Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/05533/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 10 February 2016

Decision & Reasons Promulgated
On 29 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR MAHER AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Asfaw, Counsel instructed by M-R Solicitors
For the Respondent: Ms A Fijiwala, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Geraint James QC sitting at Hatton Cross on 25 September 2013) dismissing his appeal against the decision of the Secretary of State to refuse to vary his leave to remain as a Tier 4 (General) Student Migrant, and against her concomitant decision to remove him from the UK by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

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Relevant Background

2. The appellant is a national of Bangladesh, whose date of birth is 1 January 1990. On 20 September 2010 he was granted entry clearance as a student until 31 August 2012. In a decision made by Judge Boyes sitting at Hatton Cross on 24 July 2013 in appeal number IA/06432/2013, it was held that he had made an in-time application for further leave to remain on 31 August 2012.

3. Judge Boyes also found that the application had been wrongly rejected as invalid because of an alleged failure to pay the appropriate application fee. Judge Boyes observed that the facts in the case before him were different in some respects from those in the case of **Basnet (validity of application – respondent) [2012] UKUT 00113 (IAC)**. In **Basnet**, the respondent specifically stated that the payment mandate was invalid because there was no signature. In the case before him, the appellant's evidence was that his then representative had completed the payment mandate, but he had been unable to contact his previous representative to clarify what had happened with his application. So he was not able to provide any clarification by way of oral evidence, through no fault of his own, as to whether the mandate was signed or not, nor was he able to confirm whether or not there were sufficient funds in the account for which details were provided. The evidence was thus more finely balanced in the case before him than in **Basnet**. However, he did not consider that the respondent had discharged the evidential burden that the application was invalid.

4. Judge Boyes held that the second application at the end of October 2012 was made at a time when his first application remained undetermined. He therefore had a full right of appeal and was able to challenge the decision made by the respondent against the second application under the Immigration Rules.

5. The judge held that the second application was made on 26 October 2012, although elsewhere the date is given as 29 October 2012. Nothing turns on this disparity.

6. No evidence of funds was submitted with the second application. But bank statements were subsequently submitted by the appellant's representatives under cover of a letter dated 27 November 2012, before a decision had been made on the second application. The appellant relied on a bank statement covering the period 1 October 2012 to 20 November 2012. Between 1 and 16 October there were funds of only 634.39 BDT in the account. Judge Boyes held that the bank statement provided did not show that required funds had been held for the required period of 28 days prior to the second application, only that they had been held from 18 October 2012, a period of only eight days.

7. Judge Boyes held that the appeal could therefore not succeed under the Rules. However, the respondent had a policy, known as the evidential flexibility policy, which should have been considered in accordance with the guidance given by the Upper Tribunal in **Rodriguez (flexibility policy) [2013] UKUT 0042 (IAC)**. He considered that this was a case in which that flexibility policy should have been followed, but had not been. The judge quoted the following extract from page 116 of the modernised guidance on Tier 4, version 8.0 valid from 17 January 2013:

> Evidential Flexibility
>
> Under the evidential flexibility process, where there are minor errors or omissions in an application but there is sufficient evidence to show that the application would likely to be granted, he may contact the migrant or the sponsor for clarification or to request missing documents and/or information.

8. Judge Boyes continued in paragraph [32]:

> It would appear that when considering the appellant's second application form the respondent's main focus was on whether the bank statements were precluded from being taken into account because of the bank's inclusion of Appendix P. In doing so she failed to consider if further earlier evidence of funds should have been sought from the appellant. This is particularly important for the interests of procedural fairness in this case in view of the previous, unlawful, rejection of the first application. This is because the bank statements submitted with the first application may have shown that the appellant held sufficient funds at that time. It is therefore considered that the respondent's failure to apply her own evidential flexibility policy in this case renders the decision not in accordance with the law and I allow the appeal on that limited basis only. The application consequentially remains outstanding before the respondent pending its lawful consideration.

9. Earlier in his decision, Judge Boyes recorded the following exchange with the appellant, who was legally represented before him:

> At the hearing I asked the appellant if any earlier bank statements were available, in particular those returned with a previous application. He did not know where they were: the respondent claims they were returned with the first application.

10. The decision of Judge Boyes was promulgated on 9 August 2013. On 10 January 2014 the Secretary of State gave her reasons for refusing the application of 29 October 2012 (the second application) on reconsideration. The judge had ruled that his rejected application was valid and therefore the date of this rejected application was deemed as valid. He had made this application on 2 September 2012. The closing date of bank statements submitted in support of his application was dated 20 November 2012. This bank statement was dated more than one month "prior to" his application date and as such they were unable to take this document into account when assessing funds. The judge had considered evidential flexibility. But after assessing the documents submitted, the Home Office would not have requested further documents under the evidential flexibility policy. He had not demonstrated he had the level of funds required to be granted leave to remain as a Tier 4 (General) Student Migrant.

<u>The Hearing Before, and the Decision of, the First-tier Tribunal</u>

11. The appellant was represented by Universal Solicitors. In accordance with the instructions given in the notice of appeal, the Tribunal served notice of the appeal hearing on the appellant's solicitors only, as the appellant had given his personal address as being care of Universal Solicitors.

12. When the matter came before Judge Jones, there was no appearance by or on behalf of the appellant. In his subsequent decision, Judge Jones noted that notice of the hearing was sent to both the appellant and to his solicitors, although he noted that the appellant's address was given as care of his solicitors. He was satisfied that proper notice of the hearing had been given to the appellant and his representatives, and accordingly he saw no good reason to adjourn the hearing of the appeal.

13. The judge noted that the appellant's solicitors had provided a seventeen page bundle in support of the appeal on 27 January 2014.

14. Judge Jones held that the appeal must be dismissed. The appellant had to show that he had not less than £2,100 available to him for a period of not less than 28 days prior to the date of his application (29 October 2012). The appellant plainly did not discharge this burden for the period between 1 and 17 October 2012. Indeed, the futility of the appeal may well be the reason why the appellant had not attended and why no contact had been made with the Tribunal on his behalf since the letter of 27 January 2014 from the appellant's solicitors, enclosing the seventeen page appeal bundle.

The Application for Permission to Appeal

15. The appellant's application for permission to appeal to the Upper Tribunal was settled by his new representatives, M-R Solicitors LLP. The First-tier Tribunal Judge had failed to take into consideration the judgment of Judge Boyes and ought to have given some form of consideration to the bank statements provided in support of the invalid application of 2 September 2013. Judge Jones had merely reconsidered the evidence relied on for the application of 29 October 2012.

The Grant of Permission

16. On 9 October 2015 First-tier Tribunal Judge Parkes granted permission for the following reasons:

> The grounds are slightly confusing and the situation that developed shows why appellants should not give c/o addresses via their solicitors for correspondence. It appears that the evidential flexibility point was not addressed and the appellant had made it clear that he did not have the documentation.

17. Judge Parkes held it was arguable that the judge had not properly considered the matter, since the bank statements submitted with an invalid application might have supported his claim about available funds. It was arguable that it was not fair that the Home Office had not provided the earlier bank statements.

The Hearing in the Upper Tribunal

18. At the hearing before me to determine whether an error of law was made out, Ms Asfaw sought an adjournment so that enquiries could be made as to whether the respondent retained copies of the bank statements filed with the first application and/or so as to give the appellant the opportunity to obtain duplicate bank

statements. I refused the application as I was not satisfied that an adjournment for this purpose was in accordance with the overriding objective.

19. Ms Asfaw developed the arguments raised in the application for permission to appeal. In reply, Ms Fijiwala submitted that no error of law was made out.

Discussion

20. The decision of Judge Boyes was handed up to me in the course of the hearing. It was not included in the Home Office bundle that was before Judge Jones, and it was also not included in the seventeen page bundle of documents served by Universal Solicitors on 27 January 2014.

21. I accept that Judge Jones did not address the evidential flexibility issue which is touched upon in the decision under appeal. But in the seventeen page bundle of documents served by Universal Solicitors there was no meaningful attempt to present a case on this topic. They merely asserted as follows in paragraph 8 of the grounds of appeal:

> The Home Office decision is not in accordance with law. The Secretary of State did not follow up the Tier 4 guidance to decide the file.

22. This is simply not good enough. The judge was not given enough information about the appellant's case or sufficient documentary evidence so as to be able to make a ruling in the appellant's favour that the decision under appeal was not in accordance with the law. On the limited evidence and information before the First-tier Tribunal, no error of law is made out on the ground of inadequacy of reasoning. If Ms Asfaw had presented to Judge Jones the case which she presented to me, the situation would be different.

23. The decision of Judge clearly does not engage with what is envisaged by Judge Boyes, which is the Secretary of State taking account of bank statement evidence relating to funds held by the appellant in the 28 day period prior to his first application. But the judge cannot be criticised for not dealing with an issue of which he was not made aware. The burden rested with the appellant to make good his case on a breach of evidential flexibility principles in the disposal of his application upon reconsideration. The appellant did not make a meaningful attempt to discharge the burden of proof.

24. I turn to consider whether the appellant is entitled to relief on the grounds of procedural unfairness. Prima facie the answer to this question is no, as there was proper service of the notice of hearing upon him and his nominated legal representatives. He was apparently let down by his former legal representatives not informing him of the date of the hearing. This does not of itself make the proceedings unfair.

25. Nonetheless I ask myself whether the case which should have been advanced in the First-tier Tribunal, but is only now advanced by way of appeal to the Upper

Tribunal, has underlying merit. I find that it has some merit, but not sufficient merit to have led to a different outcome.

26. As I explored in oral argument, the reasoning of Judge Boyes on evidential flexibility was highly problematic. What the judge needed to do was to put himself in the position of a reasonable caseworker who was assessing the application on the information available to him or her. The caseworker who assessed the second application made at the end of October 2012 would not have been aware of the earlier rejected application, as the application and the accompanying documents were all returned to the appellant.

27. The bank statements provided to support the October 2012 application were manifestly inadequate to discharge their required purpose, which was to provide evidence of funding for a 28 day period prior to the date of second application. As the error was major, not minor, there was no duty under the evidential flexibility policy for the caseworker to request alternative proof of funds from the appellant. There was nothing in the documentation provided, such as missing statements from a sequence of bank statements, to indicate that the error came about through accidental omission. A request for alternative funding would have been entirely speculative, and the reasonable case worker is not required to engage in speculation. Thus the declaration to this effect in the refusal letter under appeal is entirely correct. It was not, and is not, the policy of the Secretary of State to request additional documents in the circumstances which appertained in this case.

28. As the Secretary of State did not appeal Judge Boyes' decision, she had to comply with his ruling. She did so by considering evidential flexibility principles, and by giving the answer which she was entitled to give, which is that (even taking into account the earlier, wrongly rejected, application) she would not have exercised discretion to request proof of alternative funding from the appellant.

29. Nonetheless, the Secretary of State was prepared to consider evidence of funding for a 28 day period preceding the first application. The appellant and his then legal representatives knew from the time of the hearing before Judge Boyes that the respondent did not retain any bank statements which might have been submitted in support of the first application, so in order to succeed in the application on reconsideration, a new set of bank statements needed to be provided. It will be recalled that the appellant was unable to confirm before Judge Boyes that evidence of funding had in fact been provided with the first application, so there could not be any a priori assumption that it was provided, still less that it complied with the rules. Following the ruling of Judge Boyes in his favour, the onus was on the appellant to provide bank statements to show the required level of funding for 28 days prior to his first application of 31 August 2012. The appellant, who was legally represented throughout, could not reasonably expect the Secretary of State to exercise discretion in his favour in an evidential vacuum. It was for the appellant to provide evidence of funding for the reconsideration exercise, not for the respondent to request such evidence.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date

Deputy Upper Tribunal Judge Monson