



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

Appeal Number: IA/44866/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 5 October 2015**

**Decision & Reasons
Promulgated
On 14 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR MUHAMMAD TAQ

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Amy Cooke, Counsel instructed by Farani Javid Taylor Solicitors

For the Respondent: Ms Julie Isherwood, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Telford sitting at Hatton Cross on 26 February 2015) to dismiss his appeal against the decision by the Secretary of State to refuse to vary his leave to remain so as to grant him ILR on the grounds of ten years' continuous lawful residence. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

2. The appellant is a national of Pakistan, whose date of birth is 1 December 1979. He first arrived in the United Kingdom on 7 December 2003 with valid entry clearance as a student. He remained lawfully as a student until 31 March 2009.
3. On 6 March 2009 he applied for further leave to remain as a student, and the application was rejected as invalid on 19 March 2009.
4. On 26 March 2009 he made a second application, which was rejected as invalid on 15 April 2009 (after his leave to remain had expired). He was given 28 days to submit a new application.
5. On 23 April 2009, he made a third application, which was rejected as invalid on 20 July 2009.
6. On 30 July 2009, he made a fourth application, which was accepted as valid and which led to the grant of further leave to remain on 4 September 2009. Thereafter the appellant had continuous lawful leave until he applied for ILR on 2 July 2014.
7. On 16 October 2013 the Secretary of State gave her reasons for refusing the application. It was accepted that he had been continuously lawfully resident in the United Kingdom until 15 April 2009, when his second in-time application had been rejected as invalid. Although he had re-submitted a third application within the 28 day time limit, this too had been rejected as invalid. So his leave "expired" on 15 April 2009, and he was without leave for a period of 141 days up to 4 September 2009.

The Hearing before, and the Decision of, the First-tier Tribunal

8. The case advanced in the grounds of appeal was that the SSHD should have exercised discretion in the appellant's favour, as he had made his ultimately successful application (the fourth application) within 28 days of the rejection of the third application on invalidity grounds.
9. At the hearing before Judge Telford, Miss Jones of Counsel appeared on behalf of the appellant. There was no Presenting Officer. At the outset of the hearing, Miss Jones renewed a request for an adjournment, which the Tribunal had twice previously refused in writing. Her reason for seeking an adjournment was to give the respondent time to produce the records held by the Home Office of the appellant's applications in 2009 so as to establish the reason why the second and third applications had been rejected as invalid. The judge refused the application for the reasons given by him in paragraphs [5] to [10] of his subsequent decision.
10. The judge dismissed the appeal under the rules for the reasons he gave in paragraphs [13] to [20]. He found that the appellant was not lawfully resident between 31 March 2009 and 30 July 2009, while noting that the respondent relied on a different period as being unlawful. He found at paragraph [22] that the appellant had given a variety of different and at times inconsistent and conflicting reasons for the refusals in 2009:

To my mind that is not on the point as none were appealed and to my mind he cannot establish any unfairness or impropriety on the part of the respondent in those refusals.

11. The judge went on to address an alternative claim under Article 8 ECHR at paragraphs [23] to [27] and he dismissed the appeal under the Rules and on human rights grounds.

The Application for Permission to Appeal

12. The appellant's legal representatives advanced one ground of appeal only. This was that the judge had erred in law in finding that the appellant's lawful residence was broken between the end of March 2009 and 4 September 2009. They relied on sub-paragraph (v) of Paragraph 276B which provides as follows:

(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days...

The Grant of Permission to Appeal

13. On 2 June 2015 First-tier Tribunal Judge Hollingworth granted permission to appeal, as an arguable error of law had arisen in relation to the construction to be placed upon the provisions governing lawful residence, and the respondent had argued the case on a footing as to a different period to that found by the Judge.

The Hearing in the Upper Tribunal

14. At the hearing before me, Ms Cooke abandoned the ground of appeal advanced in the permission application (Ground 1) but sought permission to argue a new ground (Ground 2) which was that the judge had erred in finding that the applications had been validly rejected and/or the judge had erred in not granting an adjournment to allow time for the subject access request to be processed so as to find further information about the reasons for the application being rejected.
15. Without formally granting her permission to advance a new ground, I allowed Ms Cooke to develop her case and to direct my attention to the passages in the SAR disclosure from the Home Office which were pertinent to the three rejected applications in 2009.
16. Ms Isherwood submitted that there was no merit in Ground 2, and invited me to hold that the decision of the First-tier Tribunal was sound.

Discussion

17. Ground 1 was rightly abandoned by Ms Cooke. In order to be regarded as lawful, the appellant's residence between 31 March 2009 and 4 September

2009 had to be pursuant to existing leave to enter or remain: see Paragraph 276A(b)(i). It was not, so prima facie he was not lawfully resident throughout that period. If the appellant had made a valid application on 23 April 2009 (which was less than 28 days after his previous leave had expired), he would have been able to invoke subparagraph (v) of Paragraph 276B. But he did not make a valid application, and so his period of unlawful residence began (retrospectively) on 1 April 2009. For an invalid application does not extend time. Although his fourth application was successful, he did not have existing leave to remain or section 3C leave at the time he made the application - and more than 28 days had expired since his last grant of leave - and so the period of lawful residence did not resume until the grant of leave on 4 September 2009.

18. The differing periods of unlawful leave calculated by the respondent and the judge are immaterial, as on any view the continuity of lawful residence had been broken by well over 28 days.
19. Turning to Ground 2, the ultimate objective in seeking an adjournment was the hope, not the expectation, that the material disclosed pursuant to a Subject Access Request would show that the appellant had been the victim of an historic injustice which could be prayed in aid as a compelling circumstance which justified the appellant being granted Article 8 relief outside the rules. The hoped for injustice was that one of the rejections on invalidity grounds had been unlawful; and that, absent the unlawful rejection, the appellant would have had continuous lawful leave in the period between 31 March 2009 and 4 September 2009.
20. I am in no doubt that the judge gave adequate reasons for refusing the renewed adjournment request on the evidence that was before him. The evidence of the appellant did not engender reasonable grounds for believing that he might have been a victim of injustice. The reality was that the appellant's representatives did not have evidence that the appellant had been a victim of injustice, but it was hoped that the pending SAR would improve the appellant's position evidentially.
21. There is no challenge to the judge's finding that the appellant gave contradictory evidence as to the nature of the asserted invalidity on each occasion, or to the judge's finding that the appellant admitted that it was his fault that he failed to pay the required fee for the first application or for the second application (the appellant was unclear as to which of these two applications was rejected for non-payment of the required fee).
22. So it was a reasonable exercise of discretion by the judge, having regard to the overriding objective, to refuse the adjournment on the ground that it was speculative, "without clarity or certainty as to what was sought or required and [which] might colloquially be termed a fishing expedition."
23. While the appeal to the Upper Tribunal was pending, the SAR material arrived. I take into account the SAR material *de bene esse* in case it shows, with the benefit of hindsight, that the appellant was deprived of a fair hearing in the First-tier Tribunal.

24. The SAR material clarifies the ground of invalidity upon which each of the three applications was rejected. The first application was rejected because, “the dep’s photo is unacceptable as parents’ head in photo” (page 5). The second application was rejected because no fee had been paid (page 8). The third application was rejected because the appellant had submitted the incorrect version of the Tier 4 application form (page 12).
25. Ms Cooke submits that the appellant ought to have been given the opportunity to submit an alternative photograph. Under paragraph 34C(b) the decision maker *may* contact the applicant and give him a single opportunity to correct any omission or error which renders the application invalid. But she accepts that this rule was not in force in 2009. So the appellant has not shown that the rejection of the first application was unlawful.
26. Ms Cooke submits that the respondent has not produced evidence to show “the alleged non-payment of the correct fee” She relies on **Basnet (validity of application - respondent) [2012] UKUT 00113 (IAC)**, but I do not consider that this case establishes as a general proposition that the burden rests with the respondent to prove invalidity. The case establishes that if the Secretary of State asserts that an application was not accompanied by a fee, and so was not valid, the Secretary of State has the onus of proof *where the non-payment of the fee is a disputed issue*. But, as is apparent from paragraphs [22] onwards of the decision, there were special reasons why the Upper Tribunal considered it appropriate for the onus of proof to be placed on the Secretary of State in these circumstances. But this does not detract from the general rule, which is that the burden of proving that an application has been validly made normally falls on the applicant. At paragraph [27], the Presidential panel said as follows:
- We turn to the question of who bears the burden of proving that an application has been validly made. This would normally fall on the applicant, who would discharge it by producing evidence of acknowledgement of receipt or proof of postage. Here the application was received in time, but the question of whether it was accompanied by accurate billing data can be answered only by the respondent. In those circumstances, we conclude that the evidential burden of demonstrating that the application was not accompanied by such authorisation (of the applicant or other person purporting to pay) as will enable the respondent to receive the entire fee in question’ must fall on the respondent. We reach this conclusion both by application of first principles - the party that asserts a fact should normally be the one who demonstrates it: and because the respondent is responsible for the procedure to be used in postal cases, and the features noted above prevent both the issue of a prompt receipt and an opportunity to understand why payment was not processed. An applicant is not present when an attempt to process payment is made, and has no way of later obtaining the relevant information.
27. The appellant’s evidence before the First-tier Tribunal was that it was his fault that the SSHD had not been paid. So the burden did not shift to the respondent to prove non-payment of the fee. There is nothing in the SAR

material which undermines the admission that the fee was not paid; and that it was the appellant's fault it was not paid. So the appellant has not shown that the rejection of the second application was unlawful.

28. Paragraph 34I provides as follows:

Where an application or claim is made no more than 21 days after the date on which a form is specified under the Immigration Rules and on a form that was permitted for such application or claim immediately prior to the date of such specification, the application or claim shall be deemed to have been made on the specified form.

29. Ms Cooke submits that 28 days elapsed between the second application on 26 March 2009 and the third application on 23 April 2009. She says it is unclear from the archives on which date the form changed. But she submits that it is likely that the form change took place no more than 21 days before the third application, and therefore the third application should have been treated as valid.

30. As the burden rests with the appellant, it is necessary for him to prove when the form change took place and hence to show, if he can, that his third application complied with the requirements of paragraph 34I. The appellant has not discharged this burden. So he has not shown that the rejection of his third application was unlawful.

31. Ms Cooke recognises that the SAR material is not sufficient by itself to make good a case of historic injustice, and so she concludes her skeleton argument with the submission that case should be remitted back to the First-tier Tribunal, "with directions for all evidence relating to the rejections to be served". But there is no reason to suppose that the Home Office has not already disclosed all the evidence which it has on this topic.

32. Ms Cooke points out that the judge was wrong to say that the appellant could have appealed against the rejections. But the appellant could have brought proceedings for judicial review.

Notice of Decision

33. The decision of the First-tier Tribunal did not contain an error of law, and the decision stands. This appeal to the Upper Tribunal is dismissed.

Signed

Date

Deputy Upper Tribunal Judge Monson