Asylum and Immigration Tribunal

NA & Others (Tier 1 Post-Study Work-funds) [2009] UKAIT 00025

THE IMMIGRATION ACTS

Heard on 24 April 2009
at Taylor House

Before

Senior Immigration Judge Storey
Senior Immigration Judge Perkins

Between

NA (1ST APPELLANT)
CO (2ND APPELLANT)
MM (3RD APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellants: Ms J Heybrook instructed by Kothala & Co (for NA), Mr E Nicholson instructed by Hammonds LLP (for CO), Miss L Cole-Wilson instructed by Suriya & Co (for MM)
For the respondent: Mr E Tufan, Home Office Presenting Officer

i. ***The new-style Immigration Rules governing Tier 1 (Post Study Work) contain a Maintenance (Funds) requirement in mandatory terms that admit of no discretion and make no allowance for sickness or other mitigating circumstances.***

ii. ***The effect of para 245Z (e), read together with Appendix C of the Immigration Rules and closely related parts of the Policy***

Guidance dealing with Tier 1 (Post-Study) Work, is that, to qualify, an (in-country) applicant must show he or she held £800 or over for each and every day of the period of three months immediately preceding the date of application.

iii. This requirement, however, is relaxed for those who applied before 1 November 2008. Under transitional provisions they were only required to provide a bank statement showing a closing balance of £800 or over bearing a date anywhere within the period of one month immediately preceding the date of application.

iv. The requisite amount of £800 or over can be shown in the form of a personal or joint account and may be shown in the form of personal savings held in overseas accounts.

v. Because the relevant provisions require applicants to show that they had the requisite amount of £800 during a three-month period of time immediately before their application, it is not possible to apply s.85(4) of the Nationality, Immigration and Asylum Act 2002 so as to enable them to succeed on appeal by proving they had the requisite funds for a period of time (wholly or partly) subsequent to the date of application.

vi. However, until s.85A of the 2002 Act is brought into force (subsection 85(4)(a) of which stipulates that in respect of appeals in Points Based System cases the Tribunal may consider evidence adduced by the appellant only if it was submitted at the time of applying), it remains possible for appellants to satisfy the requirements of para 245Z(e) by providing on appeal evidence in specified form showing that they had £800 or over in personal savings for the period of three months immediately prior to the date of application.

DETERMINATION AND REASONS

1. This determination is a reconsideration of the cases of three persons each of whom had brought an appeal against a decision by the respondent refusing to grant further leave to remain under the Tier 1 (Post-Study Work) scheme as contained in paras 245V, 245Z and 245ZA of the Statement of Changes in the Immigration Rules HC 395 as amended. With the agreement of the parties all three were heard together. Their appeals all turn on the issue of whether each was able to meet the requirement set out in para 245Z(e) that they had sufficient funds as specified in Appendix C to the Rules, entitled “Maintenance (funds)”. In all three appeals the appellants had met all other requirements of the Immigration Rules, those concerned with “Attributes” (Table 9 in Appendix A) and “English Language” (Appendix B) in particular.

2. Even though only raising, therefore, a limited number of issues affecting the Tier 1 (Post-Study Work) scheme, the relative novelty of the scheme, and indeed of the entire Points-Based System which now forms part of the Rules, calls for a brief resume.

3. The Tier 1 (Post-Study Work) scheme forms part of a new Points-Based System (PBS) consisting of five "tiers". At the launch of the new system in 2006 the Home Secretary said the PBS would revolutionise the way in which migration into the UK would work (A Points-Based System: Making Migration Work for Britain (CM 6741)). In a statement of intent published in December 2007, the new system was described as the biggest shake up of the immigration system in its history (Highly Skilled migrants under the points system: Statement of Intent, BIA, Dec/07; see Macdonald's Immigration Law & Practice, First Supplement to Seventh Edition, 2009, 10.6). Tier 1 is described by the UKBA as being for highly skilled individuals seeking employment or to set up in business; Tier 2 replaces the work permit scheme and most of the other categories of Part 5 of the Immigration Rules, with a system whereby employers in areas where there are gaps in the UK labour force can apply for sponsorship licences; Tier 3, which is not yet in force (and according to D.Jackson et al, Immigration Law and Practice, 4th edition, 2008, ch.10 "may never be implemented") is for unskilled workers to fill specific labour shortages; Tier 4, in force since 31 March 2009 (by HC 314), is for students; and Tier 5 caters for youth mobility (replacing the previous provision for working holidaymakers) and for temporary workers, i.e. those coming to the UK primarily for non-economic objectives. The Points Based System is seen as integral to achieving the goal of "Managed Migration".

4. Tier 1 (Post-Study Work) is one of four Tier 1 subcategories, the others being "general" (the replacement for HSMP), "entrepreneur" and "investor". It represents a new avenue for further stay for students from overseas. Under the Rules relating to students their entry and stay depends on their continuing to be students and only working with the permission of the Secretary of State and for no more than 20 hours a week. In general they are not permitted to switch from student status to any employment or business category, albeit (prior to 31 March 2009 when Tier 4 came into operation) limited exceptions were made under the Training and Work Experience Scheme (TWES) scheme and the Home Office was prepared very occasionally to grant such persons leave as a work permit holder outside the Rules. In any event, the basis of the new Tier 2 scheme, like the work permit scheme it replaced, is to enable employers based in the UK to employ people in certain limited circumstances; it does not confer a right for an applicant to look for work without having a licence to work for a specific employer in a specific approved employment. Under the Tier 1 (Post-Study Work) scheme, however, although it is intended to provide a bridge to highly skilled or skilled work, it is possible for successful applicants who have been students to stay on for two years and find any work of their choice. As the current Tier 1 (Post-Study Work) of the Points Based System - Policy Guidance (hereafter "Policy Guidance") states, "[p]ost-study workers are free to look for work without having a sponsor for the length of their leave". They are also able

to work as self-employed businesspeople. The Policy Guidance and related UKBA statements on the scheme present it as primarily intended to allow the UK "to retain the most able international graduates who have studied in the United Kingdom." That reflects the fact that it is a replacement for the International Graduate Scheme (IGS) (and its predecessor Science and Engineering Graduates Scheme (SEGS) and the Fresh Talent: Working in Scotland Scheme (FT:WISS). It is stated that although the scheme is only issued for two years, it does allow transfer to a different visa for skilled migrants within Tier 1 or alternatively Tier 2 if they are able to secure a sponsor. Yet its terms currently enable in-country applicants at least to meet the academic requirements, purely on the strength of having obtained a degree in the UK in the 12 months prior to the application (up until 31 March 2009 a post-graduate diploma could suffice). We are concerned in this reconsideration with three appellants who made in-country applications, but the scheme also allows for applications for entry clearance, albeit with some modifications in the relevant requirements, one being that £2,800, not £800 is specified as the required level of funds.

5. Apart from reflecting changes in government policy towards different immigration/migration categories, the PBS, modelled loosely on the Australian system, also embodies certain features identified in the government's ongoing "Simplification Project", which seeks to simplify not only primary legislation and subordinate legislation but also the Immigration Rules and policy instructions. Its aims include maximising transparency, efficiency, clarity and predictability, plain English and public confidence; and minimising, inter alia, "the need for decision-makers to exercise discretion" (Simplifying Immigration Law: An Initial Consultation, June 2007). Deciding applications by reference to whether applicants can score sufficient points if they possess stipulated attributes relating to age, educational and linguistic qualifications, previous earnings, etc. reflects an attempt to reduce reliance on discretion and decision-making dependent on subjective evaluation. The shift from mainly qualitative to relatively quantitative tests appears to do the same. Tier 1 (Post-Study Work) represents, therefore, an example of new-style immigration rules, rules which do not necessarily (to borrow the term used by Sedley LJ in GOO [2008] EWCA Civ 747) have a settled "acquis". (Whether, however, they have achieved simplification – when there have already been five versions in less than a year of lengthy Policy Guidance - is another matter.)

6. Before going any further it is necessary to set out the legal framework, dealing first with the Immigration Rules and related Policy Guidance, secondly with provisions governing evidence on appeal and thirdly relevant case law.

The Legal Framework

The Immigration Rules: substantive requirements

7. Paragraphs 245V-245ZA of the Statement of Changes in the Immigration Rules (as amended) set out provisions relating to the Tier 1 (Post Study Work)

scheme. These rules, inserted on 9 June 2008, came into force on 30 June 2008. Para 245V identifies the purpose of the provisions:

> "245V. Purpose
>
> The purpose of this route is to encourage international graduates who have studied in the UK to stay on and do skilled or highly skilled work."

8. Paras 245W, 245X and 245Y deal with entry and entry clearance requirements. Paras 245Z and 245ZA, dealing with students applying from within the UK for leave to remain and the terms and conditions of the grant, state:

> "245Z. Requirements for leave to remain
>
> To qualify for leave to remain as a Tier 1 (Post-Study Work) Migrant, an applicant must meet the requirements listed below. Subject to paragraph 245ZA (i), if the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
>
> Requirements:
>
> (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
>
> (b) The applicant must not previously have been granted entry clearance or leave to remain as a Tier 1 (Post-Study Work) migrant.
>
> (c) The applicant must have a minimum of 75 points under paragraphs 51 to 58 of Appendix A.
>
> (d) The applicant must have a minimum of 10 points under paragraphs 1 to 3 of Appendix B.
>
> (e) The applicant must have a minimum of 10 points under paragraphs 1 to 2 of Appendix C.
>
> (f) The applicant must have, or have last been granted, entry clearance, leave to enter or leave to remain:
>
> (i) as a Participant in the Fresh Talent: Working in Scotland Scheme,
>
> (ii) as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme),
>
> (iii) as a Student, provided the applicant has not previously been granted leave in any of the categories referred to in paragraphs (i) and (ii) above,

(iv) as a Student Nurse, provided the applicant has not previously been granted leave in any of the categories referred to in paragraphs (i) and (ii) above,

(v) as a Student Re-Sitting an Examination, provided the applicant has not previously been granted leave in any of the categories referred to in paragraphs (i) and (ii) above,

(vi) as a Student Writing Up a Thesis, provided the applicant has not previously been granted leave as a Tier 1 Migrant or in any of the categories referred to in paragraphs (i) and (ii) above, or

(vii) as a Tier 4 Migrant, provided the applicant has not previously been granted leave as a Tier 1 (Post-Study Work) Migrant or in any of the categories referred to in paragraphs (i) and (ii) above.

(g) An applicant who has, or was last granted leave as a Participant in the Fresh Talent: Working in Scotland Scheme must be a British National (Overseas), British overseas territories citizen, British Overseas citizen, British protected person or a British subject as defined in the British Nationality Act 1981.

(h) If:

(i) the studies that led to the qualification for which the applicant obtains points under paragraphs 51 to 58 of Appendix A were sponsored by a Government or international scholarship agency, and

(ii) those studies came to an end 12 months ago or less the applicant must provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.

245ZA. Period and conditions of grant

(a) Leave to remain will be granted:

(i) for a period of the difference between 2 years and the period of the last grant of entry clearance, leave to enter or remain, to an applicant who has or was last granted leave as a Participant in the Fresh Talent: Working in Scotland Scheme, as a Participant in the International Graduates Scheme (or its predecessor the Science and Engineering Graduates Scheme). If this calculation results in no grant of leave then leave to remain is to be refused;

(ii) for a period of 2 years, to any other applicant.

(b) Leave to remain under this route will be subject to the following conditions:

(i) no access to public funds,

(ii) registration with the police, if this is required by paragraph 326 of these Rules, and

(iii) no Employment as a Doctor in Training unless the applicant has, or has last been granted, entry clearance, leave to enter or remain as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme) or as a Participant in the Fresh Talent: Working in Scotland Scheme."

The Immigration Rules: documentary evidence and application forms

9. In addition, the Immigration Rules contain provisions relating to documentary evidence and applications forms. Dealing with the former, para 245AA states:

"245AA. Documentary evidence

(a) Where Part 6A or Appendices A to C, or E of these Rules state that specified documents must be provided, that means documents specified by the Secretary of State in the Points Based System Policy Guidance as being specified documents for the route under which the applicant is applying. If the specified documents are not provided, the applicant will not meet the requirement for which the specified documents are required as evidence.

(b) If the Entry Clearance Officer or Secretary of State has reasonable cause to doubt the genuineness of any document submitted by an applicant which is, or which purports to be, a specified document under Part 6A or Appendices A to C, or E of these Rules and having taken reasonable steps to verify the document, is unable to verify that it is genuine, the document will be discounted for the purposes of this application."

10. The inclusion of a specific requirement relating to documentary evidence makes it necessary to set out a related provision of the Immigration Rules dealing with specified forms and procedures for all kinds of immigration applications: paras 34-34A-J. Paragraphs 34A-J replaced, it should be noted, the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007 (S.I. 2007/No.882) with effect from 2 February 2008 (s. 31A of the 1971 Act having on that date being repealed by section 50(3)(a) of the Immigration, Asylum and Nationality Act 2006 which enables new and revised application forms to be specified administratively). These repealed Regulations had provided, inter alia, that a failure to comply with any of the requirements relating to forms only invalidated an application if several events occurred,

including that the Secretary of State notified the applicant of the failure within 28 days of the date on which the application was made. That is now changed.

11. Paras 34-34A-J in their relevant parts provide:

> "Specified forms and procedures for applications or claims in connection with immigration
>
> 34. An application form is specified when:
>
> (i) it is posted on the website of the United Kingdom Border Agency of the Home Office,
>
> (ii) it is marked on the form that it is a specified form for the purpose of the immigration rules,
>
> (iii) it comes into force on the date specified on the form and/or in any accompanying announcement.
>
> 34A. Where an application form is specified, the application or claim must also comply with the following requirements:
>
> (i) the application or claim must be made using the specified form,
>
> (ii) any specified fee in connection with the application or claim must be paid in accordance with the method specified in the application form, separate payment form and/or related guidance notes, as applicable,
>
> (iii) any section of the form which is designated as mandatory in the application form and/or related guidance notes must be completed as specified,
>
> (iv) if the application form and/or related guidance notes require the applicant to provide biographical information, such information must be provided as specified,
>
> (v) an appointment for the purposes stated in subparagraph (iv) must be made and must take place by the dates specified in any subsequent notification by the Secretary of State following receipt of the application, or as agreed by the Secretary of State,
>
> (vi) where the application or claim is made by post or courier, or submitted in person:

(a) the application or claim must be accompanied by the photographs and documents specified as mandatory in the application form and/or related guidance notes,

(ab) those photographs must be in the same format specified as mandatory in the application form and/or related guidance notes, and

(b) the form must be signed by the applicant, and where applicable, the applicant's spouse, civil partner, same-sex partner or unmarried partner, save that where the applicant is under the age of eighteen, the form may be signed by the parent or legal guardian of the applicant on his behalf,

(vii) where the application or claim is made online:

(a) the photographs and documents specified as mandatory must be submitted in the manner directed in the application form and/or related online guidance notes and by such date as is specified in the acknowledgement of the online application,

(ab) those photographs must be in the same format specified as mandatory in the application form and/or related guidance notes, and

(b) the confirmation box (which states that the information contained in the application form is true and complete) must be completed by the applicant or, if the form is completed by an immigration adviser on the applicant's behalf, by the immigration adviser on specific instructions from the applicant that the information given is true and complete, and

(viii) the application or claim must be delivered in accordance with paragraph 34B.

34B. [deals with the rules governing the sending of application forms]

34C. Where an application or claim in connection with immigration for which an application form is specified does not comply with the requirements in paragraph 34A, such application or claim will be invalid and will not be considered.

34D.Where the main applicant wishes to include applications or claims by any members of his family as his dependants on his own application form, the applications or claims of the dependants must meet the following requirements or they will be invalid and will not be considered:

(i) the application form must expressly permit the applications or claims of dependants to be included, and

(ii) such dependants must be the spouse, civil partner, unmarried or same-sex partner and/or children under the age of 18 of the main applicant.

34E-34F. [deal with rules governing variation of applications or claims for leave to remain]

34G-I. [deal with determination of the date of an application or claim (or variation in accordance with para 34E]

34J. [deals with withdrawn applications or claims for leave to remain]."

Appendix C

12. We have seen that para 245Z contains requirements that refer to three appendices: para 245Z(c) requires an applicant to have a minimum of 75 points under paras 51 to 58 of Appendix A (dealing with attributes), para 245Z(d) requires an applicant to have a minimum of 10 points under paras 1 to 3 of Appendix B (dealing with English language). Para 245Z(e) requires an applicant to have a minimum of 10 points under paras 1 to 2 of Appendix C (dealing with maintenance).

13. Appendix C of the Immigration Rules, headed "C Maintenance (Funds)" states at paras 1A-2:

"1A. In all cases where an applicant is required to obtain points under Appendix C, the applicant must have the funds specified in the relevant part of Appendix C at the date of the application and must also have had those funds for a period of time set out in the guidance specifying the specified documents for that purpose.

Tier 1 Migrants

1. An applicant applying for entry clearance or leave to remain as a Tier 1 Migrant (other than as a Tier 1 (Investor) Migrant) must score 10 points for funds.

2. 10 points will only be awarded if an applicant:

(a) applying for entry clearance, has the level of funds shown in the table below and provides the specified documents, or

Level of funds	**Points**
£2,800	10

(b) applying for leave to remain, has the level of funds shown in the table below and provides the specified documents.

Level of funds	**Points**
£800	10

3. The applicant must have the funds specified in paragraph 2 above at the date of the application and must also have had those funds for a period of time set out in the guidance specifying the specified documents for the purposes of paragraph 2 above."

Policy Guidance

14. The "guidance" referred to in Appendix C (and also, as we shall see, in para 245AA) is a reference to the UKBA Policy Guidance document identified earlier, a published document entitled "Tier 1 (Post-Study Work) of the Points-Based System – Policy Guidance. This Policy Guidance has gone through different versions. The first version of this guidance was issued when the scheme began on 30 June 2008 (version 06/08). The second version, issued on 11 September 2008 (version 09/08), made changes to the section entitled "Tier 1 (Post-study Work): Maintenance" and included a page at the end in different typeface headed "Transitional arrangements for maintenance (funds)". Further versions were published on 27 November 2008 (version 11/08), 19 January 2009 (version 01/09) and 31 March 2009 (version 03/09). The guidance in all its versions differentiates between "initial applicants" and those who apply having previously had leave to remain under the IGS or the FT:WISS. Throughout this determination we are concerned with initial applicants unless otherwise stated. It is of some importance to note that as a result of the contents of the 11 September 2008 version, there were transitional provisions regarding maintenance relating to applicants who applied on or before 31 October 2008. There were also different transitional provisions for applicants who had previous leave under the IGS (formerly SEGS) or the FT:WISS. We shall look at them shortly.

Those applying after 31 October 2008

15. For those who applied *after* 31 October 2008 date the provisions contained in the Policy Guidance relating to funds are clear. In the current version of the Tier 1 (Post-Study Work) Policy Guidance, under the head "General Guidance for Applicants to the Points-Based System" and the sub-head "Documents we require to support applications under the points-based system", it is stated at paras 10 and 11 that:

"10. The applicant must ensure he/she provides all of the necessary supporting documents at the time he/she sends us the application. If the immigration rules state that specified documents must be provided, we will say so in this guidance and we will only accept those documents.

11. If the applicant does not provide the specified documents, we will not contact him/her to ask for them. Therefore, if the applicant fails to send the correct documents we may refuse the application."

16. In the specific section headed "Maintenance requirement – all applications" the Policy Guidance states:

"89. One of the requirements of Tier 1 is that an applicant coming to the UK must be able to support himself/herself for the entire duration of his/her stay in the UK without use of public funds (benefits provided by the state). An applicant who is unable to support himself/herself could face financial hardship because he/she will not have access to most state benefits.

90. In order to qualify for entry clearance, or leave to remain under Tier 1 an applicant must show that he/she has enough money to support himself/herself. The maintenance requirements are detailed below:

- Applicants outside the UK seeking entry clearance must have at least £2,800 of personal savings which must have been held for at least three months prior to the date of application.

- Applicants in the UK seeking further leave to remain must have at least £800 of personal savings which must have been held for at least three months prior to the date of application.

91…

92…

93. The evidence to support personal savings for at least three months must be original, on the official letter-headed paper or stationery of the organisation and have the office stamp of that organisation. It must have been issued by an authorised official of that organisation.

94. Evidence must be in the form of cash funds. Other accounts or financial instruments such as shares, bonds, pension funds etc, regardless of notice period are not acceptable.

95. The evidence of maintenance must be of cash funds in the bank (this includes savings accounts and current accounts even when notice must be given), loan or official financial or government sponsorship available to the applicant. Other accounts of financial instruments such as shares, bonds, pensions etc., regardless of notice period, are not acceptable.

96. Only the following specified documents will be accepted as evidence of this requirement:

(i) <u>Personal bank or building society statements covering the three consecutive months.</u>

The most recent statement must be dated no more than one calendar month before the date of application.

The personal bank or building society statements should clearly show:

- The applicant's name;
- The account number;
- The date of the statement;
- The financial institution's name and logo;
- Transactions covering the three month period;
- That there are enough funds present in the account (the balance must always be at least £2,800 or £800, as appropriate).

Ad hoc bank statements printed on the bank's letterhead are admissible as evidence (this excludes min-statements from cash points).
… [sets out guidance on electronic bank statements]
We will not accept statements which show the balance in the account on a particular day as these documents do not show that the applicant holds enough funds for the full period needed."

17. The Guidance then gives three alternative types of specified documents acceptable as evidence of maintenance (funds) and sets out the requirements for each which closely mirror those for personal bank statements: ii) Building society pass book covering the previous three months period; (iii) Letter from bank confirming funds and that they have been in the bank for at least three months; and (iv) Letter from a financial institution regulated by Financial Services Authority (FSA) or, in the case of overseas accounts, the home regulator (official regulatory body for the country in which the institution operates and the funds are located) confirming funds.

Those applying before 1 November 2008: transitional arrangements

18. For all applicants who applied before 1 November 2008, the Policy Guidance was in similar terms, although there were minor variations and the paragraph numbering was different. However, in the version dated 11 September 2008 two important additions were made at the beginning and end of the document. At the beginning, headed "Addendum", it was stated:

"Tier 1(Post-Study Work) of the points-based system Policy Guidance.

This document contains guidance [sic] to our policy on Tier 1 (Post-Study Work) of the points based system to work in the United Kingdom.

Maintenance (funds) requirement: We have made transitional arrangements for proving maintenance (funds) for applicants and their family members who make applications up to and including 31 October 2008. You can find details of these on the last page of this document."

19. Giving these details, the last page contains the following statement:

"Transitional arrangements for maintenance (funds)

Normally, when applying to Tier 1 (Post-Study Work) from within the United Kingdom, you will have to show that you have enough funds, by sending

documentation showing you have had savings of at least £800 for at least three months before applying.

Because this is a new requirement and it may be difficult to prove this immediately, we have put transitional arrangements in place for applicants and their family members submitting their applications within the United Kingdom up to and including 31 October 2008.

Up to 31 October 2008, you do not have to show you have had the funds for at least three months before your application. You must only show you have the required funds at the time you apply. The types of documentary evidence you need to send to support your application are as described in this document. However, until 31 October 2008, they do not need to cover the three-month period, but they must be dated no more than a month before your application.

For example, if you apply under Tier 1 (Post-Study Work) on 12 July, a single bank statement with a closing balance of £800 dated between 12 June and 12 July 2008 will meet the maintenance requirements. A bank statement dated before 12 June 2008 will not be acceptable."

20. This is clearly a transitional arrangement affecting all applicants applying before a specified date.

Transitional arrangements for those with current leave in the IGS, SEGS (Science and Engineering Graduates Scheme) and FT:WISS (Fresh Talent: Working in Scotland Scheme).

21. There are also different transitional arrangements affecting some categories of applicants only. As already noted, since inception the Policy Guidance has differentiated between "initial" applicants and those with current leave in the IGS, SEGS or FT:WISS categories. Since inception it has contained a separate section headed "Tier 1(Post-Study Work) –Points Scoring: Points scoring assessment –transitional arrangements". This section deals with transitional arrangements affecting Appendix A (Attributes) and Appendix B (English Language). It makes no reference to any transitional arrangements affecting Appendix C (Maintenance). However, since the third appellant in this case falls into the IGS category, it is appropriate that we note what these arrangements specify. In the subsection dealing with "Attributes" para 84 of the current version (31 March 2009) explains that any applicant who is currently in the UK under the IGS, SEGS or FT:WISS categories (which have now been deleted from the Immigration Rules) "may apply under the transitional arrangements to come into the Tier 1 (Post-Study Work) category, as described below". Paras 85 and 86 then state:

"85. With the implementation of Tier 1 (Post-Study Work), applicants who were granted less than 2 years leave under the [IGS] or the [SEGS] will be able to apply to Tier 1 under the transitional arrangements. These arrangements will

enable them to obtain a total of up to 2 years leave under of combination of their previous scheme and Tier 1 (Post-Study Work).

86. Participants in the [FT:WISS] will normally have been granted 2 years leave at the outset and therefore most of them will not need any transitional arrangements. However, an applicant who was granted less than 2 years leave under the [FT:WISS} can apply under the transitional arrangements in Tier 1 (Post-Study Work) to get a total of 2 years leave under a combination of their previous scheme and Tier 1 (Post-Study Work).

22. Earlier at para 82 there is a Table setting out the requirements under these transitional arrangements for the award of points for Tier 1(Post-Study Work). Under this 75 points are available for applicants applying for leave to remain who have, or were last granted, leave as a participant in the IGS, SEGS or FT:WISS categories.

23. Under a separate section head entitled “English language assessment”, immediately after a paragraph dealing with initial applications (para 87), there is a paragraph dealing with “Transitional arrangements” (para 88). The latter states:

“88. If the applicant currently has, or was last granted leave as a participant in the [IGS] (or its predecessor, the [SEGS]) or a participant in the [FT:WISS] he/she will satisfy the English language requirement.”

Evidence on appeal

24. To complete the legal framework, we also need to set out the provisions of s.85(4) and s.85(5) of the 2002 Act. They provide:

“85. Matters to be considered

…

(4) On an appeal under sections 82(1), 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

(5) But in relation to an appeal under section 82(1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10-

(a) subsection (4) shall not apply, and

(b) the Tribunal may consider only the circumstances appertaining at the time of the decision to refuse."

25. We need also to set out the new section 85A introduced by s.19 of the UK Borders Act 2007, albeit not yet in force. It states:

"Points-based applications: no new evidence on appeal

(1) For section 85(5) of the Nationality, Immigration and Asylum Act 2002 (c.41) (appeal: new evidence may be considered: exception) substitute—

"(5) But subsection (4) is subject to the exceptions in section 85A."

(2) After section 85 of that Act insert—

"85A Matters to be considered: new evidence: exceptions

(1) This section sets out the exceptions mentioned in section 85(5).

(2) Exception 1 is that in relation to an appeal under section 82(1) against an immigration decision of a kind specified in section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision.

(3) Exception 2 applies to an appeal under section 82(1) if—

(a) the appeal is against an immigration decision of a kind specified in section 82(2)(a)[refusal of leave to enter the UK] or (d)[refusal to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave to enter or remain],

(b) the immigration decision concerned an application of a kind identified in immigration rules as requiring to be considered under a "Points Based System", and

(c) the appeal relies wholly or partly on grounds specified in section 84(1)(a), (e) or (f).

(4) Where Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it—

(a) was submitted in support of, and at the time of making, the application to which the immigration decision related,

(b) relates to the appeal in so far as it relies on grounds other than those specified in subsection (3)(c),

(c) is adduced to prove that a document is genuine or valid, or

(d) is adduced in connection with the Secretary of State's reliance on a discretion under immigration rules, or compliance with a requirement of immigration rules, to refuse an application on grounds not related to the acquisition of "points" under the "Points Based System"."

(3) In section 106(2) of that Act after paragraph (u) insert—

> "(ua) may make provision, for the purposes of section 85A(4)(a), about the circumstances in which evidence is to be treated, or not treated, as submitted in support of, and at the time of making, an application;".

26. It can be seen that s.85A does not replace s.85(4). Rather it expands the scope of the s. 85(5) exceptions to it, in respect of new evidence. One component of "Exception 2" relates expressly to appeals against an immigration decision concerning an application under the Points Based System.

Relevant cases

27. Mention should also be made of the two Tribunal decisions to which each of the representatives made reference: LS (Gambia) and EA (Nigeria), as well as the Court of Appeal case of GOO. Since EA was concerned to clarify the meaning of LS (Gambia) we can confine ourselves to a summary of EA. EA concerned a student who between the date of application for leave to remain and the date of decision (and without the respondent learning of it) had changed his course from a degree course in accountancy and finance at London Metropolitan University to a Bachelor of Science degree in computer science at Anfell College. At paras 5-7 the Tribunal stated:

> "5….Section 85(5) provides, by way of contrast, that an appeal against entry clearance or a certificate of entitlement (that is to say, an out-of-country appeal) is to be decided by reference only to evidence relating to the circumstances at the date of the decision. As the Tribunal pointed out in LS (Gambia) s85 (4) applies, without any difference of wording, to asylum and human rights appeals and in-country immigration appeals. It follows that, under the 2002 Act, they are governed by the same principles *so far as the admissibility of evidence is concerned*: that is what s85 (4) is about.
>
> 6. But the evidence is only admissible in so far as the Tribunal thinks it "relevant to the substance of the decision". That phrase is important. It is not the evidence's relevance to the appellant's claim or his application that is in question: it is its relevance to the decision that was actually made. It may be the case that, as has been suggested a number of times in the Court of Appeal, the issue of whether a person is a refugee at any particular time is "one composite question"; but a decision on a matter under the Immigration Rules is a decision on the detailed eligibility of an individual by reference to the particular requirements of the Rule in question in the context of the application that that person has made.
>
> 7. It is thus not open to an appellant to argue simply that, on the date of the hearing, he meets the requirements of the Immigration Rules. He can succeed only if he shows that the decision that was made was one which was not in accordance with the Immigration Rules. Section 85(4) allows him to show that by reference to evidence of matters postdating the decision itself, and it may well be that the effect is that the question for the Tribunal in an in-country case is whether the decision can be justified as a correct one at the date of the hearing. But that does not mean that the Tribunal is the primary decision-maker. The Tribunal's task remains that of hearing appeals against decisions actually made. The correct

interpretation of s85 (4) is perhaps best indicated by saying that the appellant cannot succeed by showing that he would be granted leave if he made an application on the date of the hearing: he can succeed only by showing that he would be granted leave if he made, on the date of the hearing, the same application as that which resulted in the decision under appeal. The subsection does not permit an appellant to change his case under the Immigration Rules for being allowed to remain in the United Kingdom. (That is, of course, without prejudice to the fact that s84 (1) may allow the appeal to succeed on different grounds entirely.) "

28. In GOO the Court of Appeal was concerned with eight cases where the Secretary of State had found persons to fail to meet the requirements of the Immigration Rules relating to students either because they had changed their course since applying for variation of leave or had failed to produce evidence of satisfactory attendance or progress. At paras 29- 31 Sedley LJ noted that whilst it was always open to the Secretary of State to deal with anomalies and difficulties in the application of the Immigration Rules by exercising discretion outside the rules (and sometimes inside the rules), there was a second way which was more rational, particularly given that the relevant immigration rules, para 60(v) in particular, lacked clarity and did not contain explicit words laying down that no regard was to be had to considerations such as illness:

"29. A second way of dealing with such anomalies is to ask whether the rules really are so stringent that the anomalies have to arise at all. The appellants' case is that there is no need to read rule 60(v) with the stringency of SW (Jamaica); that doing so is productive of injustice; and that a more generous reading can do much to prevent this. In support of his approach Mr Macdonald reminds us of the decision of Woolf J, as he then was, in R v IAT, ex parte Gerami [1981] Imm AR 187:

> "…it would not be right to treat a person as disqualified from being given further leave to remain in this country because of a prolonged lack of success. That is a matter which only goes to discretion under para 12 and does not amount to a condition precedent to a successful application."

30. While, as Mr Macdonald acknowledges, the rules are no longer in the form they were in then, Gerami in his submission forms part of the *acquis* of law and practice relating to foreign students – an *acquis* which appears to have remained undisturbed until and for a decade after the introduction of HC 395 in 1995 and only recently to have become contentious. Whether this is right or not, the approach of Woolf J in Gerami seems to us to make so much sense that it would take clear words to displace it; and we consider that rule 60(v) is by no means clear in this regard. Of course the Home Secretary needs to know how a student has done in his examinations in order to decide whether he is making satisfactory progress and should be allowed to stay on. But it would take very explicit words to lay down that a student who has attended every lecture and seminar and turned in excellent coursework has not made satisfactory progress because he was too ill to sit his examinations, and that he is therefore debarred for good from having another shot at them. We do not believe that Parliament, in approving the Immigration Rules pursuant to s.3(2) of the 1971 Act, can have thought that it was sanctioning in such circumstances the termination of a prospective career in which a foreign student had invested years of his life and possibly all his family's savings; nor that the Home Secretary, if called upon to explain them, would have said that this was their intended effect.

Conclusion of law

31. In our judgment the meaning of rule 60(v) is that a student who wants an extension of stay must be able to produce evidence of satisfactory progress, whether on the course named in his application for entry clearance or on another recognised course which he or she has undertaken. A failure to sit or to pass relevant examinations will always be material to the evaluation of the student's progress, but whether it is decisive will depend on the reason for it. If the reason is not inconsistent with satisfactory progress, rule 60(v) is satisfied."

The Appellants

29. All three appellants had applied for further leave to remain under the new Tier 1 (Post-Study Work) scheme. The first appellant, a citizen of Sri Lanka, who had studied here and been awarded a BSc degree from the University of Portsmouth, applied on 19 November 2008. He scored sufficient points to qualify under the "Attributes" and "English" requirements, but fell down on "Maintenance". He had submitted statements of his current account with HSBC for the 3 month period 14 August to 14 November 2008, but the account did not show a credit balance continuously over £800 until after 1 October 2008. For that reason the respondent, on 18 December 2008, refused his application. On appeal, however, Senior Immigration Judge (SIJ) McKee allowed his appeal. In a determination notified on 11 February 2009 he found that although prior to the date of application the appellant could only show one-and-a-half months during which his personal savings were always £800 or more, by the time of the hearing he was able to show that he had an unbroken period of three months during which he had funds consistently above the £800 level. On that basis, the SIJ considered that s.85(4) of the Nationality, Immigration and Asylum Act 2002 (hereafter "the 2002 Act") entitled him to treat the recent period as satisfying the requirements of the Rules in substance. The respondent was successful in obtaining an order for reconsideration.

30. The second appellant, a citizen of Jamaica, had recently completed a full-time Masters degree in Actuarial Science at City University, London. Shortly afterwards, on 29 October 2008, she applied for an extension of leave to remain under Tier 1 (Post-Study Work). She enclosed a bank statement dated "September 2008" covering the period 10 September to 25 September 2008 showing that throughout that period she had a balance of over £800. Due to transitional provisions then in place, she was informed she was only required to show a closing balance of at least £800 in personal savings. In a decision dated 11 December the respondent accepted she had the requisite number of points under Appendices A and B but awarded no points under Appendix C ("Maintenance (funds)"). Accordingly the Secretary of State refused her application stating that she was not satisfied the appellant had provided the specified documents to show she was in possession of sufficient funds, as detailed in Appendix C of the Immigration Rules. Her appeal came before Immigration Judge (IJ) R B L Prior. By the time of the hearing the appellant had submitted further bank statements covering the period 29 September - 29 October 2008; they included statements showing a closing balance of over £800 within this latter period. In a determination notified on 9 February 2009

he dismissed her appeal. Despite stating at para 2 that "I can only take into account the circumstances appertaining at the time of the hearing before me by virtue of Section 85(4) of the 2002 Act", he made no mention of the evidence she had submitted just before the hearing. He found that as the respondent had required her to produce a personal bank statement covering the one-month period immediately before the application showing a minimum balance of £800, her production of a bank statement covering the period 10 September-25 September amounted to a failure to produce the specified documents. He then stated:

> "9. By the date of the decision of 11 December 2008 the specification of the period to be covered by a bank or building society statement had been enlarged from one month to a period of three months immediately preceding the application.
>
> 10. Clearly the intention of the Rules is that applicants prove that they are relatively financially self sufficient. Such sufficiency was not likely to be satisfied by evidence that on a single day a sum of £800 was available to the applicant, but that credit balance fell away and thus was not maintained as a minimum and continuing source of adequate financial assistance.
>
> 11. I was not satisfied that the Appellant met the requirements of sub-paragraphs 245Z (e) of the Rules, as at the date of either the decision or the hearing".

31. The appellant sought and obtained an order for reconsideration, it being found arguable that the IJ had misunderstood the relevance of s.85 (4) of the 2002 Act.

32. The third appellant, a citizen of Tanzania, had been pursuing studies in the UK since September 1998. On 11 July 2007 she was granted further leave to remain as a participant of the IGS until 9 July 2008. On 30 November 2007 she was awarded a diploma in higher education. On 7 July 2008 she applied for leave to remain under Tier 1(Post-Study Work) as a participant of the International Graduate Scheme (IGS). The respondent refused her application under Appendix C stating that the documents she had provided did not demonstrate that she had been in possession of £800 for the period specified in the guidance. She had produced bank statements for the period 12 April 2008 to 11 June 2008. These showed that over this period she was continually overdrawn usually by at least £500. On 11 June 2008 these showed an overdraft of £559.88. She appealed stating that her understanding was that she was required to demonstrate that she had earned £800 per month, rather than that she had £800 in her bank account. She also stated that she had been ill from December 2007 to February 2008 and had not recommenced her employment with BUPA Care Homes, Ilford until March 2008, having been supported during her period of illness by her uncle. On 19 August 2008 Immigration Judge Ross dismissed her appeal. He noted that the appellant had conceded:

> "that she did not have £800 at the date of the application, or one month before it. In fact no bank statement had been submitted showing the accounts of 7 July

2008. The nearest date is approximately one month earlier on 11 June 2008 when she was over £500 overdrawn. Sadly for her therefore she does not meet the requirements of the Immigration Rules, the fact that she was ill a few months earlier is not a matter which I can take into account, and neither is the fact that she misunderstood the rules."

33. He went on to dismiss her appeal on Article 8 grounds as well. Her application for reconsideration argued that the IJ had failed to address the Court of Appeal case of GOO and in doing so had caused injustice to the appellant. On statutory review David Holgate QC sitting as a Deputy High Court Judge ordered reconsideration. He stated that whilst Article 8 was unarguable, he considered that albeit GOO was dealing with a different part of the Immigration Rules it was arguable that the rationale of the decision was applicable to the "interpretation and/or application of both [para] 245(e) and Appendix C [of the Immigration Rules]. On that basis it could be relevant to take into account evidence on the Appellant's illness as well as the history of the Appellant's studies in the UK."

Submissions

The first appellant

34. Mr Tufan's submission concerning the respondent's application for reconsideration in respect of the first appellant was as follows. He accepted that *if* it was right for the three months' requirement to be considered by reference to the date of hearing, then the first appellant met it. However, he submitted, it would be wrong to consider it thus. The wording of para 245Z(e) and 245AA and the interconnected Appendices and Policy Guidance documents admitted of no discretion and made clear that the relevant date for deciding whether an applicant met the maintenance (funds) requirement was the date of application, not the date of decision or date of hearing. Para 245AA specifically prevented applicants producing evidence post-application. The Policy Guidance made clear that for each and every day of the three months period that applied to this appellant the applicant's personal savings had "always" to be £800 or more. In assuming that he could consider the requirement satisfied by reference to funds held by the first appellant for a further one and half months *after* the date of application (so as to give him 3 months in total) SIJ McKee went beyond his remit. The reference in s.85(4) to "the substance of the decision" related in this type of case to what the applicant had by way of savings at the date of application and it made no sense to consider that s.85(4) could come to the aid of the first appellant.

35. Miss Heybrooke contended that SIJ McKee was right to treat s.85(4) as entitling him to consider evidence of funds post-dating the application, since the Immigration Rules were subordinate to legislation and both the Rules and the Policy Guidance were simply guidance and had to give way to primary legislation which allowed post-decision evidence to be taken into account. To read the Immigration Rules and Policy Guidance literally could lead to all kinds of injustices and absurdities, e.g. leading to the failure of an appellant whose savings fell under £800 during the requisite period for just one day. It could mean accepting that someone who had the requisite savings at the date of

application but had none by the time of hearing could still succeed under the Immigration Rules, even though plainly no longer able to maintain himself or herself. SIJ McKee was correct to note, she said, that the amendment to s.85 (4) created by s.19 of the UK Borders Act 2007, viz. s.85A, was not yet in force. Without s.85A there was no statutory basis for excluding post-decision evidence relevant to the substance of a decision. In addition, reported cases of the Tribunal, LS (Post-decision evidence-Directions-Appealability) Gambia [2005] UKAIT 00085 and EA (Section 85 (4) explained) Nigeria [2007] UKAIT 00013 in particular, made clear that on appeal immigration judges could have regard to evidence indicating that an appellant met the requirements at the date of hearing. Unlike the appellant in EA whose switch to a different course after the date of application meant her appeal failed, the first appellant was not seeking to change his application from what it had been originally: his application remained the same throughout. The purpose of the Immigration Rules was surely achieved by the IJ deciding the appeal on the basis of evidence as it stood at the date of the hearing. By taking the latest evidence into account he avoided injustice. He ensured that the assessment was proportionate, balancing strict requirements against GOO-type considerations calling for flexibility. To take account of such evidence also fitted well with a purposive approach to construction of the Immigration Rules, since the purpose was to ensure students wanting to work under this scheme had some support whilst here. If the first appellant had made his application three months earlier, he would only have had to show £800 for one month. It was also pertinent that the new Rules had not been well-publicised and the transitional period was a very short one (30 June - 31 October 2008). The period indicated by SIJ McKee covered the three months between 3 November 2008 and 6 February 2009, the latter being just three days before the hearing, meaning that it was as up-to-date as could be expected.

The second appellant

36. In giving his reasons for dismissing the second appellant's appeal the IJ had emphasised that since the appellant had applied under this scheme her credit balance had fallen away so that it was less than specified as necessary both at the date of the decision and the date of hearing. In amplifying the second appellant's grounds for reconsideration Mr Nicholson submitted that thereby the IJ had clearly misunderstood the purport of s.85 (4). He had written that "I can only take into account the circumstances appertaining at the time of the hearing before me by virtue of Section 85(4) of the 2002 Act", ignoring that this provision governed evidence relating to the date of decision. At the date of application, he submitted, the second appellant met the requirements of the Immigration Rules. Because she had applied on 29 October 2008, i.e. before 31 October 2008, she fell under the transitional provisions. Those provisions were not entirely clear but on either of two main possible constructions the second appellant succeeded. If those provisions only required her to show she had £800 on (what could be as little as) *one day* during the month directly preceding her application she plainly succeeded, e.g. on 25 September 2008 she had £1,641.87 in personal savings. If that provision meant she had to show personal savings at £800 or above for a continuous period of *one month* directly preceding her application, then in fairness the respondent should have

had regard to her August bank statements because the bank statement month for September did not cover the whole of that month and she should not be disadvantaged by the different time-cycles of banks or by when banks chose to send out monthly statements. They were the only bank statements she could get at the time.

37. Mr Nicholson also had a fallback argument in case we were not with him in respect of what the second appellant had been able to evidence at the date of application. It was that the second appellant was able to meet the one-month requirement of showing £800 or more during the period of one month immediately before the date of application by virtue of evidence that was submitted post-decision but in time for the hearing before the IJ - evidence showing she had personal savings always on or above £800 between 27 September 2008 and 29 October 2008.

38. We asked Mr Nicholson what relevance he thought para 34A of the Immigration Rules had to his fall-back position that the second appellant could pray in aid evidence as to her personal savings in the one-month period directly preceding her application, albeit such evidence was only submitted for the first time shortly before the IJ heard her case. He contended that this provision could not negate the clear terms of s.85 (4) which entitled an IJ to consider post-decision evidence. It was also significant that the Policy Guidance itself made clear that applications that failed to include all the specified documents could still be accepted as valid. Para 12 of the current Policy Guidance, for example, stated that if the applicant did not provide the specified documents, "we will not contact him/her to ask for them". But it continued: "Therefore, if the applicant fails to send the correct documents we *may* refuse the application" (emphasis added). That made clear, he said, that there was no automatic invalidation. In a further note submitted shortly after the hearing Mr Nicholson submitted that para 34A was a rule about invalidity of applications and non-compliance with it had the result that the application would not be considered. In the second appellant's case the appellant's application had not been treated as invalid and so the respondent must be taken as having "waived" the requirements of this rule. In any event, his note added, it was not open to the respondent had not refused the application for Post-Study Work due to the second appellant failing to meet para 34A requirements (We should add that during their submissions neither of the other two representatives chose to make comments on the para 34A point; Mr Tufan's submission, which we shall examine later at para 63, was expressly tentative).

39. Section 86(3), said Mr Nicholson, obliged the IJ to allow the appeal if the decision against which the appellate was brought was "not in accordance with the law (including immigration rules)…". The IJ's approach, if accepted, would compel immigration judges to fulfil the role of a primary decision-maker.

40. Mr Tufan agreed with Mr Nicholson that the IJ's approach to s.85(4) as set out in para 2 (and para 11) of his determination was wrong but contended that the effect of para 245AA was that unless the evidence of funds at an £800 level was provided at the time of applying, that was that: it made no difference if it

was provided later. He further disputed Mr Nicholson's view that the appellant in fact met the requirements under the transitional provisions set out in the relevant Policy Guidance. Mr Tufan said he accepted that the transitional provisions in respect of maintenance were ambiguous. If the requirement set out in that guidance meant that she had to show she always had £800 for a one month period prior to the date of application, then the fact of the matter was that she had only submitted relevant bank statements covering the period 10-25 September, which did not cover the one month period immediately before the application (which was 30 September – 29 October) and in any event was less than a calendar month. The statements she had submitted for August were even further outside the requisite period. Even if the transitional provisions only required an applicant to show £800 in savings for one day in the month immediately preceding the application, the second appellant still failed to qualify since she had no closing balance of £800 during the relevant period. So whilst he accepted that the IJ had erred in law, his error should not be seen as material since at para 8 the IJ had correctly decided that the (September) statement she had produced covered less than one month immediately before the application. That reason was sufficient on its own to justify the IJ's dismissal of the appeal in law. For the same reasons he had given in his submissions on the first appellant's case, he did not accept that the second appellant could show she met the requirements of para 245Z(e) on the strength of evidence submitted only recently.

The third appellant

41. Miss Cole-Wilson for the third appellant confirmed that her client accepted that neither at the date of application, the date of decision nor the date of hearing did she have the funds specified in Appendix C read together with the Policy Guidance. However, shortly before the adjourned first-stage reconsideration hearing she had reached a position where she was able to show she had requisite funds: she had submitted a bank statement covering 2 February-18 February 2009 showing a balance of over £1,000. On LS (Gambia) and EA (Nigeria) principles she was entitled to have her case decided on the basis of the evidence available at the date of hearing of her appeal. In the period before her application, she had been off sick between 6 December 2008 and 23 March 2009; she had survived through the third-party support of her uncle as she was entitled to do under the Immigration Rules on students. Miss Cole-Wilson accepted that the appellant could not rely on having misunderstood the rules but submitted that the IJ was wrong to find at para 11 that her illness was "not a matter which I can take into account…". She contended that, as recognised by the Deputy High Court judge who granted the order for reconsideration on statutory review, the case of GOO was relevant by analogy. Notwithstanding her status under the Immigration Rules the third appellant's initial entry was as a student and at the time of application her status as a student was still subsisting. Section 86(3) required an IJ to allow an appeal not only where it was not in accordance with the Immigration Rules but also when it was not in accordance with the immigration law. As with the case of LS (one of the appellants in GOO), her illness amounted to what Sedley LJ described at para 25 as:

> "the not uncommon situation in which genuine personal difficulties have either prevented a student from sitting a course examination or caused him to fail it. The present cases, to the facts of which we will be coming, afford reminders of the kinds of vicissitude that can impede studies."

42. Para 245Z embodied a provision which was in the circumstances unfair in that it made no provision for a situation where somebody is prevented from satisfying the requirements of the rules by circumstances beyond their control. As emphasised in GOO, Parliament must be taken to have understood that persons who come to the UK as students make a considerable financial and personal investment and a strict liability approach was contrary to the spirit of the Immigration Acts. The third appellant had a good immigration history and prior to the new code coming into effect had been here lawfully for just over 10 years. The purpose of the Immigration Rules was to ensure that a person had been financially able to manage prior to their application. Whilst the appellant was in hospital and recuperating she had been put in funds by her uncle (third-party support was permitted under the student Rules) and since back at work it inevitably took time for her to build up her own savings again.

43. Mr Tufan in reply contended that the relevant rules were not flexible; they reflected an intention of Parliament to codify rules that were transparent, streamlined and predictable. GOO was not concerned with a maintenance requirement. In any event para 60 (with reference to para 57) dealt with terms such as "satisfactory attendance" and "satisfactory progress" which were capable of the broad interpretation given by their lordships, in preference to the more literal approach which had been taken by the Tribunal up to that time. The third appellant may have been here lawfully for some time but she had always until now asserted that she was going to leave the UK at the end of here studies, which was some 10 months before the present application.

Discussion

44. It can be seen that paras 254AA-ZA cross-refer to three appendices to the Rules, A-C. Appendix A deals with "Attributes", and specifies which academic qualifications qualify an applicant to score points and how many. Appendix B deals with "English Language" and sets out, inter alia, organizations and tests on a list of English language test providers. Appendix C, headed "Maintenance (Funds)" sets out the requirements an applicant must meet in order to score the requisite 10 points awarded for this sub-category. Both para 245AA and Appendix C refer expressly to there being "guidance" existing about their requirements (which can only be the Policy Guidance on Tier 1(Post Study) Work). Appendix C directs the reader to this guidance for determining two things: the period of time for which an applicant has to have had the requisite funds (£800 for in-country applications) and what are the specified documents required in order to show that: Appendix C says that these matters are "set out" in the Policy Guidance "for that purpose".

45. Several observations are in order.

46. First, the provisions as just set out consist of three components (provisions in para 245, in Appendices A-C and in a document entitled “Policy Guidance”) that are closely interrelated. Para 245Z cross-refers to Appendix C and para 245AA and Appendix C cross-refer to the Policy Guidance (as we shall see later on, para 34A also contains a reference to “related guidance notes”). Plainly, like Appendix A and B, Appendix C forms an integral part of the Immigration Rules. Whilst the Policy Guidance as such is not part of the Immigration Rules, the Rules do refer to it (as “guidance”) and it is guidance which specifies what documentary evidence is acceptable. It is not a rule which leaves the requirements relating to acceptable evidence to be discovered by reference to what the Secretary of State may require (as is the case with the requirement contained in para 289 of the Immigration Rules relating to domestic violence for applicants to produce “such evidence as may be required by the Secretary of State”, a rule whose status was analysed in Ahmed Iram Ishtiaq v SSHD [2007] EWCA Civ 386, paras 31-34). And there are two respects in which the rules treat the guidance as determinative: as to the period of time for which an applicant must show he has had the requisite £800 in maintenance (funds) and as to the type of documents he must produce to evidence that. Unlike some items of Home Office policy, the Policy Guidance does not seek or purport to set out, and is not to be confused with a document setting out, matters of Home Office policy that exist as concessions outside the rules. Unlike UKBA Immigration Directorate Instructions (IDIs) which albeit in the public realm are written for UKBA staff, the Policy Guidance is clearly written for potential applicants. As such it is something on which applicants are entitled to rely as accurate and reliable information about what is expected of them if they wish to qualify under the Immigration Rules. The Policy Guidance appears, therefore, to be a hybrid of a new kind, being guidance expressly for applicants and containing some provisions that are integral to the understanding and operation of the relevant immigration rules.

47. Second, the requirements set out in paras 245Z and in Appendix C are expressed in mandatory language: to qualify for leave to remain an applicant “must” meet the listed requirements. In particular, para 245Z (e) specifies that the applicant “must” have a minimum of 10 points under paras 1 to 2 of Appendix C. Para 1A of Appendix C specifies that “[i]n all cases” the applicant “must” have the funds specified and “must” score 10 points for funds. These requirements admit of no discretion. The guidance given in the Policy Guidance is for the most part in similar terms. Unlike the typical maintenance requirement still found in many categories of the Immigration Rules, that in para 245Z(e) requires applicants to show they have the maintenance money in the form of a specified amount held over a specified past period.

48. Third, there is an absence in these provisions of any tests that require the decision-maker to make up his or her own mind about the appellant’s academic or linguistic attributes by reference to past circumstances or performance. There is no longer any maintenance requirement of a kind that requires the decision maker to make a judgement about whether it is “adequate”. If, by reference to specified lists or exceptions, applicants can show that the requisite academic qualification has been awarded to them, that they have the

necessary language requirement and a specified amount of funds (and assuming no general grounds for refusal apply), they must be granted leave to remain for two years (less in IGS, SEGS or FT:WISS cases: see para 245ZA(a)(i)). We shall have cause to return to this observation later on when dealing with the submissions made on behalf of the third appellant, who sought to rely on the Court of Appeal case of GOO.

49. It would be wrong to say that the Points Based System generally represents the ascendancy of "box-ticking" or that it has completely eliminated the need for the exercise of individual judgement by the decision-maker, particularly in respect of the relevant Policy Guidance. For example, in relation to verification of documents both the Policy Guidance for Tier 1(General) and that for Tier 1(Post Study Work) note that where the agency has "reasonable doubts" that a document is genuine it may seek to verify the document with an independent third party or government agency. And it is stated that what is considered to be "reasonable doubt" will depend on an individual application. But so far as para 245Z and Appendices A, B and C are concerned, there are no such terms and even in the Policy Guidance, there are relatively few requirements which require an exercise of interpretation or individual judgement.

50. Fourth, the provisions relating to Tier 1 (Post-Study Work) do not contain any allowances for persons who find themselves unable to meet the requirements specified in Appendices A-C by virtue of illness or related circumstances outside the control of an applicant. There are none in para 245Z(e) or Appendix C and none in the Policy Guidance. That is not to say that the Tier 1 scheme *as a whole* is wholly free of such allowances. For example under the separate Tier 1(General) of the Points Based System – Policy Guidance, in the section dealing with "Attributes" and calculation of points deriving from previous earnings, para 67 states:

> "Points for previous earnings can be claimed in respect of any single, consecutive 12 month period from the 15 months immediately prior to the date of application. The only circumstances where an applicant may claim points for a 12 month period of earnings from outside of this period are where:
>
> the applicant can establish that they have been absent from the workplace at some point during the last 12 months, due to full-time study (initial applications only);
>
> or
>
> the applicant can establish that they have been absent from the workplace at some point during the last 12 months (or during the 12 months preceding the start of full-time studies) due to a period of maternity or adoption related leave" (the latter are dealt with at paras 80-85).

51. Fifth, the relevant Immigration Rules contain specific requirements for documentary evidence, which, again, are described in mandatory terms, para 245AA stipulating that where Appendix A to C, or E state that specified documents must be provided:

> "that means documents specified by the Secretary of State in the Points Based System Policy Guidance as being specified documents for the route under which the applicant is applying. If the specified documents are not provided, the applicant will not meet the requirement for which the specified documents are required as evidence".

52. Here again there is an example of an immigration rule that defers to the Policy Guidance for defining a particular requirement, namely what are the "documents specified".

53. In the light of these general observations we turn to set out our findings on the key issues raised by these appeals.

The mandatory nature of the Tier 1 (Post-Study) Work requirements

54. In view of the mandatory formulation of the requirements for the Tier 1 (Post-Study Work) scheme as given by the Immigration Rules we see no scope for adopting a purposive construction. It is well-established that such a construction cannot be applied where the words are wholly unambiguous (Alexander v Immigration Appeal Tribunal) [1982] 2 All ER 766. Subject to what we say below about the transitional provisions (and also two other aspects of the Policy Guidance: see paras 71, 72-78), their plain and ordinary meaning is absolutely clear. The use of "must" means that either the requirements are met or they are not met. In ex parte Rahman [1987] Imm AR 313, the Court of Appeal stated that although a degree of latitude is allowed in construing the Immigration Rules, it does not extend to departing from the plain, ordinary, natural meaning of the language. In any event, even when a purposive construction may be called for (e.g. because of ambiguity), it is salient to consider what was said by Laws LJ in MB (Somalia) v Entry Clearance Officer [2008] EWCA Civ 102. Laws LJ considered whether the plain and ordinary meaning of a rule should be set aside or modified in order to give effect to a purposive construction. He pointed out that any rule should be construed so as to further its purpose, but considered that that purpose could usually be identified from the terms of the instrument itself. Developing the point further in AM (Ethiopia) & Others & Anor v Entry Clearance Officer [2008] EWCA Civ 1082, Laws LJ stated that "[i]t is in the nature of the Immigration Rules that they include no over-arching implicit purposes. Their only purpose is to articulate the Secretary of State's specific policies with regard to immigration control from time to time, as to which there are no presumptions, liberal or restrictive. The whole of their meaning is, so to speak, worn on their sleeve…."

The non-discretionary nature of the requirements

55. We have already highlighted the mandatory wording of para 245Z(e), Appendix C and the relevant parts of the Policy Guidance. Additionally we have noted that there is no scope in para 245Z, Appendix C or the Policy Guidance for allowances to be made for applicants who are unable through circumstances beyond their control to meet the maintenance requirement. There is, we saw, such a provision within the Policy Guidance provisions

governing Tier 1(General) and past earnings (for maternity and adoption), but there is nothing similar under the Post-Study Work scheme.

56. For this reason we see no merit in Miss Cole-Wilson's submissions concerning the relevancy of GOO. As noted earlier, there is an absence in the Tier 1 (Post-Study Work) provisions of any tests that require the decision-maker to make up his or her own mind about the appellant's abilities or qualifications or the quality of his or her past performance as a student. These provisions are wholly different in character from those found within the Immigration Rules for students considered in GOO. Terms like "regular attendance" and "satisfactory progress" are not tied to any prescribed set of standards. The Immigration Rules laying down requirements of this kind for students have a long history and have been operated hand-in-hand with a set of Home Office practices when applying them to students who had fallen ill or were unable to study for pressing reasons. It was this complex context (or "acquis") which led Sedley LJ to decide that the Tribunal's approach to such criteria for ascertaining ability to study had been too narrow, stringent and literal and had to be rejected in favour of a broader approach which accepted that attendance and progress could be assessed giving due weight to justifiable difficulties that a student may have experienced. Such a context is entirely lacking under the Tier 1 (Post-Study Work) scheme (the terms of which may indeed be in part a response to GOO).

57. To the extent that the previous type of maintenance requirement often used in the Rules - cast in terms of adequacy - was and is capable of individual judgement, such a requirement has not been replicated in the context of the Tier 1 scheme. Maintenance is now defined in terms of specified funds.

The historic nature of the Appendix C maintenance requirement

58. In order to achieve the 10 points awarded for maintenance, Appendix C states that applicants must show "[i]n all cases" that they have the funds specified "at the date of the application and must also have had those funds for a period of time set out in the guidance specifying the specified documents for that purpose". The language could not be clearer. It stipulates that a decision must be made by reference to a fixed point in the past, namely the date of application. It is an historic test affixed to that specific date. It is true that para 2(b) contains the present tense: it states that an applicant can only awarded 10 points if her or she "has" the level of funds shown. But the words used are "if an applicant... *applying* for leave to remain has..." that level (emphasis added) and para 2 is also clearly circumscribed by para 3, which states that the applicant "must have the funds specified in para 2 above at the date of the application ...". Put another way, the rule in Appendix C is one which does not require the decision-maker to ask "What is the position today (at the date of decision)?", but "What is shown about the position over a past period (calculated by reference to the date of applying)?". The requirement to "have" the level of funds is met by proving that they were held at that level over a specified past period.

59. It is in virtue of this feature of the requirement that we reject the submissions made by Ms Heybrook for the first appellant which sought to argue that he was entitled to succeed by virtue of s.85(4) as interpreted by the Tribunal in EA (Nigeria) (itself seeking to clarify the effect of LS (Gambia)). Of course, EA (Nigeria) has now to be read in the light of GOO and the fact that the Court of Appeal did not accept that it mattered whether students had changed courses from the ones nominated in their application, since such changes were considered not to alter the ongoing fact that they were applying for (further) leave as students. But in our view that modification does not affect the underlying principle expressed in EA that focus has to be placed on the substance of the decision. Indeed it is this principle that is the key to understanding why EA does not assist appellants in respect of appeals concerned with the Appendix C requirement. It is true that EA (Nigeria), like LS (Gambia) identifies the fact that s.85(4) has the effect that the question of whether appellants meet the requirements of the Immigration Rules may be decided in the light of post-decision evidence. But these cases were concerned with decisions that did not specify a fixed historic timeline. The type of immigration decision at issue here is one that concerns an application of a kind identified in immigration rules as requiring to be considered under a "Points Based System". Part of the substance of that decision concerns whether something has been shown to be the case in the past and over a period of time to be calculated by reference to the date of application. A requirement that a person owned property at a specific point in time in the past is not met by showing that he owns it at the present time. EA fails to help applicants seeking to rely on funds accrued since they applied, not because of anything to do with whether the nature of their application has changed over time: normally applications made by applicants for leave to remain under the Post-Study Work

scheme will not have not changed into something else. It fails to help simply because the decision in question in this type of case imposes a requirement tied to an historic time.

The relevance of s. 85(4)

60. What are the consequences of this for the applicability of s. 85(4)? According to Mr Tufan the specific provisions in the Immigration Rules and Policy Guidance governing Tier 1 prevent it from having any application.

61. The principal provision he identified was para 245AA, although in the light of questions the panel put to Mr Nicholson, he also sought to rely on a separate provision of the Rules, namely para 34A.

62. The effect of para 245AA was, he said, to specifically prevent applicants submitting documentary evidence post-application with a view to showing they did have £800 in personal savings over the requisite period. However, in our view that is to misread this rule. Para 245AA is not a rule requiring that documentary evidence has to be produced *at the time of application*. Rather it is a rule with a two-fold function, namely: (i) to identify what documents have to be provided ("…documents specified by the Secretary of State in the Points Based System Policy Guidance as being specified documents for the route under which the applicant is applying"); and (ii) to clarify the consequences of non-provision of the specified documents ("If the specified documents are not provided, the applicant will not meet the requirements for which the specified documents are required as evidence"). The rule does not contain a requirement for production of the specified documents at any particular point in time. It is also, manifestly, not a rule purporting to govern how evidence is to be received on an appeal.

63. The other provision suggested tentatively by Mr Tufan to render the application of s.85(4) to Tier 1 cases nugatory is para 34A. The latter, of course, is a provision relating to all kinds of applications in connection with immigration. Paras 34A and 34C have three main elements: first they delimit their scope to application forms which are "specified" (para 34); second, they set out the requirements in respect of specified forms (34A); and third, they spell out the consequences of non-compliance with such requirements (para 34C). The apparent significance for Tier 1 (Post-Study Work) lies in what is stated in para 34A(vi). It obliges an applicant to comply with the following requirement:

> "(vi) where the application or claim is made by post or courier, or submitted in person::
>
> *(a)* the application or claim *must be accompanied by* the photographs a*nd documents specified as mandatory in the application form and/or related guidance notes…"* (emphases added)

64. The relevance of this provision, submits Mr Tufan, is that the Tier 1 (Post-Study Work) Policy Guidance specifies as specified documents documentary

evidence of personal savings in certain forms, e.g. in the form of a personal bank statements. Hence he says, if an applicant has not ensured that his application is "accompanied" by such documents, there is a patent failure to comply with para 34A.

65. We do not agree with Mr Tufan's analysis. We have rejected the argument that s.85(4) can override a decision under the Points Based System tying eligibility to the possession of funds for a period in the past. Being able to show at the date of hearing that an appellant now has the requisite level of funds cannot help. But that does not mean the sub-section has no role whatsoever in such cases. We have examined its scope in relation to evidence about matters arising post-decision, but it is not only about that. The subsection states:

> "…the Tribunal may consider evidence about *any matter* which it thinks relevant to the substance of the decision, *including* evidence which concerns a matter arising after the date of the decision."(emphasis added).

66. Its wording clearly encompasses not just evidence which concerns a matter arising *after* the date of decision but also evidence arising *before* it. Thus if there is evidence hitherto unavailable or simply not produced which concerns a matter arising before the date of decision, s.85(4) gives the Tribunal power to take it into account.

67. In principle, therefore, there is nothing to stop the Tribunal from exercising its power under s.85(4) to consider evidence that applicants have submitted *post-application* to show that they had the requisite £800 *pre-application*.

68. We agree that the language of para 34A is mandatory and that in the case of an applicant for Tier 1 (Post-Study Work) who has not submitted the specified documentary evidence with the application form (i.e. at the same time as the date of application), then it may be that the application does not meet all the requirements of the Rules. But none of the decisions in each of these appeals was based on para 34C (which sets out the consequences of a breach of para 34A). Further, each of the decisions states that it is a decision made under para 245Z(e) of the Immigration Rules. Each states that because the appellant has not provided the specified documents to show possession of the requisite level of funds he or she cannot be awarded any points under Appendix C (to which para 245Z(e) cross-refers). The precise route by which the respondent got to the point of deciding their cases under para 245Z(e) notwithstanding their apparent non-compliance with para 34A and the apparently clear terms of para 34C - whether that be by waiver, as suggested by Mr Nicholson, or some other route - is not a matter we need to decide. What we are faced with is the need to reconsider appeals against decisions made under the Immigration Rules and in our view it is imperative that we consider those decisions as they stand.

69. To the extent that Mr Tufan sought to take a position on para 34A, we would merely point out that the same IDIs that set out the new procedures brought in by para 34A relating to specified application forms (IDI Feb/08) state at 8.6. "Once discretion has been exercised to accept an application as valid, in

line with para 8.3 or 8.5 above, consideration should continue as usual in line with the immigration rules or published policy applicable to the application".

70. There is a similar approach to be found in the Policy Guidance. This Guidance clearly proceeds on the assumption that the respondent has discretion as to whether to waive compliance with such requirements. As we have already noted, in the Tier 1 (Post-Study Work) Policy Guidance, under the head "General Guidance for Applicants to the Points-Based System" and the sub-head "Documents we require to support applications under the points-based system", it is stated at paras 10 and 11 that:

> "10. The applicant must ensure he/she provides all of the necessary supporting documents at the time he/she sends us the application. If the immigration rules state that specified documents must be provided, we will say so in this guidance and we will only accept those documents.
>
> 11. If the applicant does not provide the specified documents, we will not contact him/her to ask for them. Therefore, if the applicant fails to send the correct documents we *may* refuse the application."[Emphasis added]

73. Such provisions somewhat undermine Mr Tufan's attempt to rely on other passages in the Policy Guidance which require specified documents to be submitted with the application, in particular the statement at para 10 that "[t]he applicant must ensure he/she provides all of the necessary supporting documents *at the time* he/she sends us the application."(emphasis added). As we have already noted, the very next paragraph, para 11, expressly states that the respondent has a discretion as to whether to treat failure to comply with this requirement as an obstacle: it states that "… if the applicant fails to send the correct documents we *may* refuse the application" (emphasis added).

74. Thus it can be seen that nothing in the Immigration Rules dealing with Points Based applications or in the Policy Guidance, has the effect of rendering s.85(4)'s potential application to Tier 1 (Post-Study Work) appeals nugatory. If it had been intended that applicants could not succeed unless they had submitted the specified documents at the time of applying that could have been specified; but it was not. The nature of the decision concerned (one whose substance relates in part to an historic timeline) limits the scope of application of this sub-section, but does not exclude it entirely. Neither the Rules nor the Policy Guidance stipulates anything either about the reception of evidence on appeal, which (for in-country appeals) is governed by s.85(4).

75. It is not surprising that this is so. Section 85(4) is a piece of primary legislation, whereas the Immigration Rules are not even, as noted by Lord Hoffman in Odeola v Secretary of State for the Home Department [2009] UKHL 25 at para 6, a form of subordinate legislation. By virtue of s.86(3) they have the force of law but they cannot override primary legislation. Indeed it seems to us, as it seemed to SIJ McKee in the case of the first appellant (and Mr Tufan did not seek to disagree), that the respondent has clearly recognised the current primacy of s.85(4) by having decided it was necessary to enact further primary legislation to circumscribe its effect specifically in respect of Points

Based System appeals. As already noted, s.19 of the UK Borders Act 2007 amends s.85 of the 2002 Act so as to create two exceptions to it, one of which is that neither s.85(4) nor s.85(5) will apply to Points Based appeals. It introduces a statutory requirement in Points Based appeals prohibiting consideration by the Tribunal of evidence that was not submitted at the time of making the application. However, it is not yet in force. Until this amendment to the 2002 Act comes into force the immigration rules cannot fetter the applicability of s.85(4). They cannot create an exception not yet brought into force.

The relevant period of time for showing possession of funds: the post-31 October 2008 position

76. We must now spell out what the above means for the issue of the relevant period of time over which an applicant must show the requisite level of funds. Para 1A of Appendix C stipulates that an applicant "must... have the funds specified in the relevant part of Appendix C at the date of application and must also have had those funds for a period of time set out in the guidance...". Such wording makes plain that the decision on whether an applicant can show the requisite funds is to be made by reference to a period of time before the date of application as given in the Policy Guidance. The current version of the latter specifies that the period of time over which in-country applicants must show they have held at least £800 is the period of "at least three months prior to the date of application" (para 90).

77. The formulation given in para 90 does not say expressly that the period must be at least three months *immediately* prior to the date of application", but we do not think anything else can be meant. It would make no sense for it to refer to earlier disconnected periods of three months. So much is conveyed by the subsequent para 96 which states that the most recent bank or building society statements must be dated no more than one calendar month before the date of application and must cover three "consecutive" months. Were Appendix C and the specified parts of the Policy Guidance to be read as permitting applicants to rely on earlier unspecified periods of three months, there would be nothing in principle to stop them being possibly a very long time ago, even before an applicant had become a student.

78. The only caveat we would make to the above is that there would appear to be some leeway in respect of the evidence which applicants must produce in order to prove they have personal savings of £800 or more in the preceding three months. Although read literally that appears to mean that they must show they have this level of savings for the entirety of the calendar month immediately preceding the application, it is not said that the proof of that has to be completely up to date; indeed the reference in para 96 to the most recent statement having to be "dated no more than one calendar month before the date of application" clearly envisages that the proof need not cover the situation right up to and including the date of application. It is wholly understandable why this requirement cannot be meant literally, as it would

impose something wholly impractical, conjuring up the spectacle of applicants having to perform a same-day dash from their banks (to get a statement dated that day) to the post-box (to post the application form). If an applicant applies in person at 4 p.m. on day X, it may be impossible for them to have obtained a bank statement giving a closing balance for that same day and it may be impracticable for them to obtain one within a week or so.

The relevant period of time for showing possession of funds: the position up to 31 October 2008: transitional provisions: one month or one day?

79. Of the three appellants only the second appellant had made an application before 1 November 2008. From our summary of their submissions it can be observed that both his representative, Mr Nicholson, and the Home Office Presenting Officer, Mr Tufan regarded the position under the transitional provisions as ambiguous. Very properly they made submissions covering the two main possible interpretations, namely that applicants must show that directly preceding the date of application they held £800 or more for either (i) any one day; or (ii) one month. Their uncertainty, which we are aware has been reflected in recent determinations by immigration judges on Tier 1 (Post Study Work) cases, is understandable since the specific guidance contained on the last page of the relevant Policy Guidance, headed "Transitional arrangements for maintenance (funds)" states that applicants do not need to show they have had the funds for at least three months before their application: "You must only show you have the required funds at the time you apply". That sentence, unhelpfully, does not in terms state what period of time is meant by "time you apply". The next two sentences give some clue. They state:

> "The types of documentary evidence you need to send to support your application are as described in this document. However, until 31 October 2008, they do not need to cover the three-month period, but they must be dated no more than a month before your application".

80. They help clarify that, in order to show you have requisite funds at the "time you apply", what you need to show must be *dated* no more than a month before the application. But they say nothing about needing to show funds covering the period of a month.

81. However, according to Mr Tufan, the final paragraph appears to point towards the period over which an applicant must show £800 or more as being one month. It states:

> "For example, if you apply under Tier 1 (Post-Study Work) on 12 July, a single bank statement with a closing balance of £800 dated between 12 June and 12 July 2008 will meet the maintenance requirements. A bank statement dated before 12 June will not be acceptable."

82. We note that the example hypothesizes a one month period (12 June-12 July) and refers to it being sufficient to produce a single bank statement with a closing balance of £800 "*between"* those two dates. The difficulty with this wording is that the term "between" is ambiguous. It could mean "over" or

"covering" that period or it could mean simply a date falling within that period. The final sentence simply reinforces the point made earlier that the period within which a bank statement closing balance must be dated cannot go back more than one month before the date of application.

83. Given the ambiguity, what assistance can be gained from a purposive construction? It might be thought that either reading is consistent with the expressed purpose behind this provision, namely to make allowance for the difficulty of proving a new requirement introduced in rapid fashion without having alerted would-be student applicants.

84. Ultimately, therefore, it comes down to considerations of transparency. In our view, given this ambiguity, applicants could not be blamed if in response they had submitted a single bank statement within that month not necessarily showing funds of £800 or over for all of that month. If the transitional provisions had meant to require applicants to show they held £800 for a whole month, they would have said so. That being the case, the wording should be read as requiring only that an applicant produce a bank statement showing a closing balance of £800, the date of that closing balance falling on any date within the period of one month prior to the date of application. On that interpretation it is possible to envisage cases in which the applicant had only held £800 or over for one day, although he or she may be able to show that that amount was held for more than one day.

85. There is still the matter of what is meant by "closing balance"? Does it mean that what is required is a bank statement showing an end balance of £800 or over (meaning the last balance shown on the statement)? Or does it mean a bank statement showing that on at least one day of the daily entries recorded there was a daily closing balance of £800 or over? If it were the latter it would not necessarily matter if the end-balance shown were less than £800. If it were the former it would not matter that, for example, the last balance given was the only one on which an applicant could show £800 or over. Normal usage, as we understand it, is to construe "closing balance" as meaning the balance that is carried forward to the next statement. "Closing balance" is normally distinguished from "daily closing balance". Since it would be theoretically possible for an applicant to produce a single bank statement showing a closing balance on any date within the previous month, it may be that in practice there is little difference between the two possible interpretations. For that reason we think the approach should be to follow normal usage.

<u>The amount of £800: must it be shown on each and every day of the three month period?</u>

86. Except in the form of general calls for a purposive construction, none of the representatives in the three cases before us sought to argue that the requirement to show £800 in personal savings over a three month period could be met by applicants whose savings dipped below that figure for one or more days. In our view such argument would have been futile in any event. It is true

that neither para 245Z(e) nor Appendix C states in terms that applicant must show his or her personal savings have *always been* at the level of £800 or more over the three months. But by virtue of the fact that they do cross-refer to the Policy Guidance to establish the relevant period of time and the relevant specified documents, we think that in this specific context it is justified to use the Policy Guidance as an aid to interpreting what is mean by an applicant "having had" the "level of funds" for the requisite period.

87. In adopting this approach we are conscious that in relation to internal Home Office policy instructions and specific matters of guidance not identified in the Immigration Rules, the position is that they are not to be used as an aid to construction: see ZH (Bangladesh) [2009] EWCA Civ para 32. However, it seems to us that the express linkage made by the Immigration Rules to what the Policy Guidance has to say about the period of time and documents needed to evidence that, necessitates a different approach.

88. We recognise, focussing on the Policy Guidance, that it does not specify an "always" requirement in every place where it is dealing with the funds requirement. For example, at paras 48(6) and 82, which set out the requirements for the award of points for initial applicants, it is noted that "Applicants for leave to remain in the United Kingdom must have £800 of available funds" (at para 90 the wording is "must have at least £800 of personal savings"). But at para 96, which is one of the provisions of the Policy Guidance specifying what documents are required to evidence the maintenance requirement, it is stated at subpara 1. that personal bank or building society statements "should clearly show" …[that] "the balance *must always be* at least £2,800 or £800, as appropriate." (emphasis added). Earlier on in the same paragraph it is explained that the respondent will not accept statements which simply show the balance in the account on a particular day "as these documents do not demonstrate that applicants hold sufficient funds for the full period required.". In our view these provisions are inextricably linked to what the Immigration Rules require and to seek to read them down in some way would be to undermine the Rules.

89. Even if, contrary to what we have found, a purposive construction of the Maintenance (Funds) requirement were thought apt, it would not necessarily follow, in any event, that it would be appropriate to excuse any dips below £800 since it is clearly seen as the minimum amount necessary to ensure self-support (the Policy Guidance refers to applicants showing they have "at least" £800 [£2,800 in out of country cases]; it is not an optimal figure.

Nature of the applicant's control over the funds

90. Unlike the rules governing businesspersons, applicants under Tier 1 are permitted to demonstrate they meet the maintenance requirement even when their personal savings of £800 or more are held in a joint account. Nothing is said about this in the very first or current version of the Policy Guidance, but in the second (at para 93), third (at para 100) and fourth versions (at para 100) (see para 14 above) of the Policy Guidance it was expressly stated that if an

applicant wishes to rely on a joint account as evidence of available funds, he/she must be named on the account along with one or more other named individuals. We think that if the latest Policy Guidance intended to adopt a different approach from that adopted in its three predecessor versions, it would have said so.

91. Given that the Immigration Rules do not impose a requirement of personal savings in the applicant's name only and the Policy Guidance does not purport to impose such a requirement either, we see no reason to preclude reliance on a joint account.

Geographical location of savings

92. There is nothing in the Rules or the Policy Guidance which prevents an applicant meeting the Maintenance (Funds) requirement by showing personal savings that are held in an overseas bank or building society. It is nowhere said that the statements from a bank or building society specified in 96(i), (ii) or (iii) must be a British or UK bank.

93. We have considered the possible interpretation that because 96(iv) identifies that documents accepted as evidence can include a "letter from a financial institution regulated by the Financial Services Authority, or in the case of overseas accounts, the home regulator…" this shows that it is only British or UK banks and buildings societies that can be covered by 96(i)-(iii). However, if that had been the intention of the drafters of the Policy Guidance then they would surely have specified that in 96(i)-(iii), particularly given the fact that paras 96(i)-(iv) seek to cover exhaustively the range of admissible types of evidence. It is true, of course, that all British and UK banks are regulated by the FSA, but there are many other types of financial institutions which are covered by the phrase "financial institution": the FSA website mentions, for example, mortgage lenders, insurance brokers and institutions dealing in securitised derivatives.

94. Here too we see no reason to read the requirements of the scheme more restrictively than do the Rules.

The three appellants

95. We are now in a position to state our findings on the three appeals before us.

The first appellant

96. The determination of SIJ McKee allowing the appellant's appeal was vitiated by legal error. That is because even though required by the (post-31 October 2008) Policy Guidance to show funds of £800 or more for the three months immediately preceding the date of application ((19 November 2008) the evidence this appellant produced covering those three months showed that it was only for half that period that his balance was always £800 or over. For

reasons given earlier, the fact that since 19 November he had achieved a three month period during which he held £800 or over could not assist him. The SIJ was wrong to reason that s.85(4) could shift the relevant three month period to align with matters as they stood at the date of hearing. He overlooked that the decision in this case contained an historic test tied to the date of application and so "the substance of the decision" had to relate to that time period.

97. It follows from our earlier analysis that the decision we must substitute for that of the SIJ is to dismiss the appellant's appeal.

The second appellant

98. Because the second appellant applied before 31 October 2008, her application fell under the transitional provisions set out in the version of the Policy Guidance covering that period. Following our earlier analysis, that meant that she only had to produce a single bank statement dated somewhere between 29 September 2008 and 29 October 2008 (the latter being the date of her application) showing a closing balance of £800. Accordingly the IJ erred in law in considering that the applicant had to show she held £800 or more for a period of one month immediately preceding the application. The IJ's view that s.85(4) limited him to taking into account "only… circumstances appertaining at the time of the hearing" appears to suggest, wrongly, that pre-hearing circumstances are irrelevant. But that aside, the very thing he did in this determination was ignore the date of hearing evidence in the form of the appellant's further evidence as to her personal savings during that period.

99. However, it remains to consider whether these errors were material. Mr Tufan submitted that the IJ could not be said to have materially erred in law in dismissing the appeal, since even if only production of one bank statement showing a closing balance dated within a month of the date of application (29 October 2008) was required, the second appellant had failed to comply with that requirement, as the bank statements she submitted only covered dates in September (10th-25th September) which were before the earliest possible date allowed, namely 29 September 2008. However, as already noted, it is not in dispute that subsequent to her application and prior to the hearing before the IJ she had submitted further bank statements covering the period 29 September-29 October 2008. They include statements showing a closing balance of over £800 within the latter period. The second appellant was entitled to expect the IJ to have acted under s.85(4) of the 2002 Act and to have taken this further evidence into account. Accordingly the IJ's legal error was material. Since the second appellant had satisfied the transitional requirements for Maintenance (Funds) in full, the decision we must substitute for that of the IJ is to allow her appeal.

The third appellant

100. As noted earlier, at the time of application this appellant had current leave to remain under the IGS scheme. That means that as regards points under

“Attributes” and English Language” she stood to be considered under transitional arrangements for persons in the IGS, SEGS or FT:WISS categories: see above paras 21-23. It is not necessary for us to address the general issue of whether transitional arrangements for persons in these categories effectively exempt them from the normal requirements under Appendix C (Maintenance) to show personal savings of £800 over three months. That is because this appellant applied before 1 November 2008 and so in any event fell under the separate transitional arrangements affecting every category of applicant applying before that date.

101. Having applied on 3 July 2008, the third appellant would have been in a position to meet the maintenance requirement under these transitional arrangements if she had been able to produce a bank statement showing a closing balance of £800 or over on any day falling in the period 3 June - 3 July 2008. But throughout the whole of that period she had no savings. Hence, the IJ was correct to dismiss her appeal. Accordingly his decision must stand. The fact that the third appellant was able to produce evidence during the reconsideration process to show she now had over £800 for a period of three months did not assist her. That is because such post-decision evidence did not relate to any date between 3 June-3 July 2008. The fact that she had a good immigration history and, prior to the new code coming into effect had been here lawfully for just over 10 years, was irrelevant.

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Article 8 ECHR

102. Article 8 was not raised in the first appellant’s grounds of appeal and, having allowed the appeal under 245Z(e), SIJ McKee understandably did not address it in his determination. In the second appellant’s case we have allowed her appeal under para 245Z(e) and it is hence unnecessary to consider the Article 8 grounds. In the case of the third appellant, the order for reconsideration specifically precluded the Article 8 grounds and we see no reason to re-open the matter. Nothing said in this case, therefore, deals with the extent to which decisions refusing applicants under the Tier 1 (Post Study Work) scheme can be challenged on Article 8 ECHR grounds. We would venture four observations, however.

103. If we are right in our analysis of the scheme, it is an example of new-style Immigration Rules whereby the Secretary of State has set down rigorous criteria which treat transparency and efficiency as key values and are so formulated that there are bound to be hard cases or “near-misses” that fall through the net. The example we gave earlier of a person who meets all the requirements save for having his or her personal savings fall below £800 even for one day during the requisite three month period is in point. As we know from the case of GOO, one response the Secretary of State may make to challenges to the stringency of such Rules would be to point out that there is always the possibility that the respondent will decide in the exercise of her residual discretion to grant limited leave in this category notwithstanding failings of this kind. Of course, it might be said that the Policy Guidance rather limits the forms such an examination outside-the-rules might take, at least in

the context of an appeal, since its final paragraph makes clear that administrative review is not available in in-country appeals. However, unlike the situation in GOO, where their Lordships rejected the respondent's invocation of her power of residual discretion and saw scope (based on the acquis of relevant law) for a more liberal construction of evaluative terms such as "satisfactory progress" contained within the Rules, there appear to be no similar evaluative terms within the Tier 1 (Post-Study Work) scheme.

104. Secondly, Article 8 is not to be equated with an obligation to take into account compassionate circumstances.

105. Thirdly, whilst it is possible for a student in the course of his or her studies (and part-time working, if applicable) to have developed over time ties with the community that amount to significant elements of a private life within the meaning of Article 8 (a student may also have maintained or developed incidental family life ties here), they are persons who have come to the UK for a limited purpose and with no expectation of being able to stay except by meeting the requirements of the Immigration Rules. They do not thereby acquire a right to remain in the UK despite the Immigration Rules. A refusal under the Tier 1 (Post-Study) scheme may mean they fail to make their immigration prospects better; it does not mean they have been made worse.

106. Fourth, when the Tier 1 (Post-Study) Work scheme was introduced the government decided it was appropriate to make transitional arrangements of two kinds: one so as to ensure that those students who had leave under pre-existing schemes for highly skilled students – for IGS, SEGS and FT: WISS – had a chance to apply under the new scheme; the other so as to ensure that all applicants who had had little time to adjust their financial circumstances so as to comply with the new requirement to show they held £800 for three-months immediately preceding their application were not unfairly disadvantaged. Put another way, the new Post-Study Work scheme have already incorporated provisions designed to assist applicants who might otherwise have been disadvantaged by the terms in which and the speed with which they were introduced. In respect of the transitional arrangements affecting maintenance, they have enabled applicants to know sufficiently in advance the requirements they were expected to fulfil.

Signed

Senior Immigration Judge Storey