Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09637/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 August 2013	**On 22nd August 2013**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WENHAO XU

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: No appearance

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal issued on 18 June 2013 allowing an appeal by Mr Wenhao Xu against the decision of 15 March 2013 refusing to vary his leave to remain as a Tier 4 Student and to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006. In this determination I will refer to the parties as they were before the First-tier

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Tribunal, Mr Wenhao Xu as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of China born in June 1992. On 13 September 2012 he first arrived in the UK with a visa as a Tier 4 Student valid until 21 January 2013. On 17 January 2013 he applied for further leave to remain in the same capacity. The respondent accepted that he could meet the requirements of Appendix A (Attributes) but not of Appendix C (Maintenance/Funds).

3. As the appellant was studying in Inner London he had to show that he had the required funds to cover the fees for the first academic year of his course at Coventry University and have funds of £1,000 per month for nine months. The information before the respondent was that his course fees were £10,375 of which he had made two payments of £3,459 and £5,666 totalling £9,125. He was therefore required to show that he was in possession of £10,250, made up of £9,000 for his maintenance and £1,250 for outstanding course fees.

4. However, the bank statements submitted by the appellant covering the period from 14 December 2012 to 10 January 2013 showed that between 3 January and 10 January 2013 he was in possession of no more than £10,082 so falling short by £168. As he could not meet the requirements of the rules, his application was refused.

The Hearing before the First-tier Tribunal

5. The appellant appealed against this decision and in his grounds said that he had paid in full his tuition fees and had had more than £9,000 in his bank account for over 28 days. In these circumstances the respondent was wrong, so it is argued, to conclude that he did not have the level of funds required. He asked for the appeal to be determined without a hearing and submitted a witness statement to the First-tier Tribunal in which he says that his tuition fees were supposed to be £10,375 but he was awarded a discount of £1,250 when he paid his fees in full. His discounted tuition fee was therefore £9,125. He had submitted the receipt for his payment when he submitted the application. With his statement he enclosed a letter from his university to confirm the discount. The appellant then said in para 6 of his statement:

> "I didn't know my university didn't update my CAS in the system. Since I have paid the full tuition fees and only evidence that I have had is my receipts which I had submitted. My receipts show that I have paid £9,125 in total, there was no reason for me to just leave £1,250 outstanding balance. And I didn't know that I needed to request a letter to confirm the discount from my university and UK Border Agency didn't contact my university to confirm my fee status before they refused me as well. I think I was innocent in this application and particularly was my first visa renewal in the UK. I just thought my receipts were enough to prove that I didn't owe any tuition fees."

6. The judge referred to the letter from Coventry University confirming that the discount had been awarded and then went on to deal with the appeal in the following way:

> "8. This appears to be a case where the judgment of the Court of Appeal in Miah v Secretary of State for the Home Department [2012] EWCA Civ 261 applies. The near- miss principle at least arguably opened following the judgment of the Court of Appeal in Pankina and Others [2010] EWCA Civ 719 no longer applies. The near miss principle contended for in Miah was considered not to be the same as the de minimis principle. If a departure from the rule is truly de minimis, the rule is considered to have been complied with. In my judgment the shortfall was truly de minimis and I find the Immigration Rule was met by the appellant's evidence."

On this basis the appeal was allowed and a fee award was made on the basis that the appellant had succeeded in the appeal and should have been granted leave to remain when he applied.

The Grounds and Submissions

7. The respondent was granted permission to appeal on the basis that it was arguable that the judge erred in law, having acknowledged that the appellant did not meet the requirements of the rules in relation to maintenance/funds, by allowing it on the near miss principle contrary to the guidance set out in Miah. The grounds argue that the appellant had not met the requirements of the rules and that the respondent had been correct to refuse the application.

8. At the hearing before me Mr Tarlow adopted the grounds making it clear that the respondent's complaint was that the judge was in substance applying a near miss argument by wrongly describing the shortfall in the funds as falling within the de minimis principle. He accepted that the evidence submitted to the First-tier Tribunal if correct would indicate that the appellant could have met the requirements of the rules save for the failure to submit all the required information at the date of application. However, the information submitted and in particular the CAS indicated that the fees were £10,375 and there was no indication that any discount would be applied.

The Error of Law

9. The application for further leave to remain by the appellant was made under the points-based scheme and he is required to submit with his application all the evidence he wishes to rely on. That evidence showed that his fees for his next academic year amounted to £10,375. The respondent gave him credit for the payments of £3,459 and £5,666 but under the rules the appellant needed to show that he had £9,000 for his maintenance plus the balance of his fees. He therefore failed to meet the requirements of the rules in that his bank balance fell below £10,250 for the period 3-10 January 2013.

10. He submitted in support of his appeal further evidence to show that as he had paid his fees in full, they were discounted to £9,125 but there was no evidence to that effect submitted with his application. The appellant was not able to rely on further evidence before the First-tier Tribunal by reason of the provisions of s.85A(3)(b) of the Nationality, Immigration and Asylum Act 2002

11. The position therefore before the First-tier Tribunal was that the appellant had failed to meet the requirements of the rules by £168 for seven days from 3-10 January 2013. This failure cannot be categorised as de minimis. In Miah, Stanley Burnton LJ held that the approach in Mongoto [2005] EWCA Civ 751 and Rudi [2007] EWCA Civ 1326 should be preferred to Pankina [2010] EWCA Civ 719 on the issue of whether there could be a near miss approach to the immigration rules. As Stanley Burnton LJ said in [25] of Miah, once an apparently bright line rule is disregarded as subject to a near-miss penumbra and a decision is made in favour of a near-miss applicant on that basis, another applicant will appear claiming to be a near-miss to that near-miss and that will be a steep slope away from predictable rules, the efficacy and utility of which would be undermined.

12. The rules require an applicant to provide information about his course fees and maintenance and to demonstrate his ability to meet those requirements by the submission of specific documents. On the evidence supplied by the appellant with his application, the respondent's decision was in accordance with the rules. There was no proper basis on which an appeal against that decision could be allowed by treating a short-fall of £168 as de minimis. To do so undermines the requirements of the rules. I must allow the respondent's appeal against the decision relating to the variation of leave to remain.

13. This is a case where the removal decision made on 15 March 2013 was in the same document as the decision to vary leave to remain and was therefore not in accordance with the law for the reasons set out by the Court of Appeal in Secretary of State v Ahmadi [2013] EWCA Civ 512. The wording of s.47 has subsequently been amended by the Crime and Courts Act 2013 but that post-dates the decision made in this appeal. It is open to the appellant to make further submissions to the respondent on his particular circumstances including the issues raised in this appeal before that decision is re-made by the respondent.

Decision

14. The First-tier Tribunal erred in law and I set the decision aside. I re-make the decision by dismissing the appellant's appeal against the decision refusing to vary his leave to remain but I allow his appeal against the decision to remove him on the basis that that decision was not in accordance with the law.

Signed Date: 22 August 2013

Upper Tribunal Judge Latter