Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25185/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 June 2013	**On 10 June 2013**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR MEHDI HABIB
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Chowdhury, Legal Representative instructed by Kalam Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh and was born on 29 December 1986.

2. This is an appeal against the decision of First-tier Tribunal Judge Blum who, in a determination dated 15 February 2013, dismissed the appellant's appeal for further leave to remain as a student and on Article 8 grounds.

3. This appeal concerns the correct date for assessing maintenance where an outstanding variation for leave to remain is varied before the respondent makes a decision.

4. The background to this case is as follows. The appellant entered the United Kingdom (UK) on 13 August 2008 as a student and remained here in that capacity with lawful leave until 29 February 2012. He then made an in time application for further leave to remain as a Tier 4 (General) Migrant on 29 February 2012. His application was made on the basis that he would continue his studies at Lincolns College, London. On 23 May 2012 the respondent revoked the licence of this college. The respondent informed the appellant of this in a letter dated 6 June 2012. The letter invited Mr Habib either to withdraw his application and make a new one or to vary the existing application. Mr Habib chose to vary the existing Tier 4 application, submitting a new Certificate of Acceptance of Studies (CAS) on 4 August 2012. On 17 August 2012 he provided further financial evidence. On 23 October 2012 the respondent refused his application for further leave to remain.

5. The respondent refused the application under HC 395 (the Immigration Rules) only on the grounds of maintenance. The parties were in agreement that the appellant was required to show funds of £1,600 for a consecutive 28 day period. The question here was, which 28 period? That prior to 29 February 2012, the date of the initial application or that prior to 4 August 2012, the date of the variation application?

6. The parties both referred to paragraph 1A (h) of Appendix C of the Immigration Rules which says as follows about the 28 day period that must be evidenced in order to meet the maintenance requirements:

> "… the end date of the 90-day and 28-day periods … will be taken as the date of the closing balance on the most recent of the specific documents, and must be no earlier than 31 days before the date of application."

7. The respondent's position was that this meant that the appellant had to show that for a continuous 28 day period during the 31 days before 4 August 2012, the appellant had to show funds of £1,600. The appellant does not dispute that he cannot show that he met the maintenance requirement for such a period (or any other period except that prior to the initial application made on 29 February 2012).

8. The appellant's case is that "*the date of application*" in paragraph 1A (h) is 29 February 2012, the date of his initial application and that the respondent was wrong to consider 4 August 2012 as the relevant date.

9. First-tier Tribunal Judge Blum, in essence, agreed with the respondent's position. So, for a number of reasons, do I.

10. For the appellant, Mr Chowdhury relied on the respondent's Tier 4 Policy Guidance, the relevant extracts of which were contained at pages 5 and 6 of the appellant's bundle. Mr Chowdhury maintained that the Policy Guidance does not state that further financial evidence was required to support a variation application. It indicated only that a new CAS was needed. Where the Policy Guidance did not ask for financial evidence when making a variation application, the respondent could not be correct in taking the "*the date of application*" in paragraph 1A (h) of Appendix C as the date of the variation. Therefore, according to Mr Chowdhury, paragraph 1A (h) of Appendix C must refer to the need to meet the maintenance requirements at date of the initial application, not at the date of the variation.

11. What the Policy Guidance says, however, as relevant to the appellant, is:

> "If your permission to stay has expired whilst you were awaiting a decision on your application we will delay the refusal of your application for 60 days to allow you to obtain a new CAS from a different sponsor and vary your application or leave the UK."

12. I did not accept that this could read, as Mr Chowdhury would have me do, as a clear statement that only a new CAS would be required in support of the variation application and the financial evidence submitted with the initial application would be sufficient. It appears to me that the Policy Guidance sets out two stages, obtaining the CAS and using this to go on to make the variation application. It is not stating that merely obtaining a new CAS and submitting it can amount to a variation application. The Policy Guidance does not purport to set out everything that is needed in support of the variation application. In addition, it is guidance and clearly not intended to replace the maintenance requirements set out in paragraph 1A (h) of Appendix C. It cannot be used to interpret Appendix C in the manner suggested by Mr Chowdhury.

13. Further, the reported case of **Qureshi (Tier 4 – effective variation – App C) Pakistan]2011] UKUT 00412 (IAC)** also considered the situation of a Tier 4 Student application where the appellant had varied the application whilst awaiting a decision from the respondent. At [38] the Upper Tribunal found as follows:

> "As to the date the respondent is required to take into account for the purposes of determining the points to be awarded under Appendix C, where there has been a variation substituting a new college, *it is the date of the most recent variation* for the purposes of paragraph 1A(c) [of Section 3C(5) of the 1971 Act] (my emphasis)."

14. The Upper Tribunal in **Qureshi** went on to find at [39] that the "*effective date of application for the purposes of calculation of the funding requirements"* was the date that the appellant in that case had varied her application, note the date of her initial application.

15. In addition, if more were needed, the respondent's letter of 6 June 2012 clearly informed the appellant that he was expected to provide further financial evidence showing that as of the time of his variation application he had sufficient finances. This information was in bold and headed with the words "*Important – please note*". That appeared to me to amount to sufficient notice to the appellant that he needed to provide further financial evidence if he was going to make a variation application. There was nothing confusing about this. It is not in any way inconsistent with the Policy Guidance or the wording of paragraph 1A (h) of Appendix C.

16. It was therefore my view that Judge Blum did not err in refusing the appellant's appeal under the Immigration Rules as the maintenance requirements were not met. The relevant date for considering the maintenance requirements was 4 August 2012, the date of the variation application. As above, the appellant has conceded that he could not show that he had the required funds for a continuous 28 day period in the 31 day period prior to 4 August 2012. It was not suggested before me that the ratio of **Khatel & Others (s85A: effect of continuing application) Nepal [2013] UKUT 44 (IAC)** on the period that can be taken to amount to being part of an application had any materiality in Mr Habib's appeal. The appeal under the Immigration Rules could not have succeeded before Judge Blum and no error of law arises.

17. I also do not accept that Judge Blum erred in his consideration of the appellant's Article 8 claim. He sets out the correct legal approach at [24] and relevant case law at [25]. At [26] he takes into account the appellant's evidence as to the difficulties he experienced in providing further financial evidence for the variation application. He was clearly entitled not to take the appellant's evidence in that regard at its highest. At [27] the judge considered correctly the case of **CDS (PBS "available" Article 8) Brazil) [2010] UKUT 305**. It was open to him to find that the appellant had not built up a private life of any substance or that, even if he had a private life in the UK, it was "*ordinarily by its very nature of a type which can be formed elsewhere*". This was not a case where the Article 8 claim could have succeeded where it did not under the Immigration Rules.

18. I should add that the respondent's decision of 23 October 2012 contained an order under Section 47 of the Immigration, Asylum and Nationality Act 2006. It has been found by the Upper Tribunal in **Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC)** that such an order made in these circumstances is not in accordance with the law but that the unlawfulness does not infect the decision to refuse to vary leave to remain. I found that the First-tier Tribunal made an error on a point of law in failing to find the Section 47 removal decision to be not in accordance with the law. I also set aside that part of the decision and re-make it, finding, in line with **Adamally and Jaferi**, that the removal decision was not in accordance with the law. If the respondent wishes to remove the appellant, she will have to re-make that decision.

Decision

19. The determination of the First-tier Tribunal on the appeal under the Immigration Rules and Article 8 of the ECHR does not disclose an error on a point of law and shall stand.

20. The First-tier Tribunal made an error on a point of law as regards the Section 47 order, failing to address its illegality. I set aside only that limited part of the decision. I remake it, finding that the Section 47 order was not in accordance with the law.

21. No anonymity order is made.

Signed Date: 10 June 2013
Upper Tribunal Judge Pitt