Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34184/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27th March 2014	**On 6th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR MUHAMMAD RIZWAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Saini (Counsel)
For the Respondent: Mr S Whitwell (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant's appeal against decisions to refuse to vary his leave and to remove him from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 (made on 17th June 2013) was dismissed by First-tier Tribunal Judge Malone ("the judge") in a determination promulgated on 7th February 2014. The appellant applied

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for leave to remain in the United Kingdom as a Tier 4 Student Migrant on 24th July 2012. Almost a year later, on 17th June 2013, the Secretary of State refused his application.

2. The application was refused in the light of the Secretary of State's finding that the appellant was not entitled to the points claimed in the attributes category, contained in Appendix A to the rules. In particular, the CAS assigned in July 2012 related to a course at NQF level 7, above degree level, and so the appellant was required to show abilities in the English language at a minimum level of CEFR B2. He was required to provide an original English language test certificate. The appellant provided three TOEIC certificates in all. The first, dated 14th June 2012, showed that he passed the listening and reading modules. The second, dated 19th June 2012, showed that he took speaking and writing but passed only the writing component. He then re-set the speaking element on 11th July 2012 and passed it on that occasion.

3. The judge found that the appellant relied on a certificate showing a single module passed at a sitting and so he could not meet the requirements set out in Appendix O(1).

4. The appellant was also required to meet the requirements contained in Appendix C(1)(B)(a)(i)(3) of the rules. He had to show bank statements as evidence of funds, covering a period of 28 days. The statements in fact provided fell short by one day, although they did show that he held more than the minimum funds required. After receiving the adverse decision, the appellant then provided bank statements relating to his account with Lloyds, showing that he held more than the minimum required between 22nd May and 18th July 2012, sufficient to show that the requirements of the rules were met.

5. In this context, the judge found that by reason of section 85A(4) of the 2002 Act, the bank statements submitted by the appellant after the decision could not be taken into account, as they did not accompany the application.

6. The judge went on to consider "evidential flexibility". He concluded that any such policy could have no bearing on the English language requirements. Paragraph 245AA(c) of the rules, introduced on 6th September 2012, also showed that the Secretary of State was not obliged to ask for a further bank statement, to cover the missing day.

7. The judge went on to make an Article 8 assessment and found that the appellant had established private life ties in the United Kingdom, since his arrival in April 2011. However, refusal to vary his leave and his removal from the United Kingdom amounted to a proportionate response.

8. The appellant applied for permission to appeal. It was contended that the judge erred, first, in relation to the English language requirement. Nothing

in Appendix O to the rules specified that the speaking component could not be taken in isolation. This was permitted in the TOEIC examination scheme. What was prohibited was taking the listening and reading components together and passing the listening component on one occasion, devoting the majority of the time permitted to that discipline, and thereafter sitting a second combined exam and passing the speaking component by devoting the majority of time to this aspect. The appellant did not, however, act in this way.

9. It was also contended that the judge erred in relation to evidential flexibility and paragraph 245AA of the rules. The appellant's case clearly fell within scope of the policy as it was apparent that the absent bank statement for the missing day was one document in a series, which had been omitted. Paragraph 245AA itself referred to a missing bank statement from a series as an example falling within scope.

10. Permission to appeal was granted on 26th February 2014.

11. In a brief rule 24 response from the Secretary of State, dated 12th March 2014, the appeal was opposed. The respondent intended to submit that the judge directed himself appropriately. The requirements of Appendix O were clearly stated and required the appellant to show that he passed all components in one sitting, as found by the judge.

<u>Submissions on Error of Law</u>

12. Mr Saini adopted the written grounds in support of the application. He sought a slight amendment to the first ground. HC 628, which came into force on 28th October 2013, made changes to Appendix O. It was this change that substituted for the earlier rules a requirement for evidence of scores in all relevant components during a single sitting of the examination.

13. The earlier version of Appendix O did not stipulate or require combined tests. Paragraph 251 of the rules, the earlier version, came into force on 1st October 2008 and did not contain such a requirement. The rules in force as at the date of decision enabled the appellant to take the tests as he did. He was able to re-sit the module and pass it.

14. So far as the missing bank statement was concerned, this defect was easily capable of remedy by means of evidential flexibility.

15. Mr Whitwell said that the logic of the appellant's position was understood. The Secretary of State accepted that HC 628 came into effect in October 2013. There was little he could say to assist in relation to the first ground. The Secretary of State might be in some difficulty. He accepted that there might then be an impact on the second ground.

16. In a brief response, Mr Saini said that HC 628 contained transitional provisions and so it was clear that the appellant was able to rely on the rules as they were, when the decision was made in June 2013.

Conclusion on Error of Law

17. So far as the first ground is concerned, I find in the light of the evidence and the submissions that the appellant was entitled to re-take the module he failed, as he did. He did not fall foul of the requirements of Appendix O in so doing. It was not in issue between the parties that paragraph 245AA, which was inserted into the rules with effect from 6th September 2012, fell to be considered. The bank statement missing from the series provided by the appellant, so as to leave one day uncovered, clearly fell within scope. Sub-paragraph (b)(i) identifies a missing bank statement from a series as an example. The Secretary of State ought to have considered the application of paragraph 245AA but the notice of decision shows that she did not do so.

18. With great respect to the experienced judge, the determination shows that he did not have in mind the version of Appendix O to the rules which was in force when the adverse decision was made. The earlier version of Appendix O did not prohibit the passing of the components or modules in the manner achieved by the appellant. Similarly, the determination shows (at paragraph 21) that the judge considered evidential flexibility in the light of his finding that the English language requirements were not met. This led him to conclude that the Secretary of State was under no obligation to ask for a further bank statement as this would have made no difference to the outcome of the application. In fact, as the English language requirements were met, and as there was no other ground of refusal, paragraph 245AA fell to be applied, or at least taken into account.

19. The decision of the First-tier Tribunal contains material errors of law and must be set aside and re-made.

Re-making the Decision

20. Mr Whitwell said that the appropriate course would be to send the decision back to the Secretary of State, so that she could make it afresh, in the light of the Upper Tribunal's findings. Mr Saini did not dissent from this proposed course.

21. I find as a fact that the appellant has shown that the English language requirements contained in the applicable version of Appendix O were met. Refusal of the application on the basis of the missing bank statement was the only other ground of refusal. It now falls to the Secretary of State to consider the application of paragraph 245AA of the rules, taking into account the First-tier Tribunal's Judge's findings regarding the resources available to the appellant, as set out in paragraph 16 of the determination. The appellant held more than the minimum level of funds required

between 22nd May and 18th July 2012, for a longer period of time than the minimum required under the rules. Should the Secretary of State decide to call for the missing bank statement, the outcome will inevitably be a conclusion that the appellant met the maintenance requirements of the rules. The decision to refuse to vary the appellant's leave was unlawful in all the circumstances and the decision to remove him is, similarly, unsustainable.

DECISION

The decision of the First-tier Tribunal has been set aside. It is re-made as follows: appeal allowed; the appellant awaits a lawful decision on his application from the Secretary of State.

Signed Dated

Deputy Upper Tribunal Judge R C Campbell

FEE AWARD

By section 12(4) of the Tribunals, Courts and Enforcement Act 2007, in re-making a decision, the Upper Tribunal may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision. In these circumstances, as I have allowed the appeal, I make a fee award in respect of any fee paid or payable in this appeal.

Signed Dated

Deputy Upper Tribunal Judge R C Campbell