



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Mumtaz (s. 85A – commencement order – adjournment hearing) Pakistan [2011] UKUT 00472 (IAC)

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Determination Promulgated**

**On 15 November 2011**

.....

**Before**

**THE PRESIDENT, MR JUSTICE BLAKE**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**And**

**NASEER MUMTAZ**

**Respondent**

**Representation :**

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer

For the Respondent: Mr Raif Rahman, Solicitor

The transitional provision in article 3 of the UK Borders Act 2007 (Commencement No 7 and Transitional Provisions) Order 2011, concerning the commencement of s. 85A of the Nationality, Immigration and Asylum Act 2002 (Matters to be considered: new evidence: exceptions), adopts an unusual approach, in making the applicability of that section turn on whether there has been a hearing before the commencement date (23 May 2011). Whatever the problems such an approach may cause, it is plain that, for the purposes of article 3, an oral hearing at which an application for an adjournment was considered by a judge (and granted) was a hearing for the purposes of article 3, with the result that section 85A did not apply, so as to restrict the evidence that the judge could consider at the substantive hearing.

**DETERMINATION AND REASONS**

1.

This is an appeal brought by the Secretary of State from a decision of Immigration Judge Thew, promulgated 9 June 2011, whereby she allowed an appeal by Mr Mumtaz (the appellant before her) in

respect of a decision made on 4 February 2011 refusing an extension of stay as a student under the points based system. We gave our decision at the conclusion of the hearing.

2.

At the time of the Home Office decision there was a gap in the information supplied. An appeal was lodged by Mr Mumtaz to the First-tier Tribunal, Immigration and Asylum Chamber.

3.

That appeal came before the First-tier Judge, Judge Cohen on the 5 April, 2011. On that occasion the representative of Mr Mumtaz applied for an adjournment in order to present the evidence that was available at the time of the decision and related to the decision and without which the application may not have succeeded. The judge heard submissions; the Home Office were represented and granted the adjournment.

4.

The case next came before Immigration Judge Thew on the 6 June. Mr Mumtaz had provided the evidence demonstrating his entitlement under the points-based system.

5.

The judge considered the fact that in May 2011 an Order had been made bringing into effect section 19 of the UK Borders Act 2007 that limited the ability of the Tribunal to hear evidence that had not been tendered to the Secretary of State at the time of the decision in a points based appeal.

6.

At paragraphs 4 and 5 of her judgement the learned Judge said this:

“4. ....The Commencement Order stated that the new provision applied to all appeals served for the first time against refusals of application to remain in the United Kingdom under the points based system regardless of the date that the appeal was lodged.

5. In the appeal before me the file showed that the first hearing was listed for the 5 April, 2011 when Mr Rahman sought an adjournment for the production of documents which application was granted by Immigration Judge Cohen. In these circumstances the hearing before me was not the first hearing and consequently section 19 did not apply and it was open to me to consider the evidence that was adduced concerning the Halifax Bank statement.”

Having considered the evidence she allowed the appeal.

7.

The sole issue in the present appeal is whether the Judge had correctly applied the Commencement Order on the facts of the case as he found them to be. The Commencement Order is the UK Borders Act 2007 (Commencement No 7 and Transitional Provisions) Order 2011 (SI No. 1293 cc.53).

8.

Article 2 of the Order says:

“Section 19 (Points-based applications: no new evidence on appeal) of the UK Borders Act 2007 shall, subject to article 3, come into force on 23 May 2011.”

Under the heading “Transitional Provision”, article 3 reads:

“(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 23rd May 2011 and which is still pending.

(2) For the purposes of this article, a hearing is where one or more Immigration Judges hear an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 against a 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 has not lapsed under section 99 of that Act.”

9.

For the purpose of determining this appeal, we shall pass over without comment the defective description of the changes made by the Tribunals, Court and Enforcement Act 2007.

10.

Before us it was common ground that because there had been an oral hearing at which an application for an adjournment was made and considered by the Immigration Judge there had been at least a case management hearing in respect of this appeal. Consequently article 3(2) of the Commencement Order bit and section 19 was not applicable to the decision. We agree with the concession of Mr Bramble to this effect and the submission of Mr Rahman; and accordingly this appeal is dismissed.

11.

It is to be noted, however, that a more difficult question might arise if in this particular case Mr Mumtaz had applied in advance of the hearing for an adjournment as good practice encourages him to do so as to avoid unnecessary hearings before the Immigration Judge.

12.

It is somewhat unusual for a transitional provision to apply not by reference to the date of the Home Secretary’s decision or indeed the lodgement of the appeal but by reference to a hearing including a case management hearing, as case management hearings both in the First-tier and Upper Tribunal are frequently conducted on the papers on the basis of representations received without the attendance of the parties. It would be bizarre if the efficient practices of the Tribunal were to lead to appellants being disadvantaged as to the material they could adduce in support of an appeal.

13.

However, while that question remains to be decided on another day, the judge made no error of law in deciding as he did in this appeal. The Secretary of State’s appeal from that decision will be dismissed.

Signed

Mr Justice Blake

President of the Upper Tribunal

Immigration and Asylum Chamber