Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10249/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Determination Promulgated**
On 20th February 2014	**On 26th March 2014**

Before

UPPER TRIBUNAL JUDGE DAWSON
DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

MUDASAR IQBAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. In this appeal the Secretary of State now becomes the appellant. However, for the sake of clarity and to avoid confusion, we shall continue to refer to the parties as they were before the First-tier Tribunal.

2. At the hearing before us there was no appearance by the appellant or representation on his behalf. In a letter faxed to the Tribunal on the day before the hearing the appellant indicated that he would be unable to attend court on the following day because his wife's grandmother had passed away and he had to attend her funeral. An Upper Tribunal Judge refused the request on the same day indicating that the judge hearing the appeal would consider whether the determination of the First-tier Judge revealed a material error and then, if so, decide what further action to take. If necessary, it would consider whether it would be appropriate to adjourn the appeal.

3. As indicated below, we first considered whether or not the determination showed an error on a point of law such that it should be re-made. Having concluded that it did, we decided it would not be necessary to adjourn the appeal in order to re-make the decision. In reaching that conclusion, we took into consideration the submission by Mr McVeety that the appellant's application to adjourn had not been supported by his stated representatives, Usman Khan Solicitors, and did not give a reason for the failure to attend which was supported by evidence. Additionally, before proceeding, we arranged for the court clerk to contact the representatives by phone but they could not be reached on the number given. In the circumstances, we considered that it was not in the interests of justice to further adjourn the appeal and continued to hear it applying the provisions of Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Error on a Point of Law

4. In a renewed application to the Upper Tribunal, Upper Tribunal Judge Taylor gave permission to the respondent to appeal against the determination of First-Tier Tribunal Judge Frankish who allowed the appeal against the decision of the respondent to refuse leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system.

5. When granting permission, Upper Tribunal Judge Taylor noted that the grounds of application by the respondent argued that the judge misdirected himself because he took into account evidence which was sent to the respondent by the appellant later and separately from the application, even if on the same day. The respondent argued that the appellant was not permitted to do so by virtue of paragraph 34A(vi)(a) of the Immigration Rules which required that the application had to be accompanied by documents specified as mandatory in the application form. Upper Tribunal Judge Taylor considered that the grounds were arguable.

6. It should be noted that the grounds also contended that the judge failed to have regard to the provisions of Section 85A(4) of the Nationality, Immigration and Asylum Act 2002 because he was only permitted by that Section to take account of evidence submitted in support of, and at the time of making, the application. It was further contended that the additional evidence from the appellant was not submitted when the application was made as it was not submitted with the application when posted.

7. Mr McVeety confirmed that the respondent relied upon the grounds which we have summarised, above. He emphasised that, although the judge found that the appellant had submitted the bank documents in question on the same day he submitted his application, that did not mean that the determination was without error because the appellant had failed to comply with the specific provisions of the Rules.

8. The appellant has not provided a response pursuant to rule 24 but we noted his contention in the grounds of appeal to the F-tT that he had paid the fees for his course although the issue of the late submission of bank information was not raised at that stage. The fees issue was resolved at the hearing when the Presenting Officer conceded that the amount which the appellant had to show as available was £1,600 as maintenance although that sum was not available in his UK bank account. The appellant then submitted that he had sent, on the same day as his completed application, a statement for an account with United Bank in Pakistan which showed sufficient funds to cover the £1,600 required to be shown

9. Having considered the matter, we announced that we were satisfied that the determination showed an error on a point of law such that it should be re-made and now give our reasons for doing so.

10. The issue for our consideration was whether or not the judge was in material error in concluding that he could take into consideration evidence submitted by the appellant in the form of bank statements showing overseas funds which, he found, were sent to the respondent separately to, but on the same day as, the application for leave to remain, itself. We find the judge's decision in relation to the despatch of the additional evidence somewhat unusual because he does not appear to have investigated the fact that that the original evidence from United Bank in Pakistan was dated 15th December 2012 when the leave application was only two days later. There was no evidence of despatch of that evidence either from Pakistan or to the respondent. However we do not disturb that finding; our task is to consider the error which is the subject of the application.

11. In considering the error issue, we were mindful of the Court of Appeal decision in *Raju and Others* [2013] EWCA Civ 754 which overturned the Upper Tribunal decision in *Khatel* [2013] UKUT 44 (IAC). The Court of Appeal concluded that an application for leave is made when paragraph 34G of the Immigration Rules says it is made and is not a "continuing application" to the date upon which it is decided by the respondent. We focused upon the issue raised in these two reported cases on the basis that, although not specifically considered by the judge, the appellant's application could have been seen as a continuing one and so the respondent's argument in relation to the application of paragraph 34A of the Immigration Rules might not have been conclusive. However, the decision of the Court of Appeal is clear and so the application in this case could not have been regarded as a continuing one thus permitting the later submission of a bank statement.

12. The determination of the First-tier Judge shows an error on a point of law because he failed to consider the application of paragraph 34A(vi)(a) which clearly required that an application submitted by post or courier or in person must be accompanied by the documents specified as mandatory in the application form. In that context we have applied the ordinary meaning of the word "accompanied" which is "be present or occur at the same time as". Such documents would have included the bank statements showing that the appellant had sufficient funds abroad to demonstrate that he had the requisite £1,600 for a 28 day period preceding his application. The judge also failed to consider the application of Section 85A of the 2002 Act in conjunction with consideration of paragraph 34A of the Rules which meant that he had not considered whether he could consider the documents submitted later as

evidence at all. If the judge had considered these two matters then it cannot be said that he would, nevertheless, have reached the same decision.

Re-Making the Determination

13. Having announced our decision on the error in the determination, we indicated that we would dismiss the appeal on re-making it because of the matters already examined. In doing so we also noted that, as the judge commented in paragraph 9 of the determination, the results of the appeal had become academic to the appellant because he had achieved his masters degree on 20th July 2013 albeit that he did not want a black mark on his immigration record.

14. We have concluded that the appeal must be dismissed because, applying the provisions of paragraph 34A(vi)(a) of the Immigration Rules, the bank information which the appellant later sent did not accompany his original postal application. We also point out that we are precluded from considering the information which he later submitted, in any event, because of the application of Section 85A(4) of the 2002 Act.

15. No human rights issues were raised in the original grounds of appeal or in relation to the application.

DECISION

The decision of the First-tier Tribunal involved the making of an error on a point of law. We set aside the decision and re-make it by dismissing it on immigration grounds.

Anonymity

The First-tier Tribunal did not make an anonymity order nor do we consider it appropriate to do so.

Signed Date

Deputy Upper Tribunal Judge Garratt

TO THE RESPONDENT
FEE AWARD

As we have dismissed this appeal we cannot make a fee award.

Signed Date

Deputy Upper Tribunal Judge Garratt