Upper Tribunal
(Immigration and Asylum Chamber)

: near-miss)
MM and SA (Pankina Pakistan [2010] UKUT 481(IAC)

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**

On 17 November 2010

....

Before

LORD BANNATYNE

SENIOR IMMIGRATION JUDGE P R LANE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MM

SA

Respondents

Representation :

For the Appellant: Mrs T. Sharland, Specialist Appeal Team

For the Respondents: Ms S. Iqbal, Counsel, instructed by BR Law Associates

Judicial decision-makers should be careful to identify and reject arguments based on an alleged near-miss, which, on proper analysis, are an attempt to import extraneous qualifications into the immigration rules. The Article 8 proportionality balancing exercise is unlikely to be properly conducted if the judge has, in effect, substituted his or her own view of what the rules should say.

The requirement in paragraph 116 of Appendix A to the rules, that a Confirmation for Acceptance of Studies must be issued not more than 6 months before the application for leave is made, is not met by a letter issued after the application has been made.

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission granted by the First-tier Tribunal, against the determination of Immigration Judge Duff who, following a hearing at North Shields on 30 June 2010,

allowed the appeals of the respondents against the Secretary of State's decisions to refuse to vary their leave to remain in the United Kingdom.

2. The respondents are nationals of Pakistan, born respectively on 20 July 1979 and 18 October 1978. The first respondent applied for a variation of her leave as a Tier 4 (General) Student Migrant under the points-based system of the Immigration Rules. The second respondent applied as the dependant of the first respondent. It was and is common ground that the appeal of the second respondent is entirely dependent upon that of the first respondent.

3. The relevant provisions of the Immigration Rules are as follows:-

" **245ZX Requirements for leave to remain**

To qualify for leave to remain as a Tier 4 (General) Student under this Rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the applicant will be refused.

Requirements:

…

(b) the applicant must have or have last been granted, entry clearance, leave to enter or leave to remain:

(i) as a Tier 4 (General) Student,

…

(c) the applicant must have a minimum of 30 points under paragraphs 113 to 120 of Appendix A,

…

Appendix A

Attributes for Tier 4 (General) Students

113. An applicant applying for entry clearance or leave to remain as a Tier 4 (General) Student must score 30 points for attributes.

114. Available points are shown in Table 16 below.

115. Notes to accompany Table 16 appear below that table.

Table 16

Criterion	**Points awarded**
Confirmation of acceptance for studies	30

Notes

116. A Confirmation of Acceptance for Studies will only be considered to be valid if:

(a) it was issued no more than 6 months before the application is made,

(b) the application for entry clearance or leave to remain is made no more than 3 months before the start date of the course of study as stated on the Confirmation of Acceptance for Studies,

…

(d) it was issued by an institution with a Tier 4 (General) Student Sponsor Licence,

(e) the institution must still hold such a licence at the time the application for entry clearance or leave to remain is determined,

…"

4. The first respondent wished to vary her leave to remain in order to study for an Advanced Diploma in Business Management at the London School of Business and Computing in London, N1. The course was due to begin on 12 October 2009. The Confirmation of Acceptance for Studies comprised a letter dated 30 September 2009 from LSBC.

5. The Secretary of State's decision in respect of the first respondent's refusal is dated 15 March 2010. For the 30 points required for attributes in relation to the Confirmation of Acceptance for Studies, the appellant was awarded no points. The letter explained as follows:-

"The Tier 4 Sponsor Register was checked on 02 March 2010 but London School of Business and Computing, Business Design Center, 52 Upper Street, Islington, London, N1 0QH was not listed as of this date. In view of these facts the Secretary of State is not satisfied that you have a valid visa letter."

6. The Immigration Judge's reasoning is set out at paragraphs 2 to 7 of his determination:-

"2. The burden of proving the case lies upon the appellant and the standard of proof is on the balance of probabilities. Pursuant to section 85(4) of the Nationality, Immigration and Asylum Act 2002 I may consider evidence about any matter, which I consider relevant to the substance of the decision, including evidence which concerns matters arising since the date of the Respondent's decision, but the appellant must be able to demonstrate that she qualified as at the date of her application, which was on 27 November 2009.

3. I state the above as it is crucial to the decision in this case. At the beginning of the hearing I raised that matter with Ms Cornford [the Presenting Officer] who suggested that – because this is an in-country appeal – the appropriate date for the appellant to demonstrate that she satisfied the requirements was at the date of the hearing. I made it clear that my understanding of the matter was that the relevant date was the date of the application and that I proposed to decide the matter on that basis and – if I was incorrect – then it would be open to the Respondent [the Secretary of State] to have my decision reviewed.

4. I am fortified in my view of the matter by the decision in **SSHD v Pankina and Others [2010] EWCA Civ 718** in which at paragraphs 37 & 38 under the heading 'The date at which the facts are to be tested' Lord Justice Sedley states that – in that case – compliance is to be judged as at the date of the application. Although that case was concerned with funds, nonetheless it accords with the only commonsense approach that, as it is to the Home Office a proof of having the appropriate points is to be submitted that it can only be at the time of the submission of that proof i.e. the date of application.

5. On that basis it is clear that the reasoning set out in the refusal letter of 15 March 2010 is flawed since that letter makes it clear that the application was made on 27 November 2009 but then goes on to state that the Tier 4 Sponsor Register was checked on 2 March 2010 but the London School of

Business and Computing (from whom the appellant had submitted a visa letter) was not – at that date – listed. The proper test to be applied was whether – as at the date of the application – the college was on the Tier 4 Sponsor Register.

6. Neither Ms Cornford nor the appellant was able to produce a copy of the register as at the date of the application but the appellant gave evidence that it appeared on the register on the Respondent's website at that time and Ms Cornford did not contend that it did not. The appellant stated that it had been suspended at the end of January and then removed from the list.

7. Since it is perfectly clear from the documentation that as soon as soon as the college was removed from the list the appellant took active steps to find another qualifying college and communicated with the Respondent that she was doing so, I am satisfied that it was indeed on that list at the time of the application.

8. The Respondent awarded the appellant the necessary points under the heading of Maintenance and it was on the sole basis that the college had been removed that she was not awarded the 30 points for the visa letter. The true position was that, as at the date of the application, the college that had supplied the visa letter was on the list of approved institutions and the Respondent ought to have awarded 30 points accordingly."

7. The Immigration Judge's reasoning in these paragraphs is plainly wrong and Ms Iqbal, for the respondents, did not seek to persuade us to the contrary. The Immigration Judge has misunderstood the judgment in Pankina . The effect of that judgment is not such that, as a general matter, compliance with the Immigration Rules is to be assessed by reference to the date of application. The essence of Pankina is that the Secretary of State may not impose requirements by means of guidance that does not form part of the Immigration Rules and lie outside Parliament's scrutiny. In Pankina the purported requirement in the guidance required applicants to have at least £800 of personal savings for at least three months prior to the date of application. Absent that guidance, the only meaningful way of construing paragraph 245Z and paragraph 2 of Appendix C was that those provisions required the £800 savings to be held at the time of the application (paragraph 37).

8. In the present case, the provision upon which the Secretary of State relied, and with which she asserted the first respondent could not comply, was paragraph 116(e) of Appendix A to the Immigration Rules. Appendix A is part of the Immigration Rules, as required to be laid before Parliament in accordance with the procedure set out in the Immigration Act 1971. It is in no sense to be equated with guidance of the kind with which Pankina was concerned.

9. Paragraph 116(e) requires the institution that issued the Confirmation of Acceptance for Studies (or "visa letter") still to hold the requisite licence "at the time the application for entry clearance or leave to remain is determined " (our emphasis).

10. There is nothing in paragraph 38 of Pankina that supports the approach of the Immigration Judge in the present case. On the contrary, paragraphs 38 and 39 (which need to be read together) are obiter dicta laying to rest the mistaken argument, which had frequently been run, that section 85(4) of the Nationality, Immigration and Asylum Act 2002 means everything is to be decided as at the date of the hearing before the Immigration Judge, irrespective of what the Immigration Rules actually say. The true position is that, if a Rule specifically requires a particular state of affairs to pertain at a particular point in time, then that is what needs to be shown by evidence, albeit that that might include "evidence which concerns matters arising since the date of the decision":-

“38. If, contrary to my clear view, the material policy guidance forms part of the Appendix C criteria, question 2(a) asks at what date compliance is to be judged. In the present cases, this means the date of application or the date of appeal. The £800 in the bank accounts of some of the applicants had not been there continuously for the three months preceding their applications but had been there for three continuous months by the time their appeals came up.

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 that they now have been.”

11. By the same token, section 85(4) cannot be used to write paragraph 116(e) of Appendix A out of existence.

12. For these reasons, the Upper Tribunal found on 17 November that there was an error of law in the determination of the Immigration Judge, such as to require that determination to be set aside. Pursuant to directions issued by the Tribunal on 13 October 2010, we accordingly proceeded to hear submissions regarding our re-making of the decision in the appeal.

13. According to the appellant, after the LSBC was suspended, the appellant sent an email to the Secretary of State on 19 March 2010 asking for permission to obtain a Confirmation of Acceptance for Studies letter from a new Tier 4 sponsor. The email was acknowledged but nothing further was heard from the Secretary of State. On 23 March 2010 she obtained such a letter from the Overseas Nurses Training Organisation (ONTO), based in Leeds, in respect of an NVQ in Health and Social Care programme. She started this course there on 19 April 2010 with an end date of 23 April 2012. A letter dated 16 November 2010 from ONTO states that the first respondent “is progressing well on her course and is regularly attending planned sessions with her assessor”.

14. For the respondents, Ms Iqbal sought to rely on relevant guidance, which she said assisted her clients’ case. As such the guidance fell to be construed as policies, which, if not followed, would mean that the Secretary of State’s decision to refuse to vary leave “was not in accordance with the law” (section 86(3)(b) of the Nationality, Immigration and Asylum Act 2002). The guidance to be used for applications made on or after 5 October 2009, so far as relevant, provides as follows:-

“ **Changes to the Tier 4 sponsor’s licence**

8. There are certain circumstances where the status of the Tier 4 sponsor’s licence may have an effect on a student and his/her application.

If the Tier 4 sponsor’s licence is suspended

If the Tier 4 sponsor’s licence is suspended, they cannot assign any new Confirmations of Acceptance for Studies or issue any new visa letters.

Licence suspended	**What will happen**

If the student is already in the United Kingdom studying	If the student is already in the United Kingdom and studying with a Tier 4 sponsor, we will not tell him/her if we suspend their licence. However, if the result of the suspension is that the Tier 4 sponsor loses their licence, we will tell the student and his/her permission to stay will be limited.
If the student is extending his/her stay	A student can still apply to extend his/her permission to stay if it runs out when the Tier 4 sponsor's licence is suspended, as long as he/she already has a Confirmation of Acceptance for Studies or a visa letter. However, we will hold the application until the suspension is resolved."

15. In the present case it is common ground that the suspension of the LSBC was followed by the withdrawal of the institution's licence. Accordingly, the provisions of the guidance referred to by Ms Iqbal did not advance the first respondent's case, a matter which Ms Iqbal appeared to acknowledge.

16. Instead, Ms Iqbal urged the Tribunal to concentrate upon the provisions in the guidance that concerned withdrawal of a licence. According to the guidance for applications on or after 5 October 2009, in the case of withdrawal where a student is already in the United Kingdom studying, the Secretary of State would limit the student's permission to 60 days if the student was not involved in the reasons why the Tier 4 sponsor had had their licence withdrawn; otherwise, permission to stay would in effect be withdrawn with immediate effect. The 60 day limitation would not, however, apply if the student had less than six months' leave left; but "the student may want to apply for permission to stay with another Tier 4 sponsor during this time".

17. According to Ms Iqbal, for a reason we will come to shortly, this leads on to a requirement to consider the guidance in respect of applications made on or after 3 March 2010. Here, specific provision was made in the case of withdrawal of the licence, where a student has an application under consideration with the UK Border Agency. In such circumstances:-

"If the Tier 4 sponsor's licence is withdrawn, the student's Confirmation of Acceptance for Studies will become invalid and his/her application will be refused.

The student must either make a new Tier 4 application with a new Tier 4 sponsor, apply for permission to stay in a different category, or leave the United Kingdom."

18. It is clear from the guidance that the limitation to 60 days is not to be treated as an indication that the Secretary of State will, in the case of licence withdrawal, grant the student a further 60 days' leave. On the contrary, the guidance makes it plain that the 60 day period is a restriction and that where a student has less than six months' leave, the remaining period will be left unaffected. In the present case, the leave previously granted to the appellant had elapsed before the date of decision and was, accordingly, extended only to the extent permitted by section 3C of the Immigration Act 1971.

19. Ms Iqbal sought to rely on the last set of guidance on the basis that, according to the first respondent, the Secretary of State's decision of 15 March was not received until May. The Secretary of State's records, however, showed that this arose from the Secretary of State not being supplied with a current address of the respondents. In any event, the matter does not materially affect the position because, even if one accepted Ms Iqbal's submission that the guidance for applications on and after 3 March 2010 had a part to play, the relevant provisions of that guidance to which we have

just referred make it plain that, where the licence is withdrawn, the student must either make a new Tier 4 application with a new Tier 4 sponsor or leave the United Kingdom.

20. The first respondent did neither of these things. The email query sent to the Secretary of State, concerning switching to study a nursing qualification with ONTO, cannot be said to constitute a Tier 4 application. The first respondent knew what such an application entailed; she had, after all, already made one. Ms Iqbal attempted to rely on DC (Section 3C – meaning and effect) Ghana [2007] UKAIT 00043, although she did not provide a copy of this determination to the Tribunal. [1] On inspection, however, we find that it fails to assist the respondents. That case held that it was not open to the Secretary of State to treat an entirely new application as merely a variation of an existing one, in the context of the prohibition on new applications in section 3C(4) of the 1971 Act. The case in no way can be held to suggest that the action taken by the first respondent falls to be treated as a new Tier 4 application.

21. However, even if it could, Ms Iqbal's submission runs into the sand because the Confirmation of Acceptance for Studies issued by ONTO in March 2010 cannot comply with paragraph 116 of Appendix A. That letter was not issued "no more than 6 months before the application is made" (paragraph 116(a)). The requirement that the letter must be issued "before" the application is inherent in paragraph 116(a). We find that the respondents have failed to show that the decision appealed was not in accordance with the law.

22. The final part of Ms Iqbal's submissions related to paragraphs 41 to 47 of Pankina and the interplay between the points-based system and Article 8 of the ECHR. Ms Iqbal submitted that it was through no fault of the first respondent that the institution at which she had been studying had had its licence withdrawn and that she had taken steps to inform the Secretary of State of her decision to switch to the nursing course in Leeds. Ms Iqbal cited CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC). In that case, decided in the light of and by reference to Pankina, the Tribunal found that, whilst Article 8 did not give judicial fact-finders a freestanding liberty to depart from the Immigration Rules and it was unlikely that a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes, nevertheless a person who was admitted to follow a course that had not yet ended may have built up a private life that deserved respect and the public interest in removal before the end of the course might be reduced where there are ample financial resources available.

23. Ms Iqbal also referred us to MB (Article 8 – near miss) Pakistan [2010] UKUT 282 (IAC), where Lord Justice Sedley, sitting in the Tribunal said:-

"5. We have considered whether, notwithstanding that it was not on her written agenda, the Immigration Judge ought to have dealt with [Article 8] as what one could call a Robinson point. It is the case, as Mr Blundell very properly for the Home Office has pointed out to us, that this is a door which at least is arguably open by what has recently been said by the Court of Appeal in the case of Pankina & Others [2010] EWCA Civ 719 from paragraphs 41 to 47. Because we are not required to determine this question, we do no more than note that it is at least respectably arguable that if an Article 8 case is properly before a fact finding Tribunal or Tribunal of law in this field, one of the matters which may go to proportionality is what is described by Ms Asanovic as a near miss argument. That is to say, if one is considering on the one hand the demands of a firm and fair immigration control policy and on the other the situation of somebody whose family or private life is going to be disrupted in a material way by removal for non-compliance with the Rules. It may well matter what the nature

and degree of non-compliance was. We go no further down that road at present because it does not arise materially in this case.”

24. For the Secretary of State, Mrs Sharland referred us to BN (Article 8 – post study work) Kenya [2010] UKUT 162 (IAC), in which the Tribunal noted the “fact-sensitive” nature of what the Court of Appeal had found in OA (Nigeria) [2008] EWCA Civ 82. In the latter case, the appellant’s private life was found to require protection through Article 8, against removal from the United Kingdom in the middle of an academic year. Mrs Sharland submitted that the facts of the present case were far removed from those in OA (Nigeria). They were, in reality, closer to those considered by the Tribunal in MM (Tier 1 PSW; Art 8; “private life”) Zimbabwe [2009] UKAIT 00037.

25. We find that the private life of the first respondent (and, by extension, the second respondent) is engaged for the purposes of providing a positive answer to the second of the five questions posed in paragraph 17 of Razgar [2004] UKHL 27. It is common ground that the third and fourth questions also fall to be answered in the affirmative. The issue in this case is, accordingly, whether in all the circumstances it is proportionate to expect the respondents to leave the United Kingdom, notwithstanding the effect that would have on the first respondent’s studies.

26. In the respondent’s favour is, of course, the fact that, had the LSBC not had its licence withdrawn, she might have expected successfully to have completed her Advanced Diploma in Business Management, the teaching for which, we note, was due to end on 17 December 2010. So far as her present course is concerned, we have described this earlier in the determination but it is also worth setting out paragraph 6 of the first respondent’s statement of 21 October 2010:-

“6. I confirm that I started my course with ONTO on 19 April 2010. The end date of course is 23 April 2012. I am regularly attending the course since its start date. I have paid course fee partly, have invested time in attending and studying the course and heavily spending amount for maintenance. It will be unfair and unjust if I am not allowed to complete my course.”

27. In deciding the proportionality issue, we have had regard to what has recently been said in CDS and MB, in relation to the scope of what may be described as a near-miss argument, post- Pankina, in points-based cases of this kind. It is important to emphasise the point made in CDS that Article 8 is not to be viewed as a means whereby the immigration rules can be ignored or in effect re-written, because a judicial fact-finder regards a person as having only narrowly failed to comply with the relevant rules. As the House of Lords held in Huang [2007] UKHL 11:-

“There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on” (paragraph 16).

28. The first two of those considerations need to be firmly kept in mind in considering a near-miss argument. In the present context they remind us that judicial decision makers should be careful to identify and reject arguments based on an alleged near-miss, which, on proper analysis, are an attempt to import extraneous qualifications into a provision of the Rules, such as that the applicant had no control over the failings of or other difficulties faced by an educational provider. Such factors might have a legitimate part to play in the proportionality exercise, as weighing in favour of an

applicant who has an independently strong private or family life case; but they should not be used to diminish the weight to be given to the considerations described in paragraph 16 of Huang . On the other hand, the £800 requirement, which was at issue in Pankina , lends itself much more readily to near-miss arguments (paragraph 46 of the judgments). Although it might at first sight be said that it does not matter on which side of the balance factors which are extraneous to the Rules are placed, in fact it does. The proportionality balancing exercise is unlikely to be properly conducted if the judge has, in effect , substituted his or her own view of what the Rules should say.

29. As the AIT held in KL (Article 8– Lekstaka –delay–near-misses) Serbia and Montenegro [2007] UKAIT 00044, even if a near-miss is properly identified, this does not mean that the applicant will necessarily win. A near-miss is a factor to be taken into account and thus may still be insufficient if the applicant's private and family life is insubstantial.

30. In the present case, the first respondent has not shown that she had a near-miss, so far as compliance with the Immigration Rules was concerned. Paragraph 116(e) of Appendix A was not complied with. The LSBC was not a licence holder when the application was determined. The Secretary of State may, accordingly, point to the first two factors in paragraph 16 of Huang as weighing, with undiminished force, on her side of the balance.

31. We therefore turn to the factors weighing in favour of the respondents. The Tribunal has to make a fact-sensitive assessment. This is not a case where the first respondent is facing the premature termination of a course of studies for which she has been admitted or otherwise given leave to pursue in the United Kingdom (cf. CDS , paragraph 22 above). Upon receiving information regarding the difficulties faced by LSBC, the appellant, who, according to the letter from LSBC of 30 September 2009, had previously obtained a Diploma in Business Administration, and who was then about to embark on a one year Advanced Diploma in Business Management with them in London, promptly decided to switch to a two year course in Leeds, designed to lead to an NVQ in Health and Social Care. No explanation has been provided, either in evidence or submissions, regarding the first respondent's reasons in this regard. But, even if she had sound reasons for what, on its face, is an odd change of academic direction, which has led to her embarking on a course due to finish long after the LSBC course would have finished, she is not very far advanced on the NVQ course. There is no evidence that a course of this kind cannot be undertaken in Pakistan. The appellant asserts that she is regularly attending the NVQ course. The letter of 16 November, to which we have referred, purports to support that; but does so in terms which can only be described as vague.

32. The first respondent has been in the United Kingdom only since May 2008 as, it seems, has the second respondent. No reliance is sought to be placed upon any private life that the second respondent has established in the United Kingdom. Indeed, neither of the respondents put their private life claim on any basis other than the student activities of the first respondent. There is no evidence to suggest that they would face any difficulty in returning as a couple to Pakistan.

33. We take account of the fact that the first respondent was not to blame in any way for the situation that led to the suspension and later withdrawal of LSBC's licence. However, although the first respondent notified the Secretary of State of her switch to ONTO, she failed to make a Tier 4 application in respect of that course.

34. In all the circumstances, the Tribunal finds that the weight to be accorded to the importance of maintaining immigration controls outweighs the weight to be placed on the respondents' side of the balance. Their Article 8 case therefore fails.

Decision

35. The determination of the Immigration Judge contains a material error of law and is set aside. We substitute a fresh decision, dismissing the appeal of the respondents against the Secretary of State's decision to refuse to vary their leave to remain in the United Kingdom.

Signed

Senior Immigration Judge P R Lane

(Judge of the Upper Tribunal)

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[1] See AF (Afghanistan) [2009] EWCA Civ 1076