Upper Tribunal
(Immigration and Asylum Chamber)

MS (AS & NV considered) Pakistan [2010] UKUT 117 (IAC)

THE IMMIGRATION ACTS

Heard at Field House (AIT Procession House)

On 2 November and 7 December 2009

Before

SENIOR IMMIGRATION JUDGE ALLEN

Between

MS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Z Malik, Counsel instructed by Malik Law Chambers Solicitors

For the Respondent: Mr M Blundell, Home Office Senior Presenting Officer

(i) The effect of AS and NV [2009] EWCA Civ 1076 is to make the Tribunal the primary decision maker in an increased number of cases where a new ground is raised for the first time, but it does not have the effect of requiring the Tribunal to consider as a section 120 statement a re-formulation of the original ground on which leave to remain was sought.

DETERMINATION AND REASONS

1. The appellant is a national of Pakistan. He appealed to an Immigration Judge against the decision of the Secretary of State on 27 April 2009 refusing to vary leave to remain in the United Kingdom. The appellant's wife, Ghulam Fatima and their sons Muhammad Awais and Muhammad Hamza are dependent on his appeal.

2. The appellant had applied for leave to remain as a Tier 1 (Post-Study Work) Migrant. His application was rejected because he had not satisfied the Secretary of State that he met the maintenance requirements of paragraph 245Z(e) and Appendix C of HC 395.

3. It was common ground that the appellant had made his application to remain as a Tier 1 (Post-Study Work) Migrant on 20 March 2009 and that it was treated by the Secretary of State as being made on 23 March. It was also common ground that the appellant had not had the necessary sum of £2,399 for the entirety of the three month period, in that he had not had the minimum required amount in the period 16 December 2008 – 1 January 2009.

4. It was shown at the hearing on 24 June that the appellant had maintained a balance in excess of £2,399 for over five months.

5. It was argued before the Immigration Judge that on a proper reading of Section 85(4) of the Nationality, Immigration and Asylum Act 2002, consideration could be given to the more recent bank statements. It was argued that the substance of the decision was simply the refusal to vary leave to remain, and reliance was placed on what had been said by the Tribunal at paragraph 9 in LS (Gambia) [2005] UKAIT 00085.

6. The Immigration Judge, however, founding himself on a recent decision of the Tribunal in NA and Others [2009] UKAIT 00025, concluded that any reference to "the substance of the decision" had to be a reference to the specific issue or issues which led the Secretary of State to refuse to vary the previous leave to remain. He considered that it was clear, in particular from what was said at paragraph 49 in NA , that the relevant provisions required appellants to show they had the requisite amount of personal savings during the three months immediately before their application and therefore it was not possible to consider the subsequent state of the bank account.

7. The appellant sought reconsideration of this decision, arguing that in the context of the one-stop appeal mechanism in Section 120 of the 2002 Act it was appropriate to interpret the notion of the substance of the immigration decision differently from that concluded by the Immigration Judge and that the more recent state of the bank account could be taken into account. It was also argued that the Secretary of State had not issued directions to remove the appellant from the United Kingdom, and that this operated unfairly to the appellant since he could not challenge the decision in that regard other than by remaining in the United Kingdom unlawfully. The ambit of the decision of the Court of Appeal in TE (Eritrea) [2009] EWCA Civ 174 was raised as an associated issue.

8. A Senior Immigration Judge ordered reconsideration on all grounds.

9. The hearing before me took place on 2 November and 7 December 2009, Mr Z Malik, instructed by Malik Law Chambers Solicitors (Bethnal Green Road), appeared on behalf of the appellant. Mr M Blundell appeared on behalf of the Secretary of State.

10. Mr Malik referred to the recent decision of the Court of Appeal in AS (Afghanistan) and NV (Sri Lanka) [2009] EWCA Civ 1076 and also provided a copy of TE (Eritrea). A copy of Odelola [2009] UKHL 25 was also provided.

11. Mr Malik had referred to the impending decision in AS and NV in his grounds and it was now of course decided. It was argued that AS and NV had clear implications for the earlier decision of the Tribunal in EA [2007] UKIAT 00013. It was said in AS and NV that the substance of the Section 85(4) decision meant the decision on the detailed eligibility of an individual in the context of the rule.

12. The Tribunal was referred to paragraph 78 and onwards in AS and NV . The substance of the decision was the refusal to vary leave to remain. Paragraph 80 was also relevant. If a Section 120 statement had been made then the Tribunal must consider and determine the appeal in relation to that. In AS and NV the appeal had been allowed and the Tribunal had been ordered to consider the matter under the International Graduate Scheme, although no decision had been made by the Secretary of State on that. As an example of how this would operate, if a student applied for further leave to remain as a student and was refused and appealed, making a Section 120 statement in which

they now said they qualified for leave to remain as a post-study migrant, on the basis of the reasoning in AS and NV the Tribunal must consider this and if the matter were made out the appeal should be allowed. To obtain leave to remain it was necessary to show £800 over three months prior to the date of application. If there were no application then in accordance with what was said in AS and NV the Tribunal had to consider the post-study migrant matter and determine it. It was necessary to treat the Section 120 statement as a fresh application. Its date would be considered as the date of application for the purpose of the post-study migrant rules. In this case the facts were not in dispute. The appellant had applied on 23 March 2009. It was accepted that the balance between 23 December 2008 and 1 January 2009 was less than the required amount so on the basis as decided by the Tribunal in NA the appeal could not succeed. At the hearing the appellant had made a Section 120 statement in the form of a witness statement in which he had explained why he should not be removed from the United Kingdom and should be granted leave to remain. The balance had fallen below the requisite figure for fewer than seven days but he had been maintaining the balance since 1 January and if he applied now would succeed. The Tribunal was under an obligation to treat the Section 120 statement as a fresh application. If so the appellant would succeed, as the balance had always been over the requisite amount since 1 January.

13. Also, in support of that, if the appellant were refused he would have to make another application to the Secretary of State enclosing recent bank statements, and clearly the legislative framework discouraged this. Reference was made to paragraph 102 in AS and NV and also paragraph 3. There was a preference for one-stop appeals and a view that the process should not encourage successive applications and this favoured the interpretation argued for in respect of Section 85(4) and Section 120.

14. Ground 2 was concerned with the proper interpretation of the decision of the Court of Appeal in TE . No removal directions had been issued so the Tribunal's jurisdiction was limited to the Immigration Rules and Article 8 and it did not encompass any argument as to whether discretion had been exercised outside the Immigration Rules. If that had been done then it would invoke paragraph 395C and the Tribunal could have concluded that even if the appellant did not succeed under the Immigration Rules he should not be removed, bearing in mind the paragraph 395C factors. In the absence of removal directions that could not be considered however. It was argued that this was unfair to the appellant and unlawful. The matter had been considered at paragraph 15 in TE , quoting from what had been said by Laws LJ in JM [2006] EWCA Civ 1402 at paragraphs 16 to 18 and 22 and 23. If the appellant's current appeal was unsuccessful then the Secretary of State would have to issue removal directions and when he did so the appellant would have another right of appeal and could then argue in respect of paragraph 395C before the Tribunal. The price he would pay for this would be that of committing a criminal offence by overstaying, as would his employers if they continued to employ him and this, as had been said by Laws LJ, was wrong in principle. Mr Malik also referred to paragraphs 19 and 20 of TE and the Section 47 issue. There had been no reason given for segregating removal directions from the substantive decision and this was unfair and was not in accordance with the law.

15. Mr Blundell was in some difficulties, not having seen a copy of the grounds until today and in light of the interest and potential difficulty of the issues involved I acceded to his request for an adjournment and the matter was to be listed for completion on a date to be fixed.

16. At the resumed hearing on 7 December 2009 Mr Malik referred to a letter sent to his instructing solicitors from the Civil Appeals Office concerning his ground 1 which was to be dealt with in six linked appeals to be heard as a test group on that particular issue. As it was not likely to be dealt with

by the Court of Appeal for some time he was happy for the Tribunal to proceed today, and Mr Blundell agreed. The same was true of ground 2. Mr Malik had referred to that at the previous hearing.

17. Thereafter Mr Blundell made his submissions. He relied on the skeleton argument he had put in, and amplified a number of points made in it.

18. At the outset he urged the Tribunal to exercise caution in considering what weight to give to the letter from the Civil Appeals Office to the appellant's solicitors. He referred to the Practice Direction on citation of authorities which prohibited citation in proceedings before the Tribunal of various types of documents from the Court of Appeal including permission decisions and directions, and argued that that should apply in this case even where it was in the form of a direction from a Lord Justice who had sat in AS and NV [2009] EWCA Civ 1076. Clearly it was appropriate for the letter to have been shown to the Tribunal but it was asked to approach its contents with extreme caution in reference to what was said by way of directions concerning AS and NV . What was said in the letter did not cause Mr Blundell to abandon paragraph 6.15 of his skeleton and he would continue to argue that AS and NV did not weaken what had been said in NA and Others [2009] UKAIT 00025, nor did it in effect demolish the decision in EA (Nigeria) [2007] UKAIT 00013.

19. Mr Blundell's submissions were summarised at paragraph 6 of the skeleton argument. AS and NV had not considered the ambit of Section 85(4) of the 2002 Act in any detail. As a result, the foundation of EA , on which NA was constructed, remained entirely firm. With regard to the points made at paragraph 7 of the skeleton, reference was made to the judgment in AS and NV of Moore-Bick LJ at paragraph 65 onwards. He had not cited Section 85(2), and that must indicate that Section 85(4) was not material to his judgment. Paragraph 77 was of particular relevance. Moore-Bick LJ and Sullivan LJ had focused in particular on that point. That did not mean that Section 85(4) did not receive comment in AS and NV , but when one went to the comments of Moore-Bick LJ on what the Tribunal had done, it was argued that he had treated Section 85(4) as irrelevant to the case before him. At paragraph 72 he had summarised what the Tribunal had decided, in effect shutting out the Section 120 grounds. This approach had been rejected at paragraph 83 onwards. EA and SZ were both referred to in paragraph 82, but there was no indication in that judgment that they were wrong. Sullivan LJ dealt with the point at paragraph 114. If there was an opportunity to say that the decision in EA was wrong, then it clearly existed there and likewise in respect of Moore-Bick LJ's paragraph 83. In fact neither had said that EA was wrong but had preferred to shelve the issue of Section 85(4) and referred to Section 85(2). Paragraph 9 of the skeleton dealt with this.

20. Paragraphs 78 to 79 and 110 to 114 comprised the ratio of AS and NV and that was with regard to the meaning of Section 85(2) and the reference was the same as "immigration decision" in Section 82(2). With regard to what was said about Section 85(4), this supported EA and the reliance on it in NA as a consequence. Since Section 85(4) had been treated as largely irrelevant, the Tribunal could be taken to what Arden LJ said in respect of Section 85(4). The point was referred to at paragraph 15(v) and also paragraphs 27 to 32. Significance was attached to Section 85(4) as being relevant to the appeal and Arden LJ had agreed with the views of Senior Immigration Judges Perkins and Waumsley in the Tribunal. She had quoted from SZ [2007] UKAIT 00037 and supported the decision at paragraph 32. There was nothing in Moore-Bick LJ's decision to cast any doubt on that. As regards what was said by Sullivan LJ on Section 85(4), that was to be found at paragraph 113 and in the last sentence in particular. As a consequence, it was argued that Sullivan LJ clearly said that the decision appealed against in Section 85(2) was simply the immigration decision, but the reference to the substance was a reference back to the decision actually taken under the Immigration Rule in question, which was precisely in accordance with what the Immigration Judge had found and what was found in EA and then in NA . Paragraph 11 of the skeleton referred to this.

21. It was argued that AS and NV did not disturb the previous guidance, and considered very different circumstances from those in the instant case. In AS the appellant wanted to set up in business under paragraph 206E, and in NV the original application was for indefinite leave to remain on account of ten years' lawful residence. No additional ground had been raised in a Section 120 notice in the instant case. The application was echoed in the appeal and therefore a distinction needed to be drawn and there was a clear distinction between a Section 120 case, such as an AS and NV case, and a non-Section 120 case such as this one. There was therefore nothing in AS and NV which undermined the decisions in EA and NA . What was said about Section 85(4) in AS and NV supported the conclusion in EA and NA . Reference was made to the fixed historic time line point referred to in NA : at the date of the application, as the Rules said. Reference was made to the skeleton at paragraph 14. The decision of the House of Lords in Odelola [2009] 1WLR 1230 gave some further support to what was being argued. In particular paragraphs 7 per Lord Hoffman and 39 per Lord Brown were of relevance. There was a clear statement in the Rule and this was supported by Odelola so the Tribunal should adhere to the EA and NA approach.

22. With regard to ground 2, concerning TE (Eritrea) [2009] EWCA Civ 174, it was the appellant's argument that the Secretary of State's segregation of the decision to refuse to vary leave and the decision to refuse to issue removal directions was flawed in law. Paragraph 36 of the grounds dealt with this, but it was argued that that was worded too strongly.

23. At this point Mr Malik made it clear that he did not rely on what was said in that paragraph about abuse of power.

24. Mr Blundell noted that it had been said that the decision was not in accordance with the law because of that segregation, but he argued that TE did not support that argument. He referred to paragraph 18 of his skeleton argument in this regard. Sedley and Lloyd LJJ rejected the argument made in that case that it was always inappropriate to segregate the two decisions. Paragraph 19 in Sedley LJ's judgment was of relevance in this regard. It was said that it might be acceptable if it were practical and fair and it was reasonable for a person not to break the law. He referred also to paragraphs 55 and 56 in that judgment. It was argued that this was not very clear, but it was sufficiently clear that the broad submission was rejected.

25. Mr Blundell argued that it was not possible to ascertain the ratio of the decision in TE . It had not been said by the Court of Appeal that the decision was not in accordance with the law but there was reference to it being unfair to the appellant, which was not agreed with, but even if it were, it did not amount to a decision being not in accordance with the law, and paragraph 56 in the judgment of Lloyd LJ was as strong as it went when it was said that it would have been sensible for the two stages to have been combined. The argument that no clear ratio could be found in TE (Eritrea) was supported by what was said in the grounds quoting from a permission of leave from Sir Richard Buxton on the basis that TE required clarification. The Tribunal should follow the wording of the statute. Only when removal directions were made under Section 10 could the Secretary of State consider the paragraph 395C factors and nothing bound him as to the making of such a decision.

26. JM (Liberia) had been cited in TE , but the concern in that case was that there should not be a situation where a person had to commit a criminal offence before their human rights case could be considered, and this was seen as objectionable. That should be contrasted with the situation before the Tribunal. It was not a question of human rights entitlement but the question of a person's right under paragraph 395C which was far wider than human rights issues and there was no reason for a person to be entitled to be considered under paragraph 395C, but good reason to consider a person liable to removal differently from a person seeking variation of leave.

27. In his submissions Mr Malik questioned the Secretary of State's reliance on EA which he argued had clearly been rejected by the Court of Appeal. He referred to paragraphs 78 and 79 of AS and NV . It was clear that one could not understand Section 85, including Section 85(4) without understanding Section 82 and Section 84. As to how the court had dealt with EA , reference was made to paragraphs 82 and 83. It was clear that Moore-Bick LJ had referred not only to the decisions mentioned there but also to EA and SZ and he explained this at paragraphs 83 and 84. Elsewhere Sullivan LJ dealt with the matter at paragraph 113, in particular the last sentence, which, it was argued, referred to the approach which he outlined earlier in the paragraph that the decision was not limited to a decision to refuse under specific Immigration Rules, and it was argued that the meaning of the word "decision" in Section 85(2) and Section 85(4) remained the decision to refuse an application to vary leave, not the refusal of variation under specific Rules as the Tribunal had held in NA . Paragraph 114 referred to SZ and EA as incoherent decisions. It was argued that EA and SZ and NA should no longer be seen as persuasive even in respect of Section 85(4). Even if the Home Office were correct on this point, then as Mr Malik had argued before, if an appeal was made against refusal to vary leave as a student and an appellant made a Section 120 statement that he should remain on the grounds that he satisfied the post-study work scheme, then it should be questioned what the date of the application was, as the guidance referred to the date of the application. The Tribunal had to consider the matter against the post-study work Rules as was said in NA , and if there was no application then it would have to be the date of the Section 120 statement as Mr Malik argued, as being deemed to be the date of application. In this case there was a leave to remain application which had been refused. The Section 120 statement had been made concerning the balance which was less at the date of the application but now the appellant had the appropriate balance in the account. It was argued on behalf of the Secretary of State that there was a difference as regards AS and NV since the appellant was not raising additional grounds in the Section 120 statement. Reference needed to be had to the specific wording of Section 120, in particular paragraphs 2 and 3. Keeping this in mind it was necessary to look at paragraph 80 of AS . It was argued that what the appellant had said in the Section 120 statement was clearly capable of supporting a fresh application. The Tribunal should consider the Section 120 statement as a fresh application and determine it. If so the appellant would clearly succeed, given the balance in his account.

28. As regards ground 2, it was accepted that the Secretary of State was not obliged to issue removal directions with the refusal notice. But here the Secretary of State had been unable to give any reason for the decision to segregate the removal directions and the refusal notice and this was relevant to the concern raised in TE by the Court of Appeal where there had also been no reasons given. It was also not disputed that TE did not say that the decision in that case was not in accordance with the law, but that was because in TE the Home Office had accepted the appellant's point and had agreed to issue removal directions after considering the matter under paragraph 395C. There had been no such concession in this case.

29. Finally, a point relevant to both grounds concerned paragraph 103 of AS and NV . It was argued that the legislation favoured one-stop appeals and the appellant would be forced to make a fresh application, and the legislation discouraged this. If the Home Office was right in respect of ground 2 then, again, this would force the appellant to lodge another appeal when removal directions were issued and this was discouraged by the legislative framework.

30. Mr Blundell asked and was given permission to raise two further points. The first was to ask the Tribunal to read paragraph 80 of AS and NV in full. The second was that he had not seen a Section 120 notice.

31. Mr Malik explained that that was to be found in the appellant's witness statement. In AS there was no Section 120 statement made in the appeal form but a witness statement had been taken to be the Section 120 statement.

32. Mr Blundell argued that there was nothing in the witness statement in the bundle of 19 June 2009 to indicate that it was a Section 120 statement and nor was there a submission that it should be treated as a Section 120 statement and no indication that that was what it was designed to be. It was not in Section 5 of the appeal form, contrary to what one would expect.

33. Mr Malik argued that the situation was similar to that in AS and NV . He referred also to the grounds before the Tribunal at paragraph 7 quoting from paragraph 19.43 of the seventh edition of Macdonald. There it was said there was no statutory time limit for making a Section 120 statement nor were there any statutory provisions as to the form in which such a statement was to be made. The Secretary of State could always make rules about this if he wished. The appeal should be allowed.

34. I reserved my determination.

Decision and Reasons

35. It is important first of all to set out the relevant statutory provisions:

" Nationality Immigration and Asylum Act 2002

82. Right of appeal: general

(1) Where an immigration decision is made in respect of a person he may appeal [to the Tribunal].

(2) In this Part "immigration decision" means –

(a) refusal of leave to enter the United Kingdom,

(b) refusal of entry clearance,

(c) refusal of a certificate of entitlement under section 10 of this Act,

(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,

(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,

(f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom, …

84. Grounds of appeal

(1) an appeal under section 82(1) against an immigration decision must be brought on one or more of the flowing grounds

(a) that the decision is not in accordance with immigration rules;

(b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c74) [or Article 20A of the Race Relations (Northern Ireland) Order 1977] (discrimination by public authorities);

…

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

85. Matters to be considered

(1) An appeal under section 82(1) against a decision shall be treated by [the Tribunal] as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82 (1).

(2) If an appellant under section 82(1) makes a statement under section 120, [the Tribunal] shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under section 82(1), 83(2) or 83A(2) against a decision 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 …

86. Determination of appeal

(1) This section applies on an appeal under section 82(1), 83 or 83A.

(2) The Tribunal must determine –

(a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and

(b) any matter which section 85 requires it to consider.

(3) The Tribunal must allow the appeal in so far as it]thinks that –

(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

(4) For the purposes of subsection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision.

(5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal.

(6) Refusal to depart from or to authorise departure from immigration rules is not the exercise of discretion for the purposes of subsection (3)(b).

96. Earlier right of appeal

(1) …

(2) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies-

(a) that the person received a notice under section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision,

(b) That the new decision relates to an application or claim which relies on a matter that should have been, but ha s not been, raised in a statement made in response to that notice, and

(c) that, in then opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice.]

120. Requirement to state additional grounds for application

(1) This section applies to a person if -

(a) he has made an application to enter or remain in the United Kingdom, or

(b) an immigration decision within the meaning of section 82 has been taken or may be taken in respect of him.

(2) The Secretary of State or an immigration officer may by notice in writing require the person to state –

(a) his reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which he should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which he should not be removed from or required to leave the United Kingdom.

(3) A statement under subsection (2) need not repeat reasons or grounds set out in –

(a) the application mentioned in subsection (1)(a), or

(b) an application to which the immigration decision mentioned in subsection (1)(b) relates."

It is also appropriate to set out the terms of paragraph 395C of HC395:

"395C.Before a decision to remove under section 10 is given, regard will be had to all the relevant factors known to the Secretary of State, including:

(i) age;

(ii) length of residence in the United Kingdom;

(III) strength of connections with the United Kingdom;

(iv) personal history, including character, conduct and employment record;

(v) domestic circumstances;

(vi) previous criminal record and the nature of any offence of which the person has been convicted;

(vii) compassionate circumstances;

(viii) any representations received on the person's behalf.

In the case of family members, the factors listed in paragraphs 365-368 must also be taken into account."

36. It is also important to consider the case law to which I have been referred. In EA (Section 85(4) explained) Nigeria [2007] UKAIT 00013, the Tribunal concluded that the effect of Section 85(4) of the 2002 Act was not to make the Tribunal a primary decision maker. It was important to focus on the decision actually made in response to the appellant's application. The Tribunal concluded that an in-country appellant could not succeed by showing that he met the requirements of the Immigration Rules at the date of the hearing but could succeed only by showing that the application that he made would be successful at the date of hearing.

37. This decision, among others, was considered recently by the Court of Appeal in AS (Afghanistan) v Secretary of State for the Home Department; NV (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 1076. The first appellant had been granted initial and then further leave to remain as a student in the United Kingdom. Before the expiry of that leave to remain she submitted an application for leave to remain as a person intending to establish herself in business under paragraph 206E of HC395. This application was refused, and the notice of decision included what has come to be referred to as a one stop Notice, i.e. a notice of the kind referred to in Section 120(2) of the 2002 Act. Some three weeks later she submitted an application for leave to remain under the International Graduate Scheme and on the same day lodged a notice of appeal with the Tribunal against the Secretary of State's earlier refusal of the application under paragraph 206E. On her appeal the Immigration Judge concluded that the Tribunal had no jurisdiction to consider the second application and also dismissed the appeal under paragraph 206E. This decision was upheld on reconsideration.

38. In the second case the appellant had entered the United Kingdom with leave to enter on several occasions over a period of time since January 1997. Some five days before the expiry of her most recent leave she made an application for leave to remain on the basis of ten years' residence in the United Kingdom. This application was refused and a one stop Notice was served. She appealed the Secretary of State's decision on the basis that that decision was not in accordance with the law and the Immigration Rules and some twelve days later served a Statement of Additional Grounds raising the grounds specified above and seeking a variation of her leave to remain on the basis that she was a student. The Immigration Judge who heard her appeal decided that he had no jurisdiction to hear the appeal on the student basis and a Senior Immigration Judge subsequently found that there was no material error of law in that determination.

39. These appeals were heard together by the Court of Appeal and the principal matter considered was the effect of Section 120 one stop Notices. The contention on behalf of the appellants was that the effect of a one stop Notice was that the appeal covered not only any ground before the Secretary of State when he made the decision under appeal but also any grounds raised in response to a one stop Notice, even if they had not been the subject of any decision by the Secretary of State and did not relate to the decision under appeal. On behalf of the Secretary of State it was contended that one stop Notices had a far narrower effect on appeals and the only grounds that could be put in issue on appeal were grounds placed before the Secretary of State when he made his decision or grounds raised in answer to a one stop Notice relating to that decision. It can be seen therefore that the Tribunal had preferred the interpretation of the Secretary of State.

40. By a majority the Court of Appeal allowed the appellant's appeals. Moore-Bick LJ at paragraph 78 considered that the language of the sections of the Act to which he had been referred, in particular Sections 85(2), 96(2) and 120, demonstrated that they were intended to form constituent parts of a coherent procedure designed to avoid a multiplicity of applications and appeals. He noted that Section 82 established a general right of appeal against an "immigration decision" and provided the context in

which the word “decision” in Sections 84 and 85 was to be interpreted. It was clear in his view that the expression “immigration decision” in Section 84(1) had the same meaning as it had in Section 82(1) and that the word “decision” in that sub-section must bear the same meaning. He went on to say the following:

“79. Sections 82 and 84 provide the context for the interpretation of Section 85. Here again, the word ‘decision’ in sub-Section (1) must in my view mean an immigration decision of the kind identified in Section 82(1); and the word ‘decision’ in sub-Section (2) must have the same meaning. Section 85(2) imposes a duty on the Tribunal to consider any matter raised in a statement made under Section 120 insofar as it constitutes a ground of appeal of a relevant kind against the decision under appeal. Thus far, it seems to me, the natural meaning of these provisions is to impose on the Tribunal a duty to consider matters raised by the appellant insofar as they provide grounds for challenging a substantive decision of the kind identified in Section 82 that affects his immigration status. On the face of it they do not restrict that duty to considering grounds that relate to the reasons for that decision or to the original grounds of appeal.”

41. He went on to consider the terms of Section 120 and 96(2) and considered them, as he said at paragraph 81, to point towards a procedural scheme under which the appellant was required to put forward all his grounds for challenging the decision against him for determination in one set of proceedings and the Tribunal was placed under a corresponding duty to consider them. He referred to the decision of the Senior Immigration Judge in NV as being based in part on what that judge understood to be the effect of certain passages in EA (Nigeria) relating to the effect of Section 85(4) and in the case of AS to the conclusions of the Senior Immigration Judge there that the Tribunal was not intended to be a primary decision maker as held in SZ (Bangladesh) (applicable immigration rules) [2007] UKAIT 00037. He found neither of those reasons to be persuasive. He considered that Section 85(4) had little bearing on the present case, being concerned only with the evidence that the Tribunal might consider when hearing an appeal. Nor did he see force in the argument that the effect of the appellant’s intentions was to make the Tribunal the primary decision maker in relation to any additional grounds. He also saw no force to an argument concerning the implications of his proposed findings on Section 3C(4) of the Immigration Act 1971.

42. Sullivan LJ agreed with Moore-Bick LJ. He said the following at paragraph 103:

“103. It is clear that the underlying legislative policy is to prevent successive applications which, as Arden LJ says, are likely to prolong the period in which a person’s status is uncertain and undetermined. In my judgment, that policy is better served by a “One-stop” procedure that enables all, rather than merely some, of an appellant’s “other grounds” for remaining in the United Kingdom to be considered by the AIT at one appeal hearing. The inconsistency between the narrower interpretation and the underlying policy objective – to prevent successive applications – is a powerful reason for preferring the wider, rather than the narrower, interpretation, since the latter encourages a “Multi-stop” appeal process.”

At paragraph 108 he made the point that “any grounds” in paragraphs (b) and (c) of Section 120(2) means what it says: any grounds, not “any human rights or asylum grounds”. He also referred to SZ and EA , at paragraph 114 of his decision, but remarked that the AIT in those cases had not considered how Section 85(2) should be interpreted so as to be coherent, and work in harmony with Section 96 and 120, bearing in mind the statutory purposes underlying those provisions. Earlier, at paragraph 113, he had said that he was not persuaded that the reference to “the decision appealed against”, in Section 85(2) must be a reference to the decision to refuse to vary leave to remain under

a particular Rule rather than a decision to refuse to vary leave to remain, being one of the immigration decisions as defined by Section 82(2).

43. Arden LJ dissented, for the reasons summed up at paragraph 62 of the judgment. She disagreed inter alia on the proper interpretation of the meaning of the words “against the decision appealed against” at the end of Section 85(2) and considered that her interpretation achieved the statutory purpose, disagreed with the view that in effect Parliament had intended the Secretary of State to have to exercise a choice between relying on Section 3C of the 1971 Act and Section 120 of the 2002 Act, considered that it was a coherent scheme that preserved the Secretary of State’s role as primary decision maker in all cases apart from asylum and human rights cases and concluded that the purpose of Section 120 was not to give an applicant who had missed the time limit in Section 3C a means of rectifying mistakes in his original application.

44. I should state at the outset that it is in my view right to treat the appellant’s witness statement of 19 June 2009 together with the letter from his solicitors of the same date as being a Section 120 statement, and it is clear from the file that a Section 120 notice was made in the letter from the Secretary of State to the appellant of 27 April 2009. As Mr Malik argued in his grounds for reconsideration, there is no provision for a statutory time limit for the making of a Section 120 statement nor are there any statutory provisions as to the form in which such a statement is to be made. Accordingly there are no difficulties in proceeding to treat this appeal on the basis on which it has been argued. It is also relevant to mention that I agree with Mr Blundell that I am not bound by what is said in the directions quoted in the Civil Appeals Office letter to the appellant’s solicitors with regard to the effect on EA of AS and NV for the reasons he gave.

45. It is clear from AS and NV that the Tribunal may expect to be the primary decision maker in an increased number of cases. To that extent, what was said by the Tribunal in EA [2007] UKAIT 00013 at paragraph 7 must now be regarded as too broad a statement. Sullivan LJ at paragraph 114 in AS and NV noted the decision in EA but, as he remarked, the Tribunal in that case had not considered how Section 85(2) should be interpreted so as to be coherent and work in harmony with Sections 96 and 120, bearing in mind the statutory purpose underlying those provisions. Moore-Bick LJ was not persuaded by the reasoning of the Senior Immigration Judge in NV which was in part based on what the judge understood to be the effect of certain passages in EA . If Mr Malik is right, then what is said in the headnote to EA , from which I have quoted above, would no longer be correct.

46. It is clear from the majority judgments in AS and NV that the Court of Appeal was concerned to take proper account of the underlying legislative policy which was to prevent successive applications and also to avoid the difficulties posed to the appellants who, as Sullivan LJ put it at paragraph 99, might have good reason to question the coherence of the statutory scheme if, having been told they must raise any additional grounds on pain of not being able to appeal against a later application on that ground if they failed to mention it, were then told by the Tribunal that it had no jurisdiction to consider the additional grounds that they had been ordered by both the Secretary of State and the Tribunal to put forward. In other words there is a clear risk of prejudice to an appellant who fails to put in a Section 120 notice a matter which later under Section 96 is ruled out. One can readily see how this works in relation to the facts in AS and NV where in each case within the context of a refusal to vary leave to remain a different issue was raised in the Section 120 notice. The question is, however, whether the same concerns apply and the same approach should be taken in the situation where, as in this case, an appellant who acknowledges that he cannot succeed in showing the requisite amount of money in his account over the period of time in respect of which he originally applied can, in his response to a One Stop Notice, rely on a later period of time and as a consequence

succeed in his appeal. It might be said in relation to this that a person who had failed, for example, to show under paragraph 276A of HC395 with reference to paragraph 276B that he had at least ten years' continual lawful residence in the United Kingdom at the time of application but by the time when he put in a Section 120 notice had completed the full ten year period might, on Mr Malik's argument expect to succeed. It might be said that the scheme is geared to getting a person to provide all the reasons for appealing against a particular decision rather than permitting the submission of evidence relating to subsequent circumstances which would only be relevant in the case of a decision which had not been taken.

47. The answer to this is far from clear from the judgments in AS and NV given the different situation being considered there. Certainly a matter of concern must be the risk to an appellant of not stating matters in a Section 120 notice which if they are left unstated may leave him unable to rely on them subsequently. In principle that would appear to apply equally to the situations of the appellants in AS and NV and the appellant in a case such as this. I note Mr Blundell's argument that Sullivan LJ at paragraph 113 in AS and NV had accepted that the reference to "the substance of the decision" in Section 85(4) is a reference to "the decision to refuse to vary leave to remain under Rule X". I think, however that on a proper scrutiny of paragraph 113 Sullivan LJ in fact made it clear that he was not persuaded that the reference to "the decision appealed against" was a reference to the decision to refuse to vary leave to remain under Rule X rather than the decision to refuse to vary leave to remain, and that such an approach to Section 85(2) would be consistent with the reference in Section 85(4) to "the substance of the decision".

48. It is relevant however also to consider what was said by Moore-Bick LJ at paragraph 83 in AS and NV . He said there that Section 85(4) had little bearing on the present case, being concerned only with the evidence that the Tribunal might consider when hearing an appeal. He considered the argument, that an appellant would be unable by reason of Section 85(5) to adduce evidence in support of a completely new ground of challenge and that therefore the interpretation of sub-section (2) favoured by the appellant must be wrong, went far too far. He went on to say that in a limited class of cases the prohibition on hearing evidence of matters postdating the decision under appeal would prevent the appellant from effectively pursuing an additional ground, but that was not the case with the instant appeals. He thought it was unlikely to be so in the majority of cases.

49. In my view the wording of this section of the judgment provides some assistance in clarifying the ambit of the decision. I consider that the Court of Appeal limited the ambit of its decision to cases where a fresh ground is raised in respect of the particular immigration decision made, rather than the making at a later date of an application, based on fresh evidence, arising from the original refusal or that, if it was not, its decision has to be interpreted as being so limited. I consider that the purpose of the procedural scheme established by Section 120 is to encourage an applicant to provide all the reasons he or she has for appealing against a particular decision (e.g. to refuse to vary leave to remain), rather than permitting the later submission of evidence relating to subsequent circumstances in a case such as this where the rule in question specifies a fixed historic time-line. It must follow from that that in a case such as this, the Secretary of State would not properly be able to rely on Section 96 to rule out a further application made under the points based system, and that any such reliance would be clearly vulnerable to challenge by way of judicial review. It is relevant in this regard also to bear in mind that the guidance is changed regularly in relation to the points-based scheme, and there is no guarantee in any given case that the same requirement would apply at a later date as applied at an earlier date. Appellants have had to pay close attention to the relevant website in order to

ascertain what the guidance is in respect of the relevant period. In conclusion, therefore, I consider that Mr Malik's first ground is not made out.

50. The second ground is in essence that the Secretary of State's decision was not in accordance with the law because he failed to make a decision under Section 10 of the Immigration and Asylum Act, and therefore failed to consider paragraph 395C of HC395.

51. In TE (Eritrea) [2009] EWCA Civ 174 the appellant had had an appeal against a claim for asylum refused but was given discretionary leave to remain until her 18 th birthday. Shortly before the expiry of that leave she applied for an extension which was refused two years later. It was explained in the notice of refusal that there was a right of appeal on grounds including any incompatibility of removal with the appellant's ECHR rights and it was also said that all grounds for being allowed to remain or for not being removed were to be advanced on the appeal except all those already argued. Her appeal against this decision was dismissed and the matter was appealed to the Court of Appeal on the basis that the Immigration Judge had materially erred in overlooking the Secretary of State's failure to consider and address paragraph 395C of HC395.

52. The Court of Appeal noted what had been said by Laws LJ in JM v Secretary of State for the Home Department [2006] EWCA Civ 1402 where the appellant had been refused a variation of the six months' leave on which he had entered the United Kingdom and appealed on refugee and human rights grounds. Before the Tribunal it was held that the human rights claim which he wished to reserve unless or until removal directions were given was not justiciable. At paragraph 17 Laws LJ noted that it was the case that once a person's appeal against refusal to vary leave was dismissed they were required to leave the United Kingdom and if they did not do so they would commit a criminal offence under Section 24(1)(b) of the Immigration Act 1971 and also Section 11 of the Nationality, Immigration and Asylum Act 2002. Such a person's entitlement to state benefit would also be affected and if another person employed them they would be guilty of a crime under Section 8 of the Asylum and Immigration Act 1996. Laws LJ at paragraph 18 said that it seemed to him to be wrong in principle that the price of getting before an independent Tribunal for a judicial decision on a human rights claim should be the commission of a criminal offence and other associated legal prohibitions. He also made the point at paragraph 23 that this was a case where a "one stop Notice" had been given.

53. In TE Sedley LJ, with whom Jacob LJ agreed, was of the view that all these considerations applied with equal cogency in the present case. He considered that the state had or ought to have an interest in not multiplying administrative proceedings in appeals especially where the facts and issues overlapped and where segregating them created uncovenanted difficulties for the individual. He made the point at paragraph 19 that it was not the case necessarily that the Home Secretary could never fairly or rationally take variation and removal in separate stages and that there might be cases where it was both practical and fair to segregate them. He considered, however, that the present appellant's desire not to find herself breaking the law in order to resist removal was an entirely reasonable one in which the Home Secretary, for reasons of both practice and public policy, ought to concur. He considered that whatever else might determine the choice of course by the Home Secretary it could not properly be random or dictated by simple administrative convenience. Lloyd LJ did not accept that there was an obligation on the Home Secretary to undertake a consideration under paragraph 395C in any case in which he was asked to do so at the stage of deciding whether or not to extend any existing leave to remain. He considered it would not have been unlawful in the sense of irrational for the Secretary of State to leave the paragraph 395C issue until the stage (if it arrived) at which the appellant was liable to be removed. He considered though that if the point had been raised at the

outset it would have been a sensible decision to undertake that exercise at the earlier stage. He considered, in agreement with Sedley LJ, that, the point having been raised at the reconsideration stage before the Senior Immigration Judge albeit later than it might have been, it would now be appropriate for the Secretary of State to undertake the consideration required by paragraph 395C.

54. In the instant case, the appellant chose not to pursue human rights issues before the Immigration Judge. The situation is therefore different from that in JM where the Tribunal concluded that the appellant's human rights claim was not justiciable. If the appellant fails in his appeal under the Immigration Rules and chooses not to pursue a human rights claim, any illegality consequent on his choice to remain in the United Kingdom should be on his own head. Though it is possible to envisage cases where consideration of paragraph 395C issues might make a difference, this, in my judgment, is not such a case. It may be right therefore to regard the ambit of TE as being limited to cases where the failure on the part of the Secretary of State to consider the paragraph 395C issues makes or could make a real difference.

55. For the reasons given above, the decision of the Immigration Judge dismissing this appeal is maintained.

Signed

Senior Immigration Judge Allen