Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02472/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 June 2013	**On 6 June 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ASGHAR ALI

Respondent

Representation:
For the Appellant: Mr C Avery a Senior Home Office Presenting Officer
For the Respondent: the Respondent appeared in person

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department. I will refer to her as the Secretary of State. The respondent is a citizen of Pakistan who was born on 13 December 1994. I will refer to him as the claimant. The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Hague who allowed the claimant's appeal against the Secretary of State's decision of 10 January 2013 to refuse to vary his 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.

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2. The claimant came to this country with entry clearance as a Tier 4 (General) Student Migrant for a period expiring on 15 September 2012. Before that period expired he applied for further leave to remain also as a Tier 4 (General) Student Migrant under the Points-based System.

3. The Secretary of State accepted that the claimant was entitled to the required points except those for Maintenance (Funds). These were not awarded because, whilst the appellant had shown that the necessary funds were held by his father and claimed that they were available to him, he had not provided the type of document required under paragraph 13B (a) of Appendix C of the Immigration Rules to prove that he and his father were related as claimed. He had supplied a Family Registration Certificate issued by the Government of Pakistan not a birth certificate or one of the other permitted documents.

4. The claimant appealed and, prior to the hearing before the judge, submitted his original birth certificate. The judge determined the appeal on the papers. He concluded that the birth certificate was admissible in evidence under Section 85A (4) C of the Nationality, Immigration and Asylum Act 2002. The claimant satisfied the requirements of the Immigration Rules and as a result the judge allowed his appeal.

5. The Secretary of State applied for and was granted permission to appeal. She argued that the judge erred in law by failing to give adequate reasons for admitting the birth certificate in evidence or to explain how this could validate the Family Registration Certificate submitted by the claimant with his application.

6. I indicated to Mr Avery and the claimant that it seemed to me that the s.47 removal directions made by the Secretary of State were unlawful. The s.47 point arises from a number of authorities leading up to the determination in Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC). This states that where a removal decision purportedly under s.47 of the Immigration, Asylum and Nationality Act 2006 is made concurrently with a decision refusing further leave the s.47 decision is unlawful, but the decision refusing leave is a separate decision that requires determination. S.85(1) of the Nationality, Immigration and Asylum Act 2002 brings the two decisions into one appeal, but s.86 of that Act allows and requires the determination to reflect differences in outcome. I accept that this is not a point which has been taken at any earlier stage. Nevertheless, I considered it to be an obvious point. Mr Avery conceded that the appeal against the s.47 removal directions must be allowed.

7. I asked Mr Avery whether the application which led to this appeal was one to which the UK Border Agency PBS Process Instruction "Evidential Flexibility" applied and if so had these been considered. I

showed Mr Avery and the claimant a printout of these instructions from the UKBA website. Mr Avery said that he was familiar with these and had no need to study them. He did not say that he was taken by surprise or ask for an adjournment to consider the point. He indicated that he did not wish to make any submissions in relation to this. However, he accepted that if I concluded that this was a relevant policy then it had not been applied and the outcome would be for the appeal to be allowed to the extent that the decision was not in accordance with the law and the application would need to be reconsidered by the Secretary of State in the light of the submission of the claimant's original birth certificate.

8. I find that in line with Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC) the Secretary of State should have applied her policy. The policy is set out for caseworkers to follow in a number of questions which, if answered in the affirmative, lead on to another question. This is a case where there is "missing evidence, or evidence that is not in an acceptable format". I find that the first five questions should have been answered in the affirmative leading to the point where it is said that if the preceding criteria are satisfied; "the caseworker must contact the applicant/rep/sponsor initially by telephone. The applicant/rep/sponsor should be informed that they have a maximum of seven working days to respond i.e. the missing information should be with the UKBA within this timeframe. We will use the date of receipt at UKBA if this cannot be established then evidence of the data posted should be considered. We strongly recommend that the information requested be sent by next day special delivery. Original documentation must be provided – we will not accept faxed, scanned or photo copied docs....."

9. Had the claimant been told that the Family Registration Certificate was not acceptable and that his birth certificate was required it is clear, from subsequent events, that he could have supplied it. The Secretary of State would then have had the opportunity to study the birth certificate and decide whether it was genuine and proved the claimed relationship between him and his father. The judge found that it did.

10. The judge found and I agree that this was a case to which section 85A of the 2002 Act applied. As this was an application under the Points Based System the judge was only entitled to admit and consider the claimant's birth certificate if it had been submitted with the original application or one of the other exceptions applied. Clearly, as the claimant accepts, it was not submitted with the original application. The only other exception which might apply and the one which the judge found applied and assisted the claimant was that in s 85A (4) C namely that the birth certificate was "adduced to prove that a document is genuine or valid". I find that in reaching this conclusion the judge erred in law. The Family Registration Certificate submitted by the appellant was not and could never be the type of document required under paragraph 13B (a) of Appendix

C of the Immigration Rules. What was required, in the circumstances of this case, was the appellant's birth certificate. No retrospective validation could turn the Family Registration Certificate into the required birth certificate.

11. I add as a footnote that in reply to my question the claimant said that following the determination by the judge his original birth certificate was return to him. He will now send it to the Secretary of State by registered post. Mr Avery provided him with his address so that it could be sent direct.

12. Having concluded that the judge erred in law I set aside his decision and remake it. I allow the claimant's appeal against the S47 removal directions. I allow the claimant's appeal against the refusal to vary his leave to remain in the United Kingdom to the extent that the Secretary of State's decision is not in accordance with the law and must be reconsidered by her in the light of her policies.

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Signed Date 4 June 2013

Upper Tribunal Judge Moulden