



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

Appeal Number: IA/33787/2013

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

On 19 August 2014

On 28 August 2014

Before

DESIGNATED JUDGE MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**IJAZ HUSSAIN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Jack, Home Office Presenting Officer

For the Respondent: Ms Qureshi, Counsel for Ilford Law Chambers, Ilford

DETERMINATION AND REASONS

1. The Appellant in these proceedings is the Secretary of State, however, for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The Appellant, born on 01 January 1990, is a citizen of Pakistan. He appealed against the decision of the Respondent dated 03 July 2013, refusing him leave to remain in the United Kingdom as a Tier 4 (General) Student migrant under the points based system and for a biometric residence permit. His application was found to be invalid. His appeal was heard by Judge of the First-tier Tribunal Britton on 30 April 2014 and allowed, in a Determination promulgated on 14 May 2014.

3. An application for permission to appeal was made on behalf of the Respondent. Permission to appeal was granted by First-tier Tribunal Judge Fisher on 24 June 2014. The grounds of application contend that the appellant had leave to remain in the United Kingdom until 15 April 2012 and submitted an application on 13 April 2012 for further leave to remain but it was returned as invalid because he had not signed the payment section of the application form. He submitted a further application on 11 June 2013. This was refused with no right of appeal because the Appellant had no extant leave. The Judge considered that the failure to sign the payment section of the original application was a slip and that something akin to evidential flexibility ought to have been exercised in the Appellant's favour and the application should have been treated as valid. The Judge went on to allow the appeal. The permission states that it is arguable that the Judge has erred in law in concluding that there was a valid appeal before him and in going on to purport to allow it.

The Hearing

4. The Presenting Officer referred to the case of Marghia [2014] UKUT 366. He referred to the head notes which state that there is a common law duty of fairness. He submitted that this refers to procedural fairness. The head notes go on to state that residual fairness is not referred to in the Immigration Rules and so it is a matter for the Secretary of State to decide, not the Tribunal.
5. The Presenting Officer went on to submit that he is relying on the grounds of application. He submitted that the Respondent's position is that there was no valid appeal before the First-tier Judge.
6. I was referred to the case of Basnet [2012] UKUT 00113(IAC) and the Presenting Officer submitted that the Respondent has to show failure on the part of the Appellant relating to the validity of the application. He submitted that the First-tier Judge found that the Appellant had failed to sign the payment section of the application form. There is a copy of this on file. The Judge goes on in his determination at paragraph 11, to liken this to the PBS Process Instruction Evidential Policy, stating that this was a minor omission.
7. The Presenting Officer submitted that there is no policy of evidential flexibility when validity of applications is considered.
8. He submitted that with regard to fairness the important issue is that the application was incomplete and invalid. He submitted that the actions of the Secretary of State were not procedurally unfair. He referred to the said case of Marghia which states that there is no discretion under the Rules so he submitted that this is clearly not a common law fairness case as in the case of Patel (2011) UKUT 00211 (IAC)
9. The Presenting Officer referred to the case of Mahbub Allam and Others [2012] EWCA Civ 960, paragraphs 49-51. At paragraph 51 it is stated that

the Appellant might not have appreciated the distinction between an invalid application which would not be considered unless the obvious defect was cured and an application that was a valid application but nevertheless fell to be rejected because on examination the appellant had failed to score the required number of points because he had failed to supply a specified document. The paragraph goes on to state that the distinction is a real one and in a number of places the prescribed application form makes it clear that all the questions in the relevant part of the form must be completed and if they are not the application will be invalid.

10. The Presenting Officer submitted that this point was picked up in Rodriguez [2014] EWCA Civ 2 (20 January 2014). At paragraph 86 thereof it is stated that a student will only be considered to have submitted a valid application when the specified particular requirements have been complied with. The Presenting Officer submitted that in Mr Hussain's case the Secretary of State found that the application was invalid because a signature was missing. He submitted that the Judge had no jurisdiction in this case and by dealing with the matter as he did he made a material error of law.
11. The Appellant's Representative submitted that the Appellant came to the United Kingdom on a valid student visa and completed his course. He then applied for another course just before his visa expired but his application was refused as it was found to be invalid because of the lack of a signature. She submitted that the Appellant gave the correct details in his application about his bank account and all other relevant issues. She submitted that he had no assistance when he completed the form and there is a clear omission on his part. Because of this the form was returned to him marked as invalid.
12. I was referred to his witness statement. In this he refers to the said case of Basnet and she submitted that the Secretary of State had a duty to check the form and if the signature was found to be missing the Appellant should have been given an opportunity to rectify this. She submitted that the Evidential Flexibility Policy applies here as the application could have been validated by one small correction which the Appellant could have carried out instantly.
13. She submitted that the Appellant made a fresh application but this was refused with no right of appeal because his visa had expired. In spite of this the fee was taken by the Secretary of State. The application was also refused because the maintenance requirements could not be met. She submitted that had the original application been considered, all the terms of the Rules were satisfied and it is more than likely that a visa would have been granted.
14. Counsel submitted that the Appellant then submitted a pre-action protocol letter but the response from the Secretary of State was that it was out of time.

15. Counsel submitted that the Appellant had made a fresh application as advised to do and had the Secretary of State looked at the Rules and the Policy the Appellant's application would have succeeded and by now he would have completed his course and gone home. She submitted that the Judge found that this was a minor error on the Appellant's part and based on fairness, (as referred to in the case of Naved [2012] UKUT 14(IAC)) the application should have been allowed.
16. She submitted that the Appellant had paid the full fees for the course which was due to end in December 2014 but because he did not sign the form he was prevented from doing the course. She submitted that now his college licence has been revoked so the Appellant not only is out of pocket for his fees but no longer has his college sponsor.
17. She asked me to consider the evidence and the particular circumstances of this case and find that the Judge's decision is fair and correct.
18. She submitted that the application was not refused on a substantive point and the appellant had signed the form at another place. She submitted that there was no intention on the part of the Appellant, this was just a minor error as was found by the Judge.
19. The Presenting Officer made further submissions referring to jurisdiction being set down by Statute. He submitted that although he feels sorry for the Appellant there was no valid application. He submitted that there is no near miss and evidential flexibility does not apply as this appeal concerns validity.
20. He submitted that the Appellant went on to make a further application as he was told to do but this was refused. He then submitted a pre-action protocol letter in March 2013 and the Respondent replied to this.
21. The Presenting Officer referred to the 28 days given to an Appellant when the Respondent will turn a blind eye to him overstaying but during that 28 day period the Appellant did not submit a Judicial Review application. He submitted therefore that the application made by the Appellant in June 2013 was well outside the 28 day period.
22. He submitted that there were legal routes which the Appellant could have taken but he did not and there was no valid appeal in this case.

Determination

23. The Appellant's case is that the Respondent's stance is unfair. He states that the Evidential Flexibility Policy should have been used and that he should have been asked to remedy the omission on the application form and his leave should have been regularised to give him a fair opportunity to continue his studies in the United Kingdom.

24. The First-tier Judge found that the Appellant was not an over-stayer when he made his application on 11 June 2013 and directed that the application should be decided on its merits. He refers to the Appellant's first application containing a minor omission. This minor omission, however, invalidated the application. I have considered the said case of Rodriguez which refers to the distinction between an application being invalid and an application being valid but refused because of lack of evidence.

25. In this case the Appellant did not submit a valid application in accordance with the Immigration Rules. This invalidity does not fall within the parameters of the Evidential Flexibility Policy. The Secretary of State was right to find that the Appellant was an over-stayer when he made his application on 11 June 2013.
26. The Judge made a material error of law in his Determination. Because the application was invalid the Tribunal had no jurisdiction and should not have heard the appeal.

Decision

27. There is a material error of law in the Judge's Determination.
28. I set aside the Judge's decision.
29. There was no valid application before the First-tier Judge and he had no jurisdiction to hear the case so the appellant's appeal must fail.
30. No Anonymity Direction was made.

Signed

Date

Designated Judge Murray
Judge of the Upper Tribunal