IA 05310 2013

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 August 2013	**On 28 August 2013**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE

Appellant

and

MR XINJILE

Respondent

Representation:

For the Appellant: Ms E Martin, Home Office Presenting Officer.
For the Respondent: In person

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of China born on 12 October, 1998, as the appellant herein.

2. The appellant arrived in the United Kingdom as a student on 27 July, 2009 and was granted leave to remain until 30 October, 2012. On 26 October, 2012 he applied for further leave to remain as a student but this application was refused on 11 February,

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2013. The refusal was on maintenance grounds. The appellant needed to show that he had £1600 for a 28 day period between 28 September, 2012 and 25 October, 2012. The Secretary of State noted that between 8 and 10 October, 2012 the sums had fallen below that figure - to between £1540-06 and £1599-06. The Secretary of State also noted that the information was provided on a printout bank statement which was not in the appropriate format.

3. The appellant appealed and his appeal came before a First-tier Judge on 15 April, 2013. The appeal was determined on the papers as the appellant had not elected an oral hearing. The judge noted that in his grounds of appeal the appellant had said when he had submitted his application he had made a mistake by only providing one bank statement. He had two bank accounts, one being a savings account, the other being a current account. He had submitted a further bank statement with his appeal from Lloyds TSB covering the relevant dates. In between those dates the appellant's savings were never less than £5000 and on that basis the judge was satisfied that the appellant had sufficient maintenance available. She allowed his appeal considering that she was able to take the evidence at the hearing into account as the appeal was an in country appeal.

4. The Secretary of State appealed relying on section 85A of the Nationality, Immigration and Asylum Act, 2002 -the evidence in the savings account needed to have been given to the respondent before the application was decided. Permission to appeal was granted on 10 May 2013, reference being made to *Alam* [2012] EWCA Civ 960.

5. Ms Martin submitted that the new evidence was not admissible. The appellant had made a mistake in only lodging one bank statement. There was no indication in the application that any evidence had been missed bringing into play a flexibility policy. It was clear what was required. Ms Martin relied on *Alam* and *Miah* [2012] on the near miss argument. The points based system put a premium on predictability and certainty at the expense of discretion-see paragraph 35 of *Alam*. Article 8 had not been relied upon.

6. The appellant told me that he was in the third year of studies in international trade and business communications. He acknowledged that he had made two mistakes in his application. He had not had enough cash in his personal account and he had failed to put in his savings account. He had previously had problems in his studies, getting ill in his first year and "messing up some of his subjects”. In his second year his grandfather had died and he was, as he put it, not in a good mood to study. He had failed two subjects. Now he had standard marks. He had a bankcard which covered both accounts. It was, he submitted, all one bank account.

7. At the conclusion of the submissions I reserved my decision. The First-tier Judge did not consider the appeal within the context of the legislation governing the points-based system and simply treated it as an in country appeal.

8. This is an appeal where the appellant admits he made not one but two mistakes. He failed to check that the documents submitted did not fall below the relevant figure in the 28 day period and he also failed to put in extracts from the savings account. It may be that there is a third error as what was put in was not in the correct format.

9. All this may seem hard on the appellant but the law knows no "near-miss" principle- see paragraph 28 of *Rudi* [2007] EWCA Civ 1326 cited at paragraph 17 of *Miah*.

10. The First-tier Judge could only consider the evidence adduced "in support of, and at the time of making, the application to which the immigration decision related" under section 85A 4(a). The other provisos are not relied upon.

11. The determination is clearly flawed by a material error of law. The appellant's appeal failed under the points based system as the evidence put forward to the Secretary of State in the application did not meet the maintenance requirements for the relevant 28 day period.

12. There were no grounds of appeal in relation to Article 8. Although the appellant may have built up a private life in the United Kingdom I have been provided with scant information about the depth or quality of that private life. I note that he has on his own account had some personal difficulties leading to some failures in his academic achievements although he now says things are back to normal. He would always have been aware he only had temporary permission to stay in the United Kingdom. He acknowledges that his application failed as a result of two mistakes. Although the points based system is technical students such as the appellant should not be daunted by technical problems and would be expected to have the intellectual competence to fill in a form and identify what material should accompany it. Moreover the appellant has been in the United Kingdom for a number of years.

13. The appellant could not succeed under the immigration rules governing the respondent's approach to Article 8 and even if I were to assume somewhat generously that Article 8 was engaged and I considered the steps in *Razgar v Secretary of State* [2004] UKHL 27 the respondent's decision is not unlawful or disproportionate.

    Appeal of the Secretary of State allowed.

    The decision of the First-tier Judge is reversed.

    The appellant's appeal is dismissed.

Signed

Upper Tribunal Judge Warr

27 August 2013

The First-tier Judge made no fee award and neither do I