IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/30753/2013
IA/30744/2013
IA/30750/2013
IA/30752/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 16th December 2014	**On 30th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR MD ANWARUZZAMAN
(2) MRS SHANJIDA ANWAR
(3) MISS TASNIA ZAMAN
(4) MASTER MOHAMMAD ZAMAN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr M Hussain (Counsel)
For the Respondent: Mr L Tarlow (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Courtney promulgated on 1st October 2014, following the hearing at Hatton Cross on 8th September 2014. In the determination, the judge dismissed the appeals on the basis that there were no valid appeals before her. The Appellants subsequently applied for, and were granted permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are all citizens of Bangladesh. The principal Appellant is Mr Md Anwaruzzaman. He was born on 31st January 1969. His wife is the second Appellant, Shanjida Anwar, and she was born on 5th August 1975. Their first child is Miss Tasnia Zaman, and she was born on 6th July 2002. Their second child is the fourth Appellant, Master Mohammad Zaman, and he was born on 11th August 2011 in London. The first Appellant entered the UK on 7th January 2006 with a valid entry clearance certificate as a student until 1st January 2008. He was granted successive extensions of leave to remain until 8th July 2011. On 8th June 2011, he was granted further leave to remain as a Tier (Post-Study) Migrant until 8th June 2013.

3. On 31st May 2013, the first Appellant applied for an extension of leave to remain as a Tier 1 (Entrepreneur) Migrant and his wife and children, the remaining Appellants, applied for leave to remain as his dependants.

4. On 11th June 2013, the Respondent wrote to the principal Appellant to say that:

> "The specified fee has not been paid in connection with your attempted application which you made by post on 31st May 2013. We do not consider that an exception to the requirement to pay the fee applies in this case, and therefore your application is invalid and we are returning your documents".

The letter goes on to explain that, "Although credit/debit card details had been provided, the issuing bank rejected the payment. There may have been insufficient funds in the account or the details provided did not match the information held by the bank" (see paragraph 3 of the determination).

The Judge's Findings

5. The judge had regard to the Upper Tribunal decision in **Basnet [2012] UKUT 00113**, where the Upper Tribunal said that the question of whether the first application was valid "depends not upon whether the payment was successfully processed, but on whether the application was accompanied by the fee" (see paragraph 18 of that determination, as set out in paragraph 8 of the original judge's determination). The judge went on to record that in **BE (Application fee: effect of non-payment) [2008] UKAIT 00089**, the Tribunal had held that an application "is accompanied by" a fee if it is "accompanied by such authorisation (of the applicant of other person purporting to pay" as will enable the Respondent to receive the entire fee in question, without

further recourse having been made by the Respondent to the payer (see paragraph 8 of the determination).

6. The judge observed that the evidential burden on demonstrating that the application was not "accompanied by such authorisation" falls on the Respondent Secretary of State (see **Basnet** at paragraphs 8 to 27). The judge went on to say that the Respondent's letter of 11th June 2013 did not give "any specific evidence for his reason as to why the purchasing of the payment had failed" (see paragraph 9). The judge held that it was

> "more probable than not that the Appellant is accurate in his assertion that he had provided the correct billing data; the Secretary of State has not adduced sufficient information to conclude to the contrary. She has failed to establish that the billing data was accurately used" (paragraph 9).

However, the judge then went on to say that this was not the end of the matter because "it is incumbent on Mr Anwaruzzaman to show that the bank would have paid the UKBA ……without further recourse being made to the account holder" (paragraph 9). Sufficient funds had to be available at the time of the request.

7. At the hearing before Judge Courtney, Mr Hussain, appearing as Counsel on behalf of the Appellant, submitted that the principal Appellant had paid the amount of £1,051, which was sufficient for him, but that the "Respondent did not mention exactly on what date she attempted to collect the fees although the burden was upon herself to give this information together with the reasons as per the **Basnet** directions" (see paragraph 10). Mr Hussain submitted that this was relevant because from 3rd June 2013, the principal Appellant had sufficient money for his own application (see paragraph 10).

8. The judge went on to observe that the bank statement showed that between 31st May and 11th June 2013 Mr Anwaruzzaman had a balance of between £1,364.65 and £1,042.65 in his Bank of Baroda account. The lowest figures spanned the period from the date of the application until 3rd June 2013, when £200 was transferred into the account.

9. The judge observed that "there has been no indication that there was any overdraft facility in place on the account" (paragraph 11). The Administrative Court in **Baldwin [2014] EWHC 1604** had held that:

> "The question of the validity crystallises at the moment the request for payment from the payment card was made. It does not matter if there are or are not adequate funds before or after that time. It was incumbent upon the applicant to ensure that there were sufficient funds in the account for the period from posting the application …" (see paragraph 12 of the determination).

10. In the event, the judge concluded that the relevant bank statements

> "do not show that Mr Anwaruzzaman's account had sufficient relevant funds to meet a call for the specified fee on every day in the period during which the UKBA could have attempted to process payment. That is the case even if only his fee of £1,051 was to be collected" (paragraph 13).

Accordingly, the principal Appellant could not succeed, and neither could his dependants. The appeals were dismissed. The dismissal was on the basis that there were no valid appeals before the judge.

Grounds of Application

11. The grounds of application argue that the judge failed to properly apply the principle in **Basnet**, and in particular failed to apply the proper burden of proof to the Respondent Secretary of State in relation to attempts to collect the fee. On 7th April 2014, permission to appeal was granted.

12. On 20th November 2014, a Rule 24 response was entered by Respondent Secretary of State. This makes the following points. First, that the Respondent treated the Appellant's application, as one which included his named dependants as well, and this being so, there were inadequate funds to meet the cost of the visas for the Appellant and the dependants.

13. Given that the Appellant had specified his dependants as named on the form of the principal Appellant, this was unsurprising, and accordingly there would be no valid appeal for either of them. Second, it is not material that it was the Appellant's intention to seek leave only for himself as it was open to the Respondent to treat his application as being for himself and his family.

Submissions

14. At the hearing before me, Mr Hussain repeated the submissions that he had made before Judge Courtney. He began by stating that he would have to concede that there were insufficient funds for the dependants, and that no fees were attached for their application. However, the principal Appellant did submit fees of £1,051, but these fees were not cleared by his bank. They would have been cleared from Monday 3rd June by which time he would have had sufficient funds.

15. However, the acknowledgment of service was sent to him on 3rd June 2014, and this being so, he was entitled to conclude that it was from this date onwards that an attempt would be made by the Respondent Secretary of State to secure the funds to process the application, rather than at a date before.

16. If it was a date before, then the Respondent should have complied with directions and have submitted evidence fourteen days before the hearing of Judge Courtney, explaining whether or not attempts had been made on either the Saturday or the Sunday before Monday 3rd June 2014 to withdraw the funds of £1,051 so as to process the principal Appellant's application. This had not been done.

17. Accordingly, he was entitled to conclude that at the time when the attempt was made to process his application form, namely, following 3rd June 2014, the funds were there for the Respondent Secretary of State to collect.

18. For his part, Mr Tarlow submitted that the reason given by the Respondent in the letter of 11th June was that "the specified fee has not been paid" (see paragraph 3). However, if one considered the application form of the principal Appellant it was clear here that at A16, on the application form dated 30th May 2013, there is a question to the effect "Please circle the amount to be paid", and there is a higher fee and a lower fee, and the Appellant had circled neither of them. He had not circled the fee of £1,051, which was the higher fee, and he had not circled the lower fee either. The Respondent Secretary of State would have been entitled to treat the application form as incomplete. However, the Respondent did not do so.

19. The letter of 11th June 2013 makes it clear that an attempt was made to access the funds but these were not available. Therefore, the only decision open to the judge was to conclude that the Appellant could not comply with the Rules. There was no valid appeal before the judge.

20. In reply, Mr Hussain submitted that there were a series of assumptions being made, namely, that the Secretary of State had attempted to access the monies at the weekend on Saturday or Sunday, in order to process the application. If the acknowledgment was sent out on Monday 3rd June 2014, then this is …. time when the funds should have been accessed, and if that had been done, there is no reason why the principal Appellant's application could not be processed, because the funds were there.

No Error of Law

21. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

22. The submissions before this Tribunal are exactly the same as those that were made before Judge Courtney's Tribunal in the First-tier. However, Judge Courtney dealt with these arguments perfectly adequately. It matters not when the funds are crystallised, and whether they did so on a date after 3rd June 2014 when the acknowledgment of service was sent, or whether they did so before that date. It matters not when the Secretary of State attempted to secure these funds, whether on the weekend of 1st and 2nd June 2014 or on Monday 3rd June 2014, and thereafter.

23. What arguments on behalf of the Appellant overlook, is the ruling by the Administrative Court in **Baldwin [2014] EWHC 1604** to the effect that:

> "The question of validity crystallises at the moment the request for payment from the payment card was made. It does not matter if there are or are not adequate funds before or after that time. It was incumbent on the applicant to ensure that there was

sufficient funds in the account for the period from posting the application …" (see paragraph 12 of the determination).

In the circumstances, therefore, the judge was correct in concluding that the Appellant could not succeed.

Decision

24. There is no material error of law in the original judge's decision. The determination shall stand.

25. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 29th December 2014