

IN THE UPPER TRIBUNAL

R (on the application of Razak) v Secretary of State for the Home Department IJR [2015] UKUT 00132 (IAC)

Field House
London

28 January 2015

BEFORE

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

MOHAMED RIYAS ABDUL RAZAK

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr A Jafar, Counsel instructed by Messrs Kothala Solicitors, appeared on behalf of the Applicant.

Ms C Rowlands, Counsel instructed by the Treasury Solicitor, appeared on behalf of the Respondent.

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JUDGMENT

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This judgement is re-promulgated because by error an uncorrected version was originally sent out.

Introduction

JUDGE GOLDSTEIN: The applicant brings an application for judicial review of the respondent's decision of 4 March 2013 to refuse his application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the Points-Based System and for a Biometric Residence Permit.

2. The respondent maintains that the decision was lawful and that the claim is without merit and should be dismissed.

3. The claim for judicial review was commenced on 7 August 2014. Permission was refused on the papers by Her Honour Judge Taylor sitting as a Deputy High Court Judge on 5 March 2014. However, on 19 June 2014, permission to bring these proceedings was granted after an oral hearing by Upper Tribunal Judge Coker who further granted the applicant permission to amend his grounds.

Factual Background

4. The applicant, a citizen of Pakistan born on 17 April 1980, entered the United Kingdom with entry clearance as a student on 13 February 2009 with a visa valid until 31 March 2010.

5. On 30 March 2010 the applicant applied for further leave as a Tier 4 Student that was granted on appeal to 7 October 2012.

6. On 29 October 2011, the applicant's spouse and child entered the United Kingdom with leave in line with that of the applicant.

7. On 9 October 2012, the applicant applied out of time for leave as a Tier 4 Student.

8. The respondent wrote to the applicant on 25 January 2013 to request original bank statements in the form of overseas bank

statements from Hatton Bank (Sri Lanka) and for the original of the applicant's marriage certificate and for the birth certificate of his child.

9. I pause there to point out that the parties before me were agreed that the letter was sent in error to 79 Cardiff Road WC1 8TP by recorded delivery, by which time the applicant had changed address. Indeed and as acknowledged by Ms Rowlands, it was evident from the GCID-Case Record Sheet that appeared at page 97 of the applicant's bundle that as recorded:

"Notes record that a letter was sent on 25/01/13 to request original Hatton Bank statement along with marriage and birth certificates. It isn't clear if this was sent to the correct address - notes gave the correct one but the previous one is on the letter".

10. It was however her position that it was the materiality of that error that was relevant.

11. The application was refused on 4 March 2013 under paragraphs 322(9), 245ZX(a) and (d), because the information that had been requested of the applicant had not been forthcoming. Further in terms of the applicant's claim for 10 points for Maintenance (funds) under Appendix C of the Immigration Rules, the respondent was not satisfied that the documents provided by the applicant demonstrated that he had been in possession of the required level of funds for 28 days. Thus it was considered that there were insufficient funds shown to meet the higher maintenance requirement.

12. In that latter regard, and in her decision letter, the Respondent explained that the applicant had to prove that he had the required maintenance fees of £19,800 plus any outstanding course fees for the first year of his course.

13. Paragraph 1A(h) of Appendix C states that:

"The end date of the 90-day and 28-day periods will be taken as the date of the closing balance on the most recent of the specified documents, and must be no earlier than 31 days before the date of application".

14. As such, the applicant was required to show that he was in possession of £19,800 for a consecutive 28 day period ending on the date of the closing balance of the most recent document submitted or for the account that most favoured the applicant.
15. The respondent concluded that: the applicant had failed to provide his document; failed to provide bank statements that demonstrated that he was in possession of the required level of funds for a consecutive period of 28 days; and failed to provide evidence of an established presence.
16. The applicant's dependants (his wife and child) were refused in line with that decision.
17. On 14 March 2013 the applicant's reconsideration letter was received to which the respondent replied on 29 May 2013 stating that no reconsideration was possible, because the applicant had applied for leave to remain as a Tier 4 Student after his leave had expired. There was no right of appeal. Further, because Article 8 of the ECHR had not been raised before, a separate application would have to be made for that purpose.
18. On 7 August 2013 the applicant lodged his judicial review proceedings, that being more than three months after the decision to refuse his leave to remain.

The Issues

19. The applicant's amended grounds raised four challenges to the respondent's decision, namely; he should have been considered to have established presence; that the respondent

erred in calculating the 28 day period; erred in the application of the evidential flexibility policy; finally, that the respondent should have considered the applicant's Article 8 rights, although they were not raised in his application.

20. However, before me at the outset of the hearing both parties took a very sensible approach and agreed that the outcome of this case turned on the proper construction of paragraph 1A(h) of Appendix C. It was accepted that if the applicant could not satisfy the requirement of that Rule then he could not succeed and vice versa. Mr Jafar further however clarified that the applicant continued to maintain that the Respondent should have considered his Article 8 ECHR rights.

28 Day Period

21. The statement dated 1 October 2012 showed a closing balance that had remained unaltered since 24 September 2012.
22. Having referred to the requirements of paragraph 1A(h) of Appendix C (above) Mr Jafar drew attention to the Respondent's decision letter of 4 March 2013 where in reliance on the provisions of 1A(h) the respondent continued as follows:

"As such, you are required to show that you are in possession of £19,800 for a consecutive 28 day period to meet the Tier 4 (General) Student Migrant Maintenance (funds) requirements as required by paragraph 1A of Appendix C of the Immigration Rules.

You have provided a copy of an overseas bank statement that is not notarised (it does have a stamp and states true copy but this is what the bank have put on) - the copy shows transactions between the required 28 day period in corroboration with the UK bank statements.

An original letter from the overseas bank states the balance of account which cannot be accepted as it does not demonstrate the full 28 days.

The Lloyds TSB account shows the lowest amount of funds held within the 28 day period as 7088.14 on 30 August 2012.

The Hatton National Bank document with account shows the lowest amount of funds held within period as 1121224.79 SLR which converts to 5,458.98 British Pound.

As the bank letter submitted only shows the level of funds available to you on 24 September 2012, you have not demonstrated that you have a level of funds required over the specified 28 day period to be granted as a Tier 4 (General) Student Migrant.

It has therefore been decided that you have not met the requirements as specified within the Immigration Rules and no points have been awarded for Maintenance (funds)".

23. It was Mr Jafar's submission that there was nothing in the Rules that would have prevented the respondent from taking the balance from the printout date of 1 October 2012 and calculating 28 days back and concluding that combined with the other accounts submitted, this would have taken the applicant over the requisite threshold.
24. In this regard Mr Jafar referred to a schedule prepared on the applicant's behalf that showed that if one calculated the printout date of 1 October 2012 and worked back 31 days to 4 September 2012 the applicant's funds would have been shown to be in total £20,597.82 and thus comfortably over the required threshold.
25. Mr Jafar submitted that the respondent had in error calculated backwards from the date of the closing balance shown on the printout namely 24 September 2012, that took the

applicant's combined funds to 31 August 2012 and thus well below the requisite threshold in the sum of £13,662.31.

26. Mr Jafar continued that it was now accepted that the respondent's letter to the applicant of 23 January 2013 that requested inter alia original bank statements was by mistake sent to the wrong address and therefore never received by the applicant. He maintained that this was highly material because had the Respondent written to the correct address the applicant would have furnished the relevant bank statements that would have included the applicant's Hatton National Bank passbook, a certified true copy of which appeared within the applicant's bundle and where at page 68 of that bundle a balance as at 31 October 2012 of over 1,000,000 Sri Lankan rupees was shown that went back to July 2012.

27. Mr Jafar continued that had the respondent requested the original passbook in January 2013 she would have had the balances to which Mr Jafar referred.

28. There was no dispute that had these balances shown in the passbook that range from 7 July 2012 to October 2012, combined with the Lloyds balances been considered they would have met the required bank balance threshold.

29. Mr Jafar continued that in the event what actually happened on 23 January 2013 was that notwithstanding the evidence that showed that the respondent had already been notified of the applicant's change of address the letter was sent to an incorrect address.

30. Mr Jafar submitted that had that request been made and received by the applicant he would have been required to produce the Hatton Bank passbook as it was in January 2013 and that would have shown the balance of 1,132,567.21 Sri Lankan rupees covering July 2012 to October 2012 and that would

clearly have met the requisite income threshold in conjunction with the Lloyds statements.

31. Mr Jafar repeated that there was nothing in the Rules which would have prevented the respondent from taking the balance for 1 October 2012 and calculating 28 days back and that would have taken the applicant over the income threshold.

32. Mr Jafar contended that by sending the letter of January 2013 to the wrong address, the respondent had denied the applicant the opportunity of "putting things right". Mr Jafar continued by stating "it's a knockout point and if we win on this point nothing else matters".

33. Ms Rowlands in response maintained that it would be wholly artificial to take as the date of the closing balance the date upon which a document showing that balance happened to be printed.

34. She referred to the applicant's bundle pointing out that there were two types of bank statements in the bundle from Lloyds TSB. The document on page 24 of the bundle was headed "classic statement" and was headed with the following:

"The date as shown on your statement was correct at the time of printing. Please remember this isn't an official bank copy".

35. Ms Rowlands continued that on page 26 of the applicant's bundle appeared a formal Lloyds printed bank statement that banks put in the post and send to their customers usually monthly. The statement in the bundle showed at the top of the page "Statement Opening Balance" in the sum of £7,284.94 and no doubt although the next page was not in the bundle it would have stated "Closing Balance" and then provided an appropriate figure.

36. Ms Rowlands continued that one could go to the Lloyds Bank website to obtain the printout that appears in this case at page 24 of the bundle before one received the actual bank statement. That did not mean that the closing balance shown in that statement was the closing balance as at the date it was printed.
37. Given the statement at the top of the printout (above) it was clear that the bank was pointing out that the data on the statement was correct at the time of printing. She cited the example of a cheque that may have been banked and would be included in such a printout at the time of printing. The amount shown would not have been "set in stone, after all, such a cheque may have subsequently bounced".
38. Ms Rowlands submitted that what the document at page 24 did not purport to do was give any information as to what happened after 24 September 2012. Between 24 September and 1 October 2012 there could have been a lot happening. Indeed the entries on the printout show that this was the kind of account that got used on a daily basis. It followed that whilst the date at the time of printing was correct so far as it went, the document did not say or purport to say that there were no entries between 24 September and 1 October 2012 or that the closing balance remained the same on 1 October as it did on 24 September 2012.
39. Ms Rowlands continued that she was supported in that submission by the phrasing of the Rule itself. The date required to be taken was not the date of the document, but the date of the closing balance shown. In the present case, that was the most recent of the specified documents, showing the date of the closing balance as 24 September 2012.
40. In reference to Ms Rowlands' schedule, she pointed out that if 24 September 2012 was day 28 of the 28 day period then day

1 was 28 August 2012 from which it was clear that it was only on day 7 (3 September 2012) that the applicant got above the threshold.

41. Ms Rowlands continued:

"If you are with me on this point this claim must fail and the accepted error of the Respondent therefore had made no material difference".

42. Mr Jafar in response maintained that the printout document on page 24 was

"a proper statement. It is signed by the bank which means that it is a statement, it was correct at the time of printing and the date of printing was 1 October 2012."

43. Having checked with the parties it was agreed that in accordance with 1B of Appendix C of the Immigration Rules more particularly (iv)(3) that the printout document met the requirement of the specified document.

44. Mr Jafar continued that in those circumstances the document was sent by Lloyds and verified and stamped by the bank showing what appeared on their statement as at 1 October 2012. Once the printout was stamped and verified by the bank it had equal weight in the way it was received as a bank statement
The date of the statement was he submitted:

"the key to understanding the balance and the last entry would always be the date of the last transaction. The closing balance is the date of the printout".

45. I reserved my decision.

Assessment

46. I am satisfied that the error of the respondent in sending the letter of January 2013 to the applicant at the incorrect

address made no material difference to the outcome of this case as it would not have rectified matters even if her letter had been posted to the correct address. I note that in addition to the original statements sought not being provided, the respondent on 7 November 2014, had this to say:

"This [copy statement] showed equivalent to 5,458.98 so was not enough by itself even if an original had been submitted".

It follows that as submitted by the respondent the applicant's claim was not refused solely for lack of an original statement.

47. I would further note that the letter from the applicant's solicitors to the Treasury Solicitor dated 22 May 2014 encloses a second statement from Hatton Bank but this was submitted after the date of the respondent's decision and therefore would not have been in any event considered under the evidential flexibility policy.

48. I turn now to the printout document at page 24 of the applicant's bundle. It is stamped by Lloyds Bank and signed to confirm its authenticity. This means that it is admissible as evidence as if it were a bank statement.

49. It does not have a specific entry labelled "Closing Balance" or "Opening Balance" but it is perfectly plain that it shows the balance on the applicant's account specified in the left-hand column. The statement bears the date 1 October 2012 but it is clear that this is when the document was printed. It says nothing about the balance in the account as at 1 October 2012, neither does it purport so to do.

50. The qualification at the top of the document:

"The data as shown on your statement was correct at the time of printing"

means that according to the bank's records the data printed on the account is the up-to-date correct statement of the account on the day shown.

51. It does not purport to show the balance on the date of printing and it does not convey that the balance on the most recent date in the account is the balance on the date of printing. For example, the bank might have been asked on 1 October 2014 to print out the statement for the period 6 September 2012 to 24 September 2012. Assuming that no error had come to light in the meantime, the entries would be exactly the same as those on the document on page 24 except it would be shown to be printed on 1 October 2012.

52. No-one would suggest that it was likely there had been no transactions in the account since 24 September 2012. It was only because the statement was printed close to 24 September 2012 that anyone would think that the date on the statement was in some way connected to the closing balance on that date. There is no reason why it should be.

53. I remind myself of the terms of the Rule. 1A(h) of Appendix C refers to:

"the end date of the closing balance on the most recent of the specified documents and must be no earlier than 31 days before the date of application".

54. In that regard, the date of 1 October 2012 might help to identify the most recent of the specified documents, but it does not illuminate the closing balance on any date other than the last one shown, namely 24 September 2012.

55. I therefore find that Mr Jafar's case notwithstanding the eloquence of his submissions is fundamentally misconceived.

Article 8

56. I shall now deal with this issue given that at the outset of the hearing Mr Jafar was clear that the applicant continued to maintain that the respondent should have considered his Article 8 rights even though they were not raised in his application.
57. Indeed the applicant made no mention of Article 8 in his application and as rightly submitted by the Respondent it follows that the applicant would need to make a proper application paying the relevant fee.
58. Further in any event the applicant has failed to demonstrate that there are exceptional or compelling circumstances in this case not covered by the Immigration Rules which the respondent has failed to take into account. No such considerations have been identified by the applicant to demonstrate his case is either exceptional or compelling.
59. Whilst the applicant appears to suggest that he wishes to pursue an Article 8 ECHR challenge to the decision in terms of his private life, given his wish to continue his studies in the UK, the application fails to engage with the guidance to be found in Patel v SSHD [2013] UKSC 72 and Nasim and others (Article 8) [2014] UKUT 00025 (IAC) and as such, there is no merit to this argument, since the applicant has no right to pursue studies in the UK as he chooses.
60. In Nasim it was observed that the judgment of the Supreme Court in Patel served to refocus attention on the nature and purpose of Article 8 and in particular to recognise that Article's limited utility in private life cases that were far removed from the protection of an individual's moral and physical integrity.

61. Finally, any reliance on Article 8 is premature in that the Respondent has not made a removal decision such that the applicant is unable to continue with his studies.

62. Therefore this ground must also fail.

Decision

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

Costs

64. The respondent seeks payment of her costs by the applicant summarily assessed in the sum of £6,191.

65. The applicant must show cause as to why he should not pay those costs and for this purpose I grant him seven days from the date of the judgment in which to make such submissions (if any) with liberty to the respondent to reply seven days thereafter, such respective submissions to be limited to two sides of A4 paper. Unless otherwise agreed, I shall make a summary assessment on the papers.

Permission to Appeal

66. No application has been made for permission to appeal to the Court of Appeal, but having considered this issue for myself as I am required to do by Rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I refuse to grant such permission.

67. Finally I would like to express my thanks for the clarity with which the parties' representatives presented their respective arguments that I found to be of particular assistance.~~~~0~~~~

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