Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Michael Mosinimu Mark Akande) v Secretary of State for the Home Department [2014] UKUT 00468 (IAC)

Heard at Birmingham Civil Justice Centre
On 13 August 2014

Promulgated

……

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

R (ON THE APPLICATION OF MICHAEL MOSINIMU MARK AKANDE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Mr T Mahmood (instructed via Direct Public Access)
For the Respondent: Mr V Mandalia (instructed by the Treasury Solicitor)

JUDGMENT

Judge Grubb:

1. The applicant seeks a judicial review of the Secretary of State's decision of 10 September 2013 to set removal directions for the applicant's removal to Nigeria following the refusal on 9 May 2013 of the applicant's application for leave to remain

in the UK as a Tier 4 (General) Student Migrant under para 245ZX of the Immigration Rules (HC 395 as amended) and for a Biometric Residence Permit.

2. Although the applicant formally challenges the removal directions of 10 September 2013, it was common ground between the parties that the substance of the applicant's challenge was to the refusal on 9 May 2013 to grant him leave as a Tier 4 (General) Student.

Introduction

3. The applicant is a Nigerian national who was born on 2 July 1980. He entered the United Kingdom on 28 September 2004 with entry clearance as a student valid until 31 October 2007. Subsequently, he was granted further leave as a student until 30 September 2008 and as a Tier 1 (Post-Study) Student until 9 June 2012. Further leave as a Tier 4 (General) Student was granted, following reconsideration after an initial refusal, until 19 April 2013.

4. The applicant sought further leave as a Tier 4 (General) Student. What precisely happened on or after 19 April 2013 in relation to his application for further leave is the central issue in this case. The applicant's case is that on 19 April 2013 he made an online application for further leave which he submitted to the UKBA. On that date, he paid the requisite fee of £781 via WorldPay and, as he was applying via the "premier service "route (to which I shall return shortly), he made an appointment for an interview at the UKBA offices in Sheffield for a few days later on 22 April 2013.

5. Following that process, on 9 May 2013 the Secretary of State refused the applicant's application for further leave as a Tier 4 (General) Student on the basis that he could not satisfy the maintenance requirements in Appendix C of the Rules as he could not demonstrate that he had the required funds of £5,331.50 for 28 days prior to the date of his application. In his own bank account, the applicant could only show £2,877.81 and the applicant could not rely upon financial sponsorship from his uncle because the applicant had failed to establish, as required by para 13 of Appendix C, that his uncle was his "legal guardian".

6. In refusing the applicant's application, the Secretary of State's decision stated that the applicant had no right of appeal against the refusal of leave. This was because his application had been made at a time when he did not have leave to remain as his leave had expired on 19 April 2013 and his application had been made on 22 April 2013. There was, consequently, no immigration decision falling within s.82 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") as the Respondent had not made a refusal to vary, by extension, the Applicant's leave (see, s.82(2)(d) of the 2002 Act). On 16 April 2013 the Secretary of State affirmed the decision.

7. On 27 August 2013, the applicant was served with notice that he was liable to removal as an overstayer and he was detained. On 10 September 2013, the applicant was served with removal directions to Nigeria. On 16 September 2013, the removal directions were cancelled and the following day, on 17 September 2013, the applicant

issued these proceedings. On 2 October 2013, the applicant was granted bail by an Immigration Judge and released from detention.

8. On 18 November 2013, the Secretary of State considered the applicant's claim to remain in the UK under Art 8. In her decision, she refused his application and certified the claim as "clearly unfounded" under s.94(2) of the 2002 Act.

9. On 23 April 2014, HHJ Purle QC (sitting as an Upper Tribunal Judge) granted the applicant permission to bring these proceedings. On 16 June 2014, HHJ Purle QC (sitting as an Upper Tribunal Judge) dismissed an application to set aside or review that decision.

The Issues

10. The applicant's grounds read with Mr Mahmood's skeleton argument raise three issues.

11. First, the applicant argues that he has a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against the decision to refuse him leave on 9 May 2013 because his application for leave was made in time on 19 April 2013.

12. Secondly, the applicant argues that the Secretary of State was wrong to disregard the evidence of financial sponsorship from his uncle who, it is said, is his legal guardian.

13. Thirdly, the applicant argues that the Secretary of State failed to consider his claim under Art 8 of the ECHR.

Issue 1: Right of Appeal

14. The applicant's principal argument is that he had a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) (the "FtT") as a result of the respondent's decision on 9 May 2013 to refuse his application for leave to remain. The basis of that argument is that the applicant made an in time application on 19 April 2013 so that the resulting decision taken on 9 May 2013 to refuse him leave to remain was an "immigration decision" under s.82(2)(d) of the 2002 Act. It is accepted that if the applicant did make an in-time application on 19 April 2013, then he has a right of appeal to the FtT

15. The applicant's contention is that he made his application online on 19 April 2013 rather than on 22 April 2013 when he attended the UKBA offices at Sheffield.

16. Mr Mahmood, on behalf of the applicant relied upon three emails addressed to the applicant dated 19 April 2013. The first confirmed that the applicant had paid the required fee to WorldPay of £781 acting on behalf of the UKBA. The second from the UKBA confirmed that the applicant had completed his application online. The third confirmed an appointment had been made with the UKBA at Sheffield for 22 April 2013. Mr Mahmood submitted that the applicant had "submitted" his application online on 19 April 2013 and by virtue of para 34G of the Immigration Rules that was the date upon which his application was made.

17. Mr Mandalia, on behalf of the respondent submitted that the applicant could not have made an application online on 19 April 2013 as Tier 4 (General) Students were unable to do so until June 2013. He relied upon a witness statement of Gareth Hunt, a Higher Executive Officer at UK Visas and Immigration based in Sheffield dated 11 August 2014 who stated that was the position. He submitted that the emails did not establish that an application had been "submitted" online. Rather, he contended that the applicant had completed the form online and made the necessary payment as a "print and send" application. The application was, Mr Mandalia argued, merely held on the website to be printed off and either sent by post to the UKBA or, as the applicant had chosen in this case to take advantage of the "Premium service", to be taken so as to submit the application in person at an interview.

18. Paragraph 34G of the Immigration Rules sets out when an application is "made" and, so far as relevant, provides as follows:

> "For the purposes of these rules, the date on which an application or claim (or a variation in accordance with paragraph 35E is made, is as follows:
>
> ....
>
> (ii) where the application form is submitted in person, the date on which it is accepted by a public enquiry office of the United Kingdom Border Agency of the Home Office,
>
> ....
>
> (iv) where the application is made via the online application process, on the date on which the online application is submitted."

19. The applicant's contention is that he submitted the application online and so by virtue of para 34G(iv) the application was made on 19 April 2013. The respondent's contention is that the applicant made the application in person and, by virtue of para 34G(ii), the application was made on 22 April 2013.

20. At the outset of the hearing, I enquired of the parties' representatives whether a copy of the application which the applicant had undoubtedly made at some point was available. It was not included in the Tribunal's papers and, it seemed to me, it would be advantageous to obtain a copy which might cast some light on the process by which the application was submitted and potentially, therefore, the date on which it was made. As a result of my enquiry, Mr Mandalia made enquiries as to whether the application form could be obtained. Following a short adjournment, Mr Mandalia informed me that the application was not available for the hearing as it was archived. It is, perhaps, a matter of some surprise that the application did not form part of the papers available to the Tribunal. Mr Mahmood told me that the applicant had not kept a copy of the application. Despite its absence, both representatives invited me to continue with the hearing and neither sought an adjournment in order to obtain the application. Both invited me to reach a decision on the basis of the documentary evidence and the witness statement of Mr Hunt.

21. In addition, I was only provided with the Home Office guidance entitled "Specified application forms and procedures" dated 30 May 2014. It was accepted that this was not the relevant guidance in force in April 2013. I was, nevertheless, shown it in order to illustrate the difference between a standard application made by post and a "Premium application" which required an appointment with the UKBA following an online application. It was common ground between the parties that the applicant had, albeit in April 2013, utilised the "Premium" service requiring an appointment with the UKBA. It was also common ground that the applicant had, at least, made that appointment online on 19 April 2013 with the appointment fixed for 22 April 2013.

22. The crucial issue is, therefore, whether as part of that "Premium" application process the applicant made the application online on 19 April 2013 or only when he attended the appointment with UKBA in Sheffield on 22 April 2013.

23. I begin with the evidence relied upon by the applicant.

24. The applicant relies upon three emails. All three are dated 19 April 2013 addressed to him and are timed chronologically at 16:44, 16:45 and 16:47.

25. The first is a "Transaction Confirmation" of payment made by the applicant online for his application. It states as follows:

> "Your transaction has been processed by WorldPay on behalf of UK Border Agency. We have received your payment of £781.00 for United Kingdom Border Agency service Tier 4 Student 'print and send' application. Thank you.
>
> UKBA reference number PTBA10-2982-1975-24R3
>
> WorldPay transaction IDL: 2612701000
>
> Once the UK Border Agency has received your official document and supporting documents, your application will be complete."

26. The second email is from the UKBA and states as follows:

> "You have completed your application Tier 4 Student 'print and send' application online.
>
> You will only have access to view or print a copy of your application from your account for 56 days after the date shown in your customer account as 'completed online date'. Your official document will be permanently deleted at 03.33 AM on Thu 13 Jun 2013 and you will not be able to view or print it."

27. Finally, a third email also from UKBA confirms an appointment made at the Sheffield office on 22 April 2013 and is in the following terms:

> "Your appointment details are as follows:
> Booking reference: 13-2-1263703
> Date: Mon 22 Apr 2013

Time: 11:10 AM
Location: Sheffield
Number of attendees (including yourself): 1

Checklist:

- If you need to pay for your application, you must make a payment shortly after booking your appointment. You can find out how to pay, and when you need to pay, by reading http://www.ukba.homeoffice.gov.uk/aboutus/contact/applyinginperson/cost/. If you do not pay in time, we will normally cancel your appointment.

- Arrive 30 minutes before your appointment. You will need this time for security checks.

- Bring all the dependants booked into this appointment.

- Bring a printout of this page or your confirmation email.

- If you are using a paper form (one you can print out and fill in by hand), you must bring confirmation that you have paid for your application.

- If you completed your application online, bring your official document.

- Bring your supporting documents. See your official document for details.

- If you are unable to attend, please cancel your appointment. If you originally made your appointment on our website, log in to your UKBA Account. Otherwise, call the contact centre on 08706067766. If you do not attend a booked appointment, we will not refund the GBP 100 appointment fee per applicant unless there are exceptional circumstances."

28. On behalf of the respondent, Mr Mandalia relied upon the witness statement of Gareth Hunt dated 11 August 2014 which, so far as relevant, states as follows at paras 3-4:

> "3. I can confirm that there was not any method for making any online application for leave as a Tier 4 (General) Student Migrant in place in April 2013. There was no system in place to accept online applications until June 2013. It was not possible for Mr Akande to have made any online application on 19.04.13.
>
> 4. What would have been possible in April 2013 was for Mr Akande to make an online application for an appointment to attend in connection with making a Premium service application. However, the application itself could not have been made until Mr Akande attended that appointment and paid the necessary fee. That would have happened at his appointment, on 22.04.13."

29. Mr Hunt states at para 1 of his statement that he is the "Premium Service Strategy Project Manager" at Sheffield and has held that position since April 2013. He states that the statement "is made from my own knowledge of the Respondent's Premium service".

30. There is no doubt that the applicant at least filled in an application form online on 19 April 2013. As the second email from the UKBA states, his application was "completed .... online". Equally, it is clear that the applicant paid for his application for leave online on 19 April 2013 as the first email from WorldPay makes clear.

31. The evidence of Mr Hunt is, however, unequivocal: an online application could not be made under the "Premium service" in April 2013. Mr Hunt, as he says in his statement, holds a position, coincidentally since April 2013, which would well place him to know whether an online application for Tier 4 student leave could have been made on 19 April 2013. It is his unequivocal evidence based upon his own knowledge that it could not be done.

32. Mr Mahmood submitted, in effect, that Mr Hunt's evidence was not reliable since in para 4 it stated that both an application and payment of fee could only be made by attending for an appointment at the UKBA. Mr Mahmood submitted that was plainly contrary to what had actually occurred as it was clear from the first email from WorldPay that the applicant had been able to pay online.

33. I do not read para 4 of Mr Hunt's witness statement as stating that a payment could only be made in person in April 2013. What it seems to me he is saying in para 4 is that a "premium service" application had to be made in person and the necessary fee had to be paid. In my view, the final sentence in para 4 is equivocal as to whether or not the payment could only have been made at the appointment. Therefore, I see nothing inconsistent between Mr Hunt's evidence that an application could not be made online and the first email from WorldPay confirming that the applicant had paid for an application online.

34. Likewise, the email from the UKBA confirming that the applicant had "completed" his application "online" does not say that he had "submitted" that application. That email is equally consistent with the process that Mr Mandalia submitted had taken place in this case, namely that the applicant had completed the application online and that he then had the choice, using the "standard service" to print and send it to UKBA or, using the "premium service", to print it and take it to an appointment where the application would be "submitted" and therefore be "made" by virtue of para 34G of the Immigration Rules. Indeed, that might be the natural inference from the email's reference to the applicant's application being a "print and send" application. That, in my judgment, explains the final paragraph of that email which confirms that the "completed" application can only be viewed and printed out for 56 days after the date shown as the "completed online" date. Thereafter, the application will be permanently deleted. It might be thought rather curious that an application would be deleted after 56 days if, in fact, that application had been submitted and was pending (at least potentially) before the UKBA. What this paragraph reflects, in

my judgment, is that an application "completed" online is held and available to an individual as a "print and send" application for 56 days in order that the individual can print it and either send it (using the "standard service") or submit it in person at an appointment (using the "premium service").

35. The third email confirming the applicant's appointment with UKBA at Sheffield on 22 April 2013 again merely states that the application has been "completed" online. It does not state, nor is it a necessary inference, that the application has been submitted online. Indeed, the fifth and sixth bullet points, dealing respectively with a paper application form and one completed online, are both consistent with the application not being made until the appointment. Both require the individual to bring either the paper form (i.e. one completed by hand) or the online completed form to the interview. Clearly, the "paper form" could not have been submitted until the interview. Likewise, in my judgment, the requirement to bring along a printed copy of an application completed online is, at the least, consistent with that application having not yet been submitted to the UKBA until the form is produced by the individual at the interview.

36. Mr Mahmood placed some reliance upon a letter from the UKBA dated 22 April 2013 which thanked the applicant for his application and requested that he submit detailed bank statements covering the last 28 days in order that his application could be determined. Mr Mahmood submitted that this letter was in response to an application made three days earlier online on 19 April 2013. I do not accept that submission. It seems to me that, as Mr Mandalia submitted, the timing of the letter written on the same day as the applicant's appointment, is equally consistent with the operation of the premium service which the applicant utilised.

37. It is, perhaps, a matter of some regret that the application form was not produced in these proceedings by either the applicant or the respondent. However, as I have already indicated, both representatives were content that the underlying factual issue of whether an application was made on 19 April 2013 or 22 April 2013 should be decided on the documents and witness statement of Mr Hunt. In my judgment, nothing in the email traffic to the applicant on 19 April 2013 persuades me that he "submitted" an application online on 19 April 2013. By contrast, the evidence of Gareth Hunt, who is well placed through his personal knowledge to know what processes were in place in April 2013, is clear that an online application for Tier 4 student leave could not be made in April 2013 and only became an option in June 2013. I accept that evidence. In my judgment, the applicant only "completed" his form online on 19 April 2013. There is no direct evidence from the applicant as to what he then did. The reasonable inference is that he printed that application out and took it with him to his appointment with the UKBA on 22 April 2013. It was at that point he "submitted" his application and, by virtue of para 34G(ii), it was on that date, namely 22 April 2013 that he made the application for Tier 4 leave.

38. Consequently, on the date he made his application the applicant's leave had already expired on 19 April 2013. The respondent's refusal to grant him further leave made in her decision on 9 May 2013 was not, therefore, an appealable decision under

s.82(2)(d) of the 2002 Act. It was a decision that, as the Secretary of State correctly notified the applicant, did not attract a right of appeal.

39. For these reasons, I reject this ground.

Issue 2: Maintenance

40. The requirements for leave to remain as a Tier 4 (Student) Migrant are set out in para 245ZX of the Rules. So far as relevant to this case, para 245ZX(d) requires that "the applicant must have a minimum of 10 points under paragraphs 10 to 14 of Appendix C."

41. Paragraph 11 of Appendix C sets out the "maintenance" requirements that an individual must meet in order to obtain the necessary 10 points. It is common ground between the parties that the applicant was required to show that he had available to him the equivalent of £5,331.50 for a period of 28 days between 6 March 2013 and 3 April 2013. That figure consists of two months' maintenance at £800 per month together with outstanding tuition fees.

42. Paragraph 13 of Appendix C sets out the permitted sources of such funds. In addition to the applicant himself, para 13(ii) permits the funds to be available from:

> "The applicant's parent(s) or legal guardian(s), and the parent(s) or legal guardian(s) have provided written consent that their funds may be used by the applicant in order to study in the UK; ..."

43. Paragraph 13B of Appendix C sets out a number of documents which must be provided where reliance is placed upon sponsorship from a parent or, as the applicant claims is relevant in this case, a "legal guardian". Paragraph 13B, so far as relevant, provides as follows:

> "If the applicant is relying on the provisions in paragraph 13(ii) above, he must provide:
>
> (a) one of the following original (or notarised copy) documents: ....
>
> (ii) his certificate of adoption showing the name of both parent(s) or legal guardian, or
>
> (iii) a Court document naming his legal guardian; and
>
> (b) a letter from his parent(s) or legal guardian confirming:
>
> (i) the relationship between the applicant and his parent(s) or legal guardian, and
>
> (ii) that the parent(s) or legal guardian give their consent to the applicant using their funds to study in the UK."

44. Although Mr Mahmood initially submitted that the applicant had submitted sufficient evidence of funds held by his uncle, who is his legal guardian, ultimately Mr Mahmood accepted that the applicant had not submitted with his application, as he was required by the Rules, either a "certificate of adoption" showing his uncle as his legal guardian or "a Court document" naming his uncle as his legal guardian. In the absence of that documentation, the applicant's claim to be entitled to the 10 points under Appendix C for maintenance was doomed to fail. It was simply not sufficient to produce his uncle's bank statements and rely on them unless he could also prove by the required documentation that his uncle was his legal guardian.

45. Consequently, the respondent was entitled (indeed required under the Rules) to disregard the evidence of financial sponsorship by the applicant's uncle in the absence of the required documentation under para 13B of Appendix C that he was the applicant's legal guardian.

46. For those reasons, I also reject this ground.

Issue 3: Article 8

47. In relation to this ground, Mr Mahmood both in his oral and written submissions simply submitted that the respondent had failed to consider the applicant's Art 8 rights when refusing him leave as a Tier 4 Student on 9 May 2013. However, in his oral submissions he acknowledged that this was not his main ground of challenge.

48. That was, in my judgment, an entirely realistic stance to have taken. First, although the respondent's decision of 9 May 2013 made no reference to the applicant's Art 8 rights, her subsequent decision of 18 November 2013 deals at length with the applicant's claim based upon any family and private life in the UK under the Immigration Rules and Art 8 outside the Rules. In that latter decision, the Secretary of State went on to certify the applicant's human rights claim as "clearly unfounded" under s.94(2) of the 2002 Act. Mr Mahmood did not suggest that the respondent's decision of 9 May 2013 should be read in isolation from her later consideration of Art 8 in her decision of 18 November 2013.

49. As regards his claimed family life, the applicant relied upon his relationship with his adult siblings in the UK. The Secretary of State entirely correctly concluded that any such relationships could not fall within the Immigration Rules, namely Appendix FM. Mr Mahmood did not seek to argue to the contrary.

50. As regards the applicant's private life in the UK, the Secretary of State concluded that the applicant could not meet the requirements of para 276ADE of the Immigration Rules as he had not been resident in the UK for twenty continuous years (para 276ADE(iii)) and had not established that he had lost all "ties" with Nigeria (para 276ADE(vi)). Those findings were also not challenged by Mr Mahmood in his oral submissions or skeleton argument.

51. In relation to Art 8, the Secretary of State accepted that the applicant had established a private life in the UK based upon his nine years' residence. The Secretary of State

noted the applicant's history of study on a lawful basis including that he had spent thousands of pounds, had advanced well and was now not able to complete his studies. Nevertheless, the Secretary of State concluded that the applicant's removal would be proportionate and that there were not "sufficiently compelling or compassionate circumstances to warrant permitting you to remain in this country, on a discretionary basis, exceptionally outside of the Immigration Rules."

52. The applicant places some reliance on the Court of Appeal's decision in OA (Nigeria) v SSHD [2008] EWCA Civ 82. In that case, the individual relied upon the disruption to her studies resulting from her removal as a basis for her claim under Art 8 of the ECHR. The Court of Appeal held that an Immigration Judge had been entitled to find that her removal was a disproportionate interference with her private life disrupting, as it did, her study in the UK during her degree course.

53. It is not necessary for me to set out in detail the reasoning of the Court of Appeal. It suffices to say that the circumstances in OA were unusual and compelling. The individual concerned had been the subject of fraud by an immigration advisor who had, prior to her leave expiring, told her that she had been granted indefinite leave to remain and had returned her passport complete with the required stamp. That was fraudulent and the individual concerned was wholly unaware of the problems with her status. The Court of Appeal accepted that the individual, had she made the necessary application to remain, would almost certainly have succeeded and given the circumstances surrounding the fraud by her advisor, it was not irrational for the Immigration Judge to have allowed her appeal under Art 8.

54. The present facts do not bear a true comparison with OA. Here, the applicant simply could not meet the maintenance requirements of the Rules. There is no comparison between this failure and the circumstances of the individual in OA.

55. Further, the applicant's claim was, in any event, weak. In Patel and Others v SSHD [2013] UKSC 72, Lord Carnwath dealt with the situation of an individual who failed to meet the requirements of the student rules and said this at [57]:

> "... such considerations do not by themselves provide grounds of appeal under Article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8."

56. In my judgment, the Secretary of State was fully entitled to conclude that the applicant could not succeed under Art 8 of the ECHR. The reasoning in her decision letter of 18 November 2013 led her to a rational and lawful decision to refuse the applicant's claim to remain in the UK based upon either his family or private life under Art 8 of the ECHR.

57. Reading, therefore, the decision letters of 9 May 2013 and 18 November 2013 together, I reject this ground also.

58. It is, perhaps, unnecessary for me to deal with the respondent's certification of the applicant's claim under Art 8 as being "clearly unfounded". As Mr Mandalia

submitted, the applicant had not sought to challenge that conclusion. I will, however, say a few words in relation to that certification.

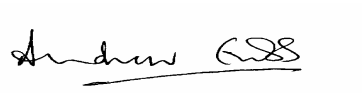
59. First, the certification would not affect any right of appeal against the decision of 9 May 2013, if contrary to my conclusion above, there was an in-country right of appeal. That is because the certification under s.94(4) only prevents the bringing of an appeal in-country where the in-country right of appeal is derived from s.92(4)(a) of the 2002 Act against an immigration decision because a "human rights claim has been made. It does not prevent an appeal being brought against the immigration decisions set out in s.92(2) which includes s.82(2)(d), namely a refusal to vary, by extension, existing leave.

60. Secondly, in any event, given the weakness of the applicant's Art 8 claim based upon his private life in the UK, I am entirely persuaded that it was open to the Secretary of State rationally to conclude that the applicant's Art 8 claim was "clearly unfounded" in the sense that any appeal relying on Art 8 was "bound to fail" (see R (Thangarasa and Yougathas) v SSHD [2002] UKHL 36.

Decision

61. For the above reasons, this claim for judicial review is dismissed.

Signed



A Grubb
Judge of the Upper Tribunal