Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48319/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 16 June 2014	**On 15th July 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FURONG HUANG

Respondent

Representation:

For the Appellant: Ms M Singh, instructed by Howells, Solicitors
For the Respondent: Mr M Diwncyz, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent, Furong Huang, was born on 29 October 1990 and is a citizen of China. I shall hereafter refer to the respondent as the appellant and to the Secretary of State as the respondent, as they were respectively before the First-tier Tribunal.

2. The appellant applied for further leave to remain in the United Kingdom as a Tier 4 (General) Student but her application was refused on 25 October 2013. She appealed to the First-tier Tribunal (Judge Agnew), which, in a determination promulgated on 25 March 2014, allowed the appeal under the Immigration Rules and on human rights grounds (Article 8 ECHR). The Secretary of State now appeals with permission to the Upper Tribunal.

3. At [5], Judge Agnew noted

> The reasons for the refusal of the appellant's application are noted in the respondent's letter dated 25 October 2013. It was noted that the appellant needed to show maintenance funds and that she was in possession of £1,957.00 for 28 days from 30 August 2013 to 26 September 2013. However, on the bank statements submitted, a balance of £1,022.48 was shown on 10 September 2013. The application was refused on that basis.

4. The judge went on to consider the cases of *Rodriguez* [2014] EWCA Civ 2 and *Alam* [2012] EWCA Civ 960 and, in addition, the Immigration Rules now incorporating the respondent's "evidential flexibility policy." The application pre-dated a change in the Rules but the decision postdated that change and it is agreed that the relevant Rule is paragraph 245AA(b):

> (b) If the applicant has submitted specified documents in which:
>
> (i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
>
> (ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
>
> (iii) A document is a copy and not an original document; or
>
> (iv) A document does not contain all of the specified information;
>
> (a) the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.

The appellant had submitted a number of bank statements for the relevant period from HSBC. Several of these statements record substantial transfers of money into the account described as "INTERNET TRANSFER" bearing the reference 400300 80850810. The First-tier Tribunal found that this reference is that of another bank account held by the

appellant (the sort code is the same as that shown on the statements which have been disclosed) and on that basis the judge went on at [11] to find as follows:

> Ms Brewer [the Presenting Officer] submitted that the respondent's representatives could not know that the appellant had another bank account and the transfers into her current account were coming from the appellant's savings account. They were not to know anything was missing. However, given the regular transfers into her bank account, the appellant's history of studying and her circumstances, I find that if considered carefully or substantively, the representative should have realised that something was missing and checked with the appellant. The appellant's savings account, held in the same bank, showed a large balance during the relevant period. As there was no other reason for refusing the appellant's application I find that the respondent's representative should in the particular circumstances of this appellant [have] checked with her to see if any bank statements were missing and on provision of her savings account (not lodged in error) the application would have been allowed.

5. Miss Singh, for the appellant, submitted that the judge had been correct for two reasons. First, as she notes at [11] there was a failure on the part of the Secretary of State substantively to analyse the evidence which the appellant had submitted. Had she done so, the existence of the (not disclosed) savings account would have become apparent. Secondly, the operation of paragraph 245AA(b)(iv) "*a document does not contain all of the specified information*" should have led the respondent to make enquiries about the transfers into the account which would have led to disclosure of the savings account.

6. I find that the judge erred in law such that her determination falls to be set aside. I say that for the following reasons. The respondent quite properly had regard to the balances shown on the appellant's account during the relevant period. There can be no dispute that the balance on the account dropped below the permitted minimum. I find that there was no obligation on the respondent to enquire as to the source of funds paid into the account and that the respondent did not fail in her obligation to carry out a proper and substantive analysis of the evidence by declining to make any enquiries of the appellant. As regards paragraph 245AA(b)(iv) I find that the bank statement documents did "contain all of the specified information" because they contained details of the bank in which the account was held and the balances on the account to which the statement related. It is stretching the meaning of sub-paragraph (iv) beyond breaking point to suggest that the "specified information" should include or refer to monies held in another account of which the Secretary of State had no knowledge or notice because the appellant had not disclosed it. The appellant relies on a Policy Guidance document for Tier 4 applicants in which it is stated that;

> > You must show you have enough money to cover your monthly living costs while you are studying in the UK ... you have an established presence studying in the UK, you must show that you have money for your living costs for each month of your course, up to a maximum of two months.

I cannot see any reason why that guidance should have led the Secretary of State to make the enquiries which the appellant and the First-tier Tribunal believed she should have made.

7. Further, notwithstanding the payments into the disclosed account at HSBC from the undisclosed savings account, the minimum balance was not maintained in the former account throughout the required period. There was no reason at all for the Secretary of State to assume that the account from which the transfers were being made belonged to the appellant or, if it did, that it contained funds which would have enabled the appellant to meet the maintenance requirements. The appellant simply failed to submit evidence relating to the accounts which she chose to disclose to the Secretary of State which showed that she met the requirements of the Rules. In consequence, her appeal under the Immigration Rules should have been dismissed.

8. Having allowed the appeal under the Rules, the judge went on to consider Article 8 ECHR. At [15], she wrote:

> The respondent makes no reference to Article 8 of the ECHR outside the Rules although Miss Brewer did make submissions upon it. I find that there are, in this particular case, arguably good grounds to consider the appellant's case outside the Rules under Article 8.

9. The judge considered the question of proportionality [17]. She noted the "significant investment the appellant and her parents have made to enable her to study in this country." She noted also that the appellant only has "six months to complete her masters course having already obtained her bachelors degree." The appellant had "contributed to the economy while studying here and making good friends." She allowed the appeal under Article 8 ECHR.

10. Given that the judge should have dismissed the appeal under the Immigration Rules, her application of *Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 640 (IAC)* was in error. Applying the principles of *Gulshan* and also *MF (Nigeria) [2013] EWCA Civ 1192,* she should first have considered whether there were compelling or exceptional circumstances in the case which had not been anticipated under the Immigration Rules but which required an assessment of Article 8 outside the Rules. Most foreign students make a significant financial investment in their studies in this country and, by doing so, contribute to the economy. Likewise, most foreign students make "good friends" whilst living and studying here. However, none of those circumstances were so unusual or particular to this appellant as to have properly led the judge to consider Article 8 ECHR outside the Immigration Rules let alone to have allowed the appeal on that basis.

11. I find that the First-tier Tribunal's determination should be set aside. I have re-made the decision. In the light of my findings and observations above, I find that the appeal should be dismissed under the Immigration Rules and on human rights grounds (Article 8 ECHR).

DECISION

12. The determination of the First-tier Tribunal promulgated on 25 March 2014 is set aside. I have re-made the decision. This appeal is dismissed under the Immigration Rules. This appeal is dismissed on human rights grounds (Article 8 ECHR).

Signed Date 8 July 2014

Upper Tribunal Judge Clive Lane