Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12796/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 December 2013	**On 7 January 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MARKO MRKAJA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In Person
For the Respondent: Ms Z. Kiss, senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Serbia. He entered the United Kingdom on 17 September 2011 as a student on a visa valid until 30 January 2013. He subsequently made an application for further leave to remain as a Tier 4 Student.

2. The application was refused on 25 March 2013.

3. The reason for the refusal was that the bank statements submitted to establish maintenance were not dated within 31 days of the application.

4. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Harrington on 26 September 2013.

5. The appellant accepted that he did not meet the Immigration Rules. He had a letter from his mother confirming that her money was available for his maintenance, this being a compulsory document which he had enclosed with his first application. He did not resubmit the document with the current application because he did not realise that he had to do so. Similarly he had submitted his previous bank account which was not one that met the time requirements of the new application.

6. Fundamentally the appellant went on to say that he had the money and if he had known to the contrary he would have submitted the correct documentation.

7. By the time of the hearing the appellant had in fact achieved that which he had set out to achieve, namely his Masters degree. His dissertation had been completed pending the appeal and he was expecting his results in two weeks from the hearing.

8. Essentially the appellant was looking for a discretionary period of leave to end with the graduation ceremony.

9. The appeal was allowed on the basis of human rights. The Judge noted that the appellant had sufficient funds as required; had spent a considerable amount of time and money in studying for his Masters and would not be able to complete his Masters from overseas.

10. The respondent sought to appeal against that decision to the effect that the Judge had not considered the public interest and failed to give adequate or proper reasons why it was disproportionate to remove the appellant.

11. Leave to appeal was granted. Thus the matter comes before me in pursuance of that grant.

12. The appellant attended in person and indicated that his application, made on 29 January 2013 for leave to remain, was in order for him to have completed his Masters. That he had now done.

13. What he would like to do is to apply to be a Tier 2 Migrant. He has employment which he wishes to do is well within the lists of skills that are set out in the Immigration Rules. If he were to apply in the United Kingdom he would not be expected to satisfy the market labour test. He

would have to do so if he returned home. Thus to make the application from home there were many more difficulties that would be in his way. He would have to show that he had a particular skill that could not be found elsewhere in order to stand any chance of coming back in that capacity. Thus, he submitted, it was easier for him to stay in the United Kingdom and make the application rather than returning.

14. I asked the appellant whether or not he had made a formal application to remain under that capacity and he indicated that he had not done so to date.

15. Miss Kiss, who represents the respondent, invited me to find that there was in fact no challenge to the fact that the appellant could not meet the Immigration Rules. She submitted that a near-miss was in the circumstances an irrelevant consideration for Article 8 and in so considering the judge had fallen into error. She cites **Miah and Others v Secretary of State for the Home Department [2012] EWCA Civ 271** by way of an example.

16. My attention was drawn particularly to paragraphs 24 and 25 noting that Lord Justice Sedley, who gave the judgment, considered the Rule should remain a Rule and that to make a Rule subject to the near-miss penumbra would be to enter the steep slope away from predictable Rules.

17. Lord Justice Sedley went on as follows:

> "For these reasons, I would dismiss the appeal in relation to the near-miss argument. In my judgement there is no near-miss principal applicable to the Immigration Rules. The Secretary of State, on an appeal to the Tribunal, must assess the strength of an Article 8 claim, but the requirements of immigration control is not weakened by the degree of non compliance with the Immigration Rules."

18. In this case the appellant was candid about the reason for his making the appeal, namely to buy time to finish his Masters degree which he has now done.

19. The Judge give very few reasons for allowing the appeal under Article 8. The fact that the appellant may have access to sufficient funds does not absolve him from the obligation to make the application in the proper way and in the proper manner. There is no suggestion here that it was the respondent who was at fault in what was done.

20. It was said at paragraph 27 of the determination by the judge that the appellant would be unable to complete his Masters from overseas. Indeed the Masters has already been completed subject to attendance at the ceremony in the future.

21. No reasons were given why Article 8 should be established over and above the fact that it would be more convenient for the appellant to remain in the United Kingdom.

22. I find that the lack of reasoning and the lack of recognition of the importance of immigration control in circumstances such as this to be an error of law. Accordingly the decision is set aside to be remade.

23. The appellant was very honest with me, indicating that in reality he wished to stay in the United Kingdom because to make any further application would be much easier for him to do than to return to his home country. He would be able to satisfy the requirements but may not be able to do so from abroad. It seems to me however that that is a circumstance that is yet to arise, no application to stay on that basis having been made. The fact that it may be more convenient for the appellant to apply in the United Kingdom or indeed that he may face difficulties, if applying from overseas, has little bearing upon the appellant's immediate rights which are engaged with the study to which he has largely completed.

24. I find that the appellant does not satisfy the Immigration Rules.

25. I bear in mind the case of **Miah** and the fact that the appellant has in fact completed that which he sought to undertake in the United Kingdom. There is no reason why the appellant could not return to his home country to make any further application acknowledging, of course, as I do that it may be more difficult for him. Those are the terms of the Immigration Rules as set down by Parliament and agreed and it would be wrong therefore to use Article 8 to circumvent the requirements so imposed.

26. In all the circumstances although I hope that the respondent may be generous in allowing an in-country appeal, that is a matter for the respondent and not for me.

27. In the circumstances the appeal in respect of the Immigration Rules is dismissed. That in respect of human rights is also dismissed.

Signed Date

Upper Tribunal Judge King TD