Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46303/2013

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**
On 30 July 2014 **On 8 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR AMARPREET SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hiren Patel, Solicitor, Hiren Patel Solicitors
For the Respondent: Mr S Walker, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal holding that he had no valid appeal before the Tribunal, and that he had no jurisdiction to hear his appeal against the decision by the respondent to refuse to vary his leave to remain as a Tier 1 (General) Student Migrant, and against a concomitant decision to remove him under Section 47 of the Immigration, Asylum and Nationality Act 2006.

© CROWN COPYRIGHT 2014

2. The appellant's application form in the respondent's bundle is stamped as having been received by the UK Border Agency on 12 June 2013. At the beginning of the form, the following is stated:

> "This is your official document for your application. You need to submit this to us by post in order to make your application."

3. Page 10 of the application form contained the applicant's declaration. This was purportedly signed by the appellant on 20 April 2013.

4. Page 11 of the application form contains the following instructions:

> "Next steps for your application.
>
> Collate your supporting documents together and post them with your official document to [the UK Border Agency].
>
> If you use recorded or special delivery, this will help us to record the receipt of your document and supporting documents. Make sure that you keep the recorded or special delivery number.
>
> What happens next?
>
> We will write to you if any of the required supporting documents are missing or unsuitable ... final checks for your application.
>
> To ensure that your application is complete, please make the following final checks. Tick each box that is relevant to your application ... if you fail to include all parts your application may become invalid."

5. For present purposes, it is convenient to note that the three boxes that were required to be ticked under "final checks for your application" are not ticked in the appellant's application form.

6. On 30 September 2012 the Secretary of State gave her reasons for refusing the application. His leave to enter had expired on 20 April 2013 but he had not submitted a valid application for leave to remain until 11 June 2013. It was more than 28 days after the date that his previous leave to enter expired. His application fell for refusal under paragraph 245ZX(m). It also fell to be refused under paragraph 245ZX(d) with reference to paragraphs 1A and 11 of Appendix C of the Rules. This was because the bank statements submitted in support of his application needed to show evidence of £9,500 maintenance for 28 days. However the bank statement to support his application showed that he had held not more than £1,721.67 for more than one day. As such, he had not demonstrated that he had the levels of funds required over the specified 28 day period to be granted as a Tier 4 (General) Student Migrant.

7. The appellant filed extensive grounds of appeal for the First-tier Tribunal. He was assisted by SRIT Service in preparing his application. They confirmed that they

prepared his application and had posted it to UKBA. He had handed over all his documents in April 2013.

8. On 9 May 2013 he received an email from SRIT Services asking him to sign his application, and send it back by email. He had done that the next day, on 10 May 2013.

9. They had already asked him to provide his card details for the Home Office fee, and he had provided such details. On 10 May 2013 UKBA had deducted £406 from his account. So he was under the impression that his advisors had submitted his application on the same day and "in time". But his advisors did not provide him with any Royal Mail receipt.

10. He finally received the refusal letter that had been sent to his previous address and he realised that his application had actually been posted on 11 June 2013. He had been under the impression his application was posted on 9 May 2013, and that fees were deducted on 10 May 2013. He submitted he should be granted a right of appeal, relying on **Basnet (validity of application – Respondent) [2012] UKUT 00113 (IAC)**.

11. In response to the grounds of appeal, the Duty Judge made a **Basnet** direction.

The Hearing Before, the Decision of, the First-tier Tribunal

12. The appellant's appeal came before Designated Judge French sitting at Birmingham. Mr Graham of Counsel appeared on behalf of the appellant, and Mr Lawson, Home Office Presenting Officer, appeared on behalf of the respondent. At the outset of the hearing, Mr Lawson apologised for the fact that the **Basnet** direction had not been complied with. But he handed in a computerised report headed "CID notes" which indicated the application had been received on 11 June 2013, the date mentioned in the refusal letter. Mr Lawson said there was no trace of any earlier application. Mr Graham for his part accepted that if the appellant did not have an established presence as a student, he would not have able to demonstrate that he had the required funds.

13. The judge adjourned the hearing for a short period for both advocates to consider the available evidence, and for Mr Lawson to confirm the amount which would have been required if the appellant had shown that he had an established presence as a student, and therefore he only had to satisfy a lower maintenance requirement.

14. When the hearing resumed, Mr Lawson said that the appellant would have needed £2,500 if he had an established presence, and that he had not been able to demonstrate that he held that sum.

15. The appellant gave oral evidence. He said he had signed the application form on 20 April 2013 and he had left it with the agent to lodge. He had paid him a fee, and had left details of his bank account. The agent had said the bank statement he provided was sufficient. He accepted that he had not been able to show that the application

had been received within 28 days of 20 April; and when he received the ultimate refusal letter from the respondent, he knew it must have been submitted in June. He was aware that he only ever had temporary leave and he still had some family in India. His intention had been to study for a further two years in this country and then return.

16. In his closing submissions, Mr Lawson submitted that even if the application had been received in time, the appellant did not meet the requirements of the Rules as the maximum amount he ever had in his account was £1,721.67 and the statement submitted was over 28 days old as of 20 April 2013.

17. In reply, Mr Graham said the situation was difficult. It looked as though the appellant had been badly let down by his former advisors, but he had acted in good faith. The fact that the fee had been taken from his account went to establish the application had been lodged in time and it was confusing how that fee had been taken. The CID notes had no record of a fee being paid. The appellant accepted that he had been advised wrongly and that the funds in the account had not been sufficient.

18. Judge French set out his findings in paragraph 11 of his subsequent determination. There was no evidence at all that the application form dated 20 April 2013 was received by the respondent on the following day, or at all until 11 June. He noted that £406 was withdrawn from the appellant's bank account on 10 May 2013 but the appellant had explained how he had given details of that account to his then representative and the judge found on the balance of probabilities that it was not established an application was lodged prior to 11 June 2013. The consequence was the application was not made until the appellant's leave had expired. Even the period of grace of 28 days now adopted did not assist him. He had no right of appeal.

19. The judge went on to say that even if a valid application had been made what was before the Secretary of State did not demonstrate that the appellant had the necessary level of funds even if he had an established presence. The bank statement submitted also fell short of what was required. The appellant would not have succeeded under Article 8 in the light of recent case law. There was nothing exceptional or compelling about his case.

<u>The Grant of Permission to Appeal</u>

20. On 25 June 2014 Designated First-tier Tribunal Judge Zucker granted the appellant permission to appeal for the following reasons:

> 2. The grounds submit that having regard to guidance in the case of **<u>Basnet</u> (validity of application – Respondent) [2010] UKUT 00113** the judge erred in failing to give sufficient weight to the fact the respondent had failed to comply with directions in respect to when any fee was received from the appellant, given in particular those matters set out at paragraph 5 of the grounds the additional

documentation and the guidance in **MM (unfairness; E&R) Sudan [2014] UKUT 00105 (IAC)**, permission is granted.

The Hearing in the Upper Tribunal

21. At the hearing before me, Mr Patel advanced a case that was materially at variance with the case advanced by Mr Graham of Counsel at the hearing. As the case which was being put relied upon a different evidential foundation from that upon which the First-tier Tribunal had proceeded and at the same time procedural unfairness on **MM** grounds was being asserted, I found it convenient to receive some oral evidence from the appellant on the issues in controversy *de bene esse*.

22. Mr Patel's case with regard to the lodging of the application was that the appellant's advisors had made an online application on 20 April 2013. He submitted that this was apparent from the application form, from which I have quoted earlier in this determination. Although it was accepted that the documents accompanying the application form, and the hard copy of the signed application form, had not been posted until some time later, applying paragraph 34G of the Rules, the date of application should be treated as the date of the online application on 20 April 2013.

23. In his oral evidence before me, the appellant initially stated that he had signed the application form in May 2013, but had backdated it to 20 April 2013 on instructions from his advisors. He then said that he had signed the form on 20 April 2013, and had also signed another copy of the form in May 2013. On the second occasion, he had not put in the date, but had left it blank.

24. On the question of maintenance, Mr Patel's case was that the judge had erred in law in not taking into account the documentary evidence of the savings jointly held by the appellant with other family members in the Bank of Baroda. This evidence had been including in the appellant's bundle. In his signed witness statement for the hearing in the First-tier Tribunal the appellant had said at paragraph 14 that he had sent this documentary evidence to the Home Office on 24 September 2013. His explanation for this was that his wife had suggested that he should send some additional funding documents. In his oral evidence before me, the appellant said that his wife had made this suggestion in about June 2013.

Discussion

25. The most troubling aspect of this case is that a fee, apparently corresponding to that which the appellant was liable to pay, was deducted from his bank account on 10 May 2013. The additional evidence referred to by Designated Judge Zucker when granting permission is that of the appellant's bank statements for the period 2 April 2013 to 16 November 2013 showing that no fee was subsequently deducted. So, the argument runs, the probability is that the fee which was deducted on 10 May 2013 relates to the appellant's application, not someone else's, because if that was the case, there would have been a further deduction by UKBA from the appellant's account at a later date.

26. However Judge French noted that the CID notes did not have a record of any fee being paid. Nonetheless, as he was well aware, the respondent entertained the application to the extent that she gave a reasoned decision as to why she was refusing it – and why she was making directions for the appellant's removal. The SSHD does not require a person whom she is proposing to remove to pay a fee as a precondition of making a removal decision or direction against that person. So the additional evidence relied on in the appeal to the Upper Tribunal does not, on analysis, constitute a compelling rebuttal of the position taken by the judge below.

27. If Mr Walker accepted that the appellant's advisors had made an online application on his behalf on 20 April 2013, this would arguably disclose an error of law on the grounds that Judge French made an agreed mistake of fact on a material matter. But Mr Walker reasonably does not agree with the factual proposition advanced by Mr Patel. Until now, the appellant has consistently maintained that the application was lodged by post, and it has not been satisfactorily established by way of appeal that the application was in fact made online on 20 April 2013.

28. Moreover, the application form in the respondent's bundle expressly states that the application will not be deemed to be made until it is posted. It is necessary to draw a distinction between the advisors downloading a pro-forma document from the internet on 20 April 2013, and actually making an online application on that day, the application form having been completed and signed by the appellant.

29. Furthermore, the appellant's oral evidence on this topic before me was confused and unsatisfactory, and inconsistent with his earlier evidence. He plainly represented in his witness statement before the First-tier Tribunal that he did not sign an application form until 9 May 2013, and that he sent it back by email to SRIT Service for posting.

30. As I canvassed in the course of oral argument, this was never a classic **<u>Basnet</u>** case. The respondent had not rejected any application by the appellant on grounds of invalidity, and in particular on the grounds of non-payment of the specified fee. Although compliance with the **<u>Basnet</u>** direction was tardy, there was compliance in that Mr Lawson at the hearing produced the CID notes which evidenced when the application had been received. So, insofar as the burden rested with the respondent to show that the application had not been submitted prior to 11 June 2013, the respondent had discharged that burden. Conversely, the appellant had not brought forward satisfactory evidence which showed that the CID notes were wrong or incomplete, and that in fact the application had been posted (or indeed made online) before 11 June 2013.

31. So I find that there was no error of law in the judge reaching the conclusion that the appellant had not discharged the burden of proving that he had made an application before the expiry of his leave, or alternatively within 28 days of his leave expiring.

32. The appellant was not in any event driven from the judgment seat, because the judge also considered what the position would have been if the appellant was treated as having made an in-time application.

33. Since the appellant was represented by Counsel, there was no procedural unfairness in the judge not taking into account the appellant's savings in India when making a finding that the appellant did not meet the maintenance requirement, even if he was treated as having an established presence as a student. For appellant's Counsel had conceded this point.

34. Mr Patel was perplexed as to why Counsel had made this concession, when the appellant relied on the savings in his witness statement, and claimed that the documentary evidence had been provided to the respondent before the date of decision.

35. Mr Patel overlooks the fact that the appellant gave oral evidence *before* Counsel made the concession. On the account of his oral evidence given by Judge French at paragraph 8 of his determination, an account which is not challenged as inaccurate, the appellant did not give oral evidence to the same effect as that set out in his witness statement on the topic of the Indian bank statements. The line taken in his oral evidence, as summarised by the judge, was simply that he had followed the advice of his agent that he needed to have the sum of £1,600 in his bank account, and that he tried to maintain that level. So on the evidence which was actually led from the appellant, he was not asserting that he had decided at the eleventh hour to provide additional evidence of funding to the Home Office.

36. Moreover, as this evidence had not been provided with the application, it was not evidence that the respondent was required to take into account, having regard to paragraph 245AA of the Rules. Accordingly, I am not persuaded that Counsel's concession that the appellant did not meet the maintenance requirement was not properly given.

Decision

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

Signed Date

Deputy Upper Tribunal Judge Monson