IAC-FH-GJ-V6

Upper Tribunal
(Immigration and Asylum Chamber)

Ali (s.120 – PBS) [2012] UKUT 00368(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 August 2012	.....

Before

UPPER TRIBUNAL JUDGE ALLEN

UPPER TRIBUNAL JUDGE CHALKLEY

Between

MANSOOR ALI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Z Malik, instructed by Malik Law Chambers Solicitors (Bethnal Green Road)

For the Respondent: Ms M Tanner, Senior Home Office Presenting Officer

(1) In a PBS case the exception set out in section 85A(3) and (4) of the Nationality, Immigration and Asylum Act 2002 precludes a section 120 statement from being used in order to adduce evidence of compliance with a different requirement of the PBS.

(2) What is said in **AQ (Pakistan)** [2011] EWCA Civ 833 regarding the material date in respect of evidence adduced does not apply to s.85A cases.

DETERMINATION AND REASONS

1. The appellant is a national of Pakistan. He appealed to a First-tier Tribunal judge against the Secretary of State's decision of 16 March 2011 refusing to vary leave to remain in the United Kingdom.

2. The appellant had applied on 29 January 2011 for leave to remain in the United Kingdom as a Tier 1 (General) Migrant under the points-based system and for a biometric residence permit. He was not awarded any points for qualifications under Appendix A of the Immigration Rules as the MBA issued by Liverpool John Moores University was not included in the list of MBA eligible programmes as

stated in the published guidance, and the evidence provided did not show that he had been awarded the qualification at the date of application. It was considered that the further documents he had submitted from Pakistan did not satisfy the requirements of the published guidance and could not be considered. As regards his claimed earnings, he had provided one payslip each from the two employers to whom he referred. Also the bank statements provided only covered the period of 2 October 2010 to 31 December 2010 and did not cover the period shown in the payslips which were both dated 14 January 2011. This meant that he had only supplied one type of document as evidence of earnings, as the payments could not be corroborated by the relevant bank statements and therefore no points were awarded for earnings. The evidence did not include the date of award of the degree or confirmation that he had completed and had been awarded the qualification claimed. Also as regards the ten points he claimed for English language, the score he had obtained in the ESOL examinations did not satisfy the necessary minimum standard.

3. In his grounds of appeal the appellant had submitted a statement of additional grounds in which he stated that:

“There is no pressing social need to deny the appellant the right to remain in the United Kingdom as he also qualifies for leave to remain in the UK as a Tier 1 (Post Study Work) Migrant.”

It was argued on his behalf that the Tribunal was obliged to consider and determine his additional ground in line with what had been said by the Court of Appeal in **AS and NV** [2009] EWCA Civ 1076.

4. The judge considered the submissions, but concluded that the application was under the PBS and was fixed in time and the position had to be considered at the date of application. She considered it was for the appellant to make a further application on the basis of the award of the Master’s degree which would enable him to satisfy a different requirement of the Rules. Article 8 was raised in the grounds of appeal but the judge commented that it was not diligently pursued before her. She accepted that the appellant had established private life as a student in the United Kingdom, however she concluded that the decision to remove him was legitimate and there was nothing in his circumstances to show that the decision was disproportionate.

5. The appellant sought and was granted permission to appeal on the basis that the judge had come to conclusions which were inconsistent with the decision of the Court of Appeal in **AQ (Pakistan)** [2011] EWCA Civ 833 and also with other authorities. It was further argued that the appeal should have been allowed under Article 8. The case was not one of a “near-miss” but of a “no-miss”. Permission to appeal was granted on the appellant’s grounds.

6. Mr Malik adopted and developed the grounds before us. He took us through the relevant statutory provisions and also the relevant authorities including **AS and NV** , **MS** [2010] UKUT 117 (IAC), **MU** [2010] UKUT 442 (IAC), **AQ (Pakistan)** , **JM** [2006] EWCA Civ 1402 and **Alam** [2012] EWCA Civ 960. He argued that the case was not one of a specific timeline, as identified in **MS** , and that the facts in **AQ** were not materially different from those in **MS** . In the instant case the degree had been awarded on 11 March 2011, six days before the date of decision on 17 March, and it was clear from the concession as recorded in **AQ** at paragraph 22 that the relevant date for the assessment of evidence was the date of the Secretary of State’s decision and not the date of the application to her. It was clear from **JM** that the appellant should not be required to commit a criminal offence as in effect he would have to on the basis of the Secretary of State’s argument. There was also the risk of a multiplicity of actions, a point in respect of which the Court of Appeal had expressed concern in **AS and NV** .

7. In her submissions Ms Tanner argued, with respect to section 85A(3)(b) and (4) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) that it was clear that the former referred to the points-based system (PBS) and the latter referred to evidence adduced at the time of the application. Clearly despite **AS and NV** and the other authorities and the seeming concession about date of decision as the key date, that was the position unless it was refuted or altered by legislation. It was clear from these provisions that in a PBS case the exception applied and it was the date of application as had been found by the judge. Section 120 merely underlined to the appellant that it was appropriate to make any representations but it was not an encouragement to make another application for which a fee would have to be paid. It was an opportunity to say why he should not be required to leave the United Kingdom. The judge had not erred as to the date of application being the key date as set out at paragraph 10 of the determination. In any event it was far from certain whether the appellant would have succeeded under a different rule as the refusal letter referred not only to the degree certificates required but also evidence about employment. Even if only one type of evidence were required, the bank statements did not reflect the period shown on the payslip and the refusal in respect of English language. The judge had dealt properly with Article 8. There was no error of law.

8. By way of reply Mr Malik argued firstly that with respect to the points he had made that had not been dealt with by Ms Tanner it could be inferred that there was no answer to what he had submitted. Secondly, he argued that though the Secretary of State’s reasons for decision were defended by the Presenting Officer, and he accepted that these were accurate with regard to the general category, however they were different from the immigration decision and it took the Secretary of State no further. Thirdly, it was argued that in respect of section 85A the point made on behalf of the Secretary of State was irrational. For example, if a student applied for leave to remain while a Tier 4 Student and got married while the application was pending and then made a One-Stop Statement, the Secretary of State was saying that that could be considered but section 85A barred putting forward evidence to back the statement up, yet the evidence of the marriage could not have been submitted with the application. In the instant case the degree had been awarded after the application was made and the Tribunal was required to consider the point left open by Sullivan LJ in **Alam** at paragraph 42. In any event, Ms Tanner had not addressed his argument about section 85(5) and his case was based on section 85(2). As long as that subsection and section 120 were in the legislation the Tribunal was obliged to determine any ground raised in a section 120 statement. Fourthly, with regard to Article 8 his point had not been addressed about this not being a near-miss case but a no-miss case, and if the requirements of the Rules were met at the date of decision and at the hearing it could not be said that the interference was proportionate.

9. We reserved our determination.

10. It will be convenient to set out the relevant provisions of the 2002 Act.

“ 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 following 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 (c. 74) [or Article 20A of the Race Relations (Northern Ireland) Order 1997] (discrimination by public authorities); …

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (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…

(5)
But subsection (4) is subject to the exceptions in section 85A.

85A. Matters to be considered: new evidence: exceptions

(1) This section sets out the exceptions mentioned in section 85(5).

(2) Exception 1 is that in relation to an appeal under section 82(1) against an immigration decision of a kind specified in section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision.

(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 in so far as it relies on grounds other than those specified in subsection (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”

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."

11. In **AS and NV** , the Court of Appeal had to consider the effect of "One-Stop" Notices pursuant to section 120 of the 2002 Act on appeals in immigration cases. It was concluded that the effect of a One-Stop Notice was that the appeal covered not only any ground before the Secretary of State when she 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 a decision by the Secretary of State and did not relate to the decision under appeal. In the first of the two cases before the Court of Appeal the Appellant had applied for leave to remain as a person intending to establish herself in business under paragraph 206E of HC 395 and, that application having been refused, with a One-Stop Notice being included with the decision, she subsequently submitted an application for leave to remain under the international graduate scheme. In the second case considered by the Court of Appeal the appellant had submitted an application for leave to remain on the basis of ten years' residence in the United Kingdom. This application was refused and with the refusal was also served a One-Stop Notice. She appealed against the Secretary of State's decision and subsequently served a statement of additional grounds seeking variation of her leave to remain on the basis that she was a student. By a majority the Court of Appeal allowed the appeals of the appellants against the decisions of Senior Immigration Judges upholding decisions of Immigration Judges that they were without jurisdiction, and remitted the cases back to the Tribunal for consideration of the additional grounds.

12. Moore-Bick LJ at paragraph 78 considered that the language of, in particular, section 85(2), section 96(2) and section 120 demonstrated that they were intended to form constituent parts of a coherent procedure designed to avoid a multiplicity of applications and appeals. He also considered that it was clear that the expression "immigration decision" in section 84(1) had the same meaning as in section 82(1), and the word "decision" in that subsection had to bear the same meaning. Again, in section 85, the word "decision" in subsection (1) had to mean an immigration decision of the kind identified in section 82(1), and the word "decision" in subsection (2) had to have the same meaning. He considered, at paragraph 81, that all the provisions pointed 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. It followed that the notice was not intended to be restricted to matters relating to the original grounds of application or that the decision being challenged could be defined by reference to the particular facts on which it was based. The fact that the effect of the appellant's argument was to make the Tribunal the primary decision maker in relation to any additional grounds was not problematic. He noted that in practice the Tribunal made many decisions which were indistinguishable from those made by the Secretary of State and was quite capable of carrying out that function and it was the responsibility of the appellant to ensure that it had all the material it needed to make a decision. It was necessary to bear in mind that the service of a notice under section 120 was in the discretion of the Secretary of State who was not obliged to take that step and would presumably do so only if she was content that the Tribunal should consider any matters put forward in response to it.

13. Sullivan LJ, who agreed with Moore-Bick LJ, considered it to be clear that the underlying legislative policy was to prevent successive applications, and emphasised that the words "against the decision appealed against" at the end of subsection 85(2) were properly interpreted as being the decision to refuse to vary the appellant's leave to remain in the United Kingdom rather than the decision to refuse to vary leave to remain under paragraph X of the Rules. He also made the point, at paragraph 113, that it was readily understandable that the AIT should not be required to consider a

matter raised in a statement of additional grounds if it did not constitute one of the grounds on which an appeal might be brought under section 84, or if it sought to challenge either a different category of immigration decision as defined by subsection 82(2) from that which had been taken (e.g. refusal to vary leave where entry clearance had been refused) or some other decision against which there was no right of appeal under section 82.

14. Subsequently in **MS** the Upper Tribunal had to consider an appeal in circumstances where the appellant had applied for leave to remain as a Tier 1 (Post-Study Work) Migrant and, that application having been refused, on the basis that he did not have the necessary funds for the relevant period, it was argued that on a proper reading of section 85(4) consideration could be given to more recent bank statements which were in effect referred to in a witness statement which was taken to be a section 120 statement. At paragraph 49 the Tribunal concluded that the Court of Appeal in **AS and NV** had limited the ambit of its decision to cases where a fresh ground was raised in respect of the particular immigration decision made, rather that the making at a later date of an application based on fresh evidence arising from the original refusal. It was concluded that the purpose of the procedural scheme established by section 120 was to encourage an applicant to provide all the reasons he or she had for appealing against a particular decision rather than permitting the later submission of evidence relating to subsequent circumstances in a case such as the instant one where the Rule in question specified a fixed historic timeline.

15. This decision was subsequently approved by the Court of Appeal in **AQ (Pakistan)** . In that case, the issue as summed up by Pill LJ at paragraph 4, was whether the points entitlement arising from a Master's degree could count towards the minimum if the degree was awarded after the Secretary of State's decision but before the decision of the Tribunal. On behalf of the Secretary of State it was accepted that, following **AS** , the relevant date for the assessment of evidence was the date of the Secretary of State's decision and not, as had been held in earlier Tribunal decisions such as **KAN** [2009] UKAIT 00022, **NO** [2009] UKAIT 0054 and **NA and Others** [2009] UKAIT 00025, the date of the application to the Secretary of State. It was noted at paragraph 26 of **AQ (Pakistan)** that both the cases considered in **AS and NV** involved consideration of evidence of events prior to the decision of the Secretary of State. The Court of Appeal also made the point, at paragraph 37, that section 120 was not intended and did not have the effect of allowing a fresh application to be made to the Tribunal under the Rules relying on events since the Secretary of State's decision. Sullivan LJ at paragraph 41 made the point that under the points-based system there was a fixed historic timeline and the effective operation of a points-based system required the points to have been accumulated at the date of the Secretary of State's decision.

16. The next case we must consider is that of **Alam** [2012] EWCA Civ 960. There the Court of Appeal disagreed with the decision of the Tribunal in **Shahzad** [2012] UKUT 81 (IAC), where it had been concluded that Article 2 of the Commencement Order of 17 May 2011, which brought section 19 of the UK Borders Act 2007 into force on 23 May 2011, was to be construed as affecting substantive rights, not merely procedure, and that Article 3 of the Order should be interpreted narrowly. The Tribunal concluded that in order to avoid any other retrospective effect Article 2 was to be interpreted as having effect only where the appellant's application to the Secretary of State was made on or after 23 May 2011. The Court of Appeal concluded that Parliament clearly intended section 85A of the 2002 Act, which was created by section 19, to operate as from 23 May 2011. We should note in passing that, although the date on the determination of the judge's appeal in the case before us was 17 June 2011, that was in fact the continuation of a hearing that had commenced on 20 May 2011, and therefore this case is not caught by the Commencement Order made in respect of section 19. At

paragraph 41 in **Alam** the Court of Appeal noted that the interrelationship between the policy underlying the "One-Stop Procedure" considered in **AS** and the policy underlying the Points-Based System (PBS) was far from clear. Quoting from what he had said at paragraph 41 in **AQ** , Sullivan LJ went on at paragraph 42 of **Alam** to accept Counsel's submission that it was unnecessary to explore the role of section 120 in appeals under the PBS in the instant case because the appellant's statement of additional grounds in response to the section 120 notice had not in fact put forward any additional grounds.

17. It is clear from what was said in **AS and NV** , that where a One-Stop Notice has been served, the Tribunal must consider and make a decision on grounds of appeal provided in a statement of additional grounds, provided that it constitutes grounds on which an appeal can be brought under section 82 of the 2002 Act, and is neither a challenge to a different category of immigration decision from that which has been taken, nor a decision against which there is no right of appeal under the 2002 Act. As was pointed out by Moore-Bick LJ in **AS and NV** at paragraph 84, the Secretary of State is not required to serve a section 120 notice, and will presumably only do so if she is content that the Tribunal should consider any matters (subject to the above caveats) put forward in response to it.

18. However, we have to consider the issue, which was identified by the Court of Appeal in **Alam** as "far from clear", of the interrelationship between the policy underlying the One-Stop procedure and the policy underlying the PBS. In **Shahzad** the Upper Tribunal considered the argument (advanced by Mr Malik), that the "application" referred to in section 85A(4)(a) includes "additional grounds" tendered pursuant to section 120. It was argued that if the effect of section 85A was that the appellant could not ask the Tribunal to consider the evidence he did not submit with his application without which it could not succeed, the same evidence could be introduced in support of a fresh application, which was permissible because the section 120 route constituted "additional grounds" being grounds other than those specified in section 85A(3)(c).

19. The Tribunal concluded:

"The very fact that the statement under s120 relates to new evidence that was not submitted with the original application simply reinforced the correctness of the refusal on the basis that the evidence that was required to satisfy the rule did not accompany the application. What Mr Malik seeks is not the opportunity to raise new grounds for challenging the decision under appeal but to make an entirely fresh application supported by evidence that did not accompany the first, thereby negating the purpose sought to be achieved by the amendment to s85 of the 2002 Act."

20. The appellants in **Shahzad** had all made PBS applications which were refused. Additional evidence provided at the appeal hearings could not be relied on, it was held, because the judge in each case found he was precluded from doing so by section 85A. In the instant case the appeal is on the basis that the appellant satisfies a different requirement of the PBS, i.e. Tier 1 (Post-Study Work) Migrant rather than Tier 1 (General) Migrant, rather than seeking to cure inadequacies in the evidence concerning the particular category in respect of which the application was made. The Court of Appeal in **Alam** noted, without comment, the rejection of the appellant's argument in this regard by the Tribunal in **Shahzad** . Insofar as it is relevant, we agree with what the Tribunal said on the point, but we must consider whether the above difference between the two cases is a matter of substance. At paragraph 47 of **Shahzad** , the Tribunal quoted Moore-Bick LJ in **AS and NV** at paragraph 80:

"That seems to me to contemplate that the statement provided under section 120 will generally contain new grounds for challenging the decision rather than additional evidence or material supporting the original grounds."

This might be said to lend some support to Mr Malik's argument, but of course the Court of Appeal in **AS and NV** was not considering the impact of section 85A on a section 120 statement, and it is necessary to examine closely the wording of the section in the context of the surrounding relevant provisions. Mr Malik places reliance on section 85(2). Section 85(2) states the general rule in respect of section 120 statements, requiring the Tribunal to consider any matter raised in the statement which constitutes a ground of appeal of the kind listed in section 84(1). Section 85(4) then empowers the Tribunal to consider evidence about any matter which it considers to be relevant. However, section 85(5) makes (4) subject to the exceptions in section 85A, which include the case where the immigration decision is made in respect of a PBS case, when evidence can only be considered if submitted in support of, and at the time of making, the application to which the immigration decision related. So, though Mr Malik is right in general in respect of the proper approach to the application of section 120, he cannot surmount the limitation in section 85A(4)(a) which, in this case, precludes reliance on the evidence on which the appellant seeks to rely. There is a clear statutory framework which specifically precludes the consideration of post-application evidence adduced by the appellant in particular categories of case, of which this is one. The fact that the case concerns a claim that the appellant satisfied a different requirement of the PBS, rather than attempting to rely on further evidence in support of an application that had already been made, as in **Shahzad** , is a distinction without substance. Both situations come within the exception set out in section 85A(4)(a). In cases governed by section 85A it is clear that in respect of evidence adduced the material date is the date of application, not the date of decision. What is said in **AQ** about the relevant date being the date of decision not the date of application has to be seen as not applying to cases governed by section 85A, with which the Court of Appeal was not concerned (para 31 of its judgment).

21. As a consequence, the appeal under the Immigration Rules is dismissed, and we therefore maintain the decision of the judge, albeit for somewhat different reasons.

22. As regards Article 8, we consider this was properly dealt with by the judge at paragraphs 15 and 16 of the determination. If a case is a "near-miss", that is by the way, as was made clear in the decision of the Court of Appeal in **Miah** [2012] EWCA Civ 261, in particular at paragraph 26, and we do not consider it to be a case of a "no-miss", as set out above. Accordingly we maintain the judge's decision in this regard also.

23. The appeal is dismissed.

Signed Date

Upper Tribunal Judge Allen

Immigration and Asylum Chamber