Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31698/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
Judgment given orally at hearing	**On 25 September 2014**
On 10 September 2014	

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR YOGENDRA JOSHI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Trussler, Counsel
For the Respondent: Ms C Johnstone, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal concerns essentially the question of whether the appellant had a valid appeal before the First-tier Tribunal, the First-tier Tribunal having decided that he did not. The background facts are somewhat involved, but I set out the chronology of events as it appears to me from the documents that have been provided.

© CROWN COPYRIGHT 2014

2. The appellant, who is a citizen of India born on 9 October 1986, made an application for further leave to remain as a Tier 4 Student Migrant on 27 February 2013. He initially came to the UK in pursuance of leave granted on 25 September 2009, that leave valid until 30 January 2012.

3. The application made on 27 February 2013 was refused in a decision dated 18 April 2013. The bases of the refusal were, firstly, that the appellant had overstayed his leave in the UK for a period of more than 28 days, prompting the refusal under paragraph 245ZX(m) of HC 395 (as amended). Secondly, the CAS was not valid because a check was made on 18 April 2013 in relation to Quinton College, the sponsoring college, but the sponsor register revealed that Quinton Colleges Limited was not listed at that date. So far as maintenance under Appendix C of the immigration rules is concerned, the appellant was not assessed in that respect because no valid CAS was provided.

4. His appeal against the refusal to grant leave came before First-tier Tribunal Judge Page on 25 April 2014 who considered the appeal 'on the papers', that is to say without a hearing. He concluded that the appellant did not have a right of appeal. The reason for that was that at the time he made the application for further leave to remain he in fact had no leave. In order for that to have been an 'immigration decision' attracting a statutory right of appeal, the result of the refusal of leave would have to have been that he had no leave (see section 82(2)(d) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")). Here, the result of the refusal was *not* that he had no leave, because he had no leave anyway because his leave had expired.

5. Permission to appeal was granted by a Judge of the First-tier Tribunal, essentially in terms of Judge Page not having had before him information from the Secretary of State which it was considered may arguably have had a bearing on the question of whether or not there was a valid appeal.

6. However, the underlying chronology goes much deeper than the last decision made by the respondent on 18 April 2013. The history goes back to 27 January 2012 when the appellant first made an application for further leave to remain as a Tier 4 Student. That application was rejected in a decision dated 8 February 2012 because the appropriate fee had not been paid or, putting it another way, the issuing bank rejected the payment.

7. As I understand the submissions made on behalf of the appellant today, it is accepted that the account which was said to support the payment of the fee did not hold sufficient funds but it is said that there was another account which did hold sufficient funds. It is argued that the appellant should have been contacted in order to allow him to submit a further application using an account which did hold the funds in question. In fact, the letter dated 8 February 2012 refusing his application states that the appellant could make a further application but there were no guarantees that the application would be successful, and that the application would be considered on its merits.

8. So the appellant could have made a further application, and indeed a further application was made on 13 February 2012. That was refused in a decision dated 20 April 2012 on three bases it seems to me. The first was that the documents he submitted were dated more than one month before the application, contrary to the rules. Secondly, he did not have an established presence in the UK because he then had no further leave to remain, his leave having expired on 30 January 2012. Thirdly, because he needed, it would appear, £5,400 but his account only held £2,836.82.

9. Following that refusal there was a pre-action protocol letter which preceded what was contemplated as being a judicial review application. That letter is dated 12 May 2012. The Secretary of State responded to it on 13 December 2012. It does not appear that any judicial review proceedings followed. If they did, I have not been made aware of the outcome of those proceedings.

10. There was then a third application for leave to remain as a Tier 4 Student, on 12 February 2013. That third application did not feature in the submissions that I heard today, or indeed when the matter was last before me when the hearing was adjourned. That application was also rejected, on 21 February 2013, because again the bank declined to make the payment. It seems again that there were insufficient funds.

11. That brings me to this application dated 27 February 2013 which was refused, as already indicated, in a decision dated 18 April 2013. It was refused for the reasons that I have set out in [3] above.

12. This appeal came before me on 11 July 2014 at which hearing the appellant was represented. I adjourned that hearing because I was not satisfied that sufficient evidence was before me for me to make an informed decision as to what the proper outcome of the appeal should be. In truth, I was not satisfied that the appellant's representative on that occasion was fully apprised of all the relevant facts, or was in a position to advance reasoned argument on the issues.

13. That situation prompted me to make directions for the further conduct of the appeal, those directions including the provision by the appellant's representatives of a skeleton argument and chronology. It is readily apparent why I made directions for a chronology and skeleton argument. Nevertheless, those directions were ignored by those acting for the appellant.

14. In addition, Mr Trussler who appeared on behalf of the appellant before me today, it seems, was instructed 'late'. That of course is no fault of his and in the short time available to him he has very impressively managed to marshal most of the salient facts in this factually complex appeal. The legal issue involved is actually one of little complexity, however.

15. At one stage the decision of the Upper Tribunal in Basnet (validity of application - respondent) [2012] UKUT 00113 (IAC) was relied on, but Mr Trussler on behalf of the appellant made it clear that that decision has no application to the issues in the appeal before me today.

16. I was, however, referred to another decision, JH (Zimbabwe) [2009] EWCA Civ 78, also referred to in the grounds of appeal to the Upper Tribunal. That was a case which dealt with the question of a variation of an application for leave and whether a second application should have been treated as a variation. However, I am not satisfied that that decision has any bearing on the issues that I need to determine.

17. Mr Trussler submitted, rather tentatively it has to be said, that if the second application (dated 13 February 2012) should have been treated as a variation of the first application (dated 27 January 2012), then the appellant may have been able to succeed in his second application because at the time he made that application he had valid leave. This proposition appears to rest on the contention that the appellant would have had statutorily extended leave under section 3C of the Immigration Act 1971, which would thus have allowed his application to have been considered.

18. However, that fact of the matter is that the appellant made his first application on 27 January 2012. It was rejected. It is accepted that he did not have sufficient funds. It seems to me that that application, for all that it matters for the purposes of the 'appeal' that is before me, was validly rejected. The second application was refused for the reasons I have given at [8] above. A judicial review was at least proposed, given that there was a pre-action protocol letter, but seemingly not pursued. If it was pursued, it was not successful.

19. A third application (dated 12 February 2013) was rejected because again the bank declined to issue the payment, possibly or even probably, because that there was a lack of funds.

20. It was inevitable that this application, which is the direct subject of the proceedings before me, fell for refusal because the appellant had overstayed for more than 28 days. The fact that the CAS was not valid because the college was no longer on the sponsor register is a feature of the refusal which actually has not been dealt with by the appellant. It would have caused the application to have been refused anyway. It may be that if it was a valid application the appellant might have been granted a further 60 days within which to find another sponsoring college, but he could not have succeeded under the rules anyway because of the fact that he was an overstayer.

21. In any event, and fundamentally for the present 'appeal', he had no leave to remain when he made that application. This brings me back to the beginning, being the decision of the First-tier Tribunal that he had no valid appeal because the decision made on 18 April 2013 was not an 'immigration decision' which attracted a right of appeal. A refusal to vary leave to remain is only an appealable immigration decision "if the result of the refusal is that the person has no leave to enter or remain" (s82(2)(d) of the 2002 Act).

22. I am satisfied that First-tier Tribunal Judge Page's conclusion in that respect was absolutely correct. The appellant had no valid leave, he had no right of appeal and

the First-tier Tribunal was correct to say so. The history that the appellant seems to be relying on is nothing to the point.

23. Accordingly, the First-tier Tribunal did not make an error on a point of law, and the decision of the First-tier Tribunal to dismiss the appeal is to stand.

Upper Tribunal Judge Kopieczek 24/09/14