IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39162/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 20th January 2015	**On 11th February 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

CRISTY FERRER POQUIZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Warren of Counsel instructed by Islington Law Centre
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Brunnen made following a hearing at Manchester on 23rd June 2014.

Background

2. The Appellant is a citizen of the Philippines born on 25th December 1970. She came to the UK with leave to remain which expired on 18 August 2012. On 9th August 2012

she applied for leave to remain in the UK as a domestic servant. The application was submitted by her then representatives, JMS Immigration Consultants and accompanied by a cheque for the fee of £561 drawn on her former employer's joint account at Lloyds TSB. The Appellant stated, and the judge accepted, that she had agreed with her then employers that the fee should be deducted from her wages.

3. The Respondent acknowledged receipt of the application on 20th August 2012 but rejected it as invalid for non-payment of a required fee on 8th October 2012. The Respondent said that:

> "Although a cheque has been submitted there were insufficient funds in the account and the bank has returned the cheque unpaid."

4. The Appellant made a fresh application on 15th October 2012 which was refused on 19th March 2013 on the grounds that, at the date of application, the Appellant did not have current leave to remain and so could not satisfy paragraph 159AE(vi) of the Immigration Rules, which requires that the Appellant should not be in the UK in breach of immigration law. It was against that decision that the Appellant appealed to Judge Brunnen.

5. It was agreed between the parties that if the judge were to find that the application made on 9th August 2012 was not fairly and validly rejected then the decision of 19th March 2013 was not in accordance with the law. If it was validly rejected, then the application of 15th October 2012 did not result in an appealable immigration decision since the decision did not result in the Appellant having no leave to remain, it having already expired when the application of 15th October 2012 was made.

The Appellant's Employment History

6. The Appellant began to work for Mr and Mrs G on 28th June 2012. They lived mainly in the Czech Republic and they returned there on 24th August 2012. The Appellant completed her domestic duties with them on 30th August and on 3rd September began to work for someone else. It appears that Mrs G told the Appellant that she wanted her to work for the family again when they returned to the UK for four weeks from 18th October 2012 but the Appellant told her that she could not comply because she had obtained permanent employment. Mrs G threatened her with withdrawal of sponsorship from the Appellant's application.

7. The Appellant has produced substantial evidence that she has been the victim of trafficking and she has been accepted as such by the competent authority.

The issue before the Judge

8. The Appellant relied on the case of Basnet (validity of application – Respondent) [2012] UKUT 00113 which held that if the Respondent asserts that an application was not accompanied by a fee and therefore invalid, the Respondent bears the burden of proof. In that case the fee was paid by credit/debit card.

9. The Tribunal held that:

> "Validity of the application is determined not by whether the fee is actually received but by whether the application is accompanied by a valid authorisation to obtain the entire fee that is available in the relevant bank account."

10. The Tribunal did not consider that the evidential burden had been discharged by the Respondent of demonstrating that the application was not accompanied by the authorisation enabling the Respondent to receive the fee in question. The Secretary of State was unable to produce the billing data page, and the applicant was deprived of an opportunity of checking the accuracy of the billing data, and was not given any evidence-based specific reason why the processing had failed. In these circumstances he ought to have been given an opportunity to re-submit the application before the leave expired.

11. The judge distinguished Basnet on the grounds that in that case the Appellant had proved that there were sufficient funds in his account at the material time which was crucial to the decision. He said that the difficulty in Basnet was proving whether the accurate billing data had been provided by the applicant in circumstances where the only evidence of that data had passed into the hands of the Respondent.

12. The judge wrote as follows:

> "The situation where payment is tendered by cheque is quite different. It does not depend on the applicant providing absolutely accurate data to the Respondent. The name of the account, the cheque number, the account number and the sort code are printed on the cheque. The other details have to be completed by the drawer but there is not the same scope for a factual slip as where data for a card transaction is supplied. In the present case we have a copy of the cheque in the Appellant's supplementary bundle. The payee, the amount in words and figures and the date are all correct. It is signed with a signature that bears a distinct resemblance to Mr G's signature on the application documents. Payment by cheque does not then depend on the Respondent processing data with complete accuracy. A cheque is a physical object which the Respondent sends for clearing. There is not the same scope for undetectable error. It is not a situation in which it is impossible for the applicant to find out what has gone wrong because the data he supplied has been destroyed and he has no means of knowing whether he inadvertently supplied inaccurate data or whether the Respondent processed it inaccurately. The person on whose account the cheque is drawn can verify whether there were or were not sufficient funds in the account to cover the cheque and if the cheque has been returned unpaid, he will have been informed of this by the bank and have the opportunity to make appropriate enquiries if he believes that a clerical error has occurred."

13. The judge concluded that in the present case there was no evidence that there were sufficient funds in the account to cover the cheque and, on the contrary, the available evidence was that the sums in that account were insufficient. He was not prepared to infer that there would have been sufficient funds in the Lloyds TSB account simply from the fact that Mr G had money at his disposal. In the absence of any evidence that there were sufficient funds in the account, which the Appellant had not established, he concluded that it was more probable than not that there were insufficient funds.

14. He recorded that Ms Warren's alternative submission was that if the cheque drawn on the account was returned unpaid it was unfair for the Respondent to reject the application without giving the Appellant an opportunity to remedy the situation. The judge said that the Respondent could not reasonably be expected whenever a cheque was returned unpaid to refer back to an applicant before rejecting the application as invalid. No distinction could properly be made whether the cheque was drawn on the applicant's own account or on another account. There was no analogy with the revocation of a licence of a student's college because it was not due to any action by the Respondent that the cheque was returned unmade.

15. On that basis he dismissed the appeal for want of jurisdiction.

The Grounds of Application

16. The Appellant sought permission to appeal on the grounds that fairness would dictate that, due to her vulnerability as a foreign domestic worker, when it became clear to the Respondent that the only reason her application was refused was due to the actions of her employers (by having insufficient funds in their account to pay the fee) she should have been given an opportunity to re-submit the application before it was rejected as invalid. She relied on the case of EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania [2013] UKUT 00313 which recognised that particular measures were needed to protect foreign domestic workers who had been trafficked and exploited by forced labour.

17. She also relied on Patel (revocation of licence – fairness) India [2011] UKUT 00211 which held:

> "Where the applicant is both innocent of any practice that led to loss of the sponsorship status and ignorant of the fact of such loss of status it seems to us that common law fairness and the principle of treating applicants equally mean that each should have an equal opportunity to vary their application by affording them a reasonable time with which to find a substitute college on which to base their application for an extension of stay to obtain the relevant qualification. In the curtailment cases express Home Office policy is to afford 60 days for such application to be made.
>
> Although we accept that there is no such policy for refusal cases fairness requires that such cases be treated in broadly the same way. The applicant must be given an equal opportunity before refusal of application to amend it in

the way we have described. This was clearly not done in this case. The Home Office knew that it had suspended the college in January 2010 but no one else did. The applicant could not have known that subsequently the college's status as an approved Sponsor was revoked before his application for an extension of stay was decided."

18. This was analogous to the Appellant's position because she was ignorant of any practice by her employers which led to her application being treated as invalid.

19. Permission to appeal was granted by Upper Tribunal Judge Kopieczek on 18th November 2014.

Submissions

20. Ms Warren relied on her grounds and submitted that the judge had not engaged with her submissions. Where the alleged non-validity of an application stems from a third party's actions, fairness requires the applicant to be given a chance to correct it, particularly so where the application is from a domestic worker. The Respondent should have been alert to the potential for unfairness because the cheque was drawn on the employer's account. The Appellant could not have known of the circumstances relating to the non-payment of the cheque and the Respondent's common law duty of fairness required her in these circumstances to go back to the Appellant because domestic workers are specifically recognised as a particularly vulnerable group. States are obliged to prevent and combat trafficking in persons and the UK has implemented a number of measures to comply with its prevention, deterrence and punishment obligations.

21. Second, she submitted that the Respondent had acted unfairly in not acting promptly on the application, thereby giving the opportunity to the employer to ensure that the funds in the bank account would not be available. The application was made on 15th August 2012 but not rejected until 8th October 2012. She relied on the case of Patel cited in the grounds and submitted that the decision was not in accordance with the law because the Respondent had not given the opportunity to the Appellant to rectify the situation which was not of her making and which was not known to her.

22. Mr Diwnycz submitted that there was no unfairness in the Respondent's procedures. There was no room for accidental error in this situation. If the Appellant submitted a cheque, the onus lies with her to ensure that the funds were available. The fact that the employer's cheque bounced did not absolve the Appellant from her responsibilities. She could have chosen an alternative method of payment. Seven weeks was not a lengthy delay. The cheque could have been presented at any time before 8th October when the decision letter was written.

Findings and Conclusions

23. This issue has recently been considered by the Court of Appeal in EK (Ivory Coast) v SSHD [2014] EWCA Civ 1517. The Court of Appeal held that the distinguishing factor between cases which could succeed on the basis of unfairness and those which

could not was whether the Secretary of State bore any responsibility for the errors which had occurred. The so-called student fairness cases all depended upon a change of position of which the Secretary of State was aware. The students had been caught out by actions taken by the Secretary of State and had no opportunity to protect themselves.

24. In the cases where it had been concluded that there had been unfairness the Home Office bore substantial responsibility for the errors which had occurred.

25. Lord Justice Sales said:

    (i) "In the present case by contrast the Secretary of State had no means of knowing why the Appellant's CAS letter had been withdrawn and was not responsible for its withdrawal and the fair balance between the public interest in the due operation of the PBS regime and the individual interest of the Appellant was in favour of simple operation of the regime without further ado."

26. Lord Justice Floyd, in the minority made the same point and said:

> "Where is the line to be drawn in these classes of case? To my mind the principle must be that where the Secretary of State becomes aware of a material change of circumstances, since the application was filed which would have the effect that the application must be refused then (unless it is clear that the applicant has been made aware of the change of circumstances or that the change of circumstances was the fault of the applicant or that the defect is obviously irredeemable) she must give the applicant an opportunity of dealing with the changed circumstance. Such principle in my judgment strikes the right balance between the need for the PBS system to work efficiently and for it to work fairly."

27. In this case plainly the Respondent could bear no such responsibility which rested, on the facts as found by the judge, entirely with Mr and Mrs G. Neither did she have any means of knowing why the funds were not available in the account.

28. The delay of seven weeks is not an unreasonable one but in any event the Secretary of State could not possibly have known that Mr and Mrs G intended to, on the Appellant's evidence, maliciously undermine the application and indeed defraud her because she had already paid them the fee through her wages.

29. So far as Basnet is concerned, the judge was plainly right to distinguish it. In Basnet the Appellant could show that there were sufficient funds in his account and was able to demonstrate that the application was accompanied by authorisation to obtain the entire fee which was available in the relevant bank account. In this case the judge found on the balance of probabilities that there were insufficient funds in the account to cover the cheque.

30. Ms Warren's said that the duty does not arise in all cases but only in cases where there is particular vulnerability, and where the UK has specific obligations such as in

the prevention and combating of trafficking in persons. It is difficult to see how the UK's obligations under Article 4 of the ECHR or Article 2A of the Palermo Protocol require them to alert an applicant, applying for a domestic service visa, that there were insufficient funds in the account to pay the cheque. Whilst the UK has obligations to prevent and combat trafficking it is difficult to see why those obligations should extend to giving notice of insufficient funds in an account. Ms Warren submitted that the fact that the cheque was drawn on the employer's account should have alerted the Secretary of State to the potential problem, but the employer was sponsoring the application and there was no reason at all to believe that Mr and Mrs G would have acted as they did.

31. It cannot be said that the Respondent's decision is unlawful, and accordingly no error in the judge's decision.

Decision

32. The original judge did not err in law and the decision stands. The Appellant's appeal is dismissed.

No anonymity direction is made.

Signed Date **10th February 2015**

Upper Tribunal Judge Taylor