Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01327/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 8 October 2015	**On 5 January 2016**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAN TAO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Not represented
For the Respondent: Mr Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals against the decision of the First tier Tribunal (Judge Phull) dated 5 May 2015. In this decision, we shall refer to the parties as they were in the First tier, ie that Mr Ran Tao is the Appellant, and the Secretary of State for the Home Department is the Respondent.

2. The Appellant, a national of China, had appealed to the FtT against the Respondent's decision of 17 December 2014 refusing to vary his leave to remain, and making a

decision to remove him under s.47 Immigration Asylum and Nationality Act 2006. The Appellant had previous leave to enter the United Kingdom as a Tier 4 student from 16 February 2012 to 27 October 2014. He had been studying for a BA (Hons) in Business Management at Anglia Ruskin University. He achieved his degree, which was awarded to him on 22 August 2014.

3. He wished to apply for further leave to remain to pursue an MA in Human Resource Management at Coventry University from 22 September 2014 to 30 September 2015.

4. He made an on line application on 1 October 2014. There was no dispute before us that where the online application was submitted on 1 October 2014 this was the formal date of application as defined by paragraph 34G (iv) of the Immigration Rules.

5. On 9 October the Respondent wrote to the Appellant asserting that the following mandatory documents had not been provided with his application: photographs; evidence of identity - BRP; and evidence of nationality - passport/travel document.

6. According to the Appellant's subsequent grounds of appeal to the FtT, the Appellant posted his documentation in support of his on-line application, to the Respondent on 15 October 2014. There is a copy of an envelope towards the rear of the Respondent's (unpaginated) bundle showing a date stamp of 15 October 2014. In his grounds of appeal, the Appellant asserts that the bank statements that he provided in his documentation included HSBC statements from 17 September 2014 to 14 October 2014, ie a consecutive 28 day period.

7. Within the Respondent's bundle are HSBC statements, apparently (from the date at the bottom right of each page) printed on 14 October 2014, covering the whole of the period 18 June 2014 to 14 October 2014. The balance was over £1640 for the whole of that period, save for one day, on 16 September 2014, when the balance was £404.19. The balance the next day, 17 September 2014, was £10,304.19.

The Respondent's decision

8. The Respondent refused the Appellant's application for leave to remain under Immigration Rule 245ZX and Appendix C of the Rules, on the grounds that the Appellant was not entitled to any points for Maintenance. This was because, it was asserted:

> "• You are required to show living costs of £1,640.00 plus your outstanding course fees of £0.00 as stated on your CAS. You are therefore required to show that you are in possession of £1,640 for a consecutive 28 day period to meet the Tier 4 (general) Student maintenance requirements.
>
> • As the closing balance of the bank statement submitted in support of your application is dated 1 October 2014, you need to show evidence of maintenance for 28 days from 4 September to 1 October 2014. However, on 16 September 2014, the bank statements you have submitted shows a

> balance of £404.19, which does not demonstrate that the required level of funds is available to you."

9. The Appellant appealed against the Respondent's decision, pointing out in his grounds of appeal that he had provided, with the material posted on 15 October, bank statements covering the 28 day period from 17 September to 14 October, and asserting (twice) that he did not understand why the Caseworker counts from 1 October, the date of filing the on line form. With his notice of appeal, the Appellant filed further bank statements, for the period 18 November 2014 to 24 December 2014, but these documents are not material.

The First tier decision

10. The Appellant requested an appeal on the papers. This appeal came before the Judge on 23 March 2015. The Judge noted at [5] the evidence submitted by the Appellant in support of his application, and noted at [6] the Respondent's request of 9 October 2014 for further documentation, but observed that:

> "The respondent does not request any evidence of financial documents for 28-days prior to 1 October 2014 to show consistent funds of £1640 in the account from the 4 September to the 1 October."

11. The Judge held that the Respondent had not applied the common law principles of fairness in the case, with reference to Naved (Student - fairness - notice of points) [2012] UKUT 14 (IAC) [7]; repeating that finding at [9], and further stating:

> "... given that he has consistently held money in his bank account over and above the maintenance requirements for Tier 4 except on the one occasion relied upon by the respondent to refuse his application.
>
> ...
>
> 11. The respondent also has discretion to consider the date of application, as the date on which it receives documents from applicants. The refusal does not indicate that any such discretion was applied in the appellant's case."
>
> 12. For all these reasons I find on balance that the respondent's decision is unlawful and not in accordance with the law and the appellant now awaits a lawful decision."

12. The decision then indicates at [13] that it was allowed.

Secretary of State's Appeal

13. The Respondent sought permission to appeal to the Upper Tribunal in an application dated 8 May 2015 on grounds, in summary, that the FtT materially erred in law in:

    (i) failing to identify what discretion the Judge was referring to, (and denying that there had been an unlawful failure to exercise discretion);

    (ii) appearing to apply a 'near miss' test to the appeal, whereas the Appellant failed to satisfy the relevant maintenance requirements.

14. Permission to appeal was granted by Judge of First tier Tribunal Shimmin on 25 June 2015. The matter now comes before us.

The hearing before the Upper Tribunal

15. There was no appearance by or on behalf of the Appellant. On the Tribunal file, there is a copy of an email, apparently from the Appellant dated 20 July 2015 addressed to IAC Customer Service in that he would like to withdraw his appeal and return back to China. He gave details of a proposed flight on 25 July 2015. There is a copy of an email from Grahame Tomlinson, Correspondence Team at Field House dated 21 July 2015 to the Appellant indicating that as the appeal before the Upper Tribunal was brought by the Secretary of State, it was not Mr Tao's appeal to withdraw. He suggested that if Mr Tao wished for his appeal to be treated as abandoned, he would need to contact the Secretary of State directly to ask them to abandon their appeal.

16. There was nothing more before us to indicate that the applicant had left the country such that the appeal might be treated as abandoned. There was nothing to indicate that the appellant did not oppose the Secretary of State's appeal. There was also nothing further explaining his non-appearance and having found good service had taken place, we proceeded to hear the appeal and heard from Mr Smart who relied on the written grounds of appeal.

Error of Law

17. We agree with the Respondent that the Judge erred in law at [10] in finding that the Respondent had failed to apply the common law principles of fairness.

18. Although Mr Smart referred to EK (Ivory Coast), the Court of Appeal did not in that judgment disapprove the principle that the Secretary of State in the exercising her functions was under a general public law duty to act fairly; rather it held that in the particular facts of that case there had been no unfairness to the appellant *caused by* the Secretary of State. Further, the Court held at [42] that nothing said in the judgment itself in Naved (as distinct from the headnote summary of it) was inconsistent with the Court's own conclusions in EK (Ivory Coast). The unfairness to the appellant Naved was described as follows:

> "42 ... The Home Office bore substantial responsibility for the error which occurred. Without warning to the applicant, it went behind the information given by him about his course with LCR, received a confusing response to its inquiry which it failed to read properly or check, and then failed to give the applicant an opportunity to adduce documentary evidence of a standard type (certificate of completion of the course etc) to resolve the dispute which appeared to have emerged about the history of his relations with LCR."

19. The Court of Appeal did find, however, that if the Upper Tribunal in Naved had intended to lay down a principle of law as formulated in its headnote: "Fairness requires the Secretary of State to give an applicant an opportunity to address grounds for refusal, of which he did not know and could not have known, failing which the resulting decision may be set aside on appeal as contrary to law ...", the

Court could not agree with such a proposition, on the grounds *inter alia* [40] that it left out of account the highly modulated and fact-sensitive way in which the general public law duty of fairness operates.

20. However, aside from the guidance now provided by the Court of Appeal as to the meaning and effect of Naved, we find that the Judge erred in a more fundamental way, in not setting out what the unfairness to the Appellant was, how it had come about, or in what way the Respondent had acted unfairly and therefore unlawfully.

21. Further, in relation to the Judge's finding at [11] that the Respondent has a discretion to consider the date of application as being the date on which the Respondent received the documents submitted in support of the application (and that the Respondent erred in law in failing to exercise that discretion) we find that there is no such discretion; paragraph 34G of the Immigration Rules makes explicit the date on which an application is treated as being made; for an on-line application, that is the date that the application was submitted on line, which in the present case was 1 October 2014.

Re-Making

22. We proceeded to re-make the appeal. We refused it on the basis that the financial requirements of paragraph 245ZX and Appendix C were not met.

23. Paragraph 1A of Appendix C to the Immigration Rules states:

> "1A. In all cases where an applicant is required to obtain points under Appendix C, the applicant must meet the requirements listed below:
>
> (a) The applicant must have the funds specified in the relevant part of Appendix C at the date of the application;
>
> (b) If the applicant is applying as a Tier 1 Migrant, a Tier 2 Migrant or a Tier 5 (Temporary Worker) Migrant, the applicant must have had the funds referred to in (a) above for a consecutive 90-day period of time, unless applying as a Tier 1 (Exceptional Talent) Migrant or a Tier 1 (Investor) Migrant;
>
> (c) If the applicant is applying as a Tier 4 Migrant, the applicant must have had the funds referred to in (a) above for a consecutive 28-day period of time;
>
> ...
>
> (h) the end date of the 90-day and 28-day periods referred to in (b) and (c) above will be taken as the date of the closing balance on the most recent of the specified documents (where specified documents from two or more accounts are submitted, this will be the end date for the account that most favours the applicant), and must be no earlier than 31 days before the date of application."

24. We take from those provisions that the applicant was required to have funds of £1,640 for a 28 day period, that he must have had them for that 28 day period by the date of the application, here 1 October 2014, and that the end date of the 28 day period could be no earlier than 31 days prior to 1 October 2014.

25. We find the requirement for the 28 day period to have ended by the date of application arises from the use of the words "must have had" in paragraph 1A(c), the pluperfect tense, referring to a time prior to the date of application.

26. The applicant here could not show funds for a 28 day period prior to 1 October 2014 as he did not have £1,640 on 16 September 2014.

27. That being so, he did not qualify for 10 points for Maintenance and could not meet the requirements of paragraph 245X(d) of the Immigration Rules.

28. The grounds of appeal did not raise Article 8.

29. We should point out that Mr Tao appears to have been an entirely law abiding and very successful student at all times, the only matter preventing him from obtaining further leave being the fact of his funds going below the required level on 1 day. We obviously do not dispute that this means that he was not entitled to further leave but it would appear to be a matter unlikely, without more, to carry much weight against him in the event of any future applications to come to or remain in the UK.

Notice of Decision

30. The determination of the First-tier Tribunal shows an error on a point of law and is set aside.

31. We re-make the appeal, refusing it under the Immigration Rules.

Signed  Date 23 December 2015

Upper Tribunal Judge Pitt