**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/01914/2013

**THE IMMIGRATION ACTS**

| **Heard at Birmingham** | **Determination Promulgated** |
|---|---|
| **on 26th June 2013** | **On 24th July 2013** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**MANPREET KAUR BADESHA**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Gill instructed by Bhogal & Co Solicitors.
For the Respondent: Mr Smart – Senior Home Office Presenting Officer.

**DETERMINATION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Obhi, promulgated on 5th April 2013, in which the appellant's appeal against the refusal of the Secretary of State to vary her leave to remain was dismissed. Judge Obhi also found that the Secretary of State's contemporaneous removal direction made pursuant to section 47 Immigration Asylum and Nationality Act 2006 was not in accordance with the law. This latter finding is not challenged by either advocate and is in accordance with the law as it stood at the date of the hearing. A lawful removal direction therefore remains outstanding.

**Background**

2. The appellant was born on 3rd October 1992 and is a national of India. Her immigration history shows that on the 18th November 2011 she was granted leave to enter the United Kingdom as a Tier 4 (General) Student Migrant with leave valid until 17th February 2016. On 28th June 2012 her leave to remain was curtailed from 27th August 2012.

3. On 16th July 2012 the appellant made a further application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant. She was awarded

the required 30 points for Attributes based upon a valid CAS, but no points in respect of maintenance. The refusal letter dated 10th January 2013 states that the appellant was required to show she had £1,600 available together with any outstanding course fees for the first year, although this latter element had been paid in full. She was therefore required to show she was in possession of £1,600 for a consecutive 28 day period to meet the requirements set out in paragraph 1A Appendix C of the Immigration Rules. That 28 day period ran from the 19th June 2012 to 16th July 2012 although the bank statements submitted in support of the application only showed £1154.28 on 30th June 2012. It was found therefore that she was unable to meet the requirements of the Rules.

4. The appellant appealed and before Judge Obhi produced the documentary evidence she sought to rely upon, in addition to which submissions were made by Mr Gill following the appellant's oral evidence. The Judge found that the funds in the account could not meet the minimum required maintenance levels for the required period in relation to the account provided by her uncle Mr Dalbir Singh held with the Punjab National Bank, although the Judge also noted this evidence was not acceptable in any event. The appellant also provided details of another account with the Punjab National Bank, not disclosed with the application, in the joint names of her uncle and his wife which showed that they held a fixed deposit account containing a sum in excess of £10,000 since 19th June 2011 which, if admissible, would demonstrate that the appellant had the required level of funding.

5. Judge Obhi considered the requirements set out in Appendix C of the Rules which must be met if an individual wishes to rely upon funds in a joint account or in the name of another. The Judge noted in particular that the appellant must be named on the joint account as one of the account holders or other criteria set out in paragraph 13 of Appendix C met.

6. Judge Obhi found that in order for the evidence in the name of the appellant's uncle to be accepted the appellant would have had to demonstrate that her uncle was her legal guardian by reference to a court document, as there was no provision in the Rules for a de facto guardian. There was no such evidence. Accordingly it was found that as the evidence of the appellant and her uncle was that the uncle had never been declared her legal guardian, even though he may have paid the course fees and provided her maintenance during the course, she was unable to meet the requirements of the Immigration Rules.

**The Grounds**

7. The grounds on which permission to appeal was sought allege procedural unfairness in that no enquiries were made with the appellant to ascertain whether or not she had the requisite funds available elsewhere, from either her parents in India or her own savings. The grounds also submit that as Judge Obhi found the decision of the respondent was not in accordance with the law the

appeal should being remitted to the Secretary of State to allow the appellant to vary her application and provide bank statements acceptable under the Immigration Rules. It is also alleged no concerns were raised with her with regard to the Rules and so she was not aware the statements would not be accepted.

8. The grounds refer to the case of Patel [2011] UKUT 00211 and allege that in that case where the tribunal allowed an appeal on the ground the decision was not fair taken fairly and not in accordance with the law it may be sufficient to direct any fresh decision is not make a period of 60 days in order to give the appellant reasonable opportunity to vary his application.

9. It is also alleged that the requirement of fairness require the appellant to be given an opportunity to address grounds of refusal which she did not know and could not have known about, failing which the decision may be set aside as being contrary to the law. It was submitted that the appellant had no such opportunity making the Judge's decision unfair under the common law principles.

10. The appeal is opposed by the Secretary of State.

**Discussion**

11. The submission the determination should be set aside in its entirety as a result of it being found the removal direction was not in accordance with the law has no merit. Two appealable decisions were made one in relation to the refusal to vary leave and secondly a section 47 removal direction. It is the removal direction that is not in accordance with the law not the refusal of variation.

12. Mr Gill's submission that the term guardian is a loose term also has no merit as it is a term with distinct legal meaning in this case as shown by the wording of paragraph 13 of Appendix C which states that the funds are only available to an applicant if they are held or provided by a member of either of the three specified classes, the second of which the applicants parent(s) or legal guardian(s) and the parent(s) or legal guardian(s) have provided written consent that their funds may be used by the applicant in order to study in the UK. It is clear that what is required is not a guardian in the de facto sense but rather a legal guardian which must imply status recognised in law. There was no evidence that the uncle who has the necessary funds had or has such status.

13. Mr Gill also argued that the same uncle provided funds when the appellant initially secured entry to the United Kingdom and so such sponsorship should be accepted/allowed this time too. It was submitted the respondent should therefore waive the formal requirements of the Rules. It was also submitted that the appellant was a genuine student and that her original college closed through no fault of hers, which I find appears to have been accepted as the chronology

shows a curtailment of her leave on 28th June 2012 with effect from 27th August 2012 which is 60 days later, the period the appellant was granted to allow her to find another course which she did. There is therefore no merit in the claim of unfairness, as such a period should have been granted as per Patel, as it was.

14. Judge Obhi clearly noted the presence of the additional funds available to the uncle but found they also fell foul of the requirements of Appendix C. Even if these were also funds accepted by the Entry Clearance Officer (ECO) in granting initial leave, it was not shown that the Rules in force at that time were the same as those in force at the date of the refusal or that the acceptance of funds by an ECO meant the mandatory requirements in the Rules should be waived in relation to the later application.

15. In relation to the argument the appellant should have been given the chance to provide additional information the Rules clearly set out the requirements to be met by an individual making an application for leave to remain as a Tier 4 (General) Student Migrant of which the appellant is deemed to have notice. The case of Rodriquez [2013] UKUT 00042 refers to a policy operated by UKBA since August 2009 indicating that where mandatory evidence was missing from an application an applicant should be given the opportunity to provide this. It was said to UKBA has a public law duty to give effect to this policy in all cases to which it applies. Rodriquez is subject to an appeal to the Court of Appeal as it is said to be contrary to that Court's decision in Alam and Others v Secretary of State for the Home Department [2012] EWCA Civ 960 in which the Court of Appeal said that the exclusion of new evidence introduced by the Nationality, Immigration and Asylum Act 2002 s.85A applied to all appeals made after the date that s.85A was brought into force and, in any event, the policy referred to in that case has been withdrawn.

16. The respondent's current position, as from 6th September 2012, is to be found in paragraph 245AA of the Immigration Rules which sets out specific circumstances in which the Secretary of State will refer back to an applicant for additional information. It has not been proved on the fact that this is such a case.

17. The fact there is a funding shortfall identified in the bank statements initially provided with the application is not challenged in the grounds seeking permission to appeal or before me today.

18. There was an attempt before the Tribunal to amend the grounds of appeal by way of a reference to Article 8 of this does not appear in the original grounds of appeal and was not relied upon before Judge Obhi.

19. Having considered the submissions made, the requirements of the Immigration Rules, case law, and all the relevant evidence, I find the appellant has failed to discharge the burden of proof upon her to the required standard to show that

the decision reached by Judge Obhi was not within the range of decisions she was entitled to make the evidence. I find it was. The requirements of the Rules are clear; the Rules in force at the date of decision contain the Secretary of State's policy for seeking further information from an applicant which has not been shown to be applicable on these facts.

20. A lawful removal direction will have to be made which, unless certified, may give the appellant a further right of appeal.

**Decision**

21. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed…….
Upper Tribunal Judge Hanson

Dated the 15th July 2013