Upper Tribunal **Appeal Number : IA/48505/2013**

(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard	**at**	**Field House**	**Determination promulgated**
On 15 July 2014		**On 16 July 2014**	

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Sheikh Marina Karim
(No anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant: Mr. K. Manzur of Haque & Hausman.
For the Respondent: Mr. G. Saunders, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Mailer promulgated on 28 March 2014 dismissing the Appellant's appeal against the decision dated 8 November 2013 to refuse to grant leave to remain as a Tier 4 (General) Student migrant.

Consideration

2. I am grateful for the helpful and realistic way in which Mr Saunders dealt with this appeal today. In the circumstances it is unnecessary to set out the background to this case in any great detail. All such details are a matter of record on file and are rehearsed in the decision of the First-tier Tribunal. I am able to be relatively brief herein.

3. The following matters are particularly germane:

(i) Although in the Respondent's combined Notice of Immigration Decision and 'reasons for refusal' letter ('RFRL') dated 8 November 2013 the Appellant was treated as having made an application on 18 September 2013 (after the expiry of her last leave which ran to 31 August 2013), the Tribunal had ruled when considering the validity of the appeal that the Appellant's application had been made on 26 August 2013 - during the currency of her extant leave: see determination of First-tier Tribunal Judge Mailer at paragraph 4. It was common ground between the parties before Judge Mailer that the date of application was 26 August 2013: see paragraph 42.

(ii) It followed that for the purposes of the application the Appellant was to be treated as having an established presence in the UK, which meant that the maintenance requirements under the Rules were at a lower amount than they would have been otherwise. The Respondent's approach to this issue was in error because the Respondent had deemed the date of application as being 18 September 2013.

(iii) To satisfy the maintenance requirements the Appellant had sought to rely upon bank statements running up to 28 July 2013. It is common ground between the parties – as confirmed to me today – that these bank statements demonstrated an adequate quantum of funds. (See also determination of Judge Mailer at paragraph 38.)

(iv) However, the bank statements were not submitted at the same time as the application of 26 August 2013, but were forwarded subsequently to the Respondent on 18 September 2013. It is common ground that the bank statements were before the Respondent at the date of the Respondent's decision – and indeed are referred to in the Notice of Decision/RFRL.

(v) Judge Mailer determined that because the bank statements were not submitted at the same time as the application "*the*

Respondent would have been obliged to refuse the application made on 26th August 2013 as the documentation which was required to accompany it was not yet available" (determination at paragraph 48).

4. Permission to appeal was granted by First-tier Tribunal Designated Judge McClure on 21 May 2014. In granting permission to appeal Judge McClure identified that it was arguable that Judge Mailer's approach was not consistent with **Nasim and others [2013] UKUT 610 (IAC)**, and in particular paragraph 76 thereof.

5. The relevant passages in **Nasim** are from paragraphs 72-76. Mr Saunders indicated that he did not resile from the position of the Respondent indicated in those paragraphs: in particular, "*an application is to be treated as continuing for evidential purposes*" (paragraph 73); "*the SSHD has never suggested in this appeal that the SSHD is not entitled to consider post-submission but pre-decision evidence. The SSHD has also made it clear that, in any event, the Tribunal is entitled to consider the evidence that the decision maker considered*" (paragraph 74); "*Accordingly, the respondent's position, in cases such as the present, is that (as held in Khatel) section 85A precludes a Tribunal, in a points-based appeal, from considering evidence as to compliance with points-based Rules, where that evidence was not before the respondent when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the respondent when she took the decision, whether or not that evidence reached the respondent only after the date of application for the purposes of paragraph 34F*" (paragraph 76). (See also paragraph (4) of the headnote in **Nasim**.)

6. Otherwise Mr Saunders indicated he had no other observations to make in the appeal – save that he confirmed acceptance that the bank statements submitted to the Respondent prior to the decision demonstrated adequate funds to meet the quantum of the maintenance requirements.

7. In the circumstances it was unnecessary to invite submissions from Mr Manzur.

8. The Respondent by accepting the position as stated to the Tribunal in **Nasim** acknowledges that even if the decision-maker had treated the application as made on 26 August 2013 he would have been able to take into account the bank statements,

notwithstanding that they were submitted after the date of the application. In turn it is effectively acknowledged by the Respondent that the First-tier Tribunal should have had regard to the bank statements in evaluating whether the Appellant met the Maintenance requirements of the Rules.

9. In all such circumstances I find that Judge Mailer erred in law in excluding from consideration the bank statements. This was a material error as it related to the core issue raised against the Appellant's application. I set aside the decision of the First-tier Tribunal accordingly.

10. In remaking the decision in the appeal I note that it is not disputed that the evidence submitted by the Appellant in support of her application demonstrated that she met the maintenance requirements of the Rules. There being no other issue taken against the Appellant, she scored sufficient points to meet the requirements for a Tier 4 (General) Student migrant under the Points Based System. The Respondent's decision was not in accordance with the Rules and variation of leave should properly have been granted to the Appellant.

11. I allow the appeal under the Immigration Rules.

12. In the circumstances it is unnecessary to consider Article 8 of the ECHR.

13. For completeness I note that Judge Mailer made reference to a section 47 decision at paragraph 25 of the determination. No such decision is contained in the Notice of Immigration Decision/RFRL, and I am unable to identify any other document containing such a decision in respect of the Appellant on file. Be that as it may, Mr Saunders acknowledged that if there were to have been a section 47 removal decision it would fall away in light of the decision now made on the appeal.

Decision

14. The decision of the First-tier Tribunal Judge contained an error of law and is set aside. The decision in the appeal is re-made. The appeal is allowed under the Immigration Rules.

Deputy Judge of the Upper Tribunal I. A. Lewis 15 July 2014