Upper Tribunal **Appeal Number**

(Immigration and Asylum Chamber)

IA/38838/2013

THE IMMIGRATION ACTS

Heard at	**Field House**
	Determination promulgated
On 11 June 2014	**On 12 June 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

Farouk Benakila
(Anonymity direction not made)

Respondent

Representation
For the Appellant: Ms. A. Everett, Home Office Presenting Officer.
For the Respondent: Mr. B. Halligan of Counsel.

DETERMINATION AND REASONS: ERROR OF LAW

1. This is an appeal against the decision of First-tier Tribunal Judge Aujla promulgated on 18 March 2014, allowing Mr Farouk Benakila's appeal against a decision of the Respondent dated 4 September 2013 to remove him from the UK. The Judge allowed the appeal on the basis that the decision was not in accordance with the law, and to the limited extent that the case was remitted to the Secretary of State for the Home Department for further

consideration and a fresh decision (see paragraphs 16 and 17 of the determination).

2. Although before me the Secretary of State is the appellant and Mr Benakila is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Benakila as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of Algeria born on 24 December 1970. He claims to have arrived in the UK on 15 May 1998. On 29 June 2012 he applied for indefinite leave to remain in the UK pursuant to the so-called long residence rule (paragraph 276B of the Immigration Rules) on the basis that he had been continuously resident in the United Kingdom for at least 14 years.

4. His application was rejected as invalid and returned on 28 August 2012 because the specified fee had not been paid. It is accepted that the Appellant's representatives enclosed an unsigned cheque with the application.

5. The Appellant's representatives forwarded, again, the application to the Respondent under cover of letter dated 31 August 2012 enclosing a duly signed cheque. In due course this application was accepted as valid, treated as having been made on 3 October 2012, and considered.

6. However, in the meantime on 9 July 2012 the Immigration Rules were amended and the Rule in respect of 14 years long residence (276B(i)(b)) deleted.

7. The Respondent considered the Appellant's application with reference to paragraph 276ADE and Appendix FM of the Rules as they stood following the amendments of 9 July 2012, and refused the Appellant's application for reasons set out in a 'reasons for refusal' letter dated 29 August 2013. A decision to remove the Appellant was made in consequence on 4 September 2013, and served on 6 September 2013.

8. The Appellant appealed to the IAC.

9. The First-tier Tribunal Judge allowed the Appellant's appeal for reasons set out in his determination: see further below.

10. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Lambert on 23 April 2014.

Error of Law

11. It is evident from paragraphs 11–15 of the First-tier Tribunal Judge's determination that he dealt with the appeal by way of consideration of a preliminary issue in respect of the validity of the application made on 29 June 2012 and the lawfulness of its rejection on 28 August 2012. The Judge reached the conclusion that the decision that was the subject of the appeal – the removal decision of 4 September 2013 - was not in accordance with the law because it was based on the Respondent's consideration of the Appellant by reference to the Rules as they stood post- 9 July 2012, whereas – as the Judge found – the Respondent should have considered the Appellant by reference to the Rules as they stood pre- 9 July 2012.

12. The Judge concluded: "*The Appellant's application remains outstanding, to be considered on the basis it was made on 29 June 2012*" (paragraph 15).

13. The Judge's reasons for this conclusion are indicated at paragraph 13 where he essentially adopts the submissions recorded at paragraph 12 in respect of the Respondent's "*policy of evidential flexibility*". The key passages in paragraph 13 in respect of the decision not being 'in accordance with the law' are these:

> "*The Respondent had failed to follow her own policy in respect of evidential flexibility which was subsequently incorporated into the Immigration Rules and appears at paragraph 245AA*"; and
>
> "*The Respondent's decision was therefore not in accordance with the law firstly, because of her failure to follow her own policy, and, secondly, on account of her failure to consider the application on the basis that it was made on 29 June 2012, not 03 October 2012*".

14. I have no hesitation in concluding that the Judge's reasoning was wrong in law. The Respondent's evidential flexibility policy is a policy that was introduced in respect of applications under the Points Based System and related to defects or omissions in the evidence submitted in support of such applications. There is nothing in any of the wording in the policy document (which may be found annexed to the decision in **Rodriguez [2013] UKUT 00042 (IAC)**) which relates to defects or omissions in respect of the paying of fees – far less does Judge Aujla identify anything relevant in the policy or indicate why a policy in respect of PBS *evidence* should be extended to *fees* for other applications.

15. Furthermore, paragraph 245AA of the Immigration Rules - which in any event was not in force at the time the Appellant attempted to submit his application on 29 June 2012, or when the Respondent rejected it as invalid on 28 August 2012 - relates to the failure to submit specified documents pursuant to Part 6A or any of the appendices referred to in Part 6A of the Rules, which relate to applications under the Points Based System and so was of no analogous application to the type of application made by the Appellant. Indeed quite the contrary: paragraph 245AA underscores that the submissions advanced on behalf of the Appellant were misconceived.

16. Mr Halligan, who did not appear before the First-tier Tribunal, sought to advance alternative submissions, but none of these 'save' the reasoning of the First-tier Tribunal Judge.

17. Mr Halligan's submissions focused on the contents of the covering letter dated 31 August 2012 sent on the Appellant's behalf following the rejection of the first application, and enclosing the application again, together with supporting documents, and a signed cheque. The letter requested that the Respondent treat the application as having been made 'on-time':

> "*We should be grateful if you could treat and process our client's application as an on-time application as our client's application had been validly submitted on 01 July 2012, which you received on 02 July 2012.*"

18. It is of course the case that the application was not validly submitted on 01 July 2012 for the very reason that the fee was not paid.

19. Be that as it may, I can see nothing in this mere request for the Respondent to overlook the invalidity of the initial application, and to go behind her decision to treat it as invalid, that changes the nature of that invalid application, or requires that the now valid application be backdated to the date of the invalid application.

20. The matter is really very simple. The Appellant made an invalid application – invalid because of the failure to pay a fee: see paragraph 34A(ii) and 34C of the Rules. This is entirely consistent with the contents of the letter of acknowledgement dated 4 July 2012, which itself draws a distinction between missing documentation, and any issue over the fee:

> "*If there is any problem with validity of the application, such as missing documentation, a caseworker will write to you as soon as possible to advise what action you need to take to rectify the problem. If there is an issue with the fee you have paid, your application will be deemed to be invalid and returned to you as soon as possible by post. You will be advised on what action you need to take to make a valid application.*"

21. The decision to reject the application of 29 June 2012 as invalid is not itself an immigration decision amenable to appeal. It has not been challenged by way of judicial review. Even the request contained in the letter of 31 August 2012 does not assert in terms that the decision was in error: I am not prepared to read the reference to the earlier application having been 'validly submitted' as taking issue with the Respondent's reasoning; indeed the tone of the letter and the request for 'backdating' acknowledges the difficulty that arises by reason of the failure to enclose the due fee. In all such circumstances the decision of 28 August 2012 to reject the initial attempted application stands as a valid and lawful decision. It follows that the subsequent application was appropriately treated as made after 9 July 2012, and appropriately considered under the then applicable Rules i.e. paragraph 276ADE and Appendix FM. The Respondent's decision to deal with the application in this way was entirely in accordance with the law.

22. I find no merit in Mr Halligan's submissions in this regard.

23. Mr Halligan also sought to suggest that in circumstances where the Appellant could no longer meet the requirements of the Rules by the date of the resubmitted application, the Respondent should have considered returning his application and cheque. I find

this to be a submission wholly without merit. In the first instance it presupposes a consideration of the substance of an application before a consideration of the validity of application. Moreover, it is tantamount to suggesting that where a hopeless application is submitted, the Respondent should advise an applicant as such and return the application without considering it further or determining it. Yet further, this submission gives no consideration to where, if it is right, it would leave the Appellant either in the appeal process or otherwise: it is premised on the basis that the Appellant could not succeed on his application, and thereby could not succeed on an appeal (indeed should not even have been given an appealable decision), and accordingly only leaves any issue in respect of whether the application fee should be restored to him.

24. In all the circumstances I find that the First-tier Tribunal Judge made a fundamental error of law, and his decision must be set aside. Further, there is no basis to remake the decision in the same terms on the basis of the alternative submissions advanced by Mr Halligan, or otherwise.

Future Conduct of the Appeal

25. Because the First-tier Tribunal Judge determined the appeal on a preliminary issue, he did not hear evidence from the Appellant and did not otherwise descend to a consideration of the merits of the Appellant's case.

26. As such the Judge's error of approach has meant that the Appellant has not had a full hearing of his appeal, and has not had the opportunity to advance the merits of his case – which, given that it is suggested by Mr Halligan that he cannot meet the requirements of the Rules, will likely involve a consideration of Article 8 of the ECHR pursuant to the guidance in **Gulshan** and **Nagre**.

27. In this context, as I observed at the hearing, even if paragraph 276B(i)(b) does not apply, it is open to the Appellant to advance the circumstance of the error of his representatives in failing to sign the cheque sent with his initial attempted application - and the resulting loss of the opportunity to be considered under the 14 year rule through no apparent fault of his own – as a matter to be considered in the context of Article 8. Whether, and to what extent, this should sound favourably in any proportionality balancing exercise will be a matter for the First-tier Tribunal Judge who rehears his appeal, and is not a matter for me to make any further comment upon.

28. The parties agreed that no specific further directions were required in the appeal.

Decision

29. The decision of the First-tier Tribunal Judge contained an error of law and is set aside.

30. The decision in the appeal is to be remade before the First-tier Tribunal, before any judge other than First-tier Tribunal Judge Aujla, to be re-listed on the first available date.

31. No further directions are required.

Deputy Judge of the Upper Tribunal I. A. Lewis 11 June 2014