**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/20142/2013

**THE IMMIGRATION ACTS**

| **Heard at : Field House** | **Determination Promulgated** |
|---|---|
| **On : 14th January 2014** | **On : 16th January 2014** |

**Before**

**Upper Tribunal Judge McKee**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**HAMZA GULZAR**

Respondent

**Representation:**

For the Appellant: Miss A. Everett of the Specialist Appeals Team
For the Respondent: unrepresented

**DETERMINATION AND REASONS**

1. On 9th May 2013 Mr Hamza's application to vary his leave as a Tier 4 Migrant was refused, with a concomitant decision to remove him under section 47 of the Immigration, Asylum and Nationality Act 2006. No points had been awarded under Appendix A for English language or Appendix C for Maintenance funds. Although Mr Hamza had passed all four components of an English language test taken with an approved provider, he had not achieved level B2 in Speaking and Writing at the same time. He had fallen short of the requisite 160 points for Speaking when he took the test on 21st March 2012, but scored 190 points when he re-sat the Speaking Test

on 19th June. He had already passed the Listening and Reading components on 26th March, but his TOEIC certificate for Speaking was said not to be acceptable, because the Listening component had to appear on the same certificate. As for maintenance, the bank statement which Mr Gulzar had sent in covered the period 12th February to 4th March 2013, whereas it needed to run from 5th February in order to cover the requisite period of 28 days.

2. An appeal to the First-tier Tribunal came before Judge Hands on 11th October 2013 for determination 'on the papers', and was dismissed under the Immigration Rules, because the decisions in respect of Attributes and Maintenance were said to be lawful. But the appeal was allowed under Article 8, because Judge Hands thought that the appellant should be allowed to complete his course, which was due to end in August 2014. Permission to challenge that outcome was granted by Designated Judge Coates, and so the matter came before me today.

3. The appellant himself did not attend the hearing, and was unrepresented. Notice of the hearing had been sent to his address in Hounslow, and had not been returned undelivered, so I was satisfied that notice had been duly served and that I could proceed in his absence. Miss Everett appeared for the Secretary of State.

4. It seemed to me that the challenge by the Secretary of State to the First-tier decision to allow the appeal on Article 8 grounds had merit, in that Judge Hands did not sufficiently explain how Mr Gulzar had established a human right to complete his course, when he did not satisfy the immigration rules for leave to remain as a student. That want of proper reasons constituted a material error, requiring the decision on the appeal to be re-made by the Upper Tribunal.

5. Contrary to the finding of the First-tier Tribunal, I find that the appeal does fall to be allowed under the Immigration Rules. As far as English language is concerned, there is no requirement in the Rules for the Speaking and Writing components of an English language test to be taken together and to appear on the same certificate. The rule in question ~ paragraph 118(b)(ii)(4) of Appendix A ~ says nothing about that. It may be mentioned in the Policy Guidance, but if it is not in the Rules, it is not binding.

6. As for the Maintenance funds, Mr Gulzar included a bank certificate for the period 12th April to 11th May 2012 with his earlier application. This showed a credit balance of well over £2,000 throughout the requisite 28-day period, when all that was needed was £1,600. When asked to submit a more recent bank statement, Mr Gulzar sent one in for the period 12th February to 4th March 2013. This showed a credit balance even further above the £1,600 required throughout the period. But the period was too short. It was not 28 days.

7. This was a situation, however, crying out for the exercise of evidential flexibility, as in paragraph 245AA(b)(i) of Part 6A of the Rules. The later bank statement was headed '**Date of previous statement 11 February 2013**'. That statement included the days missing from the 28-day period, and the statement clearly existed and could readily be obtained from the applicant. Instead of refusing the application because the bank statement submitted did not cover a long enough period, the caseworker should have contacted Mr Gulzar and asked him to send in the previous statement,

for the period ending 11th February 2013. Miss Everett very fairly agreed that this was just the sort of circumstance which the policy of 'evidential flexibility' was supposed to address.

8. Failure to apply the rule in accordance with the policy means that the resulting decision is 'not in accordance with the law'. The application for variation of leave is therefore outstanding before the Secretary of State, and awaits a lawful decision. No doubt Mr Gulzar will be contacted again and asked to submit an up-to-date bank statement, covering a recent 28-day period, in order for that decision to be made.

**DECISION**

The Secretary of State's appeal is allowed, to the extent that a material error of law has been identified in the First-tier determination. The decision on the original appeal is now re-made by the Upper Tribunal, and the appeal is allowed to the limited extent that the decision refusing to vary leave is not in accordance with the law. The matter is remitted to the Secretary of State, for her to make a fresh decision on the application to vary leave.

Richard McKee
Judge of the Upper Tribunal

14th January 2014