



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA083172014
IA083182014
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THE IMMIGRATION ACTS

Heard at Field House
On 9 May 2016

Decision & Reasons Promulgated
On 25 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ZAHOOR AHMED
GHAFOORA KHANUM
[I A]
(NO ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Mr T Melvin of the Specialist Appeals Team
For the Respondents: Ms Victor-Mazeli of Counsel instructed by
Middlesex Law Chambers

DECISION AND REASONS

The Respondents

1. The Respondents, Zahoor Ahmed and his wife Ghafoora Khanum and their daughter Irfah Ahmed are all citizens of Pakistan. They are husband and wife and their child

born in 2009. They have another child born in 2012 whose appeal against the decision of the Appellant (the SSHD) of 23 January 2014 has been found invalid.

2. On 14 May 2004 the husband was granted leave to enter as a student. Further leave as a student was granted on a number of occasions. On 23 January 2014 the SSHD refused the husband's application for further leave to remain as a Tier 4 (General) Student Migrant.
3. On 18 March 2006 the wife entered as a dependant of the husband and was granted a series of further leaves in line with her husband. On 6 August 2010 their elder child was granted leave to enter as a dependant and has been granted further leave in line.
4. The two children of the husband and wife were both born in London and are minors.

Background to the Application Leading to the Decision under Appeal

5. On 31 August 2012 the SSHD gave notice to the husband that with effect from 30 October 2012 his leave would be curtailed. Despite a Freedom of Information Act (FOI) request, there does not appear to be a copy of this notice in the Tribunal file.
6. On 9 October the husband, wife and their two children made further applications for leave to remain as a Tier 4 (General) Student Migrant and dependants which in January 2013 were rejected by the Respondent as invalid because the requisite fees had not been paid.
7. On 19 February 2013 they re-submitted their applications which on 23 January 2014 the SSHD refused on the basis that they had failed to supply bank statements for a period ending within one month of the applications which constituted a failure to meet the requirements of Appendix C of the Immigration Rules. It is noted the statements would have covered the relevant period of time if the 9 October 2012 applications had been accepted as valid.
8. On 10 February 2014 the applicants lodged notice of appeal. The grounds are brief and formulaic.
9. On 2 July 2014 they made another application, this time, for indefinite leave on the basis of the husband's claimed ten years' lawful residence upon which it would appear the SSHD has not made a separate decision.

Proceedings in the First-tier Tribunal

10. By a decision promulgated on 20 October 2015 Judge of the First-tier Tribunal Kennedy allowed the appeals, relying on the jurisprudence in *Basnet (validity of application - Respondent) [2012] UKUT 113 (IAC)* and found that the applications of 9 October 2012 were valid and allowed the appeals. In relation to the ten years' lawful residence claim the Judge found as a fact that the husband had not accumulated ten years' lawful residence before the date of the decision under appeal and that this

additional ground in fact was in effect a new application based on events occurring after the date of the decision to refuse further leave as a student and dependants.

11. The SSHD challenged the Judge's treatment of the 9 October applications as valid, noting that subsequent to the hearing before the Judge and the signing of the decision but before its promulgation the Upper Tribunal had reported its decision in *Mitchell (Basnet re-visited) [2015] UKUT 00562 (IAC)*.
12. On 14 April 2016 Designated Judge of the First-tier Tribunal Macdonald granted the SSHD permission to appeal because whereas *Basnet* had placed the burden of proof on the SSHD, *Mitchell* had recognised that the SSHD may not have access to the reasons why a payment had been declined and a more nuanced approach to the burden of proof might be needed.

Proceedings in the Upper Tribunal

13. The husband was present at the hearing. I explained the purpose and procedure to be followed in an error of law hearing. He confirmed his address as recorded in the Tribunal file.
14. Both parties agreed the sole issue before the Upper Tribunal was whether the Judge's treatment of the issue of the payment of fees disclosed a material error of law. Ms Victor-Mazeli opened by stating that although the decision under appeal was of the second application made on 19 February 2013 that application was a variation of the previously and wrongly rejected October 2012 application.

Submissions for the SSHD

15. Mr Melvin referred to pages 426 and 430 of the bundle disclosed pursuant to the FOI request. These noted that the application was invalid because payment of the required fee of £969 had been declined. The jurisprudence in *Mitchell* was applicable because *Mitchell* had been reported before the Judge's decision had been promulgated. The consequence was that the Judge should be considered as having mis-directed himself and the SSHD should be entitled to the benefit of the decision in *Mitchell* reported before promulgation.

Submissions for the Applicants

16. Ms Victor-Mazeli noted that the decision in *Mitchell* had been reported some two and a half months after the Judge heard the appeal. At the time the relevant law was that referred to in *Basnet* and the Judge had correctly directed himself so there was no material error of law in his decision. In any event, if the Judge had considered *Mitchell*, she submitted, he would have come to the same decision. The October application was on its face good and the burden was on the SSHD to show the fees had not been paid. Further, the decision in *Mitchell* could be distinguished because in *Mitchell's* case the appellant had failed to sign the mandate for payment of fees of her first application.

17. The Judge had considered the evidence for the SSHD and had referred at paragraph 32 to the relevant pages in the FOI request bundle. On the evidence he was entitled to reach to his conclusions. She pointed out the FOI request bundle showed that the 19 February 2013 application the SSHD had mislaid the fees and submitted that if this had happened on the second application it was possible there had been a similar mishap with the fees for the 9 October 2012 application. It was of note that the SSHD had been unrepresented at the hearing before the Judge.

Response for the SSHD

18. Mr Melvin reiterated that the decision in *Mitchell* had been reported before the Judge's decision had been promulgated.

Consideration and Conclusion

19. In a closely focused and well-constructed decision the Judge properly applied the law as explained in *Basnet*. Through no fault of the Judge, the law was subsequently explained in *Mitchell* reported before the Tribunal administration had promulgated the decision which the Judge had signed before *Mitchell* was reported. *Mitchell* explained the existing law and so is applicable to the circumstances of this appeal. It is therefore with considerable reluctance that I find the decision contains a material error of law.
20. Although both parties agreed that I might determine the appeal substantively without further submissions, I have on reviewing the file come to the conclusion that this is not practicable for reasons which follow.
21. There is no explanation from the Respondent of the expression at page 420 in the FOI bundle of the wording: "The application is potentially in-valid due to ç - fee declined" recorded on 19 October 2012. Similarly there is no explanation of the meaning of "(symbol) PUK Payment Error" at page 430 of the bundle recorded for 17 October 2012. On the other hand, the husband and wife have failed to identify clearly the means of payment tendered for the application of 9 October 2012 and to supply sufficient evidence to show that the relevant account or accounts were in funds for the period 9-18 October 2012. The credit card payment records which have so far been submitted are incomplete for the relevant period and there is an issue as to the appropriate credit card number which Ms Victor-Mazeli sought to explain at the hearing by stating that the card issued on the account had been replaced by a new card with a different number. Additionally, the bank statements for the same period which have so far been submitted are incomplete or missing. For these reasons, the matter must be remitted for a further hearing which having regard to Practice Statement 7.2 of November 2014 should be in the First-tier Tribunal before a Judge other than Judge Kennedy.
22. The facts as found by the Judge at paragraphs 32 and 33 of his decision shall stand but will need to be considered in conjunction with other evidence, some of which I have already identified, through the prism of *Mitchell*.

Anonymity

23. There was no request for an anonymity order and I find that none is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained a material error of law and is set aside to the limited extent for the issue whether fees on the 9 October 2012 application were paid to be remitted to the First-tier Tribunal for consideration afresh.

DIRECTIONS

By no later than ten working days before the next hearing the parties are to file and serve as appropriate the respective explanations and documents referred to in paragraph 21 above.

Signed/Official Crest

Date 24. v. 2016

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal