Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22628/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 March 2014	**On 23 April 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SU MAN MON SAN

Respondent

Representation:

For the Appellant: Ms Pal, a Senior Home Office Presenting Officer
For the Respondent: Mr Khan, EU Migration Services

DETERMINATION AND REASONS

1. The respondent, Su Man Mon San, was born on 3 May 1990 and is a citizen of Myanmar (Burma). I shall refer hereafter to Su Man Mon San as "the appellant" as she was before the First-tier Tribunal and to the Secretary of State as the "respondent." The appellant came to the United Kingdom in August 2011 as a student. She made an application for further leave to remain in that capacity but this

was rejected by a decision of the respondent dated 24 May 2013. The appellant was not awarded the required 30 points for Attributes because she had failed to provide a CIMA registration certificate in support of her application. She was also found by the Secretary of State not to have possessed sufficient funds (Appendix C) and her application was rejected on that basis also.

2. At the appeal before the First-tier Tribunal the Presenting Officer appears to have conceded that the appellant had established that she had provided proof of her CIMA registration; at [22], the judge noted that the Presenting Officer "took no point on that aspect of the appeal." Earlier, at [17], the judge recorded that "in her submission to this court, Ms Jones [the Presenting Officer] said that "no further enquiries have been made about [the appellant's] CIMA registration, because she had failed the maintenance aspects of the claim. The Home Office was unaware of the Barclays account [of the appellant] at the time."

3. The judge appears to have accepted that the appellant did not meet the maintenance requirements of the Rule on the basis of the documents which she had submitted with her application. However, at [23] he said this:

> Again, whilst I accept that the onus was on the appellant to provide evidence of the fact that she had the relevant sums of money – in this case £2,065.80 – in her position during the relevant period namely from 30 March 2013 to 26 April 2013, she has now manifestly shown that she did have such monies available to her for the relevant period. Indeed, it is not disputed that the relevant bank statements were provided by this appellant with her Notice and Grounds of Appeal, copies of which will have been provided to the Home Office. I find, therefore, that the respondent had ample opportunity to consider those matters prior to the hearing of this appeal, and it was open to the Home Office, therefore, having regard to their policy, to withdraw the decision that they had made in this case.

4. That paragraph is problematic. The "policy" referred to appears to be the so-called flexibility policy considered by the Upper Tribunal in *Rodriguez* [2013] UKUT 00042 (IAC) which the judge cites at [20]. But that decision of the Upper Tribunal has been reversed in the Court of Appeal in *Rodriguez* [2014] EWCA Civ 2. In any event, I cannot see how the flexibility policy, even if it were to apply in the appellant's circumstances (which it did not), could have assisted in the manner described by the judge at [23]. There was no suggestion that the Secretary of State had any idea whatsoever at the time she considered the appellant's application that the appellant had money in a Barclays bank account. There could, therefore, have been no question of the Secretary of State seeking further documents or details concerning an account which she did not know existed. Any flexibility policy would have been of no relevance whatever in those circumstances. As for the fact that the appellant may now "manifestly have shown that she did have monies available to her for the relevant period", that is a finding which runs entirely contrary to the very basis of the points-based system and the provisions of Section 85 of the Nationality, Immigration Asylum Act 2002. I find that the judge's reasoning at [23] is wrong in law. The judge should not have allowed the appellant to include funds in her Barclays bank account in the assessment of her funds. Had he excluded the money in

that account, the appellant was bound to fail in her application because she did not have sufficient funds for the relevant period.

5. I set aside the determination of the First-tier Tribunal and have remade the decision. In the light of my observations set out above, the appeal in respect of the Immigration Rules is dismissed.

DECISION

6. The determination of the First-tier Tribunal promulgated on 13 January 2014 is set aside. I have remade the decision. The appeal in respect of the Immigration Rules is dismissed.

Signed Date 2 April 2014

Upper Tribunal Judge Clive Lane