Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25264/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 July 2013	**On 1 August 2013**
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Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

SHOFIQ RAHMAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Hosein, of Diamond Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Bangladesh born on 25 May 1980, received from the decisions dated 24 October 2012, refusing his application for variation of leave to

remain as a student and purporting to decide that he should be removed from the United Kingdom by way of directions pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant appealed against those decisions and following hearings at Taylor House on 11 January and 18 March 2013, First-tier Tribunal Judge Scott-Baker dismissed his appeal.

2. Permission to appeal to the Upper Tribunal was granted on 16 May 2013 on two bases. The first was that, contrary to what is required by paragraph 118(b)(ii)(iv)ii of Appendix A to the Immigration Rules, the appellant had not "achieved or exceeded level B2 of the Council of Europe's Common European Framework for Language Learning in all four component (reading, writing, speaking and listening) unless exempted from sitting a component on the basis of the applicant's ability". The second basis for refusal was that the appellant had not shown, as required by paragraph 13 of Appendix C to the Immigration Rules, that relevant funds for his maintenance were held by him or by his parents or legal guardians, who had provided written consent that the funds may be used by the appellant for study in the United Kingdom.

3. The granting judge considered that, as regards the first matter, it was unclear whether the requirement to pass all components was contained in the Immigration Rules or in guidance. If it was the latter, then pursuant to the judgments in Alvi v SSHD [2012] UKSC 33, the requirement would be unlawful. As regards the second matter, the granting judge considered it arguable that a "legal guardianship declaration" provided by the appellant and signed by his brother satisfied the requirements of paragraph 13 of Appendix C.

4. The First-tier Tribunal judge found against the appellant on both matters. So far as the first is concerned, at the reconvened hearing the judge had before her an email from the administrators of the examining body in question, the City and Guilds, concerning the appellant's specific position. This email said:

> "I can confirm that the candidate has been issued the certificates you are enquiring about. Our international ESOL qualification (qualification code 8984) is set-up in a way that allows the candidates to receive a full certificate with an overall Pass Award, even if they received a Narrow Fail for one of the three components, provided they achieve at least Pass result in the other two components. Mr Rahman received a Narrow Fail for his performance on the written part of the test, but received a First Class Pass in the other two, so he was eligible for a full certificate with Pass result.
>
> **However, UKBA will only accept international ESOL (8984) certificates if the applicant received at least Pass 50% on all three components of the examination**" (original emphasis).

5. The document to which the email apparently makes reference is not, in fact, a certificate but a "notification of candidate results", issued in the name of City and Guilds in respect of the centre known as Helios International College. The "assessment description" is stated as "International English for Speakers of Other

Languages (IESOL) – communicator – B2)". The "performance codes" are "GA GF GK HI HJ". The overall result is "pass". The relevant performance codes are as follows: GA – First class pass; GF – section grade for reading: pass; GK – section grade for writing: narrow fail; HI – writing – grammar – standard not met; HJ – writing – task fulfilment – standard not met.

6. Mr Hosein sought to contend that the "assessment description" was itself no more than a 'component' and that, as a result, the appellant did in fact meet the requirements of Appendix A, paragraph 118(b)(ii)(iv)ii. With respect, I consider that submission to be misconceived. It is plain that the notification of candidate results describes passes or fails for reading, writing and listening, which clearly correspond to three of the four named components in Appendix A. Furthermore, if this were not the case, then it is inconceivable that the email from City and Guilds would not have stated as much, rather than explaining how the awarding body decided to grant an overall pass even though certain "components" (the word used in the email) had not been passed by the appellant.

7. Accordingly, there can be no question but that the requirements of the relevant provisions of Appendix A have not been met. The issue that troubled the granting judge; namely, whether the requirement to pass each of the components at B2 level was in the Rules or in guidance, manifestly cannot assist the appellant. The requirement is in the Rules themselves; Alvi has no application.

8. In any event, the appellant fails by reference to the second matter; namely, the maintenance requirements. The case for the appellant was that the "legal guardianship declaration" of 23 December 2012 was before Judge Scott-Baker and that she erred in law in finding at [8] of her determination that there was "no evidence that his brother had been appointed a legal guardian".

9. I am prepared to accept that the legal guardianship declaration was before the judge and, to that extent, what she said at [8] was wrong. However, her finding in that paragraph continued by stating that there was no evidence that there had been "any necessity for [legal guardianship] given his age at the time of the death of his parents". That finding was undoubtedly open to the judge. The declaration purports to be an assumption of legal guardianship by the appellant's 44 year old brother in respect of the appellant, described in the declaration as "aged about 33 years". How a 44 year old sibling could claim to be the legal guardian of a 33 year old man not suffering from any mental impairment was a question that Mr Hosein was unable satisfactorily to answer. He attempted to say that because the declaration had been notarised, the notary could be taken to have confirmed that, whatever the position might be in the United Kingdom, under the law of Bangladesh it was legally possible for a 44 year old to be the effective legal guardian of a 33 year old.

10. The existence and effect of foreign law must be proved in proceedings in the United Kingdom, as a matter of fact. This has not happened in the present case. I reject the unsubstantiated assertion that the notarising the guardianship declaration

necessarily means that the appellant became in law the ward of his brother, in the sense understood in the United Kingdom.

11. But all this is immaterial. As Mr Wilding pointed out, the guardianship declaration is dated 23 December 2012, almost two months after the decision in the present case. Since this is a "points based" case, Exception 2 in section 85A of the Nationality, Immigration and Asylum Act 2002 has the effect that the declaration could not constitute evidence in the present proceedings. It was not "submitted in support of, and at the time of making, the application to which the immigration decision related" (section 85A(4)(a). There has been no suggestion that the matters set out in paragraphs (b) to (d) of section 85A(4) are relevant in the present case.

12. For these reasons, the appellant's challenge to the determination of the First-tier Tribunal Judge fails on both matters. The challenge would, of course, have had to succeeded on both before her decision to dismiss the appeal against the variation of leave decision could be set aside.

13. As I explained at the hearing, the judge did, however, err in law in failing to deal with the appeal brought against the decision purporting to be made under section 47 of the 2006 Act. In the light of SSHD v Ahmadi [2013] EWCA Civ 512, the section 47 decision was unlawful and the judge should have allowed the appeal against it, to the extent of finding that the appellant awaits a lawful removal decision. To that extent, I set aside and re-make her determination; otherwise that determination stands.

Decision

14. The determination of the First-tier Tribunal does not contain an error in respect of the dismissal of the appellant's appeal against the decision to refuse to vary his leave to remain in the United Kingdom. I set aside the determination, so far as the judge dismissed the appeal against the section 47 removal decision. I re-make that part of the decision by allowing it, to the extent indicated above.

Signed Date

Upper Tribunal Judge Peter Lane