IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33031/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd August 2015	**On 21st September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR KEHINDE OLORUNFEMI ADEWALE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Rashid, Counsel instructed by David A Grand Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 25th August 1959 and he appeals under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 against the refusal dated 24th July 2014 to grant him leave to remain in the UK as a Tier 4 (General) Student Migrant under the Points Based System.

2. The respondent claimed that the appellant did not satisfy the Immigration Rules under paragraph 245ZX(c) and 245ZX(d) of the Immigration Rules. It was stated that

it was a requirement of a Tier 4 (General) Student visa that he sit a Pearson English test and had to have assigned that Pearson test score to the UK Border Agency. When the website was checked 24th July 2014 no score had been assigned. Although he provided an English language certificate he had not provided Pearson website access to the UKBA and he did not meet the requirements of the Immigration Rules.

3. As regards his maintenance it was not accepted therefore that the appellant had established presence and therefore he needed to show the maintenance fees of £9,000 plus any outstanding course fees for the first year of his course and to show that he held this for a consecutive 28 day period to meet the Tier 4 (General) Student Migrant maintenance fund requirements.

4. It was also stated that at the time of his application on 28th May 2014 he no longer had any valid leave to remain and therefore did not have established presence. I note that in the reasons for refusal, and this did not appear to be recorded, it was stated that the appellant had no leave to remain at the time of his application and therefore there was no right of appeal against the decision. This did not appear to be a point taken by the Judge of the First-tier Tribunal. Although there was an application to extend time in relation to Rule 7 of the 2005 Procedure Rules it would appear that this was considered on the basis that the appeal was out of time further to **BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035**. It was indicated by Judge Shanahan in a decision on 26th September 2014 [6] that there was an arguable case that the appellant was entitled to a right of appeal and there were special circumstances to extend time but it was specifically stated by Judge Perry, however, that the application was out of time.

5. In the event, however, Judge of the First-tier Tribunal Perry dismissed the appellant's appeal under the Immigration Rules.

6. He noted at paragraph 26 that the appellant contended that his application was made online on 23rd May. However, the judge clearly found the application was made by post and stated as follows:

> "The appellant contended that his application was made online on 23 May. However the Tier 4 application form at page 2 of 14 states 'you need to submit this to us by post in order to make your application'. While it is the case as the appellant asserts that his credit card was debited on 23 May 2014 with the application gee [sic] of £422, it remains the case that the application itself is only valid if made by post. The appellant did submit the documents in post but not until 28 May. I find that this application was out of time."

The judge made a clear finding that the application was out of time.

7. At the hearing before me Mr Rashid submitted that the application was in fact made on 23rd May 2014 and that the appellant initially filled out an application summary which showed that his credit card was charged on 23rd May 2014. He stated that this was a barcoded document which was printed out after the payment was made. I was referred to page 2 of the application where it stated "this is your official document for your application" and to page 14. In essence it was submitted that the appellant

made the application on 23rd May 2014 and that these further documents (including the application) were merely the supporting documents which were submitted. The application was made online. The appellant should be categorised as having established presence in which case he could comply with the maintenance fees required.

8. The onus was on the Secretary of State to establish that access to the Pearson website should be given to UKBA and there was no clear indication of when the Rules changed and they certainly did so subsequently to the appellant's application.

9. Mr Avery submitted **R (on the application of Wasif) v Secretary of State for the Home Department (rule 34 – "print and send") (IJR) [2015] UKUT 00270 (IAC)**. Mr Rashid did not acknowledge that the appellant had opted for option 2 and in any event he stated that this judgment postdated the hearing date.

10. Mr Avery submitted that the appellant had opted for the print and send option but in any event the appellant needed to comply with the Immigration Rules as they were at the date of decision.

11. In conclusion **R (on the application of Wasif) v Secretary of State for the Home Department** explains and declares the law as it was as at the date of application and decision and states as follows:

> "(i) An application for leave to remain in the United Kingdom must comply with the requirements of paragraph A34 and all material provisions of paragraphs 34A – 34K of the Immigration Rules.
>
> (ii) Between June 2013 and August 2014, Tier 4 applicants had the choice of submitting their applications either on line or by the 'Print and Send' mechanism.
>
> (iii) The correct construction of the Rules is as follows:
>
> (a) The first of these options required the submission of the completed application form on line and the provision of supporting documents by post.
>
> (b) The second option, 'Print and Send', required the applicant to print the completed application form and send it, with accompanying supporting documents, by post. The 'Print and Send' instruction does not amount to an on-line application.
>
> (iv) A failure to comply with the requirements in 34A (per paragraph 34C) invalidates the application."

12. It is clear that this describes the process for Tier 4 applications between June 2013 and August 2014 and I note that the appellant's application was made in May of 2014.

13. The judgment of **Wasif** makes clear the law and clearly shows that there were two options to be adopted when applicants were applying. One is the online form and the second print and send.

14. As President McCloskey states at paragraph 12 of **Wasif**:

"The 'print and send' mechanism was first introduced in the Rules in October 2012. I have, for convenience, reproduced in the Appendix to this judgment the version of paragraph A34 of the Immigration Rules which governed the Applicant's application at the material time (it has been superseded subsequently). Giving effect to the above principles I construe this as follows:

(i) The opening paragraph establishes, in unambiguous language, two options: the applicant is to either complete 'the relevant online application process' in accordance with the requirements of paragraph A34(iii) or make use of 'the specified application form' in accordance with paragraphs 34A - 34D.

Option 1

(ii) The first option requires the application to be made via the UKBA website, in accordance with the process therein stipulated. This requires the applicant to, *inter alia*, select the appropriate 'immigration category'.

(iii) Invocation of the online option requires any specific fee to be paid in accordance with the 'method specified'.

(iv) Invocation of the online application option clearly requires the completed application to be submitted on line by the relevant date.

(v) Where the online application option is selected, the Rule is unequivocal in the requirement relating to the provision of 'supporting documents': these must be submitted by post 'in the specified manner within 15 working days of submission of the online application'.

(vi) Where the online application option is selected, the sanction for non-compliance with the relevant requirements is unambiguous: the application '… will be invalid if it does not comply with the requirements of paragraph A34(iii) and will not be considered.'

Option 2

(vii) Where the second of the two options offered is selected, the 'specified application form' must be used and completed. This is accessed via the UKBA website.

(viii) In this event, the appropriate fee must be paid in the manner prescribed.

(ix) The specified types of information must be provided.

(x) The completed application must be accompanied by the photographs and documents specified as mandatory in the application form and/or related guidance notes and the form must be signed by the applicant.

(xi) Transmission of the completed application form, accompanied by the stipulated photographs and documents, must be by pre-paid post to UKBA or in person at a public enquiry office of UKBA, subject only to the exceptions listed.

(xii) Where the 'Print and Send' option is selected, the sanction for non-compliance with the relevant requirements is unambiguous: the application '… will be invalid if it does not comply with the requirements of paragraph A34(iii) and will not be considered.'"

15. As stated in Judge Perry's decision the application was submitted by post. The application itself is stamped 29th May 2014 and although it is clear that there was a payment made by a credit card dated 23rd May 2014 the application was not

submitted online because the form was signed in line with Option 2, (x) above. The form did not refer to an online application and the applicant signed the form. The declaration at the close of the application clearly shows not only the appellant's signature with a date of 23rd May 2014 but also the representative's signature and the date of 28th May 2014. The representative confirmed

> 'that I am aware of the contents of **this application**, **including its supporting documents** and that the application is to be best of his knowledge and belief true and correct'.

It is clear to me that this application although paid for on 23rd May 2014 was not completed in substance until 28th May 2014 whereupon it was posted and stamped as received by the Home Office on 29th May 2014.

16. Further to Regulation 34G, where the application form is sent by post it is the date of posting which is relevant and thus it is clear that this application was made for the purposes of the Immigration Rules on 28th May. This indeed is what is recorded by the Secretary of State in the refusal letter. I do not accept Mr Rashid's submission that the application was already made on the date of payment and this is merely following on of supporting documentation. The application states clearly at the top of page 2

> **'This is your official document for your application**
>
> **You need to submit this to us by post in order to make your application'**

17. The application was *signed* by the representative on 28th May 2014, *after* the expiry of the appellant's leave.

18. There was no error in Judge Perry's assessment with regard the immigration rules. The appellant himself acknowledged that the requirement to assign the Pearson test score came into effect on 1st July 2014. It was a requirement as at the date of the respondent's decision on 24th July 2014 that the Pearson test score was assigned to the UK Border Agency. There was no dispute from the appellant as Judge Perry confirmed that it was not so assigned as required. The relevant date for the application of the rules is the date of the decision not the date of application. As stated by Lord Neuberger in **Odelola** [2009] UKHL 25

> 'I turn, then, to the central issue, namely whether the amendments made by the 2006 Statement extend to an application made, but not determined, before the Statement came into force. In common with all your Lordships, I have reached the conclusion that they do'.

19. The error of law in Judge Perry's decision, if there is any, is that there was in fact no valid appeal before him as the application for leave to remain was made after the appellant's leave expired on 24th May 2014. Under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 a person may only appeal where there is an immigration decision and it would not be the case that the refusal would result in the person having no leave to enter or remain as the appellant's leave had already

expired. It was not that there was no 'in country' appeal – there was no appeal. As there was no valid appeal before the Tribunal, it had no jurisdiction.

20. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007

21. I set aside the decision and insert a decision to the effect that the Tribunal has no jurisdiction and there is no valid appeal.

Decision

No valid appeal.

Signed Date 18th September 2015

Deputy Upper Tribunal Judge Rimington

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Rimington