Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34496/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th November 2015	**On 22nd December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR ASAD MEHMOOD
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal of Counsel
For the Respondent: Ms A. Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 5th September 1989. His appeal against a decision of the Respondent dated 19th August 2014 to refuse leave to remain in the United Kingdom and to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006 was allowed at first instance by Judge of the First-tier Tribunal Perry sitting at Richmond Magistrates' Court on 12th January 2015. The Respondent appeals with leave against that decision and for the reasons which I have set out below at paragraph 9 I have set the decision of the First-tier Tribunal aside on the grounds of a material error of law and remade the decision.

Although this matter comes before me in the first place as an appeal by the Respondent I have for the sake of convenience continued to refer to the parties as they were known at first instance.

The Explanation for Refusal

2. The Appellant applied on 24th March 2014 for leave to remain as a Tier 4 (General) Student and for a biometric residence permit. The Respondent refused the application because bank statements submitted in support of the application had a closing balance date of 27th March 2014. However the application was made on line on 24th March 2014 and therefore the closing balance date was after the date of application by three days. The bank statements which ran from 27th February 2014 did not cover the required consecutive 28 day period. The Appellant was required to show living costs of £2,000 for the consecutive 28 day period to meet the Tier 4 (General) Student maintenance requirements but he could not do this and no points were awarded for CAS or maintenance funds.

3. The Appellant appealed against that decision arguing that he had misunderstood the 28 day period. He thought that the date of his application was 27th March 2014 when he posted the documents rather than 24th March 2014 when he submitted his application on-line. He had sufficient funds at all material times to fulfil the requirements. The Respondent had not contacted him before making a decision. Had the Respondent done so the Appellant would have submitted the correct bank statements and explained his position and his application would not then have been refused. The Respondent had acted unfairly. The Appellant's case should also be considered outside the Immigration Rules under Article 8. The Appellant had been admitted for his course and had a legitimate expectation to complete it. He had paid the tuition fees to his Tier 4 Sponsor and this amounted to a private life which deserved respect. The Appellant's compassionate circumstances outweighed the legitimate interest of the immigration authorities in enforcing immigration controls. The Appellant had been a student since 2010 with associated permitted work and social life. The Respondent's decision was disproportionate.

The Decision at First Instance

4. At paragraph 19 of his determination the Judge noted that the Appellant did not dispute that the bank statements submitted by post had a closing balance dated 27th March 2014 three days after the date on which the on-line application was made. It was clear that the Respondent could not consider bank statements covering the dates after the date of application and the Appellant therefore failed to comply with the requirements to show funds for a 28 day period. The Respondent had not disputed that the Appellant had sufficient funds in his bank account from 4th February to 24th March and was therefore in funds for the relevant 28 day period expiring on 24th March. The Appellant had shown a clear intention to comply with the requirements of paragraph 245ZX(D) and it was unfair to the Appellant to have refused his appeal in the light of the evidence that he held the requisite funds for the requisite period. There were only a few cases which failed under the Immigration Rules but succeeded under Article 8 and this was one. The Appellant had acted in good faith and

complied with the spirit and intention of the legislation. His failure on quite technical grounds should not interrupt his legitimate expectation to complete his studies. The Judge dismissed the appeal under the Immigration Rules but allowed it under Article 8.

The Onward Appeal

5. The Respondent appealed arguing that the Judge had taken an incorrect approach to the consideration of evidence of funds which was not provided with the application. The Respondent did not owe the Appellant a common law duty of fairness in considering a points-based system application where the Appellant admits as in this case that he did not provide the correct bank statements, see **EK (Ivory Coast) [2014] EWCA Civ 15**. The Judge's finding that the Appellant had a legitimate expectation to complete his studies was misconceived, see **Nasim [2014] UKUT 25** which had held that the fact that one must take the Immigration Rules as one finds them cuts both ways. Further the Judge had erred in his approach to considering Article 8 outside the Rules reliance being placed on **SS Congo [2015] EWCA Civ 387**. The Appellant's case had already been sufficiently dealt with under the Rules and there was no arguable case to consider it outside the Rules. Weight had been given by the Judge neither to the public interest as expressed within the Rules nor to the purpose of the points-based system including the need for simplicity, predictability and relative speed of the process.

6. The application for permission to appeal came before Judge of the First-tier Tribunal Davidge on the papers on 10th August 2015. In granting permission to appeal she wrote that there was merit in the Respondent's ground that the Tribunal's reasoning in allowing this Tier 4 Appellant's asylum appeal on Article 8 grounds was arguably erroneous in light of the exacting requirements of the points-based system and the relevant jurisprudence. It was erroneous to find merit in the Appellant's contention that he misunderstood the requirements of the points-based system.

7. Directions were sent to the parties by the Upper Tribunal that they were to prepare for the forthcoming hearing on the basis that if the Upper Tribunal decided to set aside the determination of the First-tier Tribunal any further evidence including supplementary oral evidence that the Upper Tribunal may need to consider if it decides to remake the decision could be so considered at that hearing.

The Error of Law Stage

8. For the Respondent it was submitted that the dismissal of the Appellant's appeal under the Rules had not been challenged by way of a cross appeal therefore this appeal was in relation to Article 8 only. For the Appellant Counsel did not seek to uphold the way that the Judge had dealt with Article 8. I found there was an error of law in 8 such that the decision at first instance fell to be set aside and the matter reheard. Counsel wished to raise a new matter which had not been before the First-tier. This related to whether the Appellant could be said to have varied his original application for further leave such that he could circumvent the time limits for the filing of evidence. I deal with that in some detail below at paragraph 11 et seq.

9. I deal first with the Article 8 issue. The Judge had found that the Appellant did not meet the Immigration Rules and proceeded to consider the appeal outwith the Rules. This decision was not perhaps as clear as it could have been given the potentially ambiguous finding at paragraph 23 that it was unfair to the Appellant to have his appeal refused "in the light of clear evidence that he held the requisite funds for the requisite period". Nevertheless I proceed on the basis that the Judge had decided that he was considering this appeal outside the Immigration Rules and for the reasons set out herein his consideration under Article 8 disclosed material errors of law. The Appellant's immigration status was precarious as he only had leave as a student and was applying for further leave. In those circumstances little weight could be placed on any private life he had established during his time in this country. There was no claim that he had a family life the only claim was that his private life was disproportionately interfered with because he wished to continue with his studies but had thus far been unable to do so because of the Respondent's decision. In those circumstances given the little weight to be attached to the Appellant's claim under Article 8 the legitimate interest in enforcing immigration control outweighed the Appellant's application such that the decision fell to be set aside.

10. On that basis the Appellant's appeal against the Respondent's decision fell to be dismissed. Once it was accepted that the Appellant could not meet the Immigration Rules because the bank statements he had submitted did not comply with the 28 day period and only little weight could be given to his private life it would be inevitable that the appeal overall would be dismissed.

11. The Appellant's argument before me was not to dispute that aspect of the case but rather to raise a new matter which was that the Judge had materially erred by dismissing the Appellant's appeal under the Rules. If that were the case and the Appellant could succeed under the Rules the issue of Article 8 became irrelevant. The difficulty for the Appellant was that there had been no cross appeal against the Judge's dismissal of the appeal under Immigration Rules. The Respondent disputed whether the Appellant was entitled to raise an entirely new matter at such a late stage.

12. I heard argument on this point and also on the issue itself. I indicated that if my decision was that there was merit in the Appellant's late purported cross appeal then I would set aside the First-tier decision but would direct that the matter come back before me for further argument on the issue newly raised by the Appellant. If I found there was insufficient merit in the Appellant's new argument to justify that course then my decision to dismiss the appeal outright would stand since the issue raised in the error of law stage under Article 8 would equally apply in a substantive re-hearing of the Article 8 appeal (and as I have indicated also given the lack of substantive representations on Article 8 by the Appellant).

13. The Respondent's objections to the Appellant's new argument relied upon the Upper Tribunal authority of **EG and NG [2014] UKUT 143** that the Tribunal is not required to determine an appeal when an Appellant's case has been withdrawn and the Respondent has not been given permission to appeal. The party that seeks to persuade the Upper Tribunal to replace the decision of the First-tier Tribunal with a

decision that would make a material difference to one of the parties needs permission to appeal. The Upper Tribunal cannot entertain an application purporting to be made under Rule 24 for permission to appeal until the First-tier Tribunal has been asked in writing for permission to appeal and has either refused or declined to admit the application.

14. My concern in this case was the somewhat ambiguous nature of the Judge's comment at paragraph 23 which I have cited above. The Judge appeared to have found that the Appellant did have funds for a 28 day period but had then gone on to decide that nevertheless the appeal fell to be refused under the Rules. In those exceptional circumstances I consider that it was right that the Appellant should at least air the fresh point he wished to make.

The Hearing before Me

15. Counsel indicated that he did not abandon the Article 8 point but did not pursue it substantively any further. He conceded that there ought to have been a cross appeal against the Judge's dismissal under the Immigration Rules. The first instance decision should be remade but not limited to the Article 8 point. The starting and end points of the Appellant's argument centred on paragraph 19 of the determination. The Appellant relied on the case of **Qureshi [2011] UKUT 00412** in which a Tier 4 Student had made an application on 6th August 2010 for extension of her leave to remain while relying on a CAS issued by a college and submitting a bank statement. Whilst the application was awaiting a decision the applicant varied her original application by sending a new CAS issued by a different college and sending a bank statement that covered a different period. The later bank statement was not in accordance with the then version of the Immigration Rules but the Upper Tribunal accepted the later bank statement as a variation of the application and allowed the appeal.

16. The ratio of **Qureshi** it was argued should apply to this appeal. In this case the date of decision was 19th August 2014 and at that time the Appellant's bank statements were available to the Respondent. Section 85A did not preclude the Tribunal from taking into account post-application and pre-decision evidence (**Ali [2013] EWCA Civ 1198**). By providing his statements for 25th, 26th and 27th March 2014 the Appellant had varied his application just as the Appellant in **Qureshi** had done. If the variation argument was accepted then the inevitable consequence was that at the date of decision 19th August 2014 the Appellant did meet the requirements of Appendix C and was entitled to be awarded 10 points for maintenance.

17. The second point was that any statute which limits the court's jurisdiction must be interpreted narrowly. Section 85A of the 2002 Act should be interpreted to mean that post-application but pre-decision evidence could be taken into account. The Judge at first instance was not restricted by the operation of Section 85A and could have considered the case within the Rules. The Judge had sympathy for the Appellant and for the reasons he gave allowed the appeal. Counsel acknowledged that it was very hard to succeed in a case under the private life aspect of Article 8 but this Appellant fell within the Immigration Rules. It was in the interest of justice that the Appellant

should be permitted to rely on these submissions by way of a response under Rule 24 and time should be extended.

Findings

18. The Appellant raised a new argument against the Judge's decision but arising out of it that the Judge should have accepted the Appellant's bank statement which ran up to 27th March because the Judge should have treated the bank statement as a variation of the application. The Appellant's argument depends on the concept that an Appellant can submit further evidence after an application has been submitted but before a decision has been reached. That led to considerable litigation including cases such as **AQ (Pakistan)** which defined the date of application as being until the day of the decision of the Respondent to refuse. The significance of the Court of Appeal decision in **Raju [2013] EWCA Civ 754** is to clarify the position that where the Immigration Rules specify that evidence should be submitted on a certain date that is the date of application. On a true construction of the Rules evidence submitted after that date is not admissible. In this case it appears not to be in dispute that the Immigration Rules set out the date on which the Appellant's evidence as to the amount of money he had in his bank statement should be submitted. However the Appellant did not submit evidence of monies held in his bank statement for the 28 days prior to the submission of his application on 24th. **AQ (Pakistan)** is therefore of limited assistance to the Appellant since his situation is governed by the more authoritative Court of Appeal decision in **Raju**. The Respondent was entitled to reject evidence which postdated the application as the Appellant's bank statement in this case did.

19. The Appellant's argument is that he applied to the Respondent to vary his application by submitting bank statement which ran three days post the application date. I can see no merit in that argument. For there to be a variation there has to be an existing application. The only application was the one made on 24th March. By submitting a bank statement which covered an incorrect period the Appellant was not seeking subsequently to amend his original application he was simply submitting an incorrect application in the first place.

20. I do not consider that the Appellant's argument as to the impact of Section 85A of the 2002 Act assists him. The Appellant relies on subsection (4) of Section 85A that the Tribunal may consider evidence adduced by an Appellant if it was submitted in support of and at the time of making the application to which the immigration decision related. The important point is not whether there is discretion for the Tribunal to consider such evidence but whether the evidence in this particular case falls within those categories. Section 85A(4)(c) shows that such further evidence may be adduced to prove that a document is genuine or valid. No such issue arose in this case since the validity of the bank statement was accepted.

21. Having considered the further argument put forward by the Appellant in this case I do not consider that there is sufficient merit in it to warrant the Appellant being granted permission out of time to file a Rule 24 reply and for the matter to be put over to another date for a substantive rehearing. The position remains that the

appeal in this case was properly dismissed by the Judge at first instance under the Immigration Rules since the Appellant had submitted a bank statement which did not comply with the Rules at the date of application. Even if it was open to the Appellant to have varied his application at a later date he did not do that he submitted an application which did not meet the Rules. Whilst in certain circumstances postdecision evidence can be admitted under the provisions of Section 85A of the 2002 Act (now repealed but with saving provisions) those exceptions did not apply in this case and there was no error of law for the Judge to fail to refer to them.

22. Although the Judge could have expressed himself more clearly in paragraph 23 he was correct to find that the Appellant could not meet the Immigration Rules. Where the Judge erred was in proceeding to allow the appeal under Article 8 outside the Rules. As I have indicated no argument of any great force was submitted to me in support of the Judge's conclusions under Article 8. That must be correct for the reasons I gave when finding a material error of law in the Judge's treatment of Article 8. Little weight could be placed on the Appellant's private life given his precarious immigration status and he did not seek to argue that he had an established family life in this country. There were no compelling reasons such that this appeal should have been allowed outside the Immigration Rules. I therefore set aside the decision at First-tier remaking it by dismissing the Appellant's appeal against the Respondent's decision to refuse leave to remain and to remove the Appellant.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision by dismissing the Appellant's appeal against the Respondent's decisions to refuse to vary leave and to remove the Appellant.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 11th day of December 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

The Judge declined to make a fee award in this case for the reasons he gave which I uphold. As the appeal has been dismissed there can be no fee award in this case.

Signed this 11th day of December 2015

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Deputy Upper Tribunal Judge Woodcraft