Upper Tribunal
(Immigration and Asylum Chamber)

Rajbhandari (PBS: funds "available") [2012] UKUT 00364(IAC)

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 6 July 2012	.....

Before

Mr C M G Ockelton, Vice President

Upper Tribunal Judge Grubb

Between

SHAILESH RAJBHANDARI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms Pinder, instructed by Ty Arian Solicitors

For the Respondent: Mr I Richards, Home Office Presenting Officer

The notion that funds only need to be "available" to an applicant is, on the true construction of Appendix C of the Immigration Rules, applicable only to student applications.

DETERMINATION AND REASONS

Introduction

1.
"Do you have a copy of Hamlet that I could borrow?"

"I don't have Hamlet , but I can easily get one for you"

"You don't have it?"

"No."

"Then do you have a copy of Macbeth I could borrow?"

“I have Macbeth , but I’m afraid you can’t borrow it.”

“Oh. Why not?”

“Because I have lent it to Mary.”

This conversation, between two users of ordinary English, contains no contradictions. It draws attention to the difference between having something and something being available. The second speaker does not have Hamlet , but it is available; she has Macbeth , but it is not available. The two concepts are not mutually exclusive: if she had been able to meet the first speaker’s requests, it would have been because it was true to say both that she had the work and that it was available. Conversely, it may be that not only does she not have The Comedy of Errors : it is not available to her either. In ordinary English there is a world of difference between having something, with its implications of present ownership, and something’s being available, that is to say there for the asking. The question said to be raised by this appeal is whether the same distinction is present in the English used by the draftsman of the Immigration Rules, specifically Appendix C of the Statement of Changes in Immigration Rules , HC 395 as amended, in its application to Tier 1 of the Points-Based Scheme.

The Facts

2.
The appellant is a national of Nepal. He entered the United Kingdom in September 2003 as a student. On application, his leave as a student was extended, and was due to expire on 31 October 2010. On 26 October 2010 he applied for further leave, not this time as a student, but under the Tier 1 (Post-Study Work) Migrant category. His application was refused on 17 December 2010. The reason for the refusal was that the appellant had failed to obtain sufficient points in the Maintenance category. He appealed to the First-tier Tribunal, and his appeal was dismissed by Immigration Judge Y J Jones. He now has permission to appeal to this Tribunal.

3.
In order to meet the requirements of the Immigration Rules, the appellant would need to show that, on the date of his application, he was entitled to the points he claimed. It is convenient to begin with the relevant section of his application form. As completed by the appellant, that section is as follows:

“

4. The reference to “a three month period” is a reference to a requirement that, in order to show the ability to maintain himself in future, an applicant demonstrate that the relevant funds have been in place in the past.

5. The financial documents were examined by the Immigration Judge. Before her it was accepted that, whether or not one also looked at a joint account held by the appellant and his girlfriend, there were not enough funds held in his or their names to meet the requirements of the Rules. Ms Pinder did her best to minimise this problem, but the truth of the matter is that for substantial parts of the three-month period the accounts were well below £800: sometimes they were overdrawn. On 27 July 2010, so far from being £800 in credit, the appellant’s own account was £780 in debt: there was a further £120 indebtedness on the joint account. It is absolutely clear that, by a substantial margin, the appellant’s own funds were not sufficient to meet the requirements of the Rules.

6. The appellant seeks to rely on evidence showing that he had further funds available to him from his parents. There were letters showing that they are persons of substance, and, as we understand the

matter, the “letter from a bank or building society” said to be enclosed with the form relates to evidence (which is not contested) of their assets. There was also a letter from the appellant’s parents, signed by both of them and dated 2 October 2010, reading as follows:

“To whom it may concern

We, the undersigned are the parents of Mr Shailesh Rajbhandari who has been studying in Wales, UK since September 2003. The purpose of this letter is to notify all the concern that we have been funding Shailesh his commencement of studies in Wales United Kingdom. We have been sending money between £400.00 and £750.00 in an approximate interval of every four or five months and this will be continued until he finishes his studies in the United Kingdom.”

7. So far as we are aware, there is no doubt about the accuracy of the evidence relating to the appellant’s parents’ financial position: the question is whether the appellant is entitled to rely on his parents’ resources for the purpose of meeting the requirements of the Rules.

The Law

8. The starting-point must be the Immigration Rules themselves. The Rules relevant to the Points-Based Scheme change so frequently that it is always difficult to know what rules were in force at a given time in the past. It appears that, at the date of the appellant’s application, the relevant rules were as follows.

9. Paragraph 245AA (which lies between para 245 and para 245A) contained a general requirement that

“Where part 6A or appendices A to C or E of these rules state that specified documents must be provided, that means documents specified by the Secretary of State in the Points-Based Scheme Policy Guidance as being specified documents for the route under which the applicant is applying. If the specified documents are not provided, the applicant will not meet the requirement for which the specified documents are required as evidence”.

10. Paragraph 245Z requires that, in order to qualify for leave to remain as a Tier 1 (Post-Study Work) Migrant, an applicant must, amongst other things, “have a minimum of 10 points under paras 1 to 2 of Appendix C”. Appendix C begins with paras numbered 1A, 1 and 2 in that order. It might therefore appear that the reference in para 245Z does not include para 1A of Appendix C. The latter paragraph is, however, a paragraph governing the interpretation of all the other paragraphs of the appendix. The relevant passages are as follows:-

“Appendix C – maintenance (funds)

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) if the applicant is applying for … leave to remain as a Tier 1 Migrant (other than a Tier 1 (Investor) Migrant) … the applicant must have had the funds referred to in (a) above for a consecutive 90-day period of time, ending no earlier than one calendar month before the date of application;

c) if the applicant is applying for entry clearance or leave to remain as a Tier 4 Migrant [that is, as a student], 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 the application;

…

(e) the applicant must provide the specified documents

Tier 1 Migrants

1. An applicant applying for … leave to remain as a Tier 1 Migrant (other than as a Tier 1 (Investor) Migrant) must score 10 points for funds.

2. 10 points will only be awarded if an applicant:

…

(b) applying for leave to remain, has the level of funds shown in the table below and provides the specified documents

Level of Funds	Points
£800	10

“

11. The requirements for Tier 4 applicants, to which Ms Pinder made reference, are in para 10 and following:

“Tier 4 (General) Students

10. A Tier 4 (General) 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.”

12. We do not need to set out the table. One of the notes is para 13. As originally drafted, that read as follows:

“Guidance published by the United Kingdom Border Agency will set out when funds will be considered to be available to an applicant, including the circumstances in which the money must be that of the applicant, and the extent to which a sponsorship arrangement that provides the required funds will suffice.”

13. Following the decision of the Court of Appeal in Pankina v SSHD [2010] EWCA Civ 719, para 13 has been expanded and now contains the relevant provision specifying when funds are considered to be “available” to an applicant, and how an applicant has to prove the matter.

14. The Tier 4 requirement was the subject of the decision of the Tribunal in CDS v SSHD [2010] UKUT 305 (IAC), heard in the immediate aftermath of Pankina . The Tribunal there decided that, in the absence of specific provision in the Rules, funds must be regarded as “available” to an applicant at the material time if they belong to a third party and the third party was shown to be willing to deploy them to support the applicant for the purpose contemplated.

15. We must make reference finally to the Tier 1 (Post Study Work) Policy Guidance, publicly available on the date of the appellant's application. This provides, at para 51 that for maintenance, "applicants for leave to remain in the United Kingdom must have £800 of available funds".

Discussion

16. Ms Pinder drew our attention specifically to what she submitted was a mismatch between para 1A(c) and paras 10 and 13 of Appendix C. The former says that in all cases the applicant must "have had" the funds; the latter says that in the case of Tier 4 it suffices if the funds have been "available". Further, the word "available" is used in the guidance for Tier 1. In these circumstances, she submitted, it could not be that an applicant under Tier 1 was required to "have had" the funds in the ordinary English sense. Looked at as a whole, Appendix C and the Guidance showed that the draftsman of the Rules drew no distinction between a person's having funds and funds being available to a person. When we pointed out the terms of the form (which we have set out above) she submitted that the phrase used there, "have access to £800 available funds" confirmed that the Secretary of State's position could not be one that depended upon the ordinary meaning of the word "have".

17. Nobody could credibly suggest that the Rules relating to the Points-Based Scheme are clear, simple or consistently drafted. They are made more difficult to understand by the fact that some of the requirements of the Rules appear to have no logical basis. How can it be, for example, that evidence of £800 (which may have been borrowed from another individual, or even from a credit card company) held in an account for three months in the past, is in some way relevant to demonstrating that a person has adequate maintenance for a much longer period in the future? We must, however, try and interpret the Rules as they are; and, in doing so, we need to take what ever assistance we can from all the relevant provisions.

18. Despite Ms Pinder's submissions, we are not persuaded that the concepts of "having" and "having available" are chaotically confused in Appendix C. As we read them, it is clear that the provisions requiring merely that funds be "available" are a feature of the maintenance requirements for students. Not only is that the head under which the word "available" appears to be chiefly used; there is also the specific provision in paragraph 13, to which we have referred, and there is the obvious fact that where the applicant for a visa is a child, the expectation would be that the necessary funds are available to him rather than necessarily held in his name.

19. Despite the general terms of para 1A of Appendix C, it cannot in our judgment have been intended to erase the distinction between the requirement of availability in the student rules and the requirement that other applicants "have" the funds in question. The wording of para 1A is unfortunate; but in our judgement its purpose was to impose the requirement as to time rather than to change any of the other requirements of the Appendix.

20. Without attempting to apply a purposive construction to the Rules, we may observe that, as a student may be a child, the notion of availability is particularly appropriate. A student may be dependent for maintenance on relatives or funding bodies. On the other hand, it is reasonable to expect that a person who seeks leave to be in the United Kingdom in order to work will be able to derive a basic level of maintenance from his work. A difference in the arrangements and requirement for maintenance between Tier 1 and Tier 4 is thus to be expected, and it is what, in our judgement, is indeed to be found in Appendix C.

21. So far as concerns the Tier 1 Guidance, para 51 requires an applicant to "have £800 of available funds". It seems to us that "available" in that requirement is not intended as an alternative to "have",

but as an additional requirement. That is to say, the £800 must not be for any reason unavailable. As an additional requirement contained only in guidance it may be subject to criticism on the lines mounted by the Court of Appeal in Alvi v SSHD [2012] UKSC 33. The guidance does not, in our judgement, undermine the requirement that the applicant "have" the funds.

22. There remains the question of the form. The form of which we have set out an extract above is prescribed under the provisions of the Rules, and is in essence part of them. It asks whether the applicant has "access to £800 available funds". The phrase "has access to" is, in its ordinary meaning, nearer to "have available" than to "have". If that question stood on its own, it might provide thought for the appellant's claim that merely having the funds available was sufficient to meet the requirements of the Tier 1 Rules. But, as we have seen, the form also specifies that the applicant "must have a minimum level of funds", and specifically directs applicants to the Immigration Rules. In the circumstances, we do not think that the wording used on the form (which is not itself found in the Rules) can be regarded as amounting to a relaxation of them.

23. On the question raised by the grounds, therefore, we have concluded that the Rules require a Tier 1 (Post-Study Work) applicant to have the funds specified in Appendix C: it is not sufficient that they are available to him.

The evidence of availability

24. Even if we were wrong about that, however, we should have dismissed this appeal. Although it is said on the appellant's behalf that his parents have always been willing to support him, it is very far from clear that the evidence before the Secretary of State or before the Immigration Judge would have been sufficient to meet the requirements of the Rules. There are two problems. The first is that the letter from the appellant's parents specifically indicates that they will continue to pay him while he remains a student, not that they will pay him at a time when he is engaged in post-study work. The second is that the letter indicates the level which has been paid during his studies, and the financial history shows that the appellant's parents' contributions have not been sufficient to enable him to maintain in his bank account the amount that the Rules require for an application of this sort. If the appellant's parents' letter were to be taken into account it could only be evidence of the terms set out in it. And, in any event, it is very difficult to see why an indication that funds were being paid at a certain level while the appellant was a student should be taken as an indication that they would be paid at a higher level after he has ceased to be a student. It therefore appears to us that even on the interpretation of the Immigration Rules sought by the appellant, he would have failed to make his case.

25. We turn briefly to Article 8. Under this head, the appellant claims that he is entitled to leave to remain, apparently as a Tier 1 (Post-Study Work) Migrant who does not meet the requirements of the Rules. His history is that he came to the United Kingdom for temporary purposes, and has been here for temporary purposes ever since. He has, so far as we are aware, obtained the qualifications he sought. The girlfriend to whom we referred earlier is no longer in the United Kingdom. He has not been able to show that, if he remained, he would be adequately maintained. There seems to us to be no conceivable basis upon which it could said that he has any right to be in the United Kingdom other than under the Rules, or that any Convention right of his would be infringed by a requirement that he depart from the United Kingdom on the expiry of his leave.

26. For the foregoing reasons this appeal is dismissed.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 4 October 2012