made a decision. As stated by the Supreme Court in paragraph 57 of Patel [2013] UKSC 72;
 57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right.
39. The judge did not accept that the Respondent had failed to properly consider evidence in her possession and was correct to conclude in paragraph 25 that there should be no reason why the Appellant's failure to submit the documents which were required

"should in these circumstances trump the rules and I therefore conclude in all those circumstances that the decision relating to the Appellant was not disproportionate."

Decision

The determination of the First-tier Tribunal does not disclose an error of law.

I do not set aside the decision. The appeal is dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity direction.

Signed

Date 3rd September 2014

Deputy Upper Tribunal Judge M A Hall

FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 3rd September 2014

Deputy Upper Tribunal Judge M A Hall