Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23723/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 May 2013	**On 5 June 2013**
Prepared on 9 May 2013	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR MD YOUNUS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Islam Khan, Counsel, instructed by M Q Hassan Solicitors
For the Respondent: Mr E Martin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who was born on 27 December 1985, is a national of Bangladesh. On 30 October 2011, he made a combined application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system and for a biometric residence

permit, but this application was refused by the respondent on 11 October 2012. The refusal letter is dated the same date. There were a number of grounds for refusal. Amongst them was that the appellant was awarded no points for Confirmation of Acceptance for Studies and was also awarded no points for maintenance (funds). His application was also refused under paragraph 322(1A) of the Immigration Rules, because it was considered that bank statements said to have been in respect of an account with the Agrani Bank were false. At the same time, the respondent made a decision to remove the appellant from the UK by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed against these decisions, and his appeal was heard before First-tier Tribunal Judge Rastogi, sitting at Hatton Cross on 1 February 2013.

3. In a determination promulgated on 13 February 2013, Judge Rastogi found that the respondent's decision to remove the appellant from the United Kingdom under Section 47 had not been made in accordance with the law, and to that extent the appellant's appeal was allowed. However, Judge Rastogi dismissed the appellant's appeal on all other grounds.

4. Insofar as the respondent had relied upon the failure of the appellant to submit an appropriate CAS, Judge Rastogi found that the CAS submitted was reliable and that this objection by the respondent was unfounded. Judge Rastogi did not make findings with regard to the authenticity of the bank account submitted, because he considered that the maintenance requirements were not met. His reason for so finding was that the statements provided did not meet the requirements of the Rules, because they did not cover a consecutive 28 day period ending no earlier than 31 days before the date of the application as required by the Rules (at paragraph 33 of his determination). The bank accounts which he had in mind were those which had been submitted and which covered a period ending on 18 October 2011. I refer to this below.

5. The appellant now appeals against this decision, with leave.

The Hearing

6. At the hearing I heard submissions on behalf of both parties, following which I did not need to hear any further evidence. I recorded the submissions which were made contemporaneously, and these are contained in the Record of Proceedings, so I shall only refer below to such of those submissions as are necessary for the purposes of this determination. I have, however, had regard to everything which was said to me during the course of the hearing, and to all the documents contained within the file, whether or not they are referred to below.

7. Notwithstanding what had been contained within the grounds, there was only one issue which was argued before me, and this related to whether or not Judge Rastogi should have rejected the evidence which had been submitted regarding the money available to the appellant on the basis that it did not cover the relevant period. It was submitted on behalf of the appellant that the evidence which had been submitted by the appellant, including the documents which were submitted on 25 July 2012, which was after the date of the application, but before the date of the decision, included accounts from the Agrani Bank ending on 25 July 2012, which was within the 31 day period immediately before the date of application required in the Rules. It is not disputed that the sums shown as available in this bank account (which was in the joint names of the appellant and his father) would have been sufficient to meet the maintenance requirements. I also note that although Judge Rastogi had said at paragraph 31 that he did not need to make findings as to whether or not the bank statements were reliable, at paragraph 25 he had found that the respondent had not discharged her burden of proving that the bank statements were false, because she had not filed any evidence to explain or justify on what basis she asserts them to be false. Accordingly, I proceed on the basis that it has not been shown that the bank statements are not genuine.

8. The sums which it has been shown in these bank accounts were available to the appellant are sufficient to meet the maintenance requirements under the Rules, and, in the absence of evidence to show that these bank accounts cannot be relied upon, Judge Rastogi should have taken these statements into consideration. I find that his failure to do so was a material error of law, such that his decision must now be remade by the Upper Tribunal.

9. I note that the respondent did take into account all the evidence which had been submitted on behalf of the appellant, including the evidence (containing the later bank statements) which had been sent to the respondent after the date of the application, but before the date of decision, which had only been rejected on the basis that the evidence had not been genuine. As Judge Rastogi has effectively found that the respondent's objection on this basis has not been substantiated, it would follow that the respondent should have considered this evidence on the basis that the bank statements were genuine. I take into account in this regard the respondent's "evidential flexibility" policy. Although the Court of Appeal in *Alam [2012] EWCA Civ 960* has stated that this policy does not oblige the respondent to check all applications and then notify all applicants where the evidence submitted on their behalves is insufficient, in light of the decision of this Tribunal in *Rodriguez (flexibility policy) [2013] UKUT 42*, it does require the respondent at the very least to take into consideration documents which she has seen which have been put before her before the date of consideration. In this regard, I also have to take into consideration the guidance given by this Tribunal in the presidential Tribunal decision in *Khatel*.

10. Accordingly, in my judgment, I must take into account all the evidence which was submitted to the respondent before the date of decision, but must also do so on the basis of what were the effective findings made by the First-tier Tribunal. The First-tier Tribunal had found that all the objections to this application were not made out, save as to maintenance, but this finding was made without taking into consideration the bank statements which went up to 25 July 2012, which covered the relevant period, and which ended within 31 days ending with the date of application. Once I take these bank statements into account, I am satisfied that the maintenance requirements under the Rules are also made out.

11. It follows that this appeal must be allowed.

12. There has been no challenge to the decision of the First-tier Tribunal with regard to the Section 47 removal decision, but in the light of my finding, this is no longer relevant.

Decision

I set aside the determination of the First-tier Tribunal as containing a material error of law, and substitute the following decision:

The appellant's appeal is allowed, under the Immigration Rules.

Signed: Date: 4 June 2013

Upper Tribunal Judge Craig