



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03063/2013

THE IMMIGRATION ACTS

Sitting in Manchester Piccadilly Hearing Centre
On 22 August 2013

Determination Promulgated
On 4 September 2013

Before

UPPER TRIBUNAL JUDGE O'CONNOR
UPPER TRIBUNAL JUDGE DAWSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR YIKAI YANG

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Presenting Officer

For the Respondent: M Adophy, Saintta Lawyers UK

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department. We shall refer to Mr Yang, who was the appellant before the First-tier Tribunal, as the claimant.
2. The claimant is a citizen of China born 1 February 1988. He arrived in the United Kingdom on 18 July 2012 with leave to enter as a Tier 4 (General) Student conferred until 7 October 2012. On 5 October 2012 he made an application to extend his leave, in order to study for a postgraduate qualification at the University of Liverpool.

3. By way of decisions dated 14 January 2013, the Secretary of State refused to vary the claimant's leave and made a decision to remove him pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.
4. In relation to the former decision the Secretary of State awarded the claimant zero points for his Confirmation of Acceptance for Studies under Appendix A to the Immigration Rules; as a consequence of his failure to provide the original of a Bachelor of Arts certificate identified on the Confirmation of Acceptance for Studies as being evidence relied upon by the University of Liverpool when admitting the claimant onto the course of studies.
5. The Secretary of State also awarded zero points in relation to the maintenance requirement of Appendix C to the Immigration Rules, concluding, when doing so, that the claimant had been required to demonstrate that he had £6,200 in his possession for a consecutive 28-day period including, and immediately preceding, the 4 October 2012. The claimant had in excess of £6200 in his bank account between 7 September 2012 and 3 October 2012, however, the balance of the account fell to just £2,050.28 on 4 October 2012.
6. The claimant appealed these decisions to the First-tier Tribunal. This appeal was heard by First-tier Tribunal Judge Flynn, who allowed it "under the Immigration Rules" for given in a determination promulgated on 20 May 2013.
7. The judge found that, in failing to make a request of the claimant to produce his original Bachelor of Arts certificate, the Secretary of State had acted otherwise in accordance with the law by not adhering to her stated policy [paragraphs 20-22 of the determination]. This finding has not been the subject of challenge before the Upper Tribunal.
8. In relation to the maintenance requirement of the Rules, the judge concluded as follows:
 - "23. Secondly, the respondent stated that the appellant had failed to demonstrate that he holds the required level of funding for the period of 28 consecutive days. I note that his current account bank statements (which he provided with the application) cover the period from 2 September 2012 to 4 October 2012.
 24. It is clear that between 4 September and 3 October 2012, the level of funds was at all times in excess of the required amount.
 25. The respondent's guidance makes it clear that an applicant will satisfy her requirements if he demonstrates that the funds were held for any consecutive 28 day period ending no more than one month before the application was made.
 26. It is not clear why the respondent calculated backwards from the last date of the statement, but I am satisfied that her decision to assess the funds in this way was not in accordance with her guidance. I am entitled to take any account of the appellant's savings, since he did not submit this evidence to the respondent prior to her decision."

9. The Secretary of State obtained permission to appeal on three grounds; the latter two of which were based on a misreading of paragraph 26 of the First-tier Tribunal's determination and, as a consequence, have not been pursued before the Upper Tribunal. The Secretary of State maintains, however, that the First-tier Tribunal Judge erred in concluding that the SSHD's approach to the maintenance requirement was not in accordance with "guidance"; the judge having failed to identify which guidance was being referred to.
10. In his submissions before the Upper Tribunal Mr Adophy initially maintained that the claimant met the terms of Appendix C of the Immigration Rules because (i) there was no requirement within the Appendix C that the end date of the 'continuous 28 day period' must be the date of the closing balance on the most recent of the bank statements relied upon [in the instant case that being 4 October 2012] and, in any event, (ii) the Tribunal was entitled to take into account monies held in other bank accounts held by the claimant, despite the fact that no statements of account, or other evidence, relating to such accounts had been sent to the Secretary of State with the claimant's application.
11. After discussion, Mr Adophy indicated that he, "reluctantly", accepted that the claimant could not meet the requirements of paragraph 245ZX of the Immigration Rules, as a consequence of his inability to establish that he was entitled to 10 points pursuant to Appendix C of those Rules. Mr Adophy further accepted that the determination of the First-tier Tribunal ought to be set aside.
12. We now explain why Mr Adophy was correct in his concession.
13. Contrary to Mr Adophy's initial submissions it is trite law that by the application of sections 85, 85A (3) and (4), the First-tier Tribunal was not entitled to consider any evidence that had not been sent with the claimant's application to the Secretary of State, when determining the appeal brought in relation to the decision made under Part 6A of the Immigration Rules [Alam v SSHD [2012] EWCA Civ 960]. We pause to observe that although at first blush it appeared that the First-tier Tribunal had erred in taking into account evidence that had not been sent to the Secretary of State with the claimant's application, on a careful analysis it did not do so; the confusion in this regard arising out of an obvious accidental slip in the terms of paragraph 26, the judge plainly intending, but failed, to include the word 'not' in the last sentence of that paragraph. The parties before us agreed this was so.
14. Turning, as we must, to the bank statement that was produced by the claimant with his application for leave to remain, this relates to an account held in the claimant's name at Barclays Bank. It is dated 4 October 2012 and lists transactions between 4 September 2012 and 4 October 2012 inclusive. The balance of the account is in excess of £6500 on each of these dates, save for the 4 October when the balance was £2,050.28. The balance falls on the 4 October as a consequence of a payment having been made on that date to the University of Liverpool in the sum £4998, the purpose of such payment being for the claimant's accommodation. Relevant to our reasons

below we also observe that the balance of the account was less than £7200 from 1 October 2012 to 4 October.

15. The relevant paragraphs of Appendix C read as follows:

“1A In all cases where an applicant is required to obtain points under Appendix C, the applicant must meet the requirements listed below:

(a) the applicant must have the funds specified in the relevant part of Appendix C at the date of application;

...

(b) if the applicant is applying as a Tier 4 Migrant, the applicant must have had the funds referred to in (a) above for a consecutive 28 day period of time;

...

(h) The end date of the 90-day and 28-day periods referred to in (b) and (c) above will be taken as the date of the closing balance on the most recent of the specified documents ...and must be no earlier than 31 days before the date of application...”

16. Paragraph 11 of Appendix C identifies the ‘specified’ amount that the claimant was required to have held for the relevant consecutive 28-day period as:

“funds amounting to the full course fees for the first academic year of the course...plus £800 for each month of the course up to a maximum of nine months”

17. The claimant had paid his course fees by the date of his application to the Secretary of State and, consequently, the sum of the monies he was required to have held for the relevant consecutive 28-day period was £7200 [i.e. 9 x £800].

18. In relation to the accommodation costs, paragraph 13A to Appendix C provides as follows:

“In assessing whether the requirements of Appendix C, paragraph 11, are met, where an applicant pays a deposit on account to the sponsor for accommodation costs the maximum amount that will be offset against the total maintenance requirement to be met in £1000 irrespective of the actual amount of the deposit paid.”

19. The claimant was, therefore, entitled to offset £1000 of the accommodation costs that he paid on the 4 October 2012, against the £7200 specified by paragraph 11; thus bringing the total sum that the claimant was required to demonstrate he had continuously held for the relevant 28-day period to £6200.

20. There is dispute as to the correct date to be taken as the ‘end date’ of the consecutive 28-day period for the purposes of Appendix C to the Immigration Rules. Mr Adophy submits that as long as the Secretary of State [or thereafter the Tribunal on appeal] can identify, from the specified documents supplied with the application, any

continuous 28-day period during which the applicant held the required funds, and that the end date of that 28-day period was no earlier than 31 days before the date of application, then ten points must be awarded to the applicant under Appendix C.

21. We do not accept that the position posited by Mr Adophy accurately reflects the requirements set out in paragraph 1A(h) to Appendix C.
22. An applicant can elect which 'end date' he wishes to rely on for the calculation under Appendix C. Such choice is restricted by (i) the requirement that the chosen end date must be no earlier than 31 days before the date of application, and (ii) the fact that the specified documents sent to the Secretary of State with the application must demonstrate that the required funds were available for a continuous 28-day period expiring on the chosen end date.
23. The chosen end date is identified by reference to the date of the closing balance on the relevant specified documents the applicant has decided to submit. Once the application has been sent to the Secretary of State the 'end date' is fixed, by operation of paragraph 1A(h) of Appendix C.
24. In the instant case the end date [of the continuous 28-day period] was the 4 October 2012, this being the date of the closing balance on the only bank statement sent by the claimant, with his application, to the Secretary of State. If the applicant had intended the 3 October 2012 to be the 'end date' of the relevant continuous 28-day period, he was required to send, with his application, a bank statement which had the 3 October as the date of its closing balance; he did not do so.
25. On the 4 October 2012, the balance of the bank account relied on by the claimant was less than £6200. Consequently, the claimant could not meet the requirements of Appendix C of the Immigration Rules.
26. Even if the claimant were correct in his assertion that the relevant end date could be treated as being the 3 October 2012, he still does not meet the requirements of the Appendix C. The claimant did not pay his accommodation fees until the 4 October. Consequently, if an 'end date' is chosen prior to 4 October he would not gain the benefit of the £1000 offset for accommodation costs. He would, therefore, be required to demonstrate that he had held £7200 (as opposed to £6200) in the specified account for a consecutive 28-day period. He could not do so, the balance of the account being below £7200 on each of the 1, 2 and 3 October 2012.
27. Returning to a consideration of the First-tier Tribunal's determination, it is clear from what we say above that the judge erred in law in concluding that the claimant met the requirements of the Immigration Rules, he did not.
28. In paragraph 22 of her determination the judge found the Secretary of State's calculations of the maintenance requirement not to be in accordance with her 'guidance'. Even if this were correct, it was not capable of leading the judge to a

conclusion that the appeal ought to be allowed on the basis that Secretary of State's decision was not in accordance with the Immigration Rules.

29. First, on the facts of this case, the claimant did not meet the requirements of Appendix A of the Rules because he did not supply his original degree certificate with his application. Although the judge concluded that the Secretary of State acted otherwise in accordance with the law in not requesting such certificate; this did not permit the conclusion that the requirements of the Appendix A had been met.
30. Second, and of more general application, if the Secretary of State has in place guidance, or a policy, which is more beneficial to an applicant than the Immigration Rules, failure to apply such guidance or policy does not lead an appeal being allowed on the basis that the Secretary of State's decision was not in accordance with the Rules but rather has the potential to render the Secretary of State's decision unlawful.
31. As it turns out, in the instant case our file does not contain a copy of the 'guidance' referred to by the judge in paragraph 22 of his determination. In addition, both parties confirmed that they did not place any guidance before the First-tier Tribunal and neither party has been able to produce to us a copy of the guidance the judge referred to.
32. It is clear from all we say above that the First-tier Tribunal's determination contains errors on points of law that required it to be set aside.
33. We announced that decision at the hearing and invited submissions relevant to the re-making of the decision under appeal.
34. Whilst accepting that the claimant could not meet the requirements of the Immigration Rules, Mr Adophy initially submitted that the Secretary of State's decision was, in all the circumstances, unfair. However, upon Mr McVeety (i) conceding that the Secretary of State's decision to remove the claimant was unlawful for the reasons given in Javad Ahmadi [2013] EWCA Civ 512 and (ii) undertaking that prior to any further removal decision being taken the Secretary of State would give full consideration to the claimant's Article 8 ECHR rights and any representations made by him in relation to the issue of unfairness, Mr Adophy withdrew his submissions.
35. We therefore dismiss the claimant's appeal against the Secretary of State's decision refusing to vary his leave. He does not meet the requirements of the Immigration Rules and no other grounds were pursued before us. We allow the claimant's appeal against the Secretary of State's decision to remove him.

Decision

For the reasons given above the determination of the First-tier Tribunal contains an error on a point of law and is set aside.

The claimant's appeal against the Secretary of State's decision refusing to vary his leave is dismissed

The claimant's appeal against the Secretary of State's decision to remove him is allowed.

No application was made to us requesting that the fees paid by the claimant for appealing to the First-tier Tribunal be awarded to him. In such circumstances we make no fee award. Had such application been made we would not, in all the circumstances of this case, have acceded to it.

Signed:

A handwritten signature in black ink, appearing to read 'Michael O'Connor', written over a horizontal line.

Upper Tribunal Judge O'Connor
Date: 2 September 2013