



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/27492/2013

**THE IMMIGRATION ACTS**

Heard at Birmingham  
On 30<sup>th</sup> May 2014

Determination Promulgated  
On 16<sup>th</sup> June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

JAYNABEN BHIKHUBHAI AHIR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr M Wainwright of Counsel  
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

**Introduction and Background**

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Kelly promulgated on 15<sup>th</sup> January 2014.
2. The Appellant is a female citizen of India born 29<sup>th</sup> August 1985 who entered the United Kingdom on 20<sup>th</sup> June 2011. She had leave to remain as a student until 11<sup>th</sup> June 2012.

3. The Appellant claimed that she submitted an application for further leave to remain as a Tier 4 (General) Student Migrant on 9<sup>th</sup> June 2012, before her leave expired.
4. The Respondent refused the application on 8<sup>th</sup> January 2013 with reference to paragraph 245ZX(m) which states that an applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded. The Respondent contended that the Appellant had not submitted her application for leave to remain until 14<sup>th</sup> August 2012. This was more than 28 days after her previous leave expired.
5. The application was also refused under paragraph 245ZX(d) which requires that an applicant must be awarded a minimum of 10 points under Appendix C which relates to maintenance. The Respondent contended that the Appellant was required to show that she was in possession of £7,200 for a consecutive 28 day period, and in accordance with paragraph 1A(h) of Appendix C, the end of the 28 day period would be taken as the date of the closing balance on the most recent of the specified documents submitted, and the date must be no earlier than 31 days before the date of application. The closing date on the Appellant's bank statements was 28<sup>th</sup> May 2012 which was more than 31 days prior to the application and therefore the Respondent was unable to take those documents into account.
6. The Respondent contended that there was no right of appeal against the decision because the Appellant did not have leave when she made her application on 14<sup>th</sup> August 2012, as her leave had expired on 11<sup>th</sup> June 2012.
7. Nevertheless the Appellant lodged an appeal with the First-tier Tribunal. The Duty Judge at the Tribunal Support Centre in Leicester, issued directions to the Appellant's solicitors who were acting at that time, to provide proof that the application had been lodged prior to the expiry of the Appellant's leave, as this was contended on behalf of the Appellant. Those solicitors, who no longer act for the Appellant, provided a receipt indicating that a document had been posted to the Respondent on 9<sup>th</sup> June 2012. The appeal was therefore listed for hearing.
8. The Appellant had requested that her appeal be determined on the papers and Judge Kelly (the judge) determined the appeal on the papers on 24<sup>th</sup> December 2013. The judge found that there was no valid appeal before the Tribunal as the Appellant did not have leave when she made her application, and the judge rejected various arguments put forward by the Appellant's previous solicitors to the effect that the Respondent's decision was in fact a decision made under section 82(2)(g) of the Nationality, Immigration and Asylum Act, in other words a decision that the Appellant was to be removed from the United Kingdom, and that the Appellant was entitled to an in-country right of appeal because she was making a human rights claim.
9. The Appellant applied for permission to appeal to the Upper Tribunal, acting in person without legal representation. She contended that there was a preliminary issue to be decided with regards to the validity of the appeal, and the judge had not considered the bundle of documents that was before him.

10. Permission to appeal was initially refused but subsequently granted by Upper Tribunal Judge Coker in the following terms;
  1. The FTT Judge held in a precise determination that the decision the Appellant sought to appeal was not an appealable decision as defined by section 82 of the Nationality, Immigration and Asylum Act 2002. The grounds assert that there was a failure to examine documents in reaching that decision.
  2. The documents include a copy Royal Mail postage slip in the Respondent's bundle dated 14/08/2012 and a copy postal receipt showing a date of posting as 09/06/2012 in the Appellant's documents. There is a note on the file to the effect "Allow to proceed - necessary evidence now provided 30.9.13".
  3. It appears that the FTT Judge may have overlooked these documents although it is unclear which was relied upon.
11. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the First-tier Tribunal determination did not disclose an error of law as the Appellant did not have leave to remain when she made her application for further leave, and therefore did not have a right of appeal.

### **The Upper Tribunal Hearing**

12. The Appellant attended the hearing. I established that there was no need for an interpreter. The Appellant was represented by Mr Wainwright of Counsel on a direct access basis.

### **Error of Law**

13. Mr Wainwright submitted that the judge had erred in law by failing to consider and make any reference to the postal receipt dated 9<sup>th</sup> June 2012 which indicated that some documents had been posted to the Respondent on 9<sup>th</sup> June 2012. The postal receipt indicated that a large letter had been posted from a post office in Church Street, Enfield, Middlesex on 9<sup>th</sup> June 2012, and Mr Wainwright contended that as this receipt had been submitted by the Appellant's previous solicitors, it indicated that it was the Appellant's application that had been posted on that date and therefore it had been posted before her leave expired.
14. Mr Smart accepted that the judge had erred in not considering the evidence of posting but contended that there was no material error of law as the decision made by the Respondent was a refusal to grant leave, and this was not an Immigration Decision that carried a right of appeal. Mr Smart relied upon Singh (no Immigration Decision - jurisdiction) [2013] UKUT 00440 (IAC).
15. Having considered submissions by both representatives, I decided that the judge had erred by not considering or making any reference to the evidence provided by the Appellant's previous solicitors, to the effect that the application had been lodged in time. Paragraph 34G of the Immigration Rules provides that if an application is posted, then the date that the application is made, is the date of posting.
16. There was evidence submitted on behalf of the Appellant, that the application had been posted on 9<sup>th</sup> June 2012, and if that was correct, the application would have

been made in time, and the Appellant would have had a right of appeal against the Respondent's decision, as the decision would have been refusal to vary leave so that the Appellant had no leave to remain, which is a decision of a type set out in section 82(2)(d) of the Nationality, Immigration and Asylum Act 2002.

17. As this evidence had been submitted, it should, in my view, have been considered and findings made upon it. I found that Singh could be distinguished on the facts.
18. I therefore decided that the decision of the First-tier Tribunal must be set aside and re-made.
19. Both representatives agreed that it would be appropriate for me to consider the validity of the appeal, and if I found that the application had been made in time, before the expiry of the Appellant's leave, then it would be appropriate to find the Respondent's decision not in accordance with the law, and the decision would remain outstanding before the Respondent. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

### **Re-Making the Decision**

20. Mr Wainwright indicated that he intended to call the Appellant to give evidence limited to the issue of when the application for leave to remain was submitted.

### **The Appellant's Evidence**

21. The Appellant had not made a witness statement and was therefore questioned firstly by Mr Wainwright, and thereafter cross-examined by Mr Smart. I have recorded all questions and answers in my Record of Proceedings but will set out here only a summary of the evidence.
22. In answering questions put by Mr Wainwright the Appellant said that she had instructed solicitors in London to submit her application for further leave to remain. These solicitors had been recommended so she decided to use them, even though she lived in Leicester.
23. The Appellant visited the offices of her solicitors on a number of occasions and submitted various documents and completed an application form with the assistance of her solicitors.
24. The Appellant was shown the postal receipt dated 9<sup>th</sup> June 2012, which shows that a large letter was submitted from a post office in Enfield. She said that she had seen this receipt before and she believed this was towards the end of September 2012 when she asked her solicitors for information as to the progress of her application. She was told that her application had been submitted in time and shown the postal receipt as evidence of this.
25. In answering questions put by Mr Smart the Appellant described the location of her previous solicitors' office and confirmed that she had left the application with them to post. The Appellant was shown a letter dated 9<sup>th</sup> June 2012 addressed to the Respondent's office in Durham, which her previous solicitors had submitted and

which referred to Article 8 of the 1950 European Convention on Human Rights. She said that she had not been at her previous solicitors' office on that date and she had not sent that letter and her previous solicitors had prepared it in her name.

### **The Respondent's Submissions**

26. Mr Smart pointed out that the Respondent's bundle of documents contained a copy of the envelope in which the application had been submitted, which showed that the application was posted on 14<sup>th</sup> August 2012. I was asked to note that the application was date stamped 8<sup>th</sup> and 15<sup>th</sup> August 2012. Mr Smart stated that he could offer no explanation for the 8<sup>th</sup> August 2012 date stamp, but the 15<sup>th</sup> August 2012 date stamp indicated that the application had been received on that date, having been posted on 14<sup>th</sup> August 2012.
27. It was accepted, in relation to the postal receipt dated 9<sup>th</sup> June 2012, that the postcode on that receipt was the Respondent's department in Durham, and that post office Track and Trace indicated that whatever letter had been posted on 9<sup>th</sup> June 2012 had been delivered on 20<sup>th</sup> June 2012.
28. Mr Smart's submission was that it had not been proved that it was the Appellant's application for further leave to remain that was posted on 9<sup>th</sup> June 2012. I was asked to conclude that the solicitors had not posted the application on that date, and to note that the bar code on the envelope received by the Respondent, was different to the bar code on the receipt dated 9<sup>th</sup> June 2012. As it was not established that the Appellant's application had been made before her leave expired, I was asked to conclude that there was no valid appeal.

### **The Appellant's Submissions**

29. Mr Wainwright asked that I accept the Appellant's evidence, and that her previous solicitors had submitted the postal receipt dated 9<sup>th</sup> June 2012 as evidence that the application had been posted. Mr Wainwright accepted that the burden of proof was on the Appellant to prove that her application was lodged in time, and asked that I make such a finding, based upon the Appellant's evidence.
30. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

31. I accept that the Appellant instructed solicitors to submit her application for further leave to remain and I accept that she visited their office on more than one occasion. The Appellant accepts, and I find as a fact that she did not personally post her application.
32. I accept that the receipt dated 9<sup>th</sup> June 2012 shows that a large letter was posted to the Respondent's department in Durham, and that it was delivered on 20<sup>th</sup> June 2012.

33. I note the absence of any further evidence from the Appellant's previous solicitors, and there is no explanation as to why the application was posted from a post office in Enfield, and that post office is 13.4 miles from the solicitors' office.
34. I accept that the Respondent's bundle, which is not indexed or paginated, includes a copy of the envelope received by the Respondent, containing the Appellant's application. That envelope indicates that it was posted on 14<sup>th</sup> August 2012. The Royal Mail bar code is different from the bar code on the postal receipt dated 9<sup>th</sup> June 2012. I conclude that this indicates that the letter posted on 9<sup>th</sup> June 2012 was not the same letter received by the Respondent on 14<sup>th</sup> August 2012.
35. I therefore conclude that the Appellant has not proved that the letter posted on 9<sup>th</sup> June 2012, contained her application for further leave to remain. The evidence indicates that the Appellant's application was not posted until 14<sup>th</sup> August 2012.
36. Therefore the Appellant's application was made after her leave expired on 11<sup>th</sup> June 2012. This means that the Respondent's decision is not an Immigration Decision which generates a right of appeal as it is not a decision contained within section 82 of the Nationality, Immigration and Asylum Act 2002. The appeal entered by the Appellant is, for that reason, invalid and the Tribunal has no jurisdiction to consider the appeal.

### **Decision**

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. There is no valid appeal.

### **Anonymity**

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed

Date: 6<sup>th</sup> June 2014

Deputy Upper Tribunal Judge M A Hall

### **TO THE RESPONDENT** **FEE AWARD**

There is no valid appeal. There is no fee award.

Signed

Date: 6<sup>th</sup> June 2014

Deputy Upper Tribunal Judge M A Hall