IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Qureshi (Tier 4 – effect of variation – App C) Pakistan [2011] UKUT 00412 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 August 2011	.....

Before

UPPER TRIBUNAL JUDGE KEKIĆ

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS ALMAS QURESHI

Respondent

Representation :

For the Appellant: Mr Zane Malik , Counsel

For the Respondent: Mr Esen Tufan, Home Office Presenting Officer

A Tier 4 (General) Student application can be varied by virtue of the provisions in s. 3C(5) of the Immigration Act 1971. There is no restriction in s.3C(5) on the number of occasions on which application for variation of the original application can be made provided notice of variation is given prior to the respondent's decision as thereafter there would then be no application pending.

As to the date the respondent is required to take into account for the purposes of determining the points to be awarded under Appendix C, where there has been a variation substituting a new college, it is the date of the most recent variation for the purposes of paragraph 1A(c).

DETERMINATION AND REASONS

INTRODUCTION

1. In this determination we shall continue to refer for the sake of clarity to Miss Qureshi as the appellant although it is the Secretary of State being the appellant before us and the Secretary of State

as the respondent. The appellant is a national of Pakistan born 7 September 1974 and she applied on an application dated 6 August 2010 for further leave to remain in the United Kingdom as a student under the Tier 4 points-based scheme to study at Empire College London at its Birmingham Campus. Her course title was BTEC Advanced Professional Diploma in Management Studies. It had started on 15 February 2010 and was due to end on 21 January 2011. A Confirmation of Acceptance for Studies (CAS) document was submitted on the letterhead of Empire College London dated 6 August 2010 together with evidence of statements of the appellant's accounts with HSBC for the period 28 June to 27 July 2010.

2. The appellant had previously been granted leave to enter the United Kingdom on 3 February 2008 as a student until 31 May 2009. On 14 July 2009 she was granted further leave to remain as a Tier 4 (General) Student until 16 August 2010. Empire College London lost its Tier 4 (General) Student sponsor licence in September 2010. The reason for this and the precise date are not known.

3. On 15 December 2010 the appellant wrote to the Home Office explaining that her course at Empire College London was to end on 21 January 2011. She went on to explain:

" I have been accepted on a new course of MSc Management at Birmingham City University, due to start in January 2011. My student CAS information for the new course and institution has been enclosed with this letter.

Please include this with my Tier 4 application. I look forward to hearing from you and thank you ."

4. On 12 January 2011 the appellant wrote again to the Home Office and we quote her letter in full:

" I am writing with reference to my above Tier 4 application – further to my telephone conversation with Jannet, calling time was 12.10pm on 12-01-11. Jannet advised me to send this letter via fax. My current course for a BTEC Advanced Professional Diploma in Management Studies at Empire College of London (Birmingham Branch) is due to finish on January 21st Jan 2011. I send my application for Tier 4 in August 2010 and i am still waiting for my response from you. My course will be finished on 12-01-11 so i have been enrolled and have been accepted on a new course of MSc Management at Birmingham City University which is due to start in January 2011. I have already sent my details of admission and CAS No. and details to the university on this address on this dt: 18-12-10.

UK Border Agency

Lunar House

40 Wellesley Road

Croydon

CR9 2BY

My new CAS detail which I have already sent via special next day delivery, Ref of delivery time and date 18-12-2010 at 12:33 and Bar Code Ref: ZW677282030GB.

I have already done my biometrics on 26-8-2010 at 11.15am at this address:

[An address in Birmingham is provided]

Please find enclosed my student CAS information for the new course I have enrolled on and the University details and please attach these details with my Tier 4 application. I look forward to any response. ”

5. Up-to-date statements of the appellant’s one account with HSBC were sent to the respondent on 17 January 2011.

6. A decision was quickly reached and on 20 January the Home Office wrote to the appellant refusing the application. The appellant was awarded 30 points claimed for Attributes – Confirmation of acceptance for Studies (CAS) on this basis:

“ We considered your CAS from Birmingham City University, assigned on 10 December 2010

Points awarded as claimed ”

7. No points were awarded however for maintenance (Funds) for the following reasons:

“You claimed 10 points for possessing the required funds to maintain and accommodate yourself without recourse to public funds and to pay the remainder of your tuition fees for the academic year.

Your CAS from Birmingham City University states that you owe £5,750 in tuition fees. You also require £1,200 in living funds; £6,950 overall.

To support your claim you provided bank statements from two HSBC accounts.

The combined total of funds in the two accounts on the last date of the statement is £6,518.31. This figure does not meet the maintenance requirement and no points have been awarded in this area, in line with published guidance .”

8. It was further explained in the letter of 20 January that it had been decided to refuse the application for leave to remain as a Tier 4 (General) Student Migrant under paragraph 245ZX(d) of the Immigration Rules.

9. The appellant appealed arguing that she was able to score the 10 points sought. She also argued that the decision was contrary to the Human Rights Act 1998. She also relied on a Statement of Additional Grounds which added nothing new of substance to the somewhat general grounds already stated.

THE FIRST-TIER TRIBUNAL

10. Immigration Judge J Macdonald heard the appeal on 24 March 2011 when the appellant was represented by Mr Malik. There was, however, no representation for the respondent. He had before him a statement by the appellant confirming her immigration history and the circumstances surrounding the change to her application in order to study at Birmingham City University. He also had a copy of the appellant’s letter of 12 January 2011 but did not have (as confirmed by Mr Tufan before us) the earlier letter of 15 December 2010.

11. Mr Malik argued that the Home Office had been correct to consider the appellant’s position based on her proposed studies at Birmingham City University but was wrong to say that the date of the application was 12 August 2010 as it was only on 12 January 2011 the appellant had advised the respondent of her acceptance on the new course. It was further submitted that the appellant had a balance of over £6,900 for the period 16 December until 13 January 2011 (the Immigration Judge working on the date of receipt), a period of 28 days and so succeeded under the Immigration Rules.

12. In contrast with the more modest sums required for her studies at Empire College London, the fees for the course at Birmingham City were to be £6,750 of which the appellant had paid a contribution of £1,000 in cash on 9 December 2010. The outstanding balance coupled with the same maintenance requirements meant that she needed to demonstrate the availability of £6,950 to achieve the 10 points required by paragraph 245ZX(d) read with Appendix C of the Rules.

13. Observing that there was no dispute over the respondent having considered the application on the basis of studies at Birmingham City University, the Immigration Judge went on to state his conclusions in these terms:

" 16. A question then arises as to what was the date of application. It seems to me that the Home Office had a choice; they could have considered the application under the University she was actually studying at when she made her application, namely Empire College or, alternatively, considered it under the University at which she is presently studying which is what the Home Office did. Mr Malik said the Home Office were entirely correct to do that as it would have been artificial in the extreme to have considered her application under Empire College when she was no longer studying there.

17. The issue is important as, putting it shortly, if the date of application is held to be 12 th August 2010 the appellant is short of funds and if 12 th January 2011 (or more accurately 13 th January 2011 allowing for the date of posting) she had sufficient funds. The case then turns on the date of the application, it being said on the appellant's behalf that the Home Office could not really have it both ways – Birmingham City University was not mentioned in the application dated 12 th August 2010.

18. Does the date of application remain the same even if there has been a time gap of several months, the appellant has changed University and that change forms the basis of the decision?

19. It seems to me that what the Home Office were doing was to rely on the information contained in the letter from the appellant dated 12 th January 2011 which identified that she was now studying at Birmingham City University – this makes entire sense as without that letter the Home Office would not have been able to say she was studying at Birmingham City University. It seems fair to conclude that the Home Office therefore treated the application as being dated 12 th January 2011 because they based their decision on what was said in that letter – at which time the appellant was studying at Birmingham City University and not at Empire College London.

20. Absent any jurisprudential authority on this point it therefore seems to me to be reasonable to conclude that there was, as has been submitted, a fresh date of application.

21. On that basis, looking at the HSBC account, the original of which was presented to me, it can be seen that the appellant did have a sum at credit in her account of £6,900 for the 28 days period. That being so it follows that this appeal must be allowed and it is not necessary to consider questions arising out of the appellant's fundamental but qualified right under Article 8 ."

PERMISSION TO APPEAL

14. The respondent was not content with that decision and made application for permission to appeal which was granted by SIJ Chalkley on 15 April 2011 in these brief terms:

" I believe that for the succinct reasons set out in the respondent's application it is properly arguable that Immigration Judge J G Macdonald may have materially erred in law in the determination ."

15. The grounds of application (after setting out the history of the application by the appellant) state:

“ The problem for the (now) respondent, succinctly stated by the Immigration Judge at his paragraph 17, was that, if her application was on 12 th August, she was short of funds, but seemingly had enough money if her letter of 12 th January was held to be her application.

The Immigration Judge errs in regarding her letter of 12 th January as an application, rather than as a letter supplying updating information. Having made an in-time application on 12 th August 2010, thus triggering Section 3C, the applicant was prevented by Section 3C(4) from lodging a further application: that paragraph is cited here:-

‘(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section’.

Section 3C(5), however, goes on to permit the very action, of variation, which the appellant took:-

‘(5) But subsection (4) does not prevent the variation of the application mentioned in subsection(1)(a)’.

The content of an application may thus be varied, but the application means that which was lodged in-time. The Tribunal is asked to agree that the Judge made a material error, and to substitute their own decision, dismissing the appeal .”

LEGAL FRAMEWORK

16. We have already referred above to the relevant Immigration Rule (245ZX(d)). To achieve the 10 points, for Maintenance the appellant needed to meet certain of the requirements of Appendix C. We quote the relevant extracts as at the date of decision, various changes having taken place on 4 July 2011 (HC 1148):

“ 1A. In all cases where an applicant is required to obtain points under Appendix C, the applicant must meet the requirements listed below:

(a) The applicant must have the funds specified in the relevant part of Appendix C at the date of the application;

(b) …

(c) If the applicant is applying for entry clearance or leave to remain as a Tier 4 Migrant, the applicant must have had the funds referred to in (a) above for a consecutive 28 day period of time, ending no earlier than one calendar month before the date of application.

(d) If the funds were obtained when the applicant was in the UK the funds must have been obtained while the applicant had valid leave and was not acting in breach of any conditions attached to that leave.

(e) The applicant must provide the specified documents.

(f) … ”.

17. Although not relevant to this decision, we note that one of the changes implemented on 4 July 2011 is that the 28 day period is to be taken as the date of the closing balance on the most recent of the specified documents and must be no earlier than 31 days before the date of application and so removing the more generous 28 day period previously provided.

18. As to the level of funds, the provisions of Appendix C in force at the time of the decision had this to say:

“Tier 4 (General) Students

10. A Tier 4 (Child) Student must score 10 points for funds.

11. 10 points will only be awarded if the funds shown in the table below are available to the applicant and the applicant provides the specified documents to show this. Notes to accompany the table appear below the table:

Criterion **If studying in Inner London** : …	**Points** …
If studying in Outer London and elsewhere in the United Kingdom (iii) … **(** iv) Where the applicant has an established presence studying in the United Kingdom, the applicant must have funds amounting to the course fees required either for the remaining academic year if the applicant is applying part-way through, or for the next academic year if the applicant will continue or commence a new course at the start of the next academic year, or for the entire course if it is less than a year long plus £600 for each month of the course up to a maximum of two months.	10

Notes

12. …

13. …

14. An applicant will have an established presence studying in the United Kingdom if the applicant has completed a course that was at least six months long within the last period of leave as a Tier 4 Migrant, a student or as a Postgraduate Doctor or Dentist, and this course finished within the last ….. ”

19. Section 3C of the Immigration Act 1971 is in these terms:

“ **3C Continuation of leave pending variation decision**

(1) This section applies if –

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of that leave,

(b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this Section during any period when –

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under Section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, [while the appellant is in the United Kingdom] against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or

(c) an appeal under that Section against that decision, [brought while the appellant is in the United Kingdom,] as pending (within the meaning of Section 104 of that Act).

(3) Leave extended by virtue of the Section shall lapse if the applicant leaves the United Kingdom.

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this Section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection 1(a).

(6) … ".

20. We turn to the Immigration Rules in particular paragraph 34E which provides:

" 34E . If a person wishes to vary the purpose of an application or claim for leave to remain in the United Kingdom and an application form is specified for such new purpose, the variation must comply with the requirements of paragraph 34A (as they apply at the date the variation is made) as if the variation were a new application or claim, or the variation will be invalid and will not be considered.

34F. Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date such variation is made ."

21. In summary the requirements of paragraph 34A require where an application form IT is specified that it must be used. It also provides for payment of fees and other ancillary matters.

THE ISSUES BEFORE US

22. It is not disputed that the appellant made an in-time application for the purpose of further studies in the United Kingdom which he then sought subsequently to vary in anticipation of that course expiring or coming to an end on 21 January 2011. At the time she made the application dated 12 August 2010, it was for an extension of leave to remain in order to study at Empire College London. Can it be said that when she wrote to explain she wished to vary the application for a degree course at Birmingham City University, she was applying for a different purpose? This is not a point taken by the respondent. The second issue is what was the relevant date of application for the purposes of Appendix C. The appellant gave notification of her changed plans on 15 December 2010 and again on 12 January 2011. Which of those dates is the relevant one? In the alternative is it open to an applicant to vary an application more than once whilst it is pending before the respondent?

SUBMISSIONS

23. Mr Tufan explained he relied on the grounds of application but disclosed the difficulty that he had not seen the bundle of documents before the Immigration Judge which included the statement by the appellant as to the history of her dealings with the Home Office and her letter of 12 January 2011. In the course of searching his files, he came across the letter of 15 December 2010. Mr Tufan maintained that it was incumbent upon the appellant to demonstrate the availability of the specified funds as at 12 August being the date of the appellant's application. The appellant therefore needed to demonstrate £1,200 plus £1,595 in respect of the unpaid course fees at Empire College London. He

accepted that evidence before the respondent showed that this funding requirement had been met. Despite the acknowledged illogicality in this approach, even taking account of the appellant's decision to pursue the more expensive course at Birmingham City University, Mr Tufan maintained 12 August as the effective date even though the appellant would not have known of the costs of the new course then.

24. We expressed our concerns to Mr Tufan with his interpretation. Section 3C(5) permitted variation of an application and that being so if an applicant wished to pursue a more expensive course as an alternative, it would be odd if all he/she had to show was the availability of funds for the less expensive course for which application had originally been made. Mr Tufan, however, could not be persuaded to resile from his stated position.

25. Mr Malik made three submissions. The first was that based on the authority in AQ (Pakistan) v SSHD [2011] EWCA Civ 833 the Secretary of State is recorded to have made a significant concession in these terms at paragraph 22:

" For the Secretary of State, Mr Payne accepts that, following AS, the relevant date for the assessment of evidence is the date of the Secretary of State's decision and not, as may have appeared from earlier Tribunal decisions, the date of the application to her. The application is treated as continuing until the date of decision. It is further accepted that the response to an OSW may in some circumstances include additional support for the original application as well as fresh grounds of application. Moreover, the purpose of the statutory procedure, as stated by the majority in AS, is accepted and asserted."

26. Mr Malik referred us also to the conclusions of Pill LJ at paragraph 35:

" In my judgment, the decision of the Tribunal in this case was correct. A tribunal's task is to 'look back at the position as at the date of application [now decision]' as stated by the Tribunal in the present case at paragraph 14 or, as the Tribunal put it in MS, at paragraph 49, in cases where 'the rule in question specifies a fixed historic time-line."

27. Pill LJ continued at paragraph 36:

" Section 85(2), put by the appellant at the heart of his case, concludes by referring to the availability of grounds of appeal 'against the decision appealed against'. I agree with Mr Payne that the focus is on the decision of the Secretary of State. In my judgment, the 'decision' is clearly the decision of the Secretary of State. In the present context, fresh matters may be raised but are relevant only insofar as they challenge that decision. As Sedley LJ recognised in Pankina at paragraph 39, there will be cases under the Rules which depend on the situation existing at the time of the Secretary of State's decision. In my judgment Rule 245Z is one of those cases. The points to be accumulated must be accumulated at the time of the Secretary of State's decision. That includes, as is agreed, a requirement that the relevant degree has been awarded ."

28. We note that the issue before the Court of Appeal in AQ (Pakistan) was whether the points entitlement arising from a Masters Degree counted towards the minimum required if the degree was awarded after the Secretary of State's decision but before the decision of the Tribunal.

29. Mr Malik's second submission was that the proper construction of Appendix C read with s.3C(5) was that the relevant date was when the application was varied. It would otherwise lead to a nonsense. He drew the extreme contrast between the cost of a course for which application had first been made of £500 which was then varied to an MBA degree costing £30,000. He sought to

distinguish the letter of 15 December 2010 as a notice of intention by the appellant to vary rather than a notice of variation itself even though we reminded him that the appellant had submitted a CAS letter. He took instructions from the appellant and established as she had confirmed in her statement before the Immigration Judge that the bank statements had been sent with the letter of 12 January. He accepted that if the letter of 15 December 2010 was taken as the date of variation his client would be unable to succeed.

30. His third submission was that if we concluded 12 August was the relevant date for the purposes of Appendix 3C the maintenance requirements had been met in the light of, the evidence acknowledged by Mr Tufan for her studies at Empire College London. That being so any error by the Immigration Judge is not treating 12 August as the date of application was not material.

31. By way of response, Mr Tufan referred us to paragraph 30 of AQ (Pakistan) in which Pill LJ refers to the decision of Sedley LJ in Pankina v SSHD [2010] EWCA Civ 719; [2010] Imm AR 689 at paragraph 39:

" Although argument has been directed to large issues of principle arising out of the phraseology of the legislation, the answer has in my judgment to be found in the provisions themselves. The rule as framed makes it clear that it is to the Home Office that the necessary proof must be submitted. The argument that a fresh opportunity arises on appeal is based on s.85(4) of the 2002 Act, which provides that on such an appeal the Tribunal 'may consider evidence about any matter which it thinks relevant to the substance of the decision including evidence which concerns a matter arising after the date of the decision'. There are many instances of rule-based issues which need to be appraised as they stand at the moment of the appeal hearing, but the question whether at the date of the application the specified funds had been in the applicant's bank account for three continuous months cannot intelligibly be answered by evidence that they had not, albeit they now have been ."

32. In the course of submissions we were referred to the further authorities in JH (Zimbabwe) v SSHD [2009] EWCA Civ 78; [2009] Imm AR 499 which refers to the Tribunal decision in DA (Section 3C – meaning and effect) Ghana [2007] UKAIT 00043. With reference to that decision, Richards LJ observed at paragraph 31:

" The Tribunal adopted a restrictive approach to what can count as a variation. The appellant in that case had applied, during the currency of his leave to remain as a student, for further leave to remain as a student. That application was refused. He then applied for leave to remain as the unmarried partner of the sponsor. The Tribunal held, and was undoubtedly correct to hold, that the second application could not be a variation of the first because the first application had already been decided and the appellant had therefore ceased to have a pending application that could be varied. Its first reason for dismissing the appeal, however, was that the second application was not capable of being a variation of the first because the two were different in character ."

33. Richards LJ found arguments before him that DA (Ghana) had been wrongly decided on its interpretation of variation within s.3C(5) and he concluded at paragraph 35:

" The key to the matter is an understanding of how s.3C operates. I have set the section out at paragraph 10 above. That section applies, by subs.(1), where an application for variation of an existing leave is made before that leave expires (and provided that there has been no decision on that application before the leave expires). In that event there is, by subs.(2) a statutory extension of the original leave until (a) the application is decided or withdrawn, or (b) if the application has been decided and there is a right of appeal against that decision, the time for appealing has expired, or (c),

if an appeal has been brought, that appeal is pending: I paraphrase the statutory language, but that seems to me to be the effect of it. During the period of the statutory extension of the original leave, by subs.(4) no further application for variation of that leave can be made. Thus, there can only be one application for variation of the original leave, and there can be only one decision (and, where applicable, one appeal). The possibility of a series of further applications leading to an indefinite extension of the original leave is excluded. However, by subs.(5) it is possible to vary the one permitted application. If it is varied, any decision (and any further appeal) will relate to the application as varied. But once a decision has been made, no variation to the application is possible since there is nothing left to vary ."

34. The Court of Appeal in AS (Afghanistan) v SSHD [2009] EWCA Civ 1076; [2010] Imm AR 284 referred to the consideration by the court in JH (Zimbabwe) with this succinct summary by Arden LJ at paragraph 14:

" This section was recently considered [in] the decision of this court in JH (Zimbabwe)…. The effect of s.3C is that the person with limited leave to remain can make an application for variation of his leave before his leave expires. If he does so, his leave will be extended until that application is determined. However, he can make no further application to vary his leave to enter or remain until that happens: he may only apply to vary the application that he has already made (s.3C(4)). Richards LJ, with whom Laws and Wall LJJ agreed, held in JH (Zimbabwe) that this was true interpretation of s.3C and that its purpose was to prevent abuse of the system by the making of successive applications 'leading to a successive extension of the original leave to remain' ."

CONCLUSIONS

35. It was not a point argued before us however we are satisfied that the endeavours by the appellant to vary her application were for the same purpose which was for further leave to remain in the United Kingdom in order to pursue studies. We are satisfied that the variation sought by the appellant was not therefore one caught by the provisions in paragraph 34E of the Rules. In any event the conclusions of the Court of Appeal in JH (Zimbabwe) would appear to limit the opportunity to variation of the application made rather than an entirely new application for a different purpose. That however is not a matter of concern in the appeal before us.

36. We are not persuaded by Mr Malik's argument that the concession recorded in AQ (Pakistan) has a material impact where as in the case before us, the Immigration Rules specifically require an applicant to demonstrate a state of affairs or circumstances as at the date of application. In contrast with Appendix C, Appendix A (the relevant provision at the time of decision) required:

" (1) An applicant applying for entry clearance or leave to remain as a Tier 1 (General) Migrant must score 75 points for attributes ."

37. There is no indication that the Attributes needed to be in place at the time of application. Appendix C requires an applicant to show the specified funds at the date of application . It is this timeline which no doubt Sedley LJ had in mind in Pankina .

38. We are satisfied that a Tier 4 (General) Student application can be varied by virtue of the opportunity in s. 3C(5). There is no restriction in s. 3C(5) to the number of occasions on which application for variation of the original application can be made provided notice of variation is given prior to the respondent's decision as thereafter there would then be no application pending. As to the date the respondent is required to take into account for the purposes of determining the points to be

awarded under Appendix C, where there has been a variation substituting a new college, it is the date of the most recent variation for the purposes of paragraph 1A(c).

39. It is significant that the respondent did not seek to reject the appellant's application on the basis that she no longer intended to study at Empire College in London for which application had been made but to pursue a court at Birmingham City University. Although we do not agree with Mr Malik that the appellant's letter of 15 December 2010 was not notification of a variation of an application when clearly it was, it was nevertheless open to the appellant to fine tune that variation by the submission of bank statements in order to meet the requirements of Appendix C on 12 January 2011. The effective date of application for the purposes of calculation of the funding requirements therefore is 12 January 2011 in the case before us. There is no dispute as acknowledged by Mr Tufan that the funds the appellant needed to show of £6,950 had been in her account for the preceding 28 days, that is to say calculated from 16 December and including the date of application. The Immigration Judge referred to 13 January, however this was the date of receipt of application and not the relevant one for the purposes of calculation of funds under Appendix C.

40. Our conclusion therefore is that the Immigration Judge made no error of law in allowing the appeal on the basis of 12 January being the date on which the appellant needed to demonstrate available funds and also the date by reference to the 28 day requirement. The appeal by the Secretary of State is dismissed and the decision of the Immigration Judge stands.

Signed Date

Upper Tribunal Judge B W Dawson

Immigration and Asylum Chamber