Upper Tribunal
(Immigration and Asylum Chamber)

Alam (s 85A – commencement – Article 8) Bangladesh [2011] UKUT 00424(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 September 2011	………………………………

Before

UPPER TRIBUNAL JUDGE P R LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD MAHBUB ALAM

Respondent

Representation :

For the Appellant: Mr R. Hopkin, Senior Home Office Presenting Officer

For the Respondent: Mr B. Poddar, of Kalam Solicitors

(1) Where it applies, s. 85A of the Nationality, Immigration and Asylum Act 2002 precludes certain evidence from being relied on, in order to show compliance with the Immigration Rules.

(2) "Fairness" arguments concerning the application of the transitional provisions regarding s. 85A, in article 3 of the UK Borders Act 2007 (Commencement No. 7 and Transitional Provisions) Order 2011, may have a legitimate part to play in a proportionality assessment under Article 8 of the ECHR, when assessing the strength of the State's interest in maintaining the integrity of the Immigration Rules.

DETERMINATION AND REASONS

1. The respondent (hereinafter referred to as the claimant) is a citizen of Bangladesh born on 1 January 1981 who entered the United Kingdom on 26 August 2011, with entry clearance as a student. On 2 July 2010 his leave was varied, as a Tier 4 migrant until 17 April 2011. That leave was itself subsequently varied so as to terminate on 12 April 2011.

2. On 1 April 2011 the claimant applied for further variation of leave, in order to continue his studies for an ACCA qualification. On 20 April 2011 the Secretary of State decided to refuse the claimant's

application on the basis that the claimant's bank statements submitted with the application were dated more than one month prior to that application and accordingly could not be taken into account in assessing points claimed for maintenance (funds).

3. The claimant appealed against that decision to the First-tier Tribunal and his appeal was heard at Sutton by Immigration Judge Meates on 10 June 2011. By the time of the hearing, the claimant had produced bank statements covering the period 27 December 2010 to 26 March 2011, which demonstrated that he had sufficient funds over the requisite period in order to meet the requirements of the relevant Immigration Rules.

4. However, at the Immigration Judge hearing it was common ground that the claimant's ability to adduce this evidence in support of his appeal was restricted by section 85A of the Nationality, Immigration and Asylum Act 2002. Section 85A sets out a number of exceptions to the general proposition in section 85(4) that:-

"(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."

5. In the present case, the relevant exception in section 85A was exception 2:-

"(3) Exception 2 applies to an appeal under section 82(1) if –

(a) the appeal is against an immigration decision of a kind specified in section 82(2)(a) or (d),

(b) the immigration decision concerned an application of a kind identified in immigration rules as requiring to be considered under a Points-Based System, and

(c) the appeal relies wholly or partly on grounds specified in section 84(1)(a), (e) or (f).

(4) Where exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it –

(a) was submitted in support of, and at the time of making, the application to which the immigration decision related,

(b) relates to the appeal insofar as it relates on grounds other than those specified in sub-section (3)(c),

(c) is adduced to prove that a document is genuine or valid, or

(d) is adduced in connection with the Secretary of State's reliance on a discretion under immigration rules, or compliance with a requirement of immigration rules, to refuse an application on grounds not related to the acquisition of 'points' under the 'Points-Based System'."

6. In the present case, the immigration decision against which the claimant appealed was, as I have already indicated, a refusal to vary leave to remain, that is to say, the "immigration decision" described in section 82(2)(d). That immigration decision plainly concerned an application made under the Points-Based System. The claimant's grounds of appeal to the First-tier Tribunal asserted that the claimant met the relevant requirements of the Immigration Rules. His grounds of appeal, accordingly, fell within section 84(1)(a) ("that the decision is not in accordance with Immigration Rules") and (e) ("that the decision is otherwise not in accordance with the law"). There is no reference in the claimant's grounds of appeal to the Secretary of State's decision being unlawful under section 6 of the Human Rights Act 1998. Indeed, the ECHR was not mentioned.

7. Although section 85A was prospectively inserted in the 2002 Act by the UK Borders Act 2007, section 85A came into operation only on 23 May 2011, as a result of the UK Borders Act 2007 (Commencement No. 7 and Transitional Provisions) Order 2011 (2011 No. 1293 (C.53)). Article 3 of the 2011 Order contained the following transitional provision:-

"3. - (1) The amendment made to the Nationality, Immigration and Asylum Act 2002 by section 19 of the UK Borders Act 2007 will not have effect in relation to an appeal in respect of which a hearing at the First-tier Tribunal of the Immigration and Asylum Chamber has taken place before 23 May 2011 and which is still pending.

(2) For the purposes of this article, a 'hearing' is one where one or more Immigration Judges hear an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 against the decision of the Secretary of State, at the First-tier Tribunal of the Immigration and Asylum Chamber and includes Case Management Review hearings.

(3) For the purposes of this article, an appeal is 'pending' when it has been instituted under section 82(1) of the Nationality, Immigration and Asylum Act 2002 but has not yet been finally determined, withdrawn or abandoned or is not lapsed under section 99 of that Act."

8. Before the Immigration Judge, Mr Poddar (who also appeared before me) submitted that section 85A did not apply in the case of the claimant because the claimant's appeal was part-heard. It is apparent from the determination that the Immigration Judge did not consider that submission to have any force. According to Mr Poddar, it was based on the fact that, prior to 23 May 2011, the claimant had received a notice of hearing from the First-tier Tribunal. It cannot rationally be asserted that submission of a notice of hearing constitutes a "hearing" within the scope of Article 3(1) of the 2011 Order. The Immigration Judge was, accordingly, right to find that the section 85A applied to the present appeal.

9. The effect of this, as regards the claimant's ability to satisfy the Immigration Rules, was set out by the Immigration Judge at paragraph 11 of her determination:-

"11. In support of his appeal the [claimant] produced his bank statements covering the period 27 December 2010 to 26 March 2011 clearly showing that for the requisite period he had sufficient funds to meet the requirements of the Rules. However as Section 85A is now in force I am only entitled to consider circumstances appertaining as at the date of the decision and can only consider evidence adduced by the [claimant] if it was submitted in support of, and at the time of making his application to vary leave as a Tier 4 (General) Migrant. Thus I cannot consider the bank statement for the period 27 February to 26 March 2011 as this bank statement was not submitted in support of the original application, albeit that the bank statement shows that the [claimant] has the requisite funds to claim 10 points under Appendix C. The [claimant] has now produced evidence showing that he had sufficient funds available to him prior to the decision, however unfortunately I cannot take this evidence into account and therefore I must dismiss the appeal under the Immigration Rules."

10. For some reason, the Immigration Judge then turned to Article 8 of the ECHR. I say this because, as I have already indicated, there is no indication in the grounds of appeal to the First-tier Tribunal that the claimant was asserting that his removal in consequence of the immigration decision would violate his rights under the ECHR. It seems, however, that Mr Poddar was given permission by the Immigration Judge at the hearing to advance an Article 8 claim on behalf of the claimant.

11. The Immigration Judge found that the claimant had a private life in the United Kingdom since he had "embarked on a particular course of study in the United Kingdom, the ACCA, which it is his desire to complete" (paragraph 15). At paragraph 16, the Immigration Judge found that the Secretary of State's decision was "lawful and legitimate … bearing in mind the need to maintain an effective immigration control". The matter, therefore, came down to proportionality. The Immigration Judge found as follows:-

"17. As to whether the decision is proportionate my view is that there was real strength in the argument that it is not proportionate to the legitimate aim in maintaining an effective immigration control because the [claimant] has clearly established that he meets the requirements of the Rules to be awarded 10 points under Appendix C, the Rules set up by the [Secretary of State] to allow for students to study and remain in the United Kingdom. Thus it cannot be forcefully argued by the [Secretary of State] that he is [sic] decision is legitimate in maintaining an effective immigration control as the [claimant] clearly meets the requirements of the Rule set up to establish this immigration control. The problem however in allowing the appeal under Article 8 is that it was not the basis upon which the [claimant's] application was made and could result in a grant of discretionary leave for a period of three years (as is the [Secretary of State's] policy) which is clearly not the type of leave the [claimant] sought or envisaged being granted. However given my findings that the decision is not proportionate I have come to the conclusion that this appeal should be allowed under Article 8 of the ECHR but urge that the [Secretary of State] consider granting the [claimant] the limited leave requested.

18. As indicated at the hearing I also record that the [Secretary of State] should be amenable to a fresh application by the [claimant]."

12. The Immigration Judge was, of course, correct to find that the structure of sections 85 and 85A was such that her ability to consider evidence in respect of the ground advanced (albeit belatedly) under section 84(1)(g) was not covered by the evidential restrictions in section 85A, with the result that the Immigration Judge was entitled under section 85(4) to consider evidence about any matter which he thought relevant to the substance of the decision. Thereafter, however, she fell into error.

13. There is an obvious contradiction between the Immigration Judge's finding at the end of paragraph 11, that the claimant could not meet the requirements of the Immigration Rules, and the finding at paragraph 17, that he did so. It is immediately apparent that, if the Immigration Judge's logic is correct, the relevant restrictions in section 85A on the type of evidence that may be adduced will often count for nothing. Provided that an Article 8 ground is advanced, persons who, because of section 85A, cannot prove that they meet the requirements of the Immigration Rules can, nevertheless, use precisely the same evidence in order to demonstrate that they do, in fact, meet the requirements of those Rules, with the result that (provided they have some form of protected private life) the meeting of those requirements destroys the Secretary of State's ability to place the importance of maintaining immigration controls on the State's side of the proportionality balance.

14. Either the logic of this position escaped the Immigration Judge or, more likely, she chose to ignore it in order to enable the claimant to escape what might be regarded as the harsh consequences of the application of section 85A to an appeal which was pending when the Commencement Order brought that section into force.

15. There will inevitably be cases in which the same evidence will, on the one hand, fall to be excluded by virtue of section 85A, in deciding whether a person meets the points-based Rules, but may nevertheless be considered in connection with that person's assertion that the immigration decision, if

acted upon, would violate his or her Article 8 rights. However, as the present case demonstrates, a judicial fact-finder faced with such a situation must pay proper regard to the fact that, in enacting section 85A, Parliament has decided that there will be circumstances in which a person is to be disabled from proving compliance with the Immigration Rules, where the evidence relied on is not submitted at the time of making the relevant application. Provided that the judicial fact-finder appreciates the position, namely, that there has not been compliance with the Immigration Rules, the weight to be placed upon the State’s interests in maintaining the integrity of United Kingdom immigration control will be a matter for him or her. The proportionality balancing exercise cannot, however, be short-circuited by a finding that the requirements of the Immigration Rules have been met. They have not.

16. Before me, as he had (it seems) before the Immigration Judge, Mr Poddar in effect submitted that section 85A should be ignored, certainly in a transitional case of the present kind, on the basis that it would be “unfair” to do otherwise. When pressed, Mr Poddar drew no distinction between applying his “unfairness” submission to policies of the Secretary of State, Immigration Rules or provisions of primary legislation. It is, however, inappropriate for the First-tier Tribunal or the Upper Tribunal to ride roughshod over primary legislation, as suggested by Mr Poddar.

17. There may well be an issue in connection with the transitional provisions in article 3 of the 2011 Order, in that a person may have embarked on an appeal on the basis that he or she could adduce the relevant evidence to show compliance with the Immigration Rules, in connection with an appeal to the First-tier Tribunal, only to find that the Commencement Order has removed that ability. If it was thought that article 3 was irrational or otherwise could not have been lawfully made, a challenge to the making of the 2011 Order could have been brought by means of judicial review.

18. It would also be wrong to rule out the possibility of “fairness” arguments being deployed in individual appeals, in order to address problems raised by article 3 of the Order. As I have already indicated at paragraph 15 above and as I shall go on to address in a moment, such arguments can play a legitimate role in assessing the strength of the State’s interests, as part of the proportionality assessment. What is, however, clear is that the Immigration Judge in the present case was wrong in law to find as she did at paragraph 17 of the determination; and Mr Poddar was unable to advance before me any alternative basis for upholding the determination. I accordingly set it aside.

19. Mr Poddar did not submit on behalf of the claimant that the latter had been unable, when he sent in his application, to provide the bank statements the Secretary of State required in order to show compliance with the Immigration Rules. Whilst I accept that the claimant (and others in his position) would have been able to use the appellate proceedings to cure this difficulty, but for the coming into force of section 85A of the 2002 Act, Parliament has seen fit to enact that section and to give the Secretary of State power to bring it into force, by means of statutory instrument. I am not aware that the validity of the 2011 Order has been successfully challenged on judicial review. I accordingly find that the effect of section 85A in the present case is to preclude the claimant from showing that he meets the requirements of the Immigration Rules.

20. The claimant has been here for some four years, undertaking studies. He has thereby formed some sort of protected private life. No other aspect of his life here was relied upon. As requested, I have regard to the written statements of the claimant, dated 31 May 2011. In this, the claimant states that, when he received the acknowledgement letter from the Secretary of State in respect of his application, he thought that “If any further document is necessary I would be asked to provide but this was not done and subsequently my application has been refused. As a layperson I did not understand

the actual procedure and my documents show that qualify the requirements [sic].” The claimant goes on to state that he “have no intension [sic] to prolong my stay in UK upon completion of my course”. Paragraph 8 of the statement indicates that the claimant’s mother “is a cancer patient and surviving, practically I do not know whether I will be able to see my mom again or not, even I could not inform to my family members of my visa problem, kindly consider my compassionate grounds and allow my visa, then I will be able to see my mom, just to remind you respectfully law is for the people and people is not for the law [sic]”.

21. I appreciate that it is the claimant’s wish to continue with his ACCA course and that his plans for the future may be significantly affected if he is now required to leave the United Kingdom. It has not, however, been shown that he would be unable to return to this country in due course to complete his studies, should he so wish. The claimant has not asserted any family life of any kind in this country. On the contrary, as his written statement makes plain, his family life remains in Bangladesh. The ill-health of the claimant’s mother is such that he wants to return to that country to be with her and that understandable desire is likely to have an impact on his course of studies in this country. In short, having regard to all the evidence, I consider the claimant’s private life in the United Kingdom, as advanced, to be a very weak one.

22. So far as the State’s interest is concerned, I am compelled, for the reasons I have given, to find that the claimant does not meet the Immigration Rules and that there is a legitimate interest in maintaining the integrity of those Rules, when necessary by requiring those who do not meet them to leave the United Kingdom. I have, nevertheless, considered the circumstances in which the claimant has failed to meet the Rules: viz. that he is one of a necessarily fixed class whose ability to prove compliance with the Rules has changed by operation of law since he began his appeal proceedings. Those circumstances do, to some extent, diminish the State’s interest in removing the claimant, merely in order to maintain the integrity of the Rules. If the claimant’s Article 8 rights had been any stronger, I might well have concluded in the circumstances that his removal in consequence of the immigration decision would be disproportionate. As it is, however, I consider that the balance falls to be struck in favour of the Secretary of State.

Decision

23. The determination contained an error of law and I have set it aside. I re-make the decision by dismissing the claimant’s appeal under the Immigration Rules and on human rights grounds.

Signed Date

Upper Tribunal Judge P R Lane