Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01782/2013

THE IMMIGRATION ACTS

Heard at Field House
On 22 August 2013

Determination Promulgated
On 30 August 2013

Before

UPPER TRIBUNAL JUDGE WARR

Between

NIAZ MOHAMMAD NIPUN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M M Islam (London Law Associates)
For the Respondent: Ms H Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh born on 28 January 1991.

2. The appellant was granted leave to enter the UK as a Tier 4 Student on 7 July 2009 until 31 January 2012. It is the appellant's case that he completed a level 5 Diploma

in Business Management Studies in December 2011 and undertook a further level 6 course. He applied, on his account, prior to the expiry of his leave at the end of January 2012 for further leave to remain as a Tier 4 Student. This application was returned as invalid by the respondent on 28 February 2012. Sections of the form designated as mandatory had not been completed and photographs did not accompany the application form.

3. The appellant re-submitted the application on 26 March 2012 satisfying all the requirements of the Rules. He did not send his latest bank statements as he assumed that the matters would be considered as at January 2012.

4. The Secretary of State refused the application on 25 October 2012 on maintenance grounds as the closing date of the bank statements submitted in support of his application were dated 19 January 2012 and therefore were more than one month prior to his application date on 26 March 2012. As he had made his application on 26 March 2012 and his leave had expired on 31 January 2012 he had no right of appeal against the decision not having leave to remain at the relevant time.

5. Undaunted, the appellant sought to appeal, somewhat belatedly on 11 January 2013 against this decision. At that stage it was thought that the initial application had been rejected as invalid because of the non-payment of a fee and the onus of proof lay on the Secretary of State to show that the correct fee was not paid: Basnet [2012] UKUT 00113 (IAC).

6. The matter came before a First-tier Judge on 9 April 2013. It was argued that the appellant had a right of appeal, given that his application had been made during the period of his leave. Among the arguments relied upon was that the Home Office had acknowledged his earlier application on 5 February 2012 and had advised the appellant that if there was any problem with the validity of the application "such as missing documentation or omissions on the form" a case worker would write to the appellant as soon as possible to advise what action needed to be taken to rectify the problem. He was told that enquiries should not be made about the progress of the application before the appellant heard from the Home Office. Reliance was placed on Rodriguez [2013] UKUT 00042 (IAC). It emerged at the hearing that the reason for the rejection of the initial application was not due to the non-payment of fees but because of defects in the application form. The appellant's representative only discovered the real reason for the invalidity of the application on the day of the hearing. Nevertheless the appellant's representative submitted that the appellant had a right of appeal as his initial application was made in time, relying on JH (Zimbabwe) [2009] EWCA Civ 78 where it had been held that a later application was capable of being treated as a variation of the first application. Moreover the Home Office should have contacted the appellant for further documents in the light of its policy as indicated in Rodriguez. The Home Office was under a public law duty to give effect to the policy.

7. The judge did not find that the further application could be treated as a variation. It had been accepted that non-payment of fees was not the basis of the rejection of the

appellant's application. The appellant accordingly had no right of appeal. There were doubts as to whether the appellant was indeed studying at the time he varied his application.

8. Permission to appeal was granted on 25 June 2013. A response was filed on 15 July 2013 contending that the First-tier Judge had directed herself appropriately.

9. At the hearing before me Mr Islam relied on paragraph 9 of Rodriguez which referred to a validation stage being trialled whereby applicants were contacted where mandatory evidence was missing and given the opportunity to provide it before their application was rejected. The Tribunal found that the policy was an "unambiguous statement to the effect that during a 'validation stage' applicants will be contacted where evidence was missing from their applications and will be given the opportunity to provide such evidence before a rejection decision was made." The Tribunal was critical about the failure of the parties to produce evidence about the policy. It considered that a Home Office letter "heralded unequivocally the introduction of a new practice whereby all applicants would be notified of the absence of mandatory evidence from their applications and would be given the opportunity to rectify the relevant shortcoming prior to rejection."

10. Mr Islam also referred to the fact that the appellant had been sent the letter to which I have made reference on 5 February 2012 concerning any problems with the application such as missing documentation or omissions on the form. The appellant had not been contacted. When the form had been returned it had simply been re-sent. Mr Islam also referred to Naved (student – fairness – notice of points) Pakistan [2012] UKUT 00014 (IAC). "Fairness required the Secretary of State to give an applicant an opportunity to address grounds for refusal, which he did not know and could not have known…".

11. Ms Horsley submitted that it was for the appellant to show that the policy applied at the material time. The application had been rejected as invalid because mandatory information had not been included in accordance with paragraph 34A of HC 395. The 30 January 2012 application was invalid because it did not include mandatory information. The appellant had not made out his case. The second application had been made out of time. She acknowledged that if the case of Rodriguez applied the matter would have to go back to the Secretary of State to reach a fresh decision.

12. It is in my view, as I said at the hearing, difficult to distinguish the circumstances from Rodriquez where the appellant had made her application on the same date as the appellant – 31 January 2012. Just as in the case of the appellant she had received a letter from the respondent saying that a case worker would write to her as soon as possible if there was any problem with the validity of the application such as missing documentation. Unlike her case that letter was not produced although similar letters were produced.

13. I do not see how the case of Rodriguez can be distinguished and insofar as there is an onus on the appellant to bring himself within the ambit of the facts of that case in my view he has discharged it. He was given a letter which appears to be evidence of the existence of the policy and instead of him being contacted as the letter suggested the application was simply refused. I appreciate that the appellant was under the impression that the initial application had been refused on a different basis but of course had the policy been complied with he would have been notified about the true basis for the failings and he would have been able to rectify them promptly and the application would have been treated as being continuous, made in time, and carrying a right of appeal.

14. It appears clear that in the light of Rodriguez the Secretary of State's decision was unlawful and the application remained outstanding – see paragraph 17 and 27 of Rodriguez

15. The decision of the First-tier Judge was flawed by a material error of law. I re-make it. The appeal is allowed as indicated.

Signed Date 30 August 2013

Upper Tribunal Judge Warr