Upper Tribunal
(Immigration and Asylum Chamber)

Shahzad (s 85A: commencement) [2012] UKUT 81 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 th October 2011	

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Before

Mr C.M.G. Ockelton, Vice President

Upper Tribunal Judge Southern

Between

MUHAMMAD SHAHZAD

KUNAL UPENDRABHAI PATEL

KUNJAL KIRANKUMAR PATEL

MALIK MOHAMMED UMAIR KHAN

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellants: Mr Zane Malik instructed by Malik Law Chambers (for Shahzad, Patel and Patel) and Mr Zane Malik and Mr Sheryar Khan instructed by Farani Taylor LLP (for Khan)

For the Respondent: Mr Peter Deller, Home Office Presenting Officer

On its true construction, Article 2 of the UK Borders Act 2007 (Commencement No 7 and Transitional Provisions) Order 2011 amends s85 of the Nationality, Immigration and Asylum Act 2002 and introduces s85A in the 2002 Act only in relation to applications made to the Secretary of State on or after 23 May 2011.

DETERMINATION AND REASONS

Introduction

1.
These appeals have been listed together, with the agreement of the parties, because they all raise the same issue. Each of these appellants seeks in the appeal to rely upon additional documentary evidence in support of their application under the Points Based scheme. In each case the respondent says that this additional evidence, not submitted with the application, cannot be considered because it is excluded by ss 85-85A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") as amended by s 19 of the UK Borders Act 2007 ("the 2007 Act") now that a Commencement Order has given effect to the amendment to s 85 found in s 19 of the 2007 Act.

2.
The appellants challenge the decisions of the First-tier judges on a number of grounds. They argue that, because their applications were submitted before the Commencement Order was laid before Parliament, they could not have known that they would have been prevented from relying upon post-application evidence. It is said on behalf of the appellants that, given that the purpose of the transitional provisions contained within the Commencement Order must have been to mitigate the unfairness in applying the new provisions to such an applicant whose appeal had got under way before implementation of the amendment to s85, and because those transitional provisions, on a literal reading, fail to achieve that, the new arrangements disclose such unfairness as to be unlawful.

3.
Thus the challenge raised is not to the vires of s85A itself, but to the scope of the transitional provisions which, on their face, do not achieve what, it is said, must have been intended.

The Appellants

4.
Before identifying the legal framework in detail and examining the competing submissions, it is helpful to set out the salient facts relating to each of these appellants.

5.
Muhammad Shahzad, the first appellant, first arrived in the United Kingdom in March 2004 with leave to enter as a student. This leave was progressively extended, initially as a student and then as a Tier 1 (Post Study-Work) Migrant until 18 March 2011. On 4 March 2011 he submitted an application for further leave to remain as a Tier 1 (General) Migrant. The application was refused on 20 April 2011 because the respondent was not satisfied that the appellant had established the income he claimed to have from self employment. His appeal against that decision was lodged on 11 May 2011. Following a hearing on 13 June 2011, the immigration judge dismissed the appeal because he agreed with the respondent that the documentation submitted with the application in support was not sufficient and because he declined to take account of additional evidence offered to him because he found that he was precluded from doing so by s85A of the 2002 Act, in its amended form.

6.
Three grounds were advanced in challenge to that determination:

a.
The immigration judge erred in excluding the new material because, notwithstanding the terms of s85A of the 2002 Act, this was a question of adjudicative jurisdiction rather than constitutive jurisdiction ;

b.

The Tribunal was required to have regard to all the evidence in determining the appeal in order to give effect to the one stop procedure provided by s120 of the 2002 Act;

c.
The immigration judge erred in giving no reasons for dismissing the appeal on human rights grounds and so failed to engage with the claim brought under article 8 of the ECHR.

7.
Kunal Patel, the second appellant, arrived in the United Kingdom in September 2005 with entry clearance as a student. That leave was progressively extended and, in February 2009, he also was granted further leave to remain as a Tier 1 (Post-Study Work) Migrant until 26 February 2011. On 19 February 2011 Mr Patel submitted an application for further leave to remain as a Tier 1 (General) Migrant. There was a concurrent application on behalf of his wife, who had joined him in the United Kingdom as his dependant in May 2008. The outcome of her application, and her appeal, are dependant upon that of her husband.

8.
The respondent refused the application on 29 March 2011. That was because the appellant had not provided with his application the specified documents required to establish his earnings during the relevant period. His appeal was lodged on 11 April 2011. The immigration judge dismissed the appeal following a hearing on 26 May 2011 because, although the appellant now offered the complete set of bank statements to support the evidence of the wage slips sent with the application to establish earnings, he found that that was not the position on the basis of the evidence the appellant had chosen to submit with his application. The judge dismissed the appeal on human rights grounds also, finding that the interference with the appellant's private life that would arise from the refusal to grant further leave did not amount to a disproportionate interference such as to infringe Article 8 of the ECHR.

9.
Permission to appeal was sought on grounds that are identical to those submitted for the first appellant.

10.
Malik Khan, the third appellant, first came to the United Kingdom in November 2007 with entry clearance until 31 March 2011 as student. On 29 March 2011 he submitted an application for further leave to remain as a Tier 4 (General) Student Migrant. That was refused on 5 May because he had failed to submit with his application some specified documents that were required by Appendix A to the Immigration Rules, namely the certificates from the colleges at which he had studied to support what was stated in the Confirmation of Acceptance for Studies ("CAS"). He lodged his appeal on 17 May 2011.

11.
Following a hearing on 20 June 2011 the immigration judge dismissed the third appellant's appeal. That was because the appellant's evidence was that the CAS letter stating that he had been assessed on the basis of a certificate of Degree Foundation from the School of Technology and Management and a Certificate of Education from Westminster College (which is in Islamabad) was "printed in error". He sought to rely upon an amended CAS letter referring only to the qualifications he did in fact have which, of course, was not sent with his application. But the immigration judge was unable to accept that the first letter had been printed in error and held that, in any event, the amended CAS letter could not be relied upon because it had not been submitted with the application.

12.
The grounds for seeking permission to appeal were that:

a.
The immigration judge was wrong to refuse to have regard to the amended CAS letter. That was because the appeal was “lodged” and therefore “instituted” before 23 May and so the transitional provisions applied.

b.
The judge erred in not allowing the appeal on human rights grounds, on the basis that there would be a disproportionate infringement of article 8 of the ECHR.

13.
In each case permission to appeal to the Upper Tribunal has been given on the basis that it was arguable that the First-tier Tribunal judges may have applied s85A incorrectly. It was said that the challenge to the rejection of a claim under article 8 of the ECHR, where raised, was not arguable but permission was not specifically refused on that ground.

14.
Before the Upper Tribunal Mr Zane Malik, appearing for each of the appellants, advances and expands upon those grounds as “six consolidated issues” to be addressed by the Upper Tribunal. We reproduce those issues, as set out in his skeleton argument:

Issue A : Whether s85A has any application in relation to an appeal which is triggered by an immigration decision made on an application submitted to the Secretary of State at any time prior to 23 May 2011?

Issue B : Whether the question as [to] which evidence "the Tribunal may consider “ under s85A(4) is a question of adjudicative jurisdiction, as opposed to constitutive jurisdiction? If yes, what follows?

Issue C : Whether the expression "application" in s85A(4)(a) includes "additional grounds for the application" under s 120 – and/or whether the additional grounds under s120 are "the grounds other than those specified in [s85A(3)(c)]” for the purpose of s85(4)(b)? If yes, what follows?

Issue D : Whether s85A has any application to appeals before the UT?

Issue E : Whether, in presence of a provision like s85A, the common law duty of fairness requires the Secretary of State to contact the applicants when mandatory evidence is missing and give them the opportunity to provide it before making a final decision?

Issue F : How should the question of proportionality under Article 8 be approached in a case where an appellant’s appeal under the immigration rules fails solely because of the effect of s85A?

Issue A

15.
As originally enacted, but modified to reflect the present appellate structure, sub-ss (4) and (5) of s85 of the Nationality, Immigration and Asylum Act 2002 were as follows:

“(4) On an appeal under section 82(1) 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 in relation to an appeal under section 82(1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10 -

(a) subsection (4) shall not apply, and

(b) the Tribunal may consider only the circumstances appertaining at the time of the decision to refuse"

16.
The effect of those provisions is well-established. In general, on an appeal, the Tribunal will take into account such evidence as is available at the date that the Tribunal makes its decision, subject to the requirement that it be relevant to the substance of the decision against which the appeal is brought. The date in respect of which the evidence requires evaluation is therefore the date of the Tribunal's decision. In relation to entry clearance and certificate of entitlement appeals, however, only evidence relating to the position at the date of the executive decision can be considered. Evidence coming into existence, or produced, later than the date of the decision may be admitted, but it will not be relevant unless it shows what the position was at the date of the executive decision.

17.
The application of those provisions to in-country appeals, in particular appeals against refusals of application made under the strict requirements of the Points Based Scheme, has been the subject of a number of decisions. We need cite only NA and others (Tier 1 post-study work – funds) [2009] UKAIT 00025. At paragraph [74], the Tribunal said this:

"[N]othing in the Immigration Rules dealing with points based applications or in the Policy Guidance has the effect of rendering section 85(4)'s potential application to Tier 1 (post-Study Work) appeals nugatory. If it had been intended that applicants could not succeed unless they had submitted the specified documents at the time of applying that could have been specified; but it was not. The nature of the decision concerned (one whose substance relates in part to an historic timeline) limits the scope of application of this sub-section, but does not exclude it entirely. Neither the rules nor the Policy Guidance stipulates anything either about the reception of evidence on appeal, which (for in-country appeals) is governed by section 85(4)."

The reference to "an historic timeline" is a reference to the rules relevant to that particular case and to the Tribunal's interpretation of them; but, in general, it stands as a reference to any provision in the rules requiring the facts to have been as specified on a particular date in the past, for example the date of the application. If the rules require, for example, that at the date of the application the applicant be entitled to the award of a degree, showing that he became so entitled after the date of his application will not assist him to demonstrate his entitlement under the rules; but evidence post-dating the application may assist him to show that at the date of the application he was so entitled and to that extent met the requirements of the rules. Those considerations led to the decision in NO (post-Study Work – award needed by date of application) Nigeria [2009] UKAIT 00054.

18.
By the time those decisions were made, the UK Borders Act 2007 had been enacted. It received the Royal assent on 30 October 2007. Section 19 of that Act is headed "Points-based applications: no new evidence on appeal" and provides for the amendment of s85 of the 2002 Act in the following way. Sub-s85(5) was to be replaced by the words "but sub-section (4) is subject to the exceptions in section 85A", and a new s85A was to be inserted, as follows:

“ **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’.”

19.
Section 19 of the 2007 Act also included provisions for amending the power to make procedure rules under the 2002 Act.

20.
Section 19 was not brought into force immediately. Indeed, years passed without it being brought into force. On 15 February 2010 the Asylum and Immigration Tribunal ceased to exist, and appeals in immigration matters were transferred to a new Chamber, the Immigration and Asylum Chamber, of the First-tier Tribunal and the Upper Tribunal respectively: those tribunals had themselves been established by the Tribunals, Courts and Enforcement Act 2007. One of the effects of that change was that the power to make rules fell to the Tribunal Procedure Committee, so there was an amendment to the still-unimplemented s85A by the addition of a further sub-section as follows:

“(5) Tribunal Procedure Rules may make provision, for the purposes of subsection (4)(a), about the circumstances in which evidence is to be treated, or not treated, as submitted in support of, and at the time of making, an application.”

21.
More than another year passed, with, so far as we are aware, no indication that s19 of the 2007 Act would ever be brought into force. There had been a change in Prime Minister since it was originally enacted, and there was subsequently a change of government. Those making applications under the Points Based Scheme continued to be able to remedy defects in their original application by demonstrating, at an appeal, that at the date of the application, the requirements of the rules were met.

22.
Without any other notice being given so far as we are aware, on Tuesday 17 May 2011 an Order was laid bringing s19 into force on the following Monday. The Order is The UK Borders Act 2007 (Commencement No. 7 and Transitional Provisions) Order 2011 (SI 2011/1293). Article 1 of the Order contains provisions as to citation. The operative provisions are as follows:

“ **Commencement of the UK Borders Act 2007**

2. 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.

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 [sic] 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 where one or more Immigration Judges hear an appeal made 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. “

23.
We may pass article 2 without comment for the moment. Our concern is with article 3. It is clear on a first reading of that provision that the draftsman intended that the amended provisions of the 2002 Act would apply to all pending appeals, with the exception of those in respect of which there had been a “hearing” (as defined) before 23 May 2011. That exception is, indeed, the only transitional provision. That intention is confirmed by the text of the Explanatory Note, which reads as follows:

“This Order brings into force section 19 (Points-based applications: no new evidence on appeal) of the UK Borders Act 2007 which amends section 85(5) of the Nationality, Immigration and Asylum Act 2002 (c.41) as well as inserting a new section 85A. The new section 85A lists the exceptions to the general rule that the Immigration Tribunal can consider any evidence that is relevant to the substance of a decision, including any evidence which arises after the date of decision. Section 19 is subject to

the transitional provision in Article 3 which provides that section 19 will not apply to any hearing which has already commenced prior to the 23 May and which is part heard and pending, including appeals remitted to the First-tier Tribunal from the Upper Tier of the Tribunal. Appeals instituted prior to 23 May where a hearing is yet to take place will be subject to section 19. “

24.
The Note does not purport to be part of the Commencement Order. It leaves open the question whether the Order itself carries out the draftsman’s intentions.

25.
Closer inspection of article 3 of the Order reveals a number of remarkable features. The first is that its draftsman appears to have had little knowledge of the system of immigration appeals. He twice uses the phrase “at the First-tier Tribunal of the Immigration and Asylum Chamber”. The use of the preposition “at” is strange; but the remaining words of the phrase are stranger still, for they describe an institution which does not exist and never has existed. The whole point of the reforms of the 2007 Act, to which immigration appeals were made subject in 2010, is that instead of there being individual specialist Tribunals with their own individual arrangements for appeals to a further Tribunal, there is a First-tier Tribunal and an Upper Tribunal, each of general jurisdiction but divided into Chambers. The Chambers are Chambers of each Tribunal: the Tribunals are not Tribunals of each Chamber. The phrase is not merely technically wrong: it indicates a complete misunderstanding of the system.

26.
Secondly, although the draftsman goes to such lengths to define what he means by “a hearing” (a matter on which we make further observations below), he defines it by reference to the activities of “one or more Immigration Judges”. Immigration Judges comprised some (but by no means all) of the judiciary of the Asylum and Immigration Tribunal. The title is still used by courtesy, for those who held such office in the Asylum and Immigration Tribunal, but it now has no statutory basis. On 15 February 2010 all holders of the title of Immigration Judge became, instead, holders of the title of “Judge of the First-tier Tribunal”. The draftsman appears to have been unaware of this development. The Explanatory Note refers to “appeals remitted to the First-tier Tribunal from the Upper Tier of the Tribunal”. So far as we are aware, there has never been an “Upper Tier” of any Tribunal. There is, however, an Upper Tribunal.

27.
The insistence on there having been a “hearing” (as defined) in order to enable the transitional provision to have effect is also distinctly odd. It appears clear that the draftsman intended to distinguish between cases where there has been a hearing, and cases in which there has not. A “case management review hearing” counts as a hearing; but directions given by way of case management apparently do not. The effect of that would be that if a case had been identified from the beginning as one which raised procedural difficulties, which it had been necessary to review at a hearing before 23 May 2011, the new provisions would not apply to it, but if it was a straightforward case which needed no directions or directions which could be made without a hearing, they would. Further, practice varies between hearing centres as to whether case management matters are dealt with at a hearing or simply on the papers. The result would be that an appeal assigned to one centre would be caught by the new provisions, whereas if it had been assigned to another centre it would not.

28.
The oddity of the provisions as apparently intended goes further than this. The pressure of work at hearing centres varies; two appeals instituted on the same day may have hearings on different days

simply because the centres to which they were allocated have different waiting times for hearings. Thus, of two identical appeals instituted on (for example) 4 April 2011, one might have had a hearing before 23 May 2011 and the other might not, not because of any act by the appellant, but simply because it was assigned to a hearing centre where the waiting list was longer. In the former case the appellant would be able to submit new evidence; in the latter he would not.

29.
Many cases are determined without a hearing. The appeal form gives an option to the appellant to choose to have his appeal determined in this way. If an appellant's appeal was determined without a hearing, it appears that even if the determination was well before 23 May 2011, and even if, in subsequent proceedings on appeal to the Upper Tribunal, the latter would determine that the decision on appeal was erroneous and needed to be re-made, new evidence could not be taken into account after 23 May 2011. Not only does that show that the Explanatory Note is to that extent misleading, but it is worth exploring with an example. The example is one which is by no means outlandish: on the contrary, it, and the timing suggested, might be regarded as entirely routine.

30.
Suppose 'A' makes an application under the Points Based Scheme in April 2010. In July he receives a notice of refusal, on the ground that his application showed that he did not meet one of the requirements of the rules. He gives notice of appeal, and indicates that his appeal may be decided without a hearing. In preparation for the appeal, he forwards documents establishing that he did indeed meet the requirements of the rules at the date of his application. In November 2010 the file is allocated to an Immigration Judge for determination without a hearing. The Immigration Judge so determines it, noting in his determination that there is no material before him other than the documents accompanying the notice of appeal, and stating that there is still no evidence that the appellant met the requirements of the rules at the date of his application.

31.
The appellant applies for permission to appeal to the Upper Tribunal, on the ground that the Immigration Judge had clearly failed to take into account the documents supplementing the notice of appeal. Permission to appeal to the Upper Tribunal is granted in January 2011, that ground being clearly made out. The appeal comes before the Upper Tribunal for hearing in June 2011. That being the first "hearing" in relation to this appeal, the transitional provisions do not apply. The new evidence cannot be taken into account. That is despite the fact that, at the time it was produced, and at the time the appeal was determined by the First-tier Tribunal, s19 of the 2007 Act was not in force, and despite the fact that the reason for granting permission to appeal to the Upper Tribunal was failure to take the new evidence into account.

32.
The position would, of course be entirely different if the appellant's appeal had been determined by the First-tier Tribunal at a hearing. That is so even if the same appeal had been determined on the same day by the First-tier Tribunal, on precisely the same basis but at an oral hearing at which neither party was in fact represented (a not unusual occurrence): then the transitional provisions would have applied so that the Upper Tribunal would have been able to have regard to the post application material.

33.
These results are simply bizarre. That is not a reason why they could not have been intended by the Commencement Order, but it causes us to pay particular attention to the wording of the Order, to see

if there is some way by which they can be avoided. We think there is. We have considered, but are not persuaded by, the suggestion that “hearing” should be understood as including any intervention by a member of the Tribunal judiciary, whether by oral process or not. Such an interpretation would do nothing to ameliorate the difficulties arising from the denomination of the Tribunal and its judiciary. Some of the other difficulties would be removed, but some would remain, and there would be a further one. A case that had been, for whatever reason, referred to a judge to make a decision in relation to listing would be one in which there had been a ‘hearing’, but a case where the listing had been undertaken administratively would not. And here is a further problem, because the parties would not typically know whether there had been judicial intervention, and if so at what date, so would not know whether s85A applied or not. The solution, if there be one, must lie elsewhere.

34.
No doubt it would be possible to challenge the legality of the Order itself. Mr Malik did not ask us to consider such a challenge, and we doubt whether this is the right forum for it. We proceed to apply the Order as we have it.

35.
As we have indicated, the only transitional provision is the exception for cases in which there has been a hearing prior to 23 May 2011. As we have also observed, there is no such thing as the “First-tier Tribunal of the Immigration and Asylum Chamber”. It follows that there is no case in which the transitional provision in article 3 of the Order could apply.

36.
That means, simply, that in effect article 2 of the Order stands by itself. It brings s19 of the 2007 Act into force on 23 May 2011. In interpreting that provision, we need to decide the extent to which it applies to appeals pending on that date, there being no transitional provisions relating to any events that could actually happen.

37.
The general rule is that a statute (or statutory instrument) does not have retrospective effect unless either it relates to procedure only, or the retrospective effect is clearly intended. The classic description or definition in Craies on Statute Law (6 th edition, p386) is that a statute is retrospective if it “takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new disability in respect to transactions or considerations already past”. There can be little doubt that the change in the law introduced by the Commencement Order imposes a disability in respect to transactions already past, where, before commencement, an applicant has made, and paid for, his application.

38.
The retrospective effect is clearly intended, but, for the reasons we have given, it is very imperfectly achieved. In our judgement it is clearly right that the Order should be applied retrospectively only insofar as clearly specified. If authority for that is required, it can be found in Re “Wonderland” Cleethorpes [1965] AC 58, 71-2. In the circumstances of the present case it receives support from the principle that a statute should not be given an interpretation that will cause real injustice, if that can be avoided: Waugh v Middleton (1853) 8 Ex 352; and see, for example West Midland Baptist (Trust) Association Inc v Birmingham City Corporation [1968] 2 QB 188, 210.

39.
On its face, s19 of the 2007 Act introduces changes that relate to procedure. But we need to consider their effect rather more widely. As we have said, the previous regime had the effect that in order to

meet the requirements of the Immigration Rules, an applicant could remedy defects in his application by evidence produced on appeal. We do not think that it is a distortion of language to regard an applicant's ability to do so as a substantive right in relation to the application process, rather than as merely a matter relating to the procedure on appeal. Certainly the withdrawal of the ability to supplement defects in this way has an instant effect on the substantive rights of applicants whose appeals are pending: many of them would previously have been able readily to show that they had met the requirements of the rules, whereas, after the change, the fact that they did meet the requirements of the rules at the date of their application becomes irrelevant.

40.
There are two additional factors which we think point to the conclusion that article 2 of the Order should be taken as a change in substantive, rather than merely procedural law. First, there is the difficulty in relation to its application to pending appeals. Without any reference to a requirement to there having been a "hearing" before 23 May 2011, there would nevertheless be an inequity between those whose appeals were, and those whose appeals were not determined before the commencement date, when they might have instituted appeals on the same date. Secondly, section 85A as amended itself provides in subsection (5) for amendments to procedure rules for its purposes. That, we think, is a hint that it is not itself wholly procedural. (The commencement of s19 at such short notice, of course, rendered subsection (5) entirely ineffective: there can have been no possibility of the making of the appropriate procedural rules in the three working days available).

41.
For these reasons it appears to us that Article 2 of the Commencement Order should be construed as affecting substantive rights not merely procedure, and that Article 3 should be interpreted narrowly. Article 2 should not be interpreted retrospectively save in relation to any cases that might be found to fall within the words of Article 3. The result is that, in order to avoid any other retrospective effect, Article 2 is 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.

42.
We appreciate that our interpretation of the Commencement Order is bold and, in addition, we have not reached it on the basis of the submissions Mr Malik made to us. Anyone seeking to defend any other interpretation, however, will have to explain why any of the results set out in paragraphs 27 to 33 above either were intended or are desirable.

43.
The effect of that conclusion is that as each of these appeals relates to an application made before 23 May 2011, the immigration judges should have had regard to the evidence relied upon at the hearing that was not provided to the respondent with the application. Before deciding the consequence of that for the outcome of the individual appellants, we will deal briefly with each of the other grounds argued before us.

Issue B

44.
Mr Malik's second issue concerns the concepts of and distinction between "adjudicative jurisdiction" and "constitutive jurisdiction", articulated by Sedley LJ in Carter v Ahsan [2005] EWCA Civ 990, drawing upon observations of Diplock LJ in Garthwaite v Garthwaite [1964] and developed more recently in Anwar v SSHD [2010] EWCA Civ 567. Mr Malik suggests that the position here is analogous but, in our view plainly it is not. There is no doubt that in these appeals the Tribunal has

both constitutive and adjudicative jurisdiction. What is at issue is not the entitlement of the Tribunal to embark upon hearing the appeals and to determine them but the evidence it may take into account when so doing. Section 85A of the 2002 Act applies and the question of whether as a consequence the post-application evidence is excluded will depend upon the applicability of otherwise of the transitional provisions found in the Commencement Order we have discussed above.

Issue C

45.
The third issue raised by Mr Malik concerns the interrelationship, as he identifies it, between s85 and s120 of the 2002 Act. He argues that the "application" referred to in s85A(4)(a) includes "additional grounds" tendered pursuant to s120. He submits that it is open to the appellant to make a fresh application, in response to refusal of the application he has made and in respect of which he has received an adverse immigration decision because he failed to submit the evidence required. In his skeleton argument Mr Malik submits that:

"it would make a nonsense of s86(2) and s120 if an Appellant is required to put forward "all his grounds" in a one-stop statement but is barred from putting forward any evidence of support his additional grounds."

Thus, if the effect of s85A is that the appellant cannot ask the Tribunal to consider the evidence he failed to submit with his application without which it could not succeed, Mr Malik submits that the same evidence can be introduced in support of a fresh application, that being permissible because the s120 route constitutes "additional grounds" being grounds other than those specified in s85A(3)(c).

46.
That approach would also, of course, "make a nonsense of" the legislative intention of s85A, introduced into the 2002 Act in the full glare of s120. Given what we have said about the difficulties with the drafting of the Commencement Order, that in itself is not sufficient to resolve the question. However, Mr Malik's interpretation does lead to a remarkable state of affairs. His argument respects the intention of s85A to exclude evidence not submitted with the original application (because otherwise the s120 statement would not be necessary) but then defeats it by asking for the s120 statement to be treated as if it were part of the application that was unaccompanied by the evidence now relied upon.

47.
In any event, as was submitted by Mr Deller, AS (Afghanistan) v SSHD [2009] EWCA Civ 1076, relied upon by Mr Malik to support his argument, is not authority for the proposition that the issues raised in a statement under s 120 are to be treated as a "fresh application" to the Tribunal. The issues raised are to be considered as an additional or expanded ground of appeal. As Moore-Bick LJ observed at paragraph 80 of AS :

"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."

and at paragraph 83:

"… The whole tenor of the legislation points to the conclusion that the purpose of section 120 is to flush out all the grounds on which the applicant may seek to rely so that they can be considered at the same time. Section 85(4) itself, in my view, has little bearing on the present case, being concerned

only with the evidence that the Tribunal may consider when hearing an appeal. The argument that an appellant will 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 subsection (2) favoured by the appellant must be wrong goes far too far. ....."

And this is where Mr Malik's argument fails: the very fact that the statement under s120 relates to new evidence that was not submitted with the original application simply reinforces 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.

Issue D

48.
Next, Mr Malik submits that s85 does not apply to proceedings before the Upper Tribunal at all because it is concerned with appeals brought under s82 of the 2002 Act whereas the appeal before the Upper Tribunal is brought under s11 of the Tribunals, Courts and Enforcement Act 2007. This argument can be disposed of shortly. Section 12(4) of the 2007 Act makes clear that if the Upper Tribunal does set aside the decision of the First-tier Tribunal and re-make it then its power is to:

"... make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision..."

It is plain, therefore, that s85A does apply equally where the decision is remade by a judge of the Upper Tribunal. Further support for that conclusion, if it were needed, is to be found in the words of Moses LJ recently in LB (Jamaica) v SSHD [2011] EWCA Civ 1420:

"... it seems to me impossible to confine the construction of what is meant by an appeal under section 82(1) to an appeal to the First Tier Tribunal..."

Issue E

49.
This argument is aimed squarely at "a provision like s85A" and not the extent to which transitional provisions seek to mitigate its effect for those with pending appeals. Mr Malik's fifth issue is founded upon the observation of Sedley LJ in Anwar that:

"... a decision taken in defiance of basic standards of fairness and morality may be impeached as a nullity..."

because:

"...a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...".

But it must be remembered what the point under challenge on the basis of such a level of outrageous unfairness is: requiring an applicant to submit with his application all the evidence that is necessary in order for him to meet the requirement of the immigration rule he seeks to satisfy in order to qualify for further leave to remain. It is impossible to see how such a requirement is unfair or outrageous. Indeed, even if the likely introduction of such a requirement had not been signalled well in advance of

its implementation, to expect an applicant to submit evidence with the application, rather than after it had been refused because it had not been, does not seem to us to disclose unfairness at all, but simply to state what might reasonably be expected of any applicant who is made fully aware of what is required of him in order to succeed.

Issue F

50.
The final issue raised by Mr Malik concerns article 8 of the ECHR. In short, his submission is that because s85A does not prevent the appellant relying upon post -application evidence in support of his article 8 claim, if this demonstrates that the appellant, when the post-application evidence is considered, does in fact meet the requirement of the rule, the appeal must be allowed on human rights grounds because it would be impossible to see how removal in consequence of the refusal to grant leave could be a proportionate interference in the protected rights of someone who did, after all, meet the requirements of the rule under which he applied.

51.
That argument is simply misconceived because the whole point is that the appellant did not meet the requirements of the rule, one of those requirements being that he submits with his application the evidence needed to show that he satisfied its requirements.

Disposal of the individual appeals

52.
Each of these appellants applied to the Secretary of State and, in addition, instituted an appeal against refusal of the application before 23 May 2011 and so, on the basis of the construction of the Commencement Order set out above, each is entitled to rely upon post-application evidence. The question is, therefore, whether they now show that they met the requirements of the applicable rule.

53.
The appeal of the first appellant, Mr Shahdaz, was dismissed because the evidence considered by the judge did not establish the level of earnings from self-employment that was required. The judge erred in law in declining to look at the additional evidence of those earnings that was available at the hearing. Mr Deller accepts that the additional evidence does establish the earnings claimed and, as that is in a sum sufficient to meet the requirements of the applicable rule, we set aside the decision of the First-tier Tribunal and substitute a fresh decision to allow the appeal.

54.
The second appellant, Mr Patel, is in a similar position. Mr Deller accepts that if the judge had looked at the documentary evidence produced at the hearing but which was not submitted with the application, he would have found that the complete set of bank statements now available did establish that which was required. Accordingly, we set aside that decision also and substitute a fresh decision to allow the appeal. It follows that the decision of the First-tier Tribunal in respect of his wife Mrs Kunjal Kirankumar Patel, must also be set aside and replaced with a fresh decision to allow her appeal.

55.
The third appellant, Mr Khan, did not at the time of submitting his application have the required qualification and so, plainly, could not submit, with his application, evidence of having secured it. It is said in the grounds upon which permission to appeal was granted that “he should be allowed to remain here and should not be removed because he has now been awarded the relevant degree”. But

evidence that he now has something (not, incidentally, a degree) that he did not have at the time he made the application cannot establish that he met the requirements of the rule at the date of the application. Therefore, even though the judge was wrong in his reason for refusing to consider the post-application evidence, that does not assist this appellant because it was irrelevant anyway.

56.
Secondly, it is argued that the First-tier Tribunal "had an obligation… to deal with Article 8 (i.e. it is obvious) even where it has not been raised by an Appellant." The grounds assert that there was an "obvious" Article 8 point but, it seems, not sufficiently obvious to lead the appellant's legal representative who appeared before the First-tier Tribunal to raise it. This was not a "no-miss" appeal as asserted. The appellant failed to meet the requirements of the rule and had been present in the United Kingdom only a relatively short period of time; so that it was entirely unsurprising that nobody suggested before the First-tier Tribunal that there was any arguable claim under Article 8 of the ECHR. There simply was none.

57.
For those reasons, despite the error by the judge in finding that he could not look at post-decision evidence, in this case it made no difference whatever and so there is no reason to disturb the decision of the First-tier Tribunal. The appeal of Mr Khan to the Upper Tribunal is dismissed.

C. M. G. Ockelton

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 27 February 2012