



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26690/2013

THE IMMIGRATION ACTS

Heard at Field House
On 24 March 2014

Determination Promulgated
On 08 April 2014

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ZIA UR REHMAN

Respondent/Claimant

Representation:

For the Appellant: Mr G Jack, Home Office Presenting Officer
For the Respondent: Mr D Adophy of Rana & Co Solicitors

DETERMINATION AND REASONS

1. The claimant is a Pakistani citizen, born on 5 February 1988. He appeals against the decision of the Secretary of State for the Home Department dated 11 June 2013

refusing to vary his leave to remain in the United Kingdom and issuing directions for his removal under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Essentially it was for the claimant to show that for the requisite 28 day period he was in possession of at least £2,100 so as to satisfy the maintenance requirements as required by paragraph 1A of Appendix C of the Immigration Rules.
3. Paragraph 1A(h) of Appendix C of the Immigration Rules states as follows:-

“The end date of the 90 day and 28 day periods ... will be taken as the date of the closing balance of the most recent of the specified documents, and must be no earlier than 31 days before the date of application.”

4. In support of his application the claimant submitted two documents. The first was a bank statement dated 19 April 2013 from Lloyds TSB and the second was a letter from Lloyds TSB dated 22 May 2013 showing that the level of funds on that particular day was £2,093.41.
5. The relevant passage of the refusal letter reads as follows:-

“As the closing date of the bank statement submitted in support of your application dated 19 April 2013, you need to show evidence of £2,100 maintenance for 28 days from 23 March 2013 to 19 April 2013.

However, between 23 March 2013 and 26 March 2013 your bank statements state you were in possession of no more than £700.09.

It has been noted you have also submitted a letter from Lloyds TSB dated 2 May 2013 as the letter submitted only shows the level of funds available to you on 2 May 2013, and the level of funds on that day are £2,093.41 you have not demonstrated that you have the level of funds required over the specified 28 day period to be granted as Tier 4 (General) Student Migrant.

It has therefore been decided that you have not met the requirements as specified within the Immigration Rules and 0 points have been awarded for Maintenance (Funds).”

6. Thus the matter came for hearing before First-tier Tribunal Judge Adio on 2 January 2014. At that hearing the claimant ought to produce a Silver Advantage Bank account statement from Lloyds TSB covering the period of 20 April 2013 to 24 May 2013.
7. It was argued that that bank statement met the requirements of the Rules and that it was dated prior to the date of application.

8. It showed that the claimant had £2,100 available between 26 March and 1 May. The claimant was a genuine student and had paid a lot of money towards his studies.
9. It was argued before the Judge by the Home Office Presenting Officer that that new statement was not admissible by virtue of Section 19 of the UK Borders Act 2007. The Judge could only take account of documents submitted as the date of the application.
10. The Judge says nothing in the determination about that matter and finds that on the basis of the new evidence as submitted that the claimant had met the requirements of the Immigration Rules, having the requisite amount for the 28 period. The Judge found that the Secretary of State for the Home Department had not considered the claimant's case in its totality and the appeal was allowed.
11. The Secretary of State for the Home Department, however, seeks to appeal against that decision on the basis that the Judge was not permitted under the statute to take account of that particular bank statement. Indeed the Judge does not specifically engage with the submissions made relating to Section 19 nor with the provisions of Section 85A of the Nationality, Immigration and Asylum Act 2002 which places significant restrictions on the post-application evidence that can be adduced.
12. Permission to appeal was granted on that basis.
13. Thus the matter comes before me in pursuance of that grant.
14. Mr Adophy, who represents the appellant, made essentially two submissions to me. The first was that the documentation which was originally submitted was sufficient in itself to satisfy the 28 day rule, in the alternative that because there was a letter from the bank dated 2 May 2013 the new bank statement was merely evidence clarifying that situation and is not to be regarded as new evidence falling foul of the provisions of Section 19.
15. In support of his first contention my attention was drawn to the documents which can be found at appendices E and F of the respondent's bundle of documents. The first is a bank statement issued on 19 April 2013 showing activity from 20 March to 9 April 2013. It is stamped by the bank with a stamp dated 2 May 2013. The second document is a letter addressed to the claimant from the bank dated 2 May 2013 specifying that as at 2 May 2013 the balance stood at £2,093.41. That is also stamped by the bank on 2 May 2013.
16. Mr Adophy said that the difficulty facing the claimant in making his application was that the bank only issues statements on a monthly basis and the best therefore that he was able to get from the bank in time for the application was the letter of 2 May stamped by the bank to show that there had been no change in the claimant's bank details as from 9 April 2013.

17. The difficulty with that contention is that the letter does not specify that fact and could easily have done so but in any event from 9 April 2013 is the sum of £2,103.02 but on 2 May 2013 is £2,093.41. Therefore somewhere over that period the balance fell below the requisite £2,100.
18. The letter of 2 May was considered by the Secretary of State for the Home Department and for the reasons which are set out in the refusal letter did not assist the cause of the claimant.
19. The claimant made his claim on 25 May and now produces the statement dated 24 May. I do not understand without more why the more up-to-date bank statement could not have been submitted at the time of the application. The event which caused the bank account to fall below the requisite figure in any event was the £9.61 which was debited as a service charge for the account.
20. It is a relevant consideration in considering this matter to note a previous communication with the appellant by the Secretary of State for the Home Department on 4 May 2013. The appellant had originally made his application for leave as a Tier 4 (General) Student on 25 May 2013 having submitted a Confirmation of Acceptance for Studies at the Shepherd Business School Limited. Prior to having made that application there had been a decision to revoke the licence of the business school. Accordingly the claimant was notified in the letter of 4 March 2013 that he would be allowed 60 calendar days in order to submit a fresh application. Thus significantly in that document was the following:-

“If you obtain a new CAS then you will need to submit fresh and up-to-date documents with your application to vary, for example bank statements showing you are in possession of sufficient funds to cover your course fees and the maintenance requirement.”

Thus the claimant was clearly under notice to submit the most recent documents in support of the renewal of his application.

21. The second submission made by Mr Adophy is to the effect that because there was the evidence presented at the time of application of an account running to 2 May 2013, it was permissible to introduce the bank statement in clarification of that matter. It was not new evidence but merely evidence in support of that which was presented.
22. Mr Jack points out that when the original application was made on 25 May 2013 the new CAS and new bank statements seeking the variation in pursuance of the March letter from the Secretary of State for the Home Department were received on 7 May 2013. Thus it would have been open to the claimant to have submitted a bank statement prior to that period. Having gone to the trouble of obtaining the letter from the bank, a few additional sentences from bank as to the state of the account between 19 April and 2 May would have resolved the issue. Nevertheless that was

not done and the documents were not eloquent of what is now said that they represent. He submits that the new bank statement is fresh evidence and as such still caught by the Rules by Section 19 and paragraph 85A.

23. He submits that however technical it may appear, the Rules have to be obeyed.
24. It seems to me that that is an argument which has merit. It was the decision of the legislature, in enacting the various provisions relied upon, that no new evidence would be admitted after the application. Clearly the new bank statement is fresh evidence as it seeks to clarify rather than repeat that which is set out in the application. I find therefore that the Judge in failing to take consideration of the statutory framework has erred in law. I therefore set aside the decision and proceed to remake it.
25. Mr Adophy submits that to refuse to grant the leave sought for the sake of £9.61 is both unfair and draconian. He invites me to find that at the very least it breaches claimant's human rights and it is disproportionate to remove him from the jurisdiction.
26. It is in that context that the decision of **Patel and Others** as promulgated by the Supreme Court [2013] UKSC 72 is of significance. That judgment considered the cases of **Patel**, **Anwar** and **Alam**.
27. In relation to the cases of **Alam** and **Anwar** similar issues arose in their appeals, namely the practical problem faced by the appellants arising from their failure to produce relevant evidence as required under the points-based system at the relevant time. Each appellant was able to produce the relevant evidence in response to the Section 120 notice, however, but was barred by exception 2 of Section 85A from relying on it directly in support of the appeal. The issue before the Supreme Court was whether an indirect route could be found to achieve a favourable result. That indirect route being to rely upon the human rights grounds as set out in Article 8 of the ECHR.
28. Of particular importance to the present case are the terms of the judgment as set out in paragraphs 56 and 57 of that decision. The court recognised that a formalised "near miss" or "sliding scale" principle is unsupported by Strasbourg authority or by the proper reading of Lord Bingham's words in the case of **Huang**. A near miss under the Rules cannot provide substance to a human rights case which is otherwise lacking in merit.
29. The court went on to stress 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 projected human rights. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8 of the ECHR.

30. The comments made by the Supreme Court were considered by the Upper Tribunal in **Nasim and Others (Article 8) [2014] UKUT 0025 (IAC)** . The Tribunal indicated at paragraph 12 of the judgment that the particular passages as set out in paragraph 57 of **Patel and Others** had a wider import in seeking to refocus attention upon the core purposes of Article 8. It regarded the decision in **Patel and Others** as a significant exhortation from the Supreme Court to refocus attention on the nature and purpose of Article 8 and in particular to recognise its limited utility to an individual where one has moved along the continuum from that Article's core area of operation towards which might be described as its "fuzzy penumbra". The Tribunal found that the nature and right asserted by each of the appellants, based on their desire as former students to undertake a period of post-study work in the United Kingdom, lay at the outer reaches of cases requiring an affirmative answer to the second of the five "Razgar" questions.
31. The Tribunal also looked at the scope of **CDS (Brazil)** and paragraphs 39 to 42.
32. In this particular case before me the appellant has no family life or other wider Article 8 issues other than his wish to remain as a student and to capitalise upon and to see to fruition that which he has expended so much time, energy and fees upon. As such he is not somebody who can cite near miss in the context and understanding of the Upper Tribunal in **Nasim**. In that connection he is not dissimilar from a number of the appellants who appeared before the Tribunal.
33. For the sake of completeness my attention is also drawn to a decision of the Upper Tribunal in **Shahzad (Article 8 - legitimate aim) [2014] UKUT 0085 (IAC)**.
34. That held particularly where an area of the rules does not have such an express mechanism, the approach in **R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin)** (29-31 in particular) and **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)** should be followed i.e. after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.
35. It seems to me having regard to the case as a whole that the context is relatively straightforward. In the decision of March 2013 the appellant and his representatives were alerted to the need to have updated documents in support of the variation of leave to be sought. Those documents when presented were insufficient for the purposes for which they were presented. It is unfortunate because with a little more care and attention the correct documentation could have been presented. The error lies with the claimant and his representatives and not with the respondent. Unfortunately thereafter the claimant was caught by the somewhat draconian Rules against the submission of further evidence. The fact that he narrowly missed the requirements of the Rules and could in any event have satisfied them had the correct

documentation been submitted affords him little relief under the “near miss principle”.

36. Of course these matters do not prevent the sensible exercise of discretion by the Secretary of State for the Home Department in these situations. Although the points-based system seeks to remove the exercise of discretion in the interests of certainty and clarity, there must be those situations such as this which could possibly be recognised in the reality of the situation that the claimant was a bona fide student who in fact satisfied the Rules at the time of the application and decision but for the statutory limitations upon evidence being presented could have established his case. In the scheme of matters where the sums available to the claimant were deficient by £9.61 for three days is a matter of concern that so much time and money and effort have been expended on this matter.
37. It is not for me to inform the Secretary of State for the Home Department of her responsibilities or indeed to invite her to act in any way other than that which she considers to be proper in the circumstances. However in this particular case I would hope that an element of compassion and commonsense can enter into what is otherwise a legal and technical web of argument such as to permit the claimant to complete his studies in the United Kingdom, particularly as they are to be completed within a few months. In the alternative the claimant having 3C leave may be permitted to make a fresh in country application, supplying the correct documentation.
38. Nevertheless as to the legal aspect of the appeal and the application of Section 19 and paragraph 85A it falls for me to uphold the appeal of the Secretary of State for the Home Department and accordingly to dismiss that of the claimant. For the reasons advanced it is also it is also not established in the light of the current jurisprudence and that the claimant would succeed in relation to Article 8 of the ECHR.
39. Thus the Secretary of State's appeal is allowed. The decision of the First-tier Tribunal Judge is set aside and remade such that the claimant’s appeals both in respect of the Immigration Rules and of human rights are dismissed.

Signed

Date

Upper Tribunal Judge King TD