



IAC-AH-PC-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/23416/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 12 November 2014**

**Determination Promulgated
On 24 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MR RAJESHBHAI BHAGUBHAI PATEL
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Amgbah, UK Law Associates

For the Respondent: Ms J Vidyadharan, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Boyd sitting at Glasgow on 6 August 2014) dismissing the appellant's appeal on the papers against the decision by the Secretary of State to refuse to grant him leave to remain as a Tier 4 Student Migrant, and against her concomitant decision to remove him from the United Kingdom 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 such a direction is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a national of India, whose date of birth is 21 May 1980. He was granted leave to enter the United Kingdom on 13 December 2009 as a Tier 4 Student Migrant until 28 October 2013. On that day, he applied for leave to remain as a Tier 4 (General) Student Migrant.
3. The application was refused on 21 November 2013 on maintenance grounds. The appellant needed to show that he was in possession of £2,000 for a consecutive 28 day period. But he had provided no evidence of the funds available to him.
4. The appellant appealed this decision, and his appeal came before Judge Turnock sitting at Bradford on 20 February 2014 for determination on the papers. The case advanced by the appellant in his notice of appeal was that, contrary to what was said in the refusal decision, he had provided a number of bank statements with his application. He was now submitting with his appeal "a further copy of those statements".
5. Judge Turnock observed that the copy statements were dated 30 November 2013, and so could not have been identical to any statements submitted with the application.
6. However, he indicated that in his view the respondent had breached evidential flexibility principles, as in his application form the appellant had indicated that he was submitting bank statements in support of his application. Judge Turnock held that the respondent ought to have sought clarification under Rule 245AA of the Rules, and therefore a lawful decision on the application remained outstanding.
7. On 10 April 2014 the Home Office wrote to the appellant asking him to produce bank statements covering a period of 28 days, which must be dated no earlier than 31 days before the date of application on 28 October 2013. If he failed to produce the information requested within the time given, he was warned that his application would be considered on the basis of the information currently available.
8. On 12 May 2014 the Home Office gave their reasons for refusing the application on reconsideration. The appellant had submitted three bank statements from Barclays Bank. The opening and closing date of the first statement was 28 November 2013 to 1 April 2014; the second statement was dated 7 March 2014 to 29 April 2014; the third statement was dated 3 February 2014 to 1 April 2014. These bank statements were dated after his application date and so they were unable to take these documents into account when assessing his funds. He had not demonstrated that at the time of his application he had the level of funds required.

The Decision of the First-tier Tribunal

9. The appellant asked for his appeal to be determined on the papers. Judge Boyd dismissed the appeal on the basis set out in the refusal letter. The appellant had not

shown that he had the required funds of £2,000 for a consecutive period of 28 days as at the date of application.

The Application for Permission to Appeal

10. The appellant applied for permission to appeal to the Upper Tribunal, arguing that Judge Boyd had missed the point. The bank statements in the respondent's bundle covered the period up to 28 October 2013, and they showed that he was holding £2,314.11 for the relevant 28 day period prior to the date of application.

The Grant of Permission

11. On 6 October 2014 Judge Cox granted permission for the following reasons:

I have carefully considered the determination in relation to the grounds and further grounds. The grounds in essence contend that the judge failed properly to engage with or to understand the facts and history of the case with the result that he erred in law when assessing whether the appellant met the maintenance requirements of Appendix C at the relevant time. I find that the grounds have arguable merit, enhanced by the further grounds.

The Hearing in the Upper Tribunal

12. At the hearing before me, Mr Amgbah developed the arguments raised in the application for permission to appeal, and I reviewed the bank statements in the respondent's bundle. Ms Vidyadharan submitted that there was no error of law because the appellant had not proved that he had provided any bank statements with his application and/or before the date of decision. She handed up a printout from a Home Office computer record relating to the appellant. This showed that he was recorded as of 21 November 2013 as having provided no bank statements with his application.

Discussion

13. In **Khatel and Others (Section 85A: effect of continuing application) [2013] UKUT 44**, the Tribunal held that Section 85A of the Nationality, Immigration and Asylum Act 2002 precluded a Tribunal in a points-based appeal from considering evidence as to compliance with points-based Rules where that evidence was not before the Secretary of State *when she took her decision*. The Tribunal also held that the Section did not prevent a Tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only *after the date of application*, for the purposes of paragraph 34F of the Immigration Rules.
14. The second limb of **Khatel** was overturned by the Court of Appeal in **Raju and Others v Secretary of State for the Home Department [2013] EWCA Civ 754**. But the first limb of **Khatel** remains good law.

15. On the evidence provided by way of appeal against the initial refusal decision, the appellant showed in retrospect that he had been in possession of over £2,000 for a relevant 28 day period immediately preceding the date of application. This was shown in the bank statements running up to the end of November 2013, which the appellant had obtained from the bank on 2 December 2013. These same bank statements were in the Home Office bundle that was before Judge Boyd.
16. However, Judge Turnock rightly did not take into account these bank statements for the purposes of deciding whether the appellant met the maintenance requirements. He recognised that they were not admissible for that purpose, as clearly the bank statements relied on by way of appeal had not been before the Secretary of State at the date of decision.
17. Judge Turnock is to be taken as having allowed the appeal on the provisional assumption that the appellant was or might be telling the truth when he said that he had provided a set of bank statements produced on or before 28 October 2013 with his application, which the respondent had completely ignored. Although Judge Turnock invoked Paragraph 245AA, it did not apply if the appellant had failed to provide any bank statements *at all*: see sub-paragraph (c) of Paragraph 245AA. This was not a case of one bank statement being omitted from a series, so as to trigger a potential duty to make a request under sub-paragraph (b).
18. I recognise that if it were true that the appellant had provided a set of original bank statements with his application, it would be difficult, if not impossible, to provide the same set of “original” bank statements many months later. But the appellant did not seek to discharge the burden of proving that he had provided a set of original bank statements with his application by, for instance, providing a *copy set* of the same documents; and/or by providing confirmatory evidence from the bank that they had produced a relevant set of bank statements immediately before the application pursuant to a request from the appellant.
19. It is argued in the grounds of appeal that as the application had been remitted to the Secretary of State for reconsideration, Judge Boyd ought to have taken into account the bank statements in the respondent’s bundle; or alternatively Judge Boyd ought to have taken into account the more recent bank statements. But he could not take into account the bank statements in the respondent’s bundle as these had self-evidently not been before the Secretary of State at the date of decision. He also could not take into account the recent bank statements, as the appellant was not making a fresh application, but was appealing against the refusal of the application made on 28 October 2013.
20. It would have been helpful if the judge had explained why he was not taking into account the bank statements in the respondent’s bundle, but his failure to do so does not disclose a material error of law. For, as previously discussed, he simply could not take them into account due to Section 85A of the 2002 Act.

Decision

21. 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.

Signed

Date **24 November 2014**

Deputy Upper Tribunal Judge Monson