



Neutral Citation Number: [2011] EWHC 2966 (Admin)

Case No: CO/6274/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2011

Before:

MR JUSTICE EDWARDS-STUART

Between:

THE QUEEN (on the application of)
Richard Dickens KISUULE

Claimant

- and -

THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Defendant

Simon Harding (instructed by **Bhokal Partners Solicitors**) for the **Claimant**
Denis Edwards (instructed by **Treasury Solicitor's Department**) for the **Defendant**

Hearing dates: Monday 7 November 2011

Approved Judgment

Mr Justice Edwards-Stuart:

1. This is an application for judicial review. There are essentially two questions:
 - (a) Should the Secretary of State have treated this application as made on the date when it was first submitted, 27 November 2009? And, in any event,
 - (b) Did the application as first made comply with the requirements as to means of financial support applicable to Tier 4 general migrants?
2. The Applicant must succeed on both questions in order for this application to succeed. However, if the Applicant were to succeed on the first ground, but fail on the second, he would retain an in country right of appeal to the First Tier Tribunal. Whilst, for the reasons I give later in this judgment, I consider it most unlikely that the Applicant would be able to persuade the Tribunal that he satisfied the funding requirements, it is submitted on his behalf that he would be entitled to raise wider questions on an appeal, such as his Convention rights and, in particular, his rights under Article 8. If this is correct, then a decision in the Applicant's favour on the first question could be of assistance to him even if he fails on the second question.

The events leading to this application

3. On 27 November 2009 the Applicant applied on behalf of himself and two dependents, his wife and his young son, to remain in the UK for 12 months to attend a course leading to an MSc in Accounting with Finance at London Southbank University. The application had to be accompanied by verified photographs and evidence to satisfy the financial requirements of the Immigration Rules. The timing of the application was important because the Applicant's leave to remain was due to expire on the 30 November 2009.
4. On 11 January 2010 the Applicant received a letter from the UKBA returning the application and supporting documents on the ground that the photographs required had not been included. The Applicant says that on receipt of the letter he telephoned the UKBA to explain that he was very surprised to receive it since he was completely certain that he had submitted the photographs with the application. He says that he was told that if the photographs were submitted, together with the original papers, within 28 days that would be acceptable and, in particular, that the application would be treated as having been made on 27 November 2009.
5. However, this is not what the letter itself stated. The letter started by explaining that for reasons set out below the application was being returned as invalid. The reason given was that the application had to be accompanied by photographs as specified in the application form. The letter went on to say:

"Arrangements will be made to refund any fee which you have paid if we have not received a valid application within 28 days of the date of this letter.

...

If you still wish to make an application for leave to remain you must return your application forms using the enclosed address label. The application forms must not be returned to the address given on the application forms."

6. On 18 January 2010 the Applicant re-submitted the application, with the photographs in a separate envelope marked "photographs as requested" but otherwise with the same supporting documentation. On 3 March 2010 the Secretary of State rejected the application on the grounds that:

- (a) The financial information was out of date: it had to cover a 28 day period ending within 28 days (actually one month, but in the context of this application it makes no difference) of the application. It was contended that the application was made on 18 January 2010, not the original date of 27 November 2009, with the result that the financial information did not relate to a period that ended within 28 days (or one month) of the application.
- (b) The financial information did not meet the requirements of the Immigration Rules because the bank statements supplied did not show that the Applicant and his wife had available the stipulated sum, which was £3,720 (this being made up of £1,600 for the Applicant, and £533 per month for 2 months for his two dependents: his wife and his infant son).
- (c) The bank statements of Eco Petro (U) Ltd were also dated more than 28 days before the application and therefore could not be accepted as evidence of financial support. Eco Petro (U) Ltd is a company registered in Uganda, whose managing director is Jonan Douglas Ddamba. The company is a family company of the Applicant which has acted as the Applicant's financial sponsor whilst he has been studying in the United Kingdom.

7. On 12 March 2010 the Applicant wrote to the UKBA in the following terms:

"On 11 January 2010 I received a letter written and signed by J Payne, STC 1, Area 1 - London & South East Region, mentioning that I had not attached photographs to my application and that I had 28 days (from the date of the letter i.e. 11/01/2010) to return my application using the envelope that was enclosed to the address that was stated on the label. On the 11th Jan 2010 at XXXXX I called the Home Office Public Enquiry office to emphasise that I was more than 100% sure I put the required pictures in the pack I initially sent. I explained that I had even ticked this on the checklist and everything that came in the pack was double checked by my wife and we were both very positive we placed our passport size pictures in the initial pack. The advisor I spoke to then told me that there could be a possibility that the pictures got lost when the pack was in your care. He however told me that because the letter J Payne had given me the chance to re-submit my application it would be considered as being submitted when I initially sent in the Application, - 27/11/2009".

8. The Secretary of State did not reconsider the decision or agree that the application should be treated as having been made on 27 November 2009.

The Applicant's immigration history

9. The Applicant was born on 12 October 1978 and so he is now 33. On 25 August 2001, when he was 22, he was granted leave to enter the UK until 24 August 2004 in order to study. That leave was extended on 10 August 2004, 5 October 2005, 1 November 2006, 16 May 2007 and, finally, on 25 November 2008 expiring on 30 November 2009.
10. It seems that the Applicant's immigration history up to this point was impeccable. As I have mentioned, it appears that he has been supported financially by the family company in Uganda. Since the Applicant has been in the United Kingdom he has met and married his present wife (in August 2005), and they now have a son who was born in Kingston Hospital on 7 December 2007. Both his wife and son were included as dependents on the application submitted on 27 November 2009.
11. In his application form the Applicant was asked, by question L14: "Does the student receive support from a financial sponsor that meets the UK Border Agency definition of an official financial sponsor?" To this question the Applicant answered "yes" and stated that he had provided confirmation in a letter from his official financial sponsor.
12. Question L16 of the form asked him how much the official financial sponsor was paying towards his course fees and maintenance. In the box provided the Applicant inserted, against course fees, the figure of £3,340. However, against the box for the figure for maintenance the Applicant wrote "*Any amount I need*". He was criticised for the vagueness of this answer, but I have to confess that it seems to me to be a reasonable response to a rather open ended question.

The hearing

13. The Applicant gave evidence before me. He had made a witness statement, dated 2 June 2010, the contents of which he confirmed as true (subject to one qualification). Paragraph 9 of that witness statement was in the following terms:

"On the 11th January 2010, I received a letter requesting that I forward further photographs. I phoned the Home Office Public Enquiry office to confirm that I was certain that I had sent photographs with my application and indeed had ticked the checklist to confirm that I was sending them. I was informed that my application would be considered as being submitted when I originally sent it so long as I met the requirements that the photographs be sent within 28 days. I duly sent the requested photographs, but did not forward a new application form. I relied on the previously served application."
14. The Applicant accepted that the telephone call described in paragraph 9 of his witness statement cannot have taken place on 11 January 2010 but occurred

during the early afternoon of the day on which he received the letter, which must have been either 12 or 13 January 2010.

15. The Applicant told the court that the application was very important to him and he was well aware that it had to be completed correctly. He said, and I accept, that his wife double checked the form and the enclosures to ensure that nothing had been missed. I formed the impression that the Applicant was the type of person who would have taken careful steps to ensure that his application was correct.
16. I accept the Applicant's evidence that he rang the Home Office Public Enquiry office and had a conversation along the lines set out in his letter of 12 March 2010. If he did not, then the contents of his subsequent letter must be a deliberate fabrication: I am not prepared to hold that this was the case.
17. Further, I find as a fact that it is more probable than not that the Applicant did enclose the photographs in his application of 27 November 2009 and that, somewhere on the way to the desk of the case worker who considered the application on 17 January 2010, the photographs became detached from the rest of the application. The Defendant has submitted no evidence to show what the system was for dealing with documents received by post at the Croydon office, so there is no evidence to suggest that what I consider to have been the probable sequence of events is inherently unlikely. I accept, of course, that the Defendant could not be expected to explain how this particular application was processed.
18. In the light of this finding I do not need to consider issues such as the exercise of the Secretary of State's discretion or precisely what was said in the telephone conversation on 12 or 13 January 2010. This is because if the photographs were enclosed with the original application form then the application was validly made on 27 November 2009, and the subsequent decision to treat it as having been made on 18 January 2010 was therefore wrong.
19. For these reasons I will grant a declaration that the application was validly made on 27 November 2009 and that the Defendant's decision that the bank statements attached did not cover the required period was wrong. Accordingly, that part of the decision contained in the letter dated 3 March 2010 must be quashed.

The availability of maintenance funds

20. However, that is not the end of the matter because the Defendant is contending also that this application, if made on 27 November 2009, was bound to fail because the bank statements supplied by the Applicant did not show that he had available the funds required by the Immigration Rules for a 28 day period ending within one month of the date of the application.
21. Appendix C to the Immigration Rules provides that an applicant must have the funds specified in the relevant part of Appendix C at the date of the application and must also have had those funds for a period of time set out in the guidance specifying the specified documents for that purpose.

22. It is not in dispute in this case that, in terms of amount, the Applicant was required to have available to him £1,600 in respect of his own maintenance and £1,066 per month for two months in respect of his wife and son. That is £3,720 in all.
23. The Policy Guidance for Tier 4 students that was in force at the time provided that one of the means by which an applicant could demonstrate that he or she had the required amount of money available was by providing personal bank or building society statements covering a 28 day period ending no more than one month before the date of the application. In the case of a joint account, the applicant had to be named on the account. There are other means, but they were not adopted by the Applicant in this case.
24. In my view, the Defendant is clearly correct about the inadequacy of the funds available to the Applicant. The balance in the Applicant's joint account with HSBC never rose above £2,126.37 during the period 3 August 2009 to 2 November 2009, although a further temporary statement dated 16 November 2009 showed a balance of £4,368.07 for one day, 13 November 2009. The Applicant also provided a statement from an account with the Halifax in his wife's name for the period 29 September 2009 to 28 October 2009, but the balance in this account never rose above £599.39 during that period. Accordingly, the bank statements submitted by the Applicant failed to show that he had funds available to him to the amount of £3,720 for a 28 day period ending within one month of the date of the application.
25. However, the Applicant also supplied copies of bank statements for the account of Eco Petro (U) Ltd with Stanbic Bank for the period 2-16 November 2009. These showed funds in Ugandan shillings with a balance varying between 9,751 Ugandan shillings and about 100 million Ugandan shillings. Since the rate of exchange of the Ugandan shilling to the pound is in excess of 4,000, these statements probably represent balances in sterling broadly in the range of £2,500-£25,000. However, even if these funds could be regarded as money available to the Applicant, which I very much doubt, they do not cover a 28 day period.
26. There was a faint suggestion that Eco Petro (U) Ltd could be regarded as an official financial sponsor within the meaning of the Immigration Rules, but this is not a sustainable argument. The Policy Guidance document to which I have already referred provides that an official financial sponsor can be: "Her Majesty's Government, the student's home government, the British Council or any international organisation, international company, university or an Independent School".
27. However, the letter from Mr Ddamba, to whom I have already referred, dated 16 November 2009, refers to the company as "*a Ugandan Incorporated family company trading in Petroleum in the East African region*". The only office shown on the writing paper has an address in what appears to be an industrial estate in Kampala. On the face of the letter Eco Petro (U) Ltd cannot be regarded as an "international company".
28. It is quite clear from these facts that the application dated 27 November 2009 did not meet the criteria necessary to achieve the 10 points required for a Tier 4 Migrant set out in Appendix C of the Immigration Rules in force at the time and

that, on the basis of the evidence that I have summarised, the Applicant would never be able to show that he could have met the financial criteria during a 28 day period ending within one month of 27 November 2009.

29. During the course of the hearing the court was told that the Applicant also had an account with Barclays at the material time. I gave permission for the Applicant to obtain details of the balances in this account during the period prior to the application, but it emerged that the state of the account at the relevant time was unlikely to make any material difference to the Applicant's position given the extent of the shortfall revealed by the other accounts.
30. I therefore conclude that the Defendant's refusal of the application on the ground that it failed to meet the financial criteria required by the Immigration Rules was unimpeachable. In addition, I can see very little prospect of the Applicant being able to demonstrate the contrary in any appeal to the First Tier Tribunal.
31. The consequence of this is that the Defendant's refusal of the application was well founded, even if the application was treated - as it should have been - as having been made on 27 November 2009. I therefore decline to quash that part of the decision.
32. However, it may be that a right of appeal to the First Tier Tribunal would not be a sterile benefit even if the Applicant will not be able to show that he could have met the financial criteria. It is at least arguable that the Applicant would be able to invoke other Convention arguments on such an appeal if he was minded to pursue it.
33. I was not told at what point the Applicant had reached in his studies, but since it appears to be his intention (as stated in his letter of 26 November 2009) to return to Uganda to rejoin the family company once he has completed them, I would hope that in the light of this decision the parties might now be able to reach some form of accommodation.
34. If not agreed, I will hear the parties as to any questions on costs.