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Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01243/2014
IA/01245/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 13 March 2015	**On 23 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

LAILA AKTER LUBNA
SOHEL RANA
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr I Khan, Counsel
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellants are citizens of Bangladesh born on 25 March 1988 and 1 May 1987. They are wife and husband so their appeals have been linked. The appeal of the second appellant is dependent on that of the first. I was not asked and saw no reason to make an anonymity direction.

2. The first appellant entered the UK with leave to enter as a student until 31 October 2012. She completed her studies. She posted an application for further leave as a Tier 1 (Entrepreneur) Migrant with the second appellant as her dependant. However, the application was not accompanied by the requisite fee and, on 17 November 2012, the respondent wrote to the first appellant stating that the application was invalid. Although the first appellant had provided a credit/debit card number with her application, it was rejected because the expiry date was invalid. The first appellant re-submitted her application on 27 November 2012, by which time her leave had expired. In those circumstances, the respondent disputed that the appellants had a right of appeal.

3. The grounds of appeal submitted by the solicitors instructed by the appellants challenged the respondent's assertion that the applications had not been accompanied by the appropriate fee. The respondent alleged the expiry date given for the bank card was invalid. The appellants denied giving an invalid expiry date and maintained funds were available from their bank account. A duty judge therefore directed that the case be listed for the hearing of a preliminary issue and directed that the burden was on the respondent to establish the point, following *Basnet (validity of application - respondent)* [2012] UKUT 00113 (IAC). She also pointed out there appeared to be two notices of decision, dated 1 May 2013 and 3 June 2013 respectively, and it was not clear which one was being appealed. The appellants were directed to file evidence to show their appeals were in time given they had not been lodged until six months after the date of decision. Furthermore, both notices stated that the appellants' leave had been curtailed on 21 September 2011. The respondent was directed to advise which notice of appeal was being appealed.

4. The matter came before Judge of the First-tier Tribunal Goldmeier on 13 November 2014. The hearing proceeded on the basis of oral submissions as the first appellant did not attend because she was unwell. The judge recorded that it was common ground that, if the applications made on 31 October 2012 were invalid, there were no valid appeals. The judge found no reason to doubt the CID note relied on by the respondent to the effect the reason for the rejection of the applications was that an invalid expiry date had been given so the transaction had been declined. He concluded therefore that the applications were not accompanied by the requisite fees and were consequently invalid.

5. The grounds seeking permission to appeal argued the appellants should have been afforded the opportunity to submit the correct card details in accordance with paragraph 245AA of the Immigration Rules. Alternatively, the judge erred by overlooking the appellant's second application made on 27 November 2012. Reliance was placed on paragraph 245DD(g) of the rules, which states that an applicant for leave as a Tier 1 (Entrepreneur) Migrant 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 second application was submitted within 28 days of the first.

6. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Garratt. He noted the respondent had accepted at the hearing that the date of expiry of the appellants' leave had been 31 October 2012.

7. The respondent filed a rule 24 response opposing the appeal. This reiterated that the appellants' leave had been curtailed on 21 September 2011.

Error of law

8. I heard submissions as to whether the First-tier Tribunal had made a material error of law. I shall set these out only as necessary to give my reasons.

9. It was conceded by Mr Walker that the judge erred in his consideration of the issue of the validity of the appeal. He agreed with the submissions made by Mr Khan, as follows. The applications had been submitted by post on 30 October 2012. The date of application should have been taken as the date of posting, per paragraph 34G of the rules. The first appellant's bank card expired on 31 October 2012. She wrote the expiry date as "10/12" on her application form. I was shown a copy. The expiry date was not therefore an invalid expiry date when the applications were posted on 30 October 2012.

10. I note the respondent's letter returning the application, dated 17 November 2012, gave a different reason for rejecting the applications. It expressly stated the credit/debit card details given did not match the information held by the bank, which would suggest the appellants had given a wrong expiry date in the application forms. However, this was contested vigorously in the grounds of appeal submitted by Universal Solicitors and the respondent was "put to strict proof" to establish the allegation. The CID note relied on by Judge Goldmeier did not provide any detail as to why the expiry date was regarded as incorrect. I therefore accepted Mr Khan's submission, which was supported by Mr Walker.

11. I raised with the representatives whether paragraph 34A(ii) applied. This provision requires the accompaniment of the fee to be in accordance with the method specified in the application form or guidance notes. Mr Walker could not show me any provision in the form or guidance note to say, for example, that bank cards must have a certain time left before they expire in order to be accepted.

12. In the circumstances, I accepted the respondent had not discharged the burden of showing the applications were not accompanied by the correct fee (*Basnet*).

13. The point would be academic if, as alleged in the rule 24 response, the appellants' leave had been curtailed on 21 September 2011. In that case, the applications could not have been in time and the appellants would not have had a right of appeal. However, Mr Walker accepted that, although leave had been curtailed, it was reinstated until 31 October 2012. Mr Khan showed me evidence that the first appellant's appeal against the curtailment decision had been listed and then adjourned. Mr Khan explained that, before the adjourned hearing date on 9 December 2011, the respondent reinstated the appellants' leave.

14. I find the appellants had a right of appeal because the applications which led to the refusals under appeal were made at a time the appellants had current leave. Valid applications were made on 30 October 2012.

15. A further point would be the question of whether the appeals were brought in-time. The papers include a covering letter enclosing the decisions, which bears the date 6 June 2013. It was addressed to the appellants' former representatives, M Q Hassan Solicitors. As noted, there are two versions of the notices of decision, dated 1 May and 3 June 2013 respectively. Mr Khan accepted the two versions were identical in all other respects.

16. The notices of appeal recorded the decisions were received on 18 December 2013, some six months later. Mr Walker could not assist with any evidence showing when the decisions were served and he did not press the point. Mr Khan was able to produce a copy of a letter from M Q Hassan Solicitors (faxed on an unknown date in December 2013) addressed to Universal Solicitors, who had written on 16 December 2013 informing M Q Hassan that they had been instructed in place of them. The letter confirmed that they had not received any letter from the Home Office in May or June 2013. I therefore accept that the respondent did not successfully serve decision notices in June 2013 and there is no reason to find the appeals were out of time.

17. The appellants lodged valid appeals in-time. In these circumstances, the error made by Judge Goldmeier in finding the appeals were invalid was material and his decision finding the appellants had no right of appeal is set aside.

Re-making the decision

18. The parties were content for me to re-make the decision. The first appellant was present but was not called to give evidence. The appeal proceeded on the basis of oral submissions. The burden rests on the appellants to establish any factual issues on which they rely and the civil standard of proof applies.

19. The respondent made decisions to refuse to vary the appellants' leave and to remove them under section 47 of the Immigration, Asylum and Nationality Act 2006. She refused the first appellant's Tier 1 (Entrepreneur) Migrant application for two reasons.

20. Firstly, she did not score the 75 points she needed under Appendix A (Attributes) because the bank statements she submitted were from Janata Bank Ltd, which was not an acceptable financial institution in terms of Appendix P of the Immigration Rules. Mr Khan pointed out the respondent had erred in her decision letters by referring to the figure of £50,000. The appellants had in fact submitted evidence showing access to £200,000. However, as all the funds were held in an account at Janata Bank Ltd, nothing turns on this. (see page 31 of the application form)

21. Secondly, the first appellant did not score the 10 points she needed under Appendix C (Maintenance (Funds)) because she had not provided the specified documents showing she had been in possession of sufficient funds for the specified period.

22. I was only addressed on the first point.

23. As neither representative could provide me with evidence of whether Janata Bank Ltd was listed in Appendix P of the rules, I agreed to look this up myself. Mr Khan appeared to accept the bank was on the negative list as at the date of decision. The rules in force between 1 May 2013 and 30 June 2013 included Janata Bank Ltd in Appendix P(i) which listed financial institutions in Bangladesh that did not satisfactorily verify financial statements. The rules in force between 30 November 2013 and 29 December 2013, when the decision was served, also listed Janata Bank Ltd in Appendix P(i) (financial institutions in Bangladesh that did not satisfactorily verify financial statements).

24. The respondent was correct to apply the rules as in force at the date of decision (*Odelola v SSHD* [2009] UKHL 25). The bank statements submitted were not acceptable owing to the fact they were issued by Janata Bank Ltd. It follows that the respondent's decision to refuse the first appellant's application and also that of her dependent husband were in accordance with the Immigration Rules. The appeals are dismissed on that basis.

25. The grounds of appeal submitted by Universal Solicitors to the First-tier Tribunal drew attention to the fact the reasons given for rejecting the appellants' application under Appendix A (access to funds) appeared to relate to Appendix C (maintenance (funds)). The grounds suggested no reasons were given for rejecting the investment funding, although it is perfectly clear from the application form that the appellants were relying on Janata Bank Ltd statements to show this. It is less clear that Janata Bank Ltd statements were also relied on for maintenance. However, if the respondent's contention was that the statements provided did not cover the requisite period, then the statements relied on and the period of the shortfall should have been identified. It is not possible from the reasons for refusal to know why the appellants' applications were refused under Appendix C. I do not therefore regard it as a separate reason for refusal and I shall assume this point was based on the same matter as the Appendix A point.

26. Mr Khan argued that, as Janata Bank Ltd statements had been acceptable at the date of application (30 October 2012), the respondent had breached the duty of common law fairness. He did not develop his submission at all and he simply relied on the grounds of appeal. I presume the appellants would say there was procedural unfairness on the part of the respondent in failing to give them the opportunity to supply alternative statements by notifying them that Janata Bank Ltd documents would no longer to be regarded as acceptable.

27. Again, it has been necessary for me to consult the archived rules in order to see whether there is any validity in the submissions made. The rules in force between 1 October 2012 and 12 December 2012 did not contain either a positive or negative list of Bangladeshi banks on Appendix P.

28. The grounds of appeal on which Mr Khan relied were not particularly helpful to me. Reliance was placed on the case of *Thakur (PBS decision – common law fairness) Bangladesh* [2011] UKUT 00151 (IAC), a Tier 4 case which considered the factual

situation in which a college was no longer on the register as the date decision, the Upper Tribunal held as follows:

> "1. A decision by the Secretary of State to refuse further leave to remain as a Tier 4 (General) Student Migrant was not in accordance with the law because of a failure to comply with the common law duty to act fairly in the decision making process when an applicant had not had an adequate opportunity of enrolling at another college following the withdrawal of his sponsor's licence or of making further representations before the decision was made.
>
> 2. The principles of fairness are not to be applied by rote: what fairness demands is dependent on the context of the decision and the particular circumstances of the applicant."

29. The grounds of appeal set out the well-known passage from Lord Mustill's speech in *R v Home Secretary, ex parte Doody* [1994] 1 AC 531, at 560, and argued the first appellant had been genuinely pursuing her studies in the UK. The decision was therefore perverse. The grounds then go on to say she was a dedicated and talented entrepreneur and the refusal breached article 8 of the Human Rights Convention. However, article 8 was not pursued before me.

30. The grounds as drafted shed little light on how the appellants might have been unfairly treated. The evidence is sparse. However, if it is assumed the first appellant had a genuine plan to start up a business and she could not have been expected to know of the change in attitude towards Janata Bank Ltd documents which were apparently acceptable when she submitted her application, then on the face of it there was unfairness in rejecting her application on this basis without further reference to her.

31. In *Naved (Student – fairness – notice of points) Pakistan* [2012] UKUT 00014 (IAC) the Upper Tribunal held as follows:

> "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 (without contravening the provisions of s. 85A of the Nationality, Asylum and Immigration Act 2002)."

32. I have some doubts about why the appellants should be held not to have been able to know about the change of status of Janata Bank Ltd. On the facts of *Naveed*, the appellant did not meet the maintenance rules by reference to the established presence test which was imposed as a result of communications between the college and the Home Office of which he was unaware. The first appellant in this case was seeking to obtain leave as an entrepreneur and therefore a degree of familiarity and competence in dealing with bureaucratic procedures can be assumed. She was legally represented as well. It has not been explained why she could not be expected to keep abreast of changes in the Tier 1 requirements and it can be assumed she had a keen interest in them.

33. However, Mr Walker made no such submissions against the appellants. Furthermore, there is a clear parallel between cases in which the respondent withdrew a sponsor licence without reference to the student applicant, as in

Thakur, and cases in which the respondent changed the rules so that bank documents already submitted from a particular institution would no longer be accepted. I shall therefore allow the appeals to the limited extent that the decisions were not in accordance with the law and the case remains before the Secretary of State to make lawful decisions.

NOTICE OF DECISION

The First-tier Tribunal made a material error on a point of law and its decision that there were no valid appeals is set aside. The following decision is substituted:

The appeals are dismissed under the Immigration Rules.

The appeals are allowed to the extent the decisions are not in accordance with the law.

No anonymity direction has been made.

Signed **Date 18 March 2015**

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have allowed the appeals and I have therefore considered making a fee award of any fees paid. However, I do not make a fee award because the decisions were correctly made under the rules and the decision substituted by me was made with minimal input from the appellants.

Signed **Date 18 March 2015**

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal