Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21214/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 July 2013	**On 30 September 2013**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MANZUR AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Adeolu
For the Respondent: Mr Wilding

DETERMINATION AND REASONS

1. The Appellant is a citizen of Bangladesh born in 1983. He appealed against a decision of the Secretary of State on 25 September 2012 to refuse to vary leave to remain as a Tier 1 (Post-Study Work) Migrant under the points-based system.

2. The application for variation of his leave was refused under paragraph 245FD(c) and (d) of the Immigration Rules. The Respondent also made a decision to remove under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. Following a hearing on 19 November 2012 at Hatton Cross, Judge of the First-tier Tribunal Kanagaratnam dismissed the appeal under the Rules and on human rights grounds (Article 8 of ECHR).

4. The judge in dismissing the appeal under the Rules accepted the Appellant's evidence that he had sat his exams in December 2011 and completed the course in January 2012. The judge noted the contention that the degree certificate was obtained prior to the date of application on 4 April 2012. However, while he accepted that there may have been administrative delays in providing the award the Appellant needed to 'establish that he at least submitted a letter from his educational institution in accordance with the Rules'. Yet, on the evidence before him 'despite the various explanations provided by the Appellant for the delay in award there has been no letter from the educational institution in the prescribed form submitted by the Appellant in accordance with the Rules'.

5. As for Article 8 the judge, in dismissing that claim, found that the Appellant had obtained previous qualifications in Bangladesh where he had lived for the greater part of his life. The post-study work experience that he intended to obtain in the UK was intended to aid him in his employment prospects in Bangladesh. There was little evidence that he cannot obtain similar work experience in Bangladesh.

6. He sought permission to appeal. In summary, he stated, firstly: 'At the time of considering the application, Appellant had obtained and awarded his degree and the documents evidencing award of degree were before the decision maker'.

7. Further, 'The Respondent sent out an acknowledgement wherein it stated that if there was a problem with the application, a caseworker will write to the applicant as soon as possible to advise on what action needs to be taken regarding the application. Appellant never received a telephone call, email or post regarding the application until refusal letter was received through the post'.

8. Also, it was unlawful for the Respondent to make a decision to remove at the same time as making the refusal to vary leave decision.

9. Permission to appeal was granted on 19 December 2012, a judge stating:

> '….
>
> 2. *The Appellant is a Bangladeshi national who on 21 March 2012* [in fact, 4 April] *made a combined application for leave to remain in the United Kingdom as a Tier 1 (Post-Study Work) Migrant under the points-based system and for a biometric residence card. The Respondent refused the application and simultaneously made a decision to remove him from the United Kingdom by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The Appellant claimed points for Date of Award under Appendix A of the Immigration Rules. However, the date of his award was not within the twelve month period directly prior to the date of application. Amongst other things the grounds assert that the judge erred by not taking into account the authority of* ***Ahmadi*** ***(s.47 decision: validity;*** ***Sapkota) [2012] UKUT 00147 (IAC)****. This issue, which has now been*

*more fully explored by the Tribunal in **Adamally and Jaferi** **(Section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC)**, appears not to have been considered at all by the judge. That omission is in itself an arguable error of law. Whilst the other grounds put forward have perhaps less merit for the avoidance of doubt I emphasise that I am not refusing permission in respect of any of them.*

3. *There is here an arguable error of law.'*

10. At the error of law hearing before me Mr Adeolu submitted that the date of decision was a continuing decision. Although the MBA degree was awarded after the application, because it was notified to the Respondent in a response to a section 120 notice before the decision, such was acceptable under the Rules. Also, the objective of the scheme was to give the opportunity to applicants to get work experience. It was a matter of fairness to allow the Appellant who had got his degree to remain in the UK in line with the spirit of the scheme. He asked me to allow the appeal.

11. In reply Mr Wilding, referring to the Rule 24 response conceded the error in respect of the section 47 aspect of the decision. However, there was no other flaw in the determination. The Court of Appeal in **Raju, Khatel, Adhikari and Al Islam [2013] EWCA Civ 754** had made clear it was not the case that an application continues until the decision is made. It made no difference that there was a section 120 notice. The instant case was on all fours with **Raju and Others**. He asked me to uphold the dismissal.

12. In considering this matter the facts as found by the First-tier Judge seem, in the main, not to be in dispute. The Appellant sat his exams in December 2011; he made his application on 4 April 2012; his degree was obtained on 25 May 2012 (C9 of Respondent's bundle). The date of decision was 25 September 2012. It is not clear to me, however, that the judge's comment that there was administrative delay by the college in providing the award following completion of the course is correct. The 'Expected Course Completion Date' given by the college in a letter dated 13 March 2012 (C12) was stated as 'Friday 18 May 2012', thus after the date of application.

13. Further, in **Raju and Others** the Court of Appeal made it clear that **AQ (Pakistan) v SSHD [2011] EWCA Civ 833** was 'not authority for the proposition … that the applications were "made" throughout the period starting with the date of their submission and finishing with the date of the decisions' (at paragraph 24). An applicant relying on a qualification on the Tier 1 (Post-Study Work) Migrant route had to have that at the date of the application for the purposes of the relevant Rule.

14. Moreover, in **Ali (s.120 - PBS) [2012] UKUT 00368 (IAC)** the Tribunal held that (i) in a points-based system case the exception set out in s.85A(3) and (4) of the 2002 Act precludes reliance on a section 120 statement from being used in order to advance evidence of compliance with a different requirement of the points-based system; and (ii) what is said in **AQ** about the relevant date being the date of decision not the date of application has to be seen as not applying to cases governed by s.85A with which the Court of Appeal was not concerned (paragraph 31 of its judgment).

15. As for the standard letter which was sent to the Appellant on receipt of the application and which stated that if there was any problem with the validity of the application he would be informed and advised as to the action he needed to take to make a valid application, the Court of Appeal in **Alam and Others [2012] EWCA Civ 960** accepted the Respondent's contention that the check as to the validity of applications was a very preliminary check to see whether there were obvious omissions: e.g. no fee paid, no photograph supplied, no signature on the student declaration at the end of the form. The Court accepted the distinction between an invalid application, which would not be considered unless the obvious defect was cured, and an application that was a valid application, but nevertheless fell to be rejected because, on examination, the applicant had failed to score the required number of points e.g. because he had failed to supply a specified document.

16. I see no merit in the Appellant's submission as his case clearly falls within the latter category. There was no unfairness procedural or otherwise. I see no material error of law in the determination. The Appellant could not score the required points because he made his application before he obtained his qualification. The decision under the Immigration Rules stands.

17. The Appellant did not seek to challenge the decision to dismiss the appeal under Article 8 and that decision also stands.

18. Both parties agreed that the decision to remove the Appellant under section 47 of the 2006 Act could not lawfully be notified to the Appellant at the same time as the refusal to vary his leave to remain (*per* **Adamally and Jaferi**). In failing to deal with the section 47 issue the judge erred in law.

19. The decision is remade by allowing the appeal but only in that regard. The decision dismissing the appeal against the refusal to vary leave (under the Immigration Rules and Article 8 of ECHR) stands.

Decision

The decision dismissing the appeal against the refusal to vary the Appellant's leave to remain stands.

The appeal against the decision to remove the Appellant is allowed as not being in accordance with the law.

Signed Date

Upper Tribunal Judge Conway