Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01675/2013

THE IMMIGRATION ACTS

Heard at Field House	**Sent on:**
On 26 June 2013	**On 27 June 2013**

Before
UPPER TRIBUNAL JUDGE STOREY

Between

MR BILIWAL HAMEED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: In person
For the respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of Pakistan, was granted leave to enter the UK as a student until 25 July 2012. On 9 July 2012, while his leave was still extant he applied for leave to remain in the UK as a Tier 4(General) Student Migrant under the Points Based Scheme and for a Biometric Residence Permit. On 7 January 2013 the respondent refused to vary his leave to enter and also decided to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006. She pointed

out that para 1A(h) of Appendix A of the Immigration Rules required him to show that he was in possession of £1600 for a consecutive 28 day period from the date of application which she took as 4 October 2012, whereas the closing date of the bank statements submitted in support of his application was 9 July 2012.

2. The appellant appealed. At the hearing on 11 April 2013 the appellant explained that when he made his application in July 2012 he had submitted documents showing evidence of the requisite funds within the two previous months, but his application had been returned because the respondent had been unable because of a mistake in his credit card details to collect the fee. When he resubmitted his bank statements in October 2012 he did not update his bank statements. Before the judge the appellant had produced evidence in the form bank statements covering the two months prior to 9th July as well as the two months prior to 4 October 2012.

3. Applying Rodriguez (Flexibility Policy) 2013 UKUT 0042 IAC) the judge found that there had been no contact by the respondent with the appellant in relation to the mandatory evidence required. Finding further that the evidence now before him satisfied him that the appellant had the requisite funds in the relevant two month period prior to 4 October 2012, the judge allowed the appeal, his determination being sent to the parties on 24 April 2013.

4. The grounds on which the respondent was successful in obtaining permission to appeal were confined to a contention that applying the guidance set out in Rodriguez the judge was only entitled to find that the decision of the respondent was not in accordance with the law and to remit it to the respondent for her to make a fresh decision applying her evidential flexibility policy.

5. The appellant was not represented but made brief submissions after I had explained to him that I would do my best to ensure all points in his favour were considered. Mr Jarvis said that whilst the respondent's challenge to the judge's conclusions was narrow in scope it had to be right as a matter of law. He anticipated that when the matter went back to the respondent the appellant would receive a further grant of leave to enter or remain as a student.

6. Having considered the matter, I consider the judge did err in law and that his decision is to be set aside. Essentially the judge sought to allow the appeal outright on the basis of a failure by the respondent to apply her evidential flexibility policy. However, as a matter of law the appellant's original application had lapsed and his new application was dated 4 October 2012. When he resubmitted his application on this date he did not enclose updated bank statements but continued to rely on those from July. By s85A of the Nationality, Immigration and Asylum Act 2002 the judge was prevented from taking into account the later evidence

submitted at the hearing covering the two months prior to 4 October, as that was post-application evidence

7. Accordingly:

   The First tier Tribunal judge materially erred in law and his decision is set aside.

   The decision I re-make is to allow the appeal to the limited extent that the decision of the respondent is found to be not in accordance with the law for failure to apply an evidential flexibility policy. The s.47 decision was unlawful.

8. I would record that Mr Jarvis stated that he foresaw no difficulty in the respondent accepting that applying this policy the appellant would stand to benefit and regard would be had to his further evidence relating to the two months proceeding 4 October.

Signed

Date:

Judge of the Upper Tribunal