



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

Appeal Number: IA/17511/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 7th January 2015**

**Decision & Reasons Promulgated
On 20th January 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MD RAZIUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Wazed-Ali, of E1 Solicitors

For the Respondent: Mr Kandola, Senior Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Drabu CBE) who, in a determination promulgated on 18th February 2014 allowed the Respondent's appeal against the decision of the Respondent made on 3rd May 2013.
2. For the sake of convenience I shall refer to the parties as they were before the First-tier Tribunal.

3. The Appellant, Mr Rahman, was granted leave to enter the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system until 13th December 2012. On 13th December 2012 he submitted an in country application for leave to remain as a Tier 4 (General) Student. In a letter dated 17th December 2012 a letter was received from the Respondent acknowledging the application that was made and further informing the Appellant that if there was to be any problem with the validity the caseworker would write to him. Further letters were sent to the Appellant on 14th January 2013 again acknowledging the application made by him in December and informing him that if there were to be any problem with the validity of the application, then the Respondent would inform him. The letter goes on to say

“if there is any problem with the validity of the application, such as missing documentation or omissions on the form, a caseworker will write to you as soon as possible to advise what action you need to take to rectify the problem. If there is an issue with the fee you have paid, your application will be rejected and details sent to you on how to make another application.”
4. A further letter containing the same information was also sent on 6th February 2013. However on 18th January 2013 the Appellant received a letter referring to the application made for leave to remain. The letter stated that the application was not valid as the specified fee had not been paid. The letter referred to “the passage next to the box ticked below provides more detail about the failure to pay the fee.” The box ticked referred to credit card details being provided but the issuing bank rejected payment.
5. In the light of that letter, a further application was made on 10th January 2013 which resulted in a refusal dated 3rd May 2013. The decision on 3rd May 2013 made it plain that he did not have a right of appeal against the decision stating that the application was made on 28th January 2013 but that his leave to enter had expired on 13th December 2012 and therefore as he did not have leave to enter at the time of the application there was no right of appeal against that decision.
6. The reasons for refusing the second application were premised on the basis that the Appellant could not qualify as having an “established presence studying in the United Kingdom” because the last time he was given permission to stay as a student was until 13th December 2012 and therefore at the time of the application it was stated that because he had no valid leave he had not got an established presence studying in the United Kingdom. As a result of that, it meant that the amount of money that he was required to demonstrate was in excess of the maintenance funds that he would have had to have had, if his first application had been valid. Thus in essence, it was refused on the basis that the first application was refused because it was an invalid application and the decision therefore rested upon that first application being an invalid application.
7. The appellant appealed that decision with written grounds of appeal. A direction was issued pursuant to that appeal on 13th June 2013. That decision made it plain that the Appellant had seven working days from the date of the notice to file documentary evidence showing that he had made an application for further leave to remain before his last leave expired and the outcome of that application and if it was

rejected, why it was rejected or why it was contended that it was wrongly rejected and why the Appellant had a right of appeal. It is clear from the Tribunal file that information had been received by the Tribunal in accordance with that direction because a further direction was issued by the Tribunal on 22nd July 2013. The direction that was given is as follows:-

“It is argued by the Respondent that the Appellant does not have a right of appeal under Section 82 Nationality, Immigration and Asylum Act 2002 because he/she did not apply for leave to remain until after the expiry of his/her existing leave. This is because a prior application made during the currency of that leave was not accompanied by the correct fee. Following the decision in **Basnet (Validity of an application - respondent) [2012] UKUT 00113 (IAC)** the onus of proof is on the Respondent to show that the correct fee was not paid. It is therefore directed that the appeal be listed for substantive hearing; that at that substantive hearing the issue of validity to be decided and that at least fourteen days prior to the substantive hearing the Respondent lodge with the Tribunal and serve upon the Appellant any information showing that the correct fee was not paid.”

8. Thus the application was listed before the First-tier Tribunal (Judge Drabu CBE) on 24th January 2014. It is clear from the determination that the Appellant was represented by Counsel, instructed by E1 Solicitors but there was no representation on behalf of the Secretary of State. First-tier Tribunal Judge Drabu CBE set out the history at paragraphs [1]-[2] of the determination including the direction to the Secretary of State to provide the documentary evidence that was specified in the direction. The judge recorded at [3] that the Respondent had been “totally non-compliant with the directions made by the Tribunal on 22nd July 2013.” He went on to consider the right of appeal at paragraph [3] onwards. He concluded from the evidence that the Respondent had failed to produce any evidence to the contrary of that provided by the Appellant and heard argument from Counsel at [4] in which Counsel drew his attention to the statement of the Appellant dated 15th January 2014 which gave explanations that the Respondent’s assertion that the bank may have refused payment in response to his request for payment of fees in respect of his first application was plainly wrong. He referred to the bundle of documents filed in support of the appeal and found that the relevant period showed that he had sufficient funds in his account at the time and that therefore the bank would have had no reason to refuse a request of a payment. He made reference to the Appellant’s evidence in his witness statement that he had been “extremely surprised” to be informed by the Respondent that the bank had refused his request for payment and that the Appellant had also stated “there was no fault on my part and I should not be punished as I am innocent. It is the Respondent’s fault or that of the bank staff assigned to process the payment.” The judge found that having examined the relevant documents he accepted that explanation by the Appellant.
9. At [5] the judge had reserved his decision and had asked the Appellant’s representative to confirm by way of a letter from the bank that it had not refused any request for payment. However the judge went on to state that he decided not to wait for such a letter and that in the light of all the circumstances he had decided that it was not necessary to do so. Thus he reached the conclusion that the application was

validly made in time and therefore was refused without good reason. At [6] the judge went on to state that “the only ground upon which it was refused was non-payment of fees. There was no other reason given for refusal. The Appellant met the requirement of the Rules.” He went on to state at [7] that in the circumstances the reason for refusal of the second application was not in accordance with the law and the Rules and that he accepted the argument advanced by the Appellant in his witness statement at paragraphs 13-15. Thus he allowed the appeal.

10. The Secretary of State sought permission to appeal that decision and permission was granted by Upper Tribunal Judge Deans on 10th March 2014 stating “the Respondent is arguing essentially that the judge misdirected himself as to a material fact. In pursuing this argument however the Respondent will have to address her apparent breach of the Tribunal’s direction. The grounds are nevertheless arguable.”
11. The appeal came before the Upper Tribunal for hearing on 8th May 2014 when it was adjourned as a result of missing documentation. The appeal then came before the Upper Tribunal on 7th January 2015. The Secretary of State was represented by Mr Kandola, Senior Presenting Officer and the Appellant by Mr Wazed-Ali, of E1 Solicitors. Mr Kandola relied upon the grounds that were drafted for the appeal. He submitted that the Appellant had been granted leave to enter as a Tier 4 (General) Student until 13th December 2012 and on the day he had submitted an in country application for further leave to remain. This had been rejected for non-payment of fees and the relevant fee was the sum of £394. He submitted that the judge had allowed the appeal on the basis that the first application was refused without good reason at paragraph 6 and that the judge had come to the conclusion on the basis of evidence provided at the hearing that he had sufficient funds in his bank account at the relevant time, therefore there was no reason for payment to have been refused. He submitted that it has not been clear which bank statements the judge was referring to and there was a direct conflict of evidence between the documents the judge was shown and the bank statements submitted by the Appellant. He directed the Tribunal to the Lloyds Bank account statements to show that he had only £232.04 and not the £394 that he was required to have as he claimed and as the judge had found in his determination. As the grounds had set out on 13th December 2012 the Appellant had just £232.04 in his account and that remained until 18th December 2012 where £140 was paid in, bringing the balance to £372 and it was not until 20th December 2012 that the Appellant had sufficient money in his account.
12. Mr Kandola submitted that this was further supported by fresh evidence that had been annexed to the Secretary of State’s Grounds of Appeal. Those documents had not been annexed to the grounds in the Tribunal file therefore Mr Kandola provided further copies. It consisted of an e-mail dated 17th January 2014 to the Presenting Officer and annexing to it a screenshot showing that the authorisation had been declined on 17th December. Mr Kandola conceded that this had not been before the First-tier Tribunal. He submitted that the error of law was based on inadequate reasoning and the bank statements that had been referred to in the grounds.

13. Mr Wazed-Ali on behalf of the Appellant submitted that there was no error of law in the decision of the judge and that although the grounds referred to payment on 13th December 2012, that was the date of the application and not necessarily the date of payment. He directed the Tribunal to the letters in the Appellant's bundle and in particular the letter of 17th December 2012 addressed to the Appellant from the Respondent acknowledging the application that had been made on 13th December and stating that if there were to be any problem with the validity of the application then details would be sent to him. At page 8 of the bundle there was a further letter in exactly the same terms but on 14th January 2013. Thus he submitted that there had been no information provided to the Appellant that his application was invalid by reason of those two letters and therefore by 14th January 2013 the Secretary of State was still referring to the application being a live one and there being no problems with payment of the money. Thus he submitted that the bank statements demonstrated that from 20th December the Appellant had sufficient money in his account to pay the fee sum required of £394. It was not known by the Appellant what date the Secretary of State had attempted to make payment. This information had not been before the Tribunal despite the direction that was made on 22nd July 2013 and thus it was open to the judge to find that by reason of the letter of 17th December and taken in conjunction with the letter of 14th January 2013 that the Secretary of State had not demonstrated when payment had been taken and on the bank statements before the judge he was entitled to find that there was sufficient money in the account up until the dates of those letters. Thus he submitted there had been no clear evidence before the judge on which date payment of the fee had been taken and thus the judge was right to find that the Appellant had made a valid appeal on the evidence that was available before him.
14. Mr Kandola by way of reply stated that he would rely upon a mistake of fact and that it was by reason of the evidence annexed to the grounds which demonstrated the date upon which the fee had been taken and the reason for the specified fee having been refused. When asked if the grounds as drafted had made that submission, he stated that the grounds did not expressly state that submission but that at paragraph 3 of the grant of permission by Judge Deans, it was stated that the Respondent would have to address a breach of the Tribunal's directions and he stated he could offer no explanation why that information had not been provided before the judge as the e-mail had been sent on 17th January. Mr Wazed-Ali further submitted that he had not seen the Respondent's documents nor had he received the e-mail attached to the grounds. He further submitted that the grounds as drafted did not properly make any submission as now contended on behalf of the Secretary of State.
15. I reserved my decision.
16. It is plain from reading the grounds of permission drafted on behalf of the Secretary of State that it was asserted that the judge had allowed the appeal on the basis that the application was made in time and it was a valid appeal. At [3-5] of the grounds of permission, it was asserted that the judge had come to the conclusion based on the evidence provided at the hearing that the appellant had sufficient funds in his bank

account at the relevant time and therefore there was no reason for such payment to have been refused. The grounds at [4] go on to state, whilst it was not clear which bank statements the judge was referring to there was a conflict of evidence between the bank statements submitted for the purposes of the judicial review statements and those in the Appellant's bundle. It was further asserted at [5] the TSB Bank account statements showed that on 13th December, the date of the application, he had £232 in his account and the account remained the same until 18th December 2012 bringing the balance to £372.04 and it was not until 20th December 2012 that he had sufficient money in his account to meet the fee requirements. The grounds then go on at paragraph [6] to refer to the fresh evidence which is attached to the grounds. There is no reference in the grounds for any permission for such documentation to be admitted or importantly, any reference to why this information should give rise to an error of law.

17. I have considered the submissions of the parties and have done so in the light of the evidence that was placed before the First-tier Tribunal. Whilst the grounds at [4] appear to state that it was not clear which bank statements the judge was referring to, I see no difficulty in finding which statements were relevant. They were set out in the bundle of documents that had been sent to the Tribunal for the purposes of the hearing. The bank statements for the requisite period are set out at pages 20 to 23 of the bundle and refer to bank statements held at Lloyds Bank. The judge made reference to the bank statements that were set out in the bundle at [21] which showed that on 13th December he had a balance of £232.04 and that by 20th December there was £402 in the account and thereafter the money increased in the account so that there was always in excess of that amount throughout December and into January until the end date of the statement.
18. What the grounds fail to take into account is the other evidence that the judge relied upon and the basis upon which the case was advanced on the Appellant's behalf. The Appellant had produced a witness statement at pages 10 to 12 of the bundle dated 15th January 2014. In that document he had made reference to the letters that had been sent by the Secretary of State after 13th December 2012 in respect of his application. Those are the letters that Mr Wazed-Ali had referred to in his submissions. They comprised of the letter of 17th December 2012 and the letter of 14th January 2013, both letters being in the same terms which acknowledged the applications made by the Appellant and informing him that if there were any problems with the validity of the application he would be told. Therefore the evidence before the judge was that by 14th January 2013 it was not being asserted that there were any problems with the fee having been paid and that the bank statements showed that from 20th December onwards there was sufficient money in the account. Whilst the grounds refer to 13th December date as showing an amount of £232, there was no evidence before the judge on behalf of the Secretary of State as to the date at which payment was taken. The fact that the application was made on 13th December does not necessarily mean that payment was taken on that date. Therefore there was no evidence before the judge as to when payment was taken and in the light of those letters of 17th December and 14th January 2013, taken in conjunction with the Appellant's bank statements, the judge found that the Respondent had not

discharged the onus of proof and therefore he accepted the evidence of the Appellant.

19. As the decision in **Basnet (Validity of an application - Respondent) [2012] UKUT 00113 (IAC)** makes it clear the burden is on the Respondent who has the evidential burden of demonstrating that the application was not accompanied by such authorisation to enable the Respondent to receive the fee in question. It was wholly open to the judge to find that contrary to the case of **Basnet** and in particular paragraph [32] of that decision that the Respondent had been totally non-compliant with the directions that had been made by the Tribunal on 22nd July 2013. By the time of the appeal in January 2014 the Secretary of State had six months to provide the evidence that had been directed, including the date of when payment was taken and the reasons why, if payment had not been taken, why it had occurred. Furthermore there was no representation on behalf of the Respondent before the Secretary of State, therefore it was wholly open to the judge on the evidence that was before him to reach the conclusions that he did. He was entitled on the evidence that was before him to find that the Secretary of State had not discharged the burden upon her that the application was not accompanied by the specified fee. Indeed the Respondent had offered no evidence to that effect. There was no evidence before the judge as to even what date payment had been taken and therefore on the available evidence it was open to the judge to find that the application had been accompanied by the specified fee and therefore was validly made.

20. Whilst the Secretary of State now provides evidence concerning the reasons as to why payment was declined, that evidence was not placed before the First-tier Tribunal. Whilst the e-mail is dated 17th January 2014, which is before the hearing on 24th January 2014, that evidence was not placed before the First-tier Tribunal and indeed there was no representation before the Secretary of State at the hearing itself. The direction that had been made by the Tribunal on 22nd July 2013 made it plain what evidence should have been filed by the Respondent and therefore by the date of that e-mail they had six months in which to provide that information but had failed to do so. The evidence was then filed after the appeal had been heard and in an attempt to demonstrate that the judge had made an error of law. It cannot be an error of law for a judge not to take into account material that had not been placed before him. Nor do I find that the grounds that were drafted on behalf of the Secretary of State set out with any particularity a Ground of Appeal based on the submission made by Mr Kandola that the fresh evidence should be admitted to show a mistake of fact relying upon the principles laid down in **E and R v The Secretary of State for the Home Department [2004] - EWCA Civ 49**. The grounds make no such submission and the grounds as drafted clearly relate to the information that had been before the judge and the challenge was in respect of that. The Secretary of State was directed to provide that evidence on 22nd July 2013. That direction was not complied with until six months later and even then the information had not been placed before the First-tier Tribunal when it made a decision. It was therefore open to the judge to reach a decision on the material that had been placed before him which is what the judge had done but it has not been demonstrated that the judge made an error of law in doing so. In any event, it is too late for the Secretary of State now to rely upon

evidence that was known at the hearing but the Respondent had failed to place before the judge; that such evidence does not comply with the principles set out in **Ladd v Marshall** where it is said that the Appellant must not have been responsible for the mistake. The evidence was available but the Secretary of State had just not provided it despite a direction of the Tribunal to do so. In those circumstances, I do not find that it is open to the Secretary of State now to rely upon that evidence. For those reasons, it has not been demonstrated that the judge made any material error of law and that it was open to the judge to make the decision that he did on the evidence that was placed before him. Therefore the decision of the judge shall stand.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on apppoint of law. The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed

Date; 19/1/2015

Upper Tribunal Judge Reeds