**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/18256/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 18th June 2014** | **On 24th July 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD**

**Between**

**MR MUHAMMAD KHURRAM IRSHAD**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J Markus, Counsel, instructed by Silverdale Solicitors
For the Respondent: Ms L Kenny, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a citizen of Pakistan whose appeal was dismissed by First-tier Tribunal Judge Hembrough in a determination promulgated on 27th January 2014. The judge also said that the decision to refuse the application with reference to

paragraph 245ZX(d) and paragraph 1A(h) of Appendix C to the Rules was not in accordance with the law.

2. Grounds of application were lodged and permission to appeal initially refused but on renewal of the application for permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Clive Lane. He said it was arguable that the judge, having found that the immigration decision was not in accordance with the law erred in law by dismissing the appeal for reasons not arising from the decision without giving the Appellant a proper opportunity to respond. In addition, the judge's comments at paragraphs 25 to 26 were arguably unwise; it was not clear what influence those comments had upon the outcome of the appeal.

3. A Rule 24 notice was lodged indicating that the judge was correct to dismiss the appeal, although he should have done so for different reasons, namely that the Appellant did not provide any new financial evidence showing maintenance for a 28 day period preceding the date of the variation of his application – reference was made to **Qureshi (Tier 4 – effect of variation – App C) Pakistan [2011] UKUT 00412 (IAC)**. Thus the matter came before me on the above date.

4. It is helpful to set out the factual background to this appeal.

5. The application was first submitted on 12th June 2012, along with a Confirmation of Acceptance for Studies ("CAS") for a postgraduate diploma in hospitality and tourism management at Shepherd Business School Limited. Since the application was submitted the Home Office revoked the Tier 4 licence of Shepherd Business School and the Appellant was given a sixty day window within which consideration of his application would be suspended.

6. On 9th March 2013 the Appellant was assigned a CAS by Mancunia College to pursue a level 7 diploma in healthcare management.

7. On 18th March 2013 the Home Office refused the application. The Appellant was awarded 30 points for possession of a valid CAS but denied 10 points for maintenance as he was required to submit a bank statement dated within 31 days of 9th March 2013, the date his second CAS was assigned and he had not done so.

8. The skeleton argument for the Appellant sets out the material findings of the First-tier Tribunal Judge. The grounds then go on to mention **Patel (revocation of sponsor licence – fairness) India [2011] UKUT 211 (IAC)** where it was said that in circumstances where the applicant was innocent of the practice that led to loss of sponsorship status and ignorant of the fact of that loss, common law fairness required the Home Office to afford them an equal opportunity to vary the application.

9. As such the proper disposal in a case of this type would be simply to find that the decision was not in accordance with the law. On that basis no lawful decision could be regarded as having been made and the application remains to be determined by the Home Office. Ground 1 of the Grounds of application states that the judge erred

in that he considered the Appellant's situation at the date of the hearing, rather than the date of application. The second ground is that the judge erred in his application of the principles deriving from **Patel** and made findings of fact that were not properly open to him. The judge had failed to apply the factors in **Patel**. In particular when Mancunia College closed down it could hardly be said that the Appellant had not been a bona fide student there. There was no suggestion that he was not a bona fide student at his previous institution, namely Shepherd Business School. It was not possible for the Appellant to submit a fresh application while his appeal was pending: see Section 3C(4) of the Immigration Act 1971. The judge had erred at paragraph 22 of his determination when he suggested this was a possibility. The judge had made findings at paragraphs 24 and 25 which were entirely unsupported by the evidence and/or which his reasons were singularly inadequate. The implication in paragraph 24 that there might be some fault to be placed on the Appellant because he enrolled at two colleges, both of whose licence were revoked "almost immediately" was wrong as there was no basis for that suggestion.

10. At paragraph 25 of the determination it is said by the judge that it stretches "the boundaries of coincidence", that the firm of solicitors originally instructed by the Appellant were closed down by the Solicitors Regulatory Authority. It was unclear how that coincidence is relevant to the Appellant's appeal and there was no basis in evidence for that suggestion. It was unclear to what extent the judge had allowed the Appellant an opportunity to comment on these points and fairness demanded that he be given such an opportunity.

11. The Appellant accepted the principle in **Qureshi** but paragraph 245AA of the Immigration Rules, which underpin the Respondent's evidential flexibility policy should have been applied to the facts of this case.

12. The Appellant made a clear mistake when he sought to vary his application in March 2013 which would have been obvious to the caseworker. The statements disclosed that the Appellant had kept a significant sum of money in his account and it was reasonable to infer that he would still have at least some of that money. The Appellant had paid his course fees and it was not a failure by the Appellant to submit any specified documents; it was a failure to update the sequence that he had already provided.

13. Before me Mr Markus elaborated on his grounds. It was true the Appellant had not submitted fresh bank statements, the reason being that he was confused by the letter he had received from the Home Office. He had, however, a sum of around £11,000 in his account as demonstrated in the first application. This was a case where the evidential flexibility policy under paragraph 245AA should have been applied. It was clear that not all the documents were present. The Appellant had already shown that he had a significant amount of money. With reference to the guidance on evidential flexibility (produced) I was referred to page 6 where it was indicated to the caseworker that before additional evidence was requested they must have "enough reason" to believe the information existed. Accordingly the threshold was not at a particularly high level and the caseworker would have had enough reason in

this case to believe the information existed because it had been supplied with the first application. While the material was out of date it would have been obvious to the caseworker that the information was available. I was referred to various passages in **Rodriguez and Others v SSHD [2014] EWCA Civ 2** which supported that proposition.

14. For the Home Office Ms Kenny relied on the Rule 24 notice. The judge should have dismissed the appeal for reasons given there. I was asked to find there was no error of law and to uphold the decision.

**Conclusions**

15. Given that the points-based system applications refer to a fixed period of time it can readily be seen that the judge went well beyond that period in his assessment of the evidence as set out in his determination at paragraphs 21 and beyond. In particular he made comments about the Appellant enrolling at two colleges both of which had their sponsorship licences revoked almost immediately, but as the grounds of application point out that had nothing to do with the actions of the Appellant. Accordingly the judge's comments to link the events were unfair on the Appellant and constitute an error in law.

16. The judge's comments that were said to be arguably unwise by Upper Tribunal Judge Lane relate to the Appellant's refusal to answer questions about what advice he was given by his solicitors but it seems to me wrong to criticise the Appellant for his response to such questions as this was a matter of confidentiality between the Appellant and his solicitors. I agree with the submission of Mr Markus that the judge strayed into territory which was not before him and thus erred in law.

17. More importantly the relevant time for assessing compliance with Appendix C is the date of variation of the original application (as explained in **Quereshi)** which the judge did not do and the failure to do so was therefore an error in law. Because of these errors it is necessary to set the decision aside and remake the decision.

18. What has happened in this case is that the applicant made an application for leave to stay here as a Tier 4 (General) Student Migrant on the basis that he was going to study at Shepherd Business School. Before any decision had been made on that application he was told by UKBA that the school had had its sponsorship licence revoked. As such he then sought to find an alternative course provider and submitted a CAS from Mancunia College. Accordingly this was a variation of this first application and what the Appellant should have done was to have lodged fresh financial documentation in relation to the amendment of his application. He did not do so. As I see it the reasoning in **Qureshi** does apply and by not lodging fresh documentation in relation to maintenance the Secretary of State was entitled to say that he did not meet the financial requirements of the rules at the material time and was therefore bound to award him no points under maintenance (funds) which is what happened. In that sense the application was doomed to fail.

19. However, the matter does not end there. It is well known there is a procedure whereby the Respondent, after perusal of an application which is in some way incomplete, may go back to an applicant and ask for further information to be provided. The question before me is whether this is one of those cases where, under the rules, the Respondent was *obliged* to revert to this applicant for the missing information.

20. As was said in **Rodriguez** requests for further information should not be speculative and the instruction then quoted was that caseworkers "must have sufficient reason" to believe that any evidence requested exists. Paragraph 49 of **Rodriguez** indicates (with reference to the evidential flexibility guidance) that where there is uncertainty as to whether evidence exists benefit should be given to the applicant and the evidence should be requested.

21. It is not disputed before me that the Appellant did have sufficient monies at the time of the second application to justify a grant of 10 points under maintenance (funds). It is also not disputed that the Appellant did have sufficient funds when he lodged the first application. Given the latter it has to have been obvious (or should have been) to the caseworker that if further information was requested from the Appellant there was a very good chance that the Appellant continued to have sufficient funds, particularly given that the course fees of £2,500 had been paid.

22. The rules are not designed to remedy any defect in the application but they are designed to alleviate a possible harshness in the strictness of those rules. Paragraph 245AA sets out the procedure that will be adopted by the UK Border Agency when there are missing documents with the application. The Agency will only consider documents that have been submitted with the application and will only consider documents submitted after the application where subparagraph (b) applies. Under (b) the sub paragraph applies if the applicant has submitted (i) "*A sequence of documents and some of the documents have been omitted (for example if one bank statement from a series is missing)" (*my italics).

23. Plainly what this means is open to interpretation and in my view, without stretching the language of paragraph 245AA (b) (i) too far, this covers the position which was reached in this case where the current bank statement was omitted but had previously been provided in terms that would have been found to be satisfactory.

24. I am satisfied, on the particular facts of this case, that the Secretary of State should have applied her evidential flexibility policy as now set out in the Rules and reverted to the Appellant for further information. Had she done so it is more likely than not that the Appellant would have been able to provide the necessary documentation.

25. For the above reasons the appeal is allowed to the extent that the Respondent has not made a lawful decision.

**Decision**

26. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

27. I set aside the decision.

28. The decision of the Secretary of State was not in accordance with the law with regard to paragraph 245 AA of the Immigration rules.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald