Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39201/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 16th July 2014	**On 23rd July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR ZAIN UL ABADIN
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr Thorndyke
For the Respondent: Mr Harrison

DETERMINATION AND REASONS

Introduction

1. The Appellant born on 25th January 1990 is a citizen of Pakistan. The Appellant was present at the hearing and represented by Dr Thorndyke. The Respondent was represented by Mr Harrison a Home Office Presenting Officer.

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Substantive Issues under Appeal

2. The Appellant had entered the United Kingdom on 17th April 2011 as a student with leave to remain until 28th June 2013. The Appellant had made an in time application in June 2013 for leave to remain further as a Tier 4 Student. That application was refused by the Respondent on 6th August 2013. The Appellant had appealed that decision and his appeal was heard by First-tier Tribunal Judge Cox sitting at Stoke-on-Trent on 4th February 2014. He dismissed the Appellant's appeal.

3. Application for permission to appeal was sought and granted by First-tier Tribunal Judge Keane on 11th April 2014. He found the judge argued and made a material misdirection of law in not treating the totality of the funds as available to the Appellant during the relevant period.

4. I indicated to both representatives that I did not need to hear submissions in this case, found an error of law, set aside the decision and was able to remake the decision by allowing the appeal. I provide below my decision and reasons.

Decision and Reasons

5. The refusal of the Appellant's application for leave to remain as a Tier 4 Student Migrant had been from the outset on one ground only. The Appellant required to show a sum of £1,600 in his account for the appropriate 28 day period. There was a few days in that period where the amount in his account fell £34.05 below the minimum of £1,600. At the time of the hearing the Respondent well knew the reason behind that short shortfall. Indeed the judge at paragraph 7 of his determination had recorded the unequivocal concessions made by the Presenting Officer. In summary a mobile phone company had by error taken the sum of £34.05 from the Appellant's bank account on 3rd June 2013, realised that they had made an error in taking what was effectively a duplicate payment and refunded the money on 6th June 2013. That was the factual background known to the Respondent at least on the day of the hearing of the appeal. Nevertheless the Respondent pursued the appeal.

6. It is clear that the First-tier Tribunal Judge felt constrained by the Senior Courts in the cases of **Patel [2013] UKSC 72** and **Nasim [2014] UKUT 00025**. He took the view that there was no doctrine of near miss and accordingly felt constrained to dismiss the appeal.

7. The new Immigration Rules do provide a detailed, and somewhat complex, list of matters that it is required an Appellant fulfils. The Executive have decided that such is the appropriate approach in dealing with applications under these aspects of the Immigration Rules and the Superior Courts have properly acknowledged that position taken and accordingly there is as such no manoeuvrability and no concept of a near miss.

8. However this case does not constitute a near miss. If the mobile phone company were authorised and had been entitled to take that money then this would have presented as a near miss. If that money was a matter of dispute between the mobile

phone company and the Appellant, a dispute which had not been resolved, then again arguably those were not funds available to or necessarily belonging to the Appellant until such time as the resolution of such dispute and again arguably that would have constituted a near miss. It is however entirely clear from the documents and the clear concessions made by the Home Office that neither of the above scenarios occurred in this case. The mobile phone company had erroneously and without any authority taken that small sum as a duplicate direct debit or standing order that had already been paid. In fairness to that company they acknowledged and rectified their error swiftly and within a matter of three days. It was never money they were entitled to and ownership of that money did not pass from the Appellant to the mobile phone company. It remained the Appellant's money at all times. It was therefore an error to describe this as a near miss and for the judge to have felt constrained by that concept as enunciated by the Superior Courts.

9. The circumstances of those cases relied upon by the judge were different entirely to the circumstances of this case. It would in my view be exceptionally difficult to imagine any Superior Court in this country failing to observe the fundamental unfairness in the facts of this case, describing it as a near miss, and thereafter compounding mani fold the injustice caused by the phone company by refusing his application. It is a little surprising that the Home Office chose to use limited resources in pursuing this matter where experience indicates there are many other worthy causes of pursuit.

10. I find an error of law was made in this case which was clearly material to the outcome and set aside the decision of the First-tier Tribunal. It was unnecessary for me to hear further evidence in remaking the decision given the very narrow factual matrix described above and the clear concessions made by the Respondent.

Decision

11. I find a material error of law was made in the First-tier Tribunal and set aside that decision and in remaking the decision I allow the Appellant's appeal under the Immigration Rules.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Lever