



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/05533/2013

THE IMMIGRATION ACTS

Heard at : Field House

On : 12 June 2013

**Determination
Promulgated**

On : 13 June 2013

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SHOHEL AHMED

and

Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Hosein of E1 Solicitors

For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh born on 8 October 1985. He has been given permission to appeal against the determination of First-tier Tribunal

Judge Davies dismissing his appeal against the respondent's decision to refuse his application for leave to remain as a Tier 4 (General) Student Migrant.

2. On 25 November 2009 the appellant entered the United Kingdom with entry clearance as a Tier 4 (General) student, valid until 28 October 2012. On 26 October 2012 he applied for leave to remain as a Tier 4 (General) Student Migrant under the Points Based System. His application was refused on 4 February 2013 under paragraph 245ZX(d) of the immigration rules on the basis that he had not achieved the required points for maintenance under Appendix C of the rules. He had submitted bank statements from Prime Bank Ltd as evidence of funds, but Prime Bank Ltd was listed as a financial institution with which the UKBA was unable to make satisfactory verification checks, a matter notified publicly on the UKBA website. As such, the evidence from the Prime Bank Ltd had been disregarded for the purposes of paragraph 39B(c) of the rules. The appellant was accordingly granted no points for maintenance (funds) and his application was refused.

3. In his grounds of appeal to the First-tier Tribunal, the appellant stated that the list of relevant banks did not exist at the time he made his application and had only come into force on 13 December 2012. He had spent money on his course and the decision to refuse his application on that basis was therefore unfair and in breach of Article 8 of the ECHR.

4. In accordance with the appellant's request, his appeal was determined on the papers, without an oral hearing, by the First-tier Tribunal. Judge Davies dismissed the appeal under the immigration rules on the basis that the appellant was unable to discharge the burden of proof upon him.

5. Permission to appeal to the Upper Tribunal was sought on the grounds that the First-tier Tribunal Judge had failed to understand the appellant's case; that his reasons were inadequate and his findings vague; that he had failed to consider Article 8 of the ECHR; and that his decision was irrational.

6. Permission to appeal was granted on 8 May 2013, primarily on the ground relating to Article 8.

Appeal hearing and submissions

7. I put to Mr Parkinson, at the commencement of the hearing, the view that this was a case that raises issues of common law unfairness, as in Thakur (PBS decision - "common law fairness) Bangladesh [2011] UKUT 151. However his view was that the circumstances were very different to Thakur since there had always been a requirement for banks to provide verification when requested by the UKBA and the fact that the bank could not do so was sufficient grounds for the application to be refused.

8. Mr Hosein then put his grounds to me and submitted that no such list of banks had existed at the time the appellant submitted his application and the bank had, in the meantime, been taken off the list again. It was unfair to

expect the appellant to have known about the list of banks and the judge had erred by failing to consider that. Furthermore, the judge had failed to consider Article 8.

9. Mr Parkinson submitted that the fairness point had not been raised in the grounds of appeal before the First-tier Tribunal. The burden of proof was upon the appellant to show that the funds were available. The Secretary of State had concerns about Prime Bank Ltd and had thus included it in the list of banks with which they had difficulties verifying documents. The evidence before the judge in regard to Article 8 was very limited. The decision was lawful.

Consideration and findings

Error of Law

10. Whilst Judge Davies properly found that the appellant was unable to meet the requirements of the immigration rules as they stood at the time the decision was made, this was a case where, in my view, he ought to have directed his mind to the question of common law fairness. Although the case of Thakur was not expressly cited in the grounds of appeal before him, the appellant had clearly asserted in his grounds that the decision was not fair and was not in accordance with the law, given that the list of banks had not been in existence at the time he made his application. Article 8 was also raised in the grounds. However the judge gave no consideration to those matters and it is indeed not at all clear from his determination that he appreciated the issues being raised.

11. In my view the judge erred in law by failing to consider potentially material matters, in particular the matter of common law fairness, and to make proper findings in response to the grounds raised by the appellant. I therefore set aside his determination.

Re-making the Decision

12. In re-making the decision, I find that this is a case which falls within the principles considered in Thakur, albeit concerning different circumstances.

13. The respondent refused the appellant's application under paragraph 39B(c) on the grounds that she had reasonable cause to doubt the genuineness of his bank statements from Prime Bank Ltd since she had been unable to verify them. The refusal under paragraph 39B(c) was with reference to paragraph 245ZX(d), which in turn, although not expressly stated in the decision letter, was by reference to Appendix C, paragraph 1A(i), which states:

"1A. In all cases where an applicant is required to obtain points under Appendix C, the applicant must meet the requirements listed below: ...

(i) No points will be awarded where the specified documents show that the funds are held in a financial institution listed in Appendix P as being an institution with which the UK Border Agency is unable to make satisfactory verification checks."

14. Appendix P provides a list of financial institutions that do not satisfactorily verify financial statements, or whose financial statements are accepted. Paragraphs 4 and 5 of Appendix P states as follows:

“4. An applicant will not satisfy any requirement in these rules which requires him to provide documents if those documents relate to a financial institution on a list of those that do not satisfactorily verify financial statements.

5. Where stated in the lists below, the 'effective date' is the date from which the UK Border Agency will not accept financial statements relating to the stated institution.”

15. Paragraphs 7 (xi) and (xii) of Appendix P refer to financial institutions in Bangladesh; paragraph 7(xi) to financial institutions in Bangladesh that do not satisfactorily verify financial statements, set out in Table 11, and paragraph 7(xii) to financial institutions in Bangladesh whose financial statements are accepted, set in Table 12.

16. Whilst, contrary to the assertion in the grounds of appeal, paragraph 39B and Appendix C, paragraph 1A(i) came into force on 20 July 2012, namely prior to the date of the appellant’s application, paragraphs 7(xi) and (xii) of Appendix P did indeed only come into force on 13 December 2012, the date referred to in the grounds. This is also confirmed in the UKBA document at page 22 of the appeal bundle before the First-tier Tribunal, which gives that date as the “effective date” from which the UKBA would not accept financial statements from Prime Bank Limited.

17. Therefore it is the case, as pleaded in the grounds of appeal, that at the time he submitted his application, the appellant’s bank, Prime Bank Limited did not appear on any UKBA list, as a financial institution whose verification processes were of concern to the UKBA. Not only is that the case, but it is also relevant to note that Prime Bank Limited was deleted from the list of financial institutions in Bangladesh that do not satisfactorily verify financial statements, set out in Table 11, on 6 April 2013, and from that date the bank appeared in the list of financial institutions whose financial statements were accepted, as set out at Table 12. Thus, there was a period of only four months, from 13 December 2012 to 6 April 2013, in which the UKBA considered that Prime Bank Limited did not satisfactorily verify financial statements. It was during that period that the respondent made their decision in the appellant’s application.

18. The only reason the respondent gave for having “reasonable cause” to doubt the genuineness of the appellant’s bank statements was that Prime Bank Limited appeared on the list in Table 11 of Appendix P at the time his application was considered. Whilst it may be that there were other reasons to doubt the reliability of the appellant’s evidence of funds, those were not articulated in the refusal notice. Neither did the refusal notice raise any other concerns as to the appellant’s ability to meet the requirements of the rules and it appears that the funds shown in the bank statement, had the statement been accepted as reliable, were sufficient to meet the maintenance requirements of the rules. The appellant was not advised of any concerns about the bank

statement or the bank that issued the statement, nor given any opportunity to transfer his funds to a bank which did not appear in Table 11. It seems to me that that this is a case where, as in Thakur and Naved (Student - fairness - notice of points) [2012] UKUT 14, the appellant neither knew nor should be treated as having known of any problems with Prime Bank Limited and that an issue of common law unfairness therefore arose. As the Tribunal held in the head-note in Naved:

“Fairness requires the Secretary of State to give an applicant an opportunity to address grounds for refusal, of which he did not know and could not have known, failing which the resulting decision may be set aside on appeal as contrary to law (without contravening the provisions of s. 85A of the Nationality, Asylum and Immigration Act 2002).”

19. Accordingly, I find that the respondent’s decision was not in accordance with the law and that the appeal should be allowed on the limited basis that the matter is to be referred back to the Secretary of State to make a fresh, lawful decision in the appellant’s application.

DECISION

20. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside. I re-make the decision in the appeal by allowing it to the limited extent as stated above. The appellant now awaits a lawful decision in his application.

Signed
Date

Upper Tribunal Judge Kebede