Upper Tribunal
(Immigration and Asylum Chamber)

Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 January 2013	

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Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE COKER

Between

PRAKASH KHATEL

MOSTAQIUM AL ISLAM

NARAYAN ADHIKARI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR PRASAD RAJU

Respondent

Representation :

Zane Malik Instructed by Malik Law Chambers Solicitors for Khatel, Adhikari and Raju

Zane Malik and Mr S Khan Instructed by Farani Taylor Solicitors for Al Islam

For the Secretary of State: Mr Daniel Hayes, Senior Presenting Officer

(1) An application for further leave to remain is to be treated as a continuing application, starting with the date when it was first submitted and ending on the date when it is decided: AQ (Pakistan) v SSHD [2011] EWCA Civ 833.

(2) It follows that an appellant is not precluded by section 85(5) of the Nationality, Immigration and Asylum Act 2002 (as amended) from relying in an appeal upon evidence that was notified to the Secretary of State before the date of her decision.

(3) Where, in an application for leave as a Post-Study Work Migrant, the obtaining of the academic award needed to gain the requisite points is notified to the Secretary of State after the date when the application was first submitted but before a decision is made on the application, the requirement of Table 10, that the qualification is obtained within 12 months of making the application, is satisfied because the application is a continuing one until a decision upon it has been made.

DETERMINATION AND REASONS

Introduction

1.
These four appeals are being heard together because they raise a common issue about the interpretation of the Immigration Rules and law relating to an application for post-graduate work experience as a Tier 1 Post Study Work Migrant within the meaning of Appendix A to the Immigration Rules.

2.
We shall refer to each of the original applicants as a claimant. In the appeals of Adikari, Khatel and Al Islam their appeals before the First-tier Tribunal Judge were unsuccessful and they are the appellants for the Upper Tribunal. The appeal of Raju succeeded before the First-tier Tribunal and the Home Office is the appellant before us.

3.
Each appeal contains the following common features:-

i)
The claimant was given leave to enter for a short postgraduate course in the United Kingdom.

ii)
Such leave was due to expire in the early part of 2012.

iii)
The application for leave to remain was made before the expiry of the leave granted to each claimant and before 6 April 2012 when, subject to transitional provisions, the Tier 1 Post Study Work Migrant scheme was removed from the points based system (“PBS”).

iv)
At the time of each application the academic part of the course was completed and each applicant was expected by their institution of study to be awarded a qualification by the awarding institution.

v)
Such predictions were well-founded and awards were made by the awarding institution on various dates in the summer of 2012.

vi)
The application was refused by the UKBA in the autumn of 2012 after the qualification had been awarded.

vii)

The basis of the refusal was that at the time of the application the award or the qualification had not been made.

The Terms of Appendix A

4.
Paragraph 245FD of the Immigration Rules provided for the grant of leave to remain for applicants who had a certain number of points under Appendix A, B and C. Before its eventual removal from the scheme, Appendix A, entitled attributes for Tier 1 (Post-Study Work), Migrants set out the requirements. Table 10 set out how points were to be acquired. It dealt with points for the award of qualifications. It is reproduced as follows:

Qualifications	Points
The applicant has been awarded: (a) a UK recognised Bachelor or postgraduate degree, or (b) a UK postgraduate certificate in education or Professional Graduate Diploma of Education or (c) a Higher National Diploma ('HND') from a Scottish institution.	20
(a) The applicant studied for his award at a UK institution that is a UK recognised or listed body, or which holds a sponsor licence under Tier 4 of the Points Based System, (b) If the applicant is claiming pints for having been awarded a Higher National Diploma from a Scottish Institution, he studied for that diploma at a Scottish publicly funded institution of further or high education, or a Scottish bona fide private education institution which maintains satisfactory records of enrolment and attendance. The Scottish institution must: (i) be on the list of Education and Training Providers list on the Department of Business, Innovation and skills website, or (ii) hold a Sponsor licence under Tier 4 of the Points based System.	20
The applicant's periods of UK study and/or research towards his eligible award were undertaken whilst he had entry clearance, leave to enter or leave to remain in the UK that was not subject to a restriction preventing him from undertaking a course of study and/ or research.	20
The applicant made the application for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant within 12 months of obtaining the relevant qualification or within 12 months of completing a United Kingdom Foundation Programme Office affiliated Foundation Programme as a postgraduate doctor or dentist.	15
The applicant is applying for leave to remain and has, or was last granted leave as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme) or as a Participant in the Fresh Talent: Working in Scotland Scheme.	75

Paragraph 70. A qualification will have been deemed to have been ‘obtained’ on the date on which the applicant was first notified in writing, by the awarding institution, that the qualification had been awarded.

5.
In the cases of Khatel, Adhikari and Al Islam, the judges of the First-tier Tribunal each concluded that the claimant did not meet the requirements of the rules because at the time of the application he had not been awarded the post graduate qualification by the awarding institution.

6.
In reaching that conclusion regard was had to the jurisprudence of the Asylum and Immigration Tribunal notably Kan (PSW degree award required) India [2009] UKAIT 22 and NO (PSW award needed by date of application) Nigeria [2009] UKAIT 54.

7.
In the case of Raju Judge Parkes had regard to the decision of the Court of Appeal in AQ (Pakistan) v SSHD [2011] EWCA Civ 833. He also noted the decision in Ali (section 120-PBS) Pakistan [2012] UKUT 368 (IAC). Ali was a decision of the Upper Tribunal following AQ (Pakistan) where Upper Tribunal Judge Allen had regard to section 85A of the Nationality Immigration and Asylum Act 2002 as amended (“NIAA”).

AS (Afghanistan)

8.
In order to examine the potential importance of what the Court of Appeal said in AQ (Pakistan) it is necessary to recite some legislation and case law that led to it.

9.
Section 120 of the NIAA provides for service of notice on a person with respect to whom an immigration decision has been taken or is being taken

“(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.”

10.
The problem that has arisen from time to time is whether, following an immigration decision initially made upon an application for leave to remain a section 120 notice is served, a person is entitled to raise a wholly new claim for leave to remain; in the event of that modified claim being made, is he entitled to an appeal against it?

11.
In the case of AS (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1076, a judgment delivered on the 20 October 2009, the majority of the Court of Appeal (Lord Justice

Moore-Bick and Lord Justice Sullivan) concluded that in general terms a person could raise a wholly different application and require it to be determined by the Tribunal in accordance with the statutory scheme. Lady Justice Arden dissented from this conclusion and did so mainly by reference to section 3C of the Immigration Act 1971 as amended.

12.
The statutory scheme at the time included section 85 of the NIAA as follows:

" Matters to be considered .

(1)
An appeal under section 82(1) against a decision shall be treated by [the Tribunal] 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…"

13.
The scheme also included section 3C Immigration Act 1971:

" Continuation of Leave Pending Variation Decision

1.
This section applies if –

a)
A person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

b)
the application for variation is made before the leave expires, and

c)
The leave expires without the application for variation having been decided.

2.
The leave is extended by virtue of this section during any period when –

a)
The application for variation is neither decided nor withdrawn,

b)

An appeal under section 82(1) of the Nationality Asylum and Immigration Act, 2002 could be brought against the decision on the application for variation … or

c)
An appeal under that section is … pending…

3.
…(omitted)

4.
A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

5.
Subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).”

14.
Earlier in 2009, the Court of Appeal in the case of JH (Zimbabwe) [2009] EWCA Civ 78 had concluded that a wide meaning was to be given to the concept of variation of an application as opposed to making a fresh application to vary leave that has been extended by section 3C. At [35] to [45] Lord Justice Richards explains the reasons for the conclusion. Variation will include a further application made on a different prescribed form with payment of the relevant fee for a different purpose as well as applications made for the same purpose but with different details. Lord Justice Richards said at paragraph 35:-

“….. Thus, there can be only one application for variation of the original leave, and there can be only one decision (and, where applicable, one appeal) The possibility of a series of further applications leading to an indefinite extension of the original leave is excluded. However, by subsection (5) it is possible to vary the one permitted application. If it is varied, any decision (and any further appeal) will relate to the application as varied. But once a decision has been made no variation to the application is possible since there is nothing left to vary.”

15.
It is also relevant to note that a wide application to section 3C was given by the Court of Appeal in QI (Pakistan) v SSHD [2011] EWCA Civ 614, 18 April 2011. In both JH Zimbabwe and QI (Pakistan) the Court of Appeal disapproved decisions of the AIT giving a narrow meaning to the leave and the appellate jurisdiction to challenge refusals of varied applications and decisions.

The decision in AQ (Pakistan)

16.
We then reach the decision of AQ (Pakistan) v SSHD [2011] EWCA Civ 833 which features prominently in the argument in the appeals before us and that we consider is an authority of central importance to the resolution of the issues.

17.
It was an appeal against a decision of the Upper Tribunal Immigration and Asylum Chamber dismissing the appeal of the appellant against a decision of the Secretary of State to refuse to vary leave to remain in the United Kingdom pursuant to Rule 245Z (Post Study work).

18.
Lord Justice Pill stated the issues succinctly at paragraph 4 of his judgment:

“…. C an the points entitlement arising from a Masters degree count towards the minimum if the degree is awarded after the Secretary of State’s decision but before the decision of the Tribunal ?”

The appellant sought to apply the broad interpretation of Section 120 given by the Court of Appeal in AS (Afghanistan) to an application under the points based system.

19.
Lord Justice Pill noted the following:

1.
It is accepted on behalf of the appellant that the consistent practice of the Tribunal, in the absence of AS, was to require the accumulation of points to be established at the date of the application for an extension (KAN (Post-Work Study - degree award required) India [2009] UKAIT 00022, NO (Post-Study Work – award needed by date of application) Nigeria [2009] UKAIT 00054). NA and Others (Tier 1 Post-Study Work Funds) [2009] UKAIT 00025) was cited in detail by the Tribunal. It was accepted that evidence of means (not an issue in the present case) could be given on appeal but only if it related to a period of time immediately prior to the date of the application to the Secretary of State. Evidence of means for a period of time wholly or partly subsequent to the date of application was not enough.

2.
In EA (section 85(4) explained) Nigeria [2007] UKAIT 00013, the Tribunal had held that it was necessary to demonstrate compliance with the requirements of the Immigration Rules at the date of the application. In that case, the Secretary of State had not taken account of information available at the date of the hearing but bearing upon facts available at the date of decision. What an applicant may do under section 85(4), it was accepted, is to demonstrate that the application to the Secretary of State would be successful at the date of the hearing, provided the evidence related to events at that earlier time.

20.
His Lordship then summarised the decision of the majority in AS and continued as follows:-

1.
For the Secretary of State, Mr Payne accepts that, following AS , the relevant date for the assessment of evidence is the date of the Secretary of State's decision and not, as may have appeared from earlier Tribunal decisions, the date of the application to her. The application is treated as continuing until the date of decision . It is further accepted that the response to an OSW may in some circumstances include additional support for the original application as well as fresh grounds of application. Moreover, the purpose of the statutory procedure, as stated by the majority in AS , is accepted and asserted. (our emphasis)

2.
Moore-Bick LJ confirmed, at paragraph 78, that sections 85(2), 96(2) and 120 of the 2002 Act "demonstrate that they are intended to form constituent parts of a coherent procedure designed to avoid a multiplicity of applications and appeals." Sullivan LJ made a similar statement at paragraph 103. The underlying legislative policy was "to prevent successive applications."

……..

3.

For the Secretary of State, it is submitted that AS was not concerned with evidence of events subsequent to the Secretary of State's decision. I agree with that submission and with the reasoning in MS I have cited.

21.
After further references to AS the judgment of Pill LJ continues as follows:

“ . . .

1.
The Secretary of State maintains the submission that the Immigration Rules require criteria to exist at the time of her decision under appeal and compliance is to be judged as of that date. Admission before the Tribunal of further evidence of the situation at that date did not alter the principle, which was not affected by the decision in AS . The appellant did not have his degree at the date of that decision and could not rely, before the Tribunal, on its subsequent award.

……..

2.
Compliance with the requirements after the date of decision is not relevant to the "substance of the decision" as defined by section 85(4), it is submitted. By contrast, post-decision evidence may be allowed to demonstrate that the requirements were satisfied at the date of decision, subject to the change of the law by the addition of section 85A to the 2002 Act with effect from 23 May 2011. Section 85A of the 2002 Act, with effect from 23 May 2011, amended section 85(5) to provide further exceptions to the provisions of section 85(4). It has no application in the present appeal, whether or not remitted to the Upper Tribunal. I see no need to embark upon a consideration of the effect of section 85A.

3.
Mr Payne submits that to permit evidence of subsequent events to challenge the decision of the Secretary of State would be to allow successive applications which it is the object of the OSW procedure to prevent. It would convert the statutory appeal system into a statutory application system considering fresh matters raised in a section 120 Notice.

…..

Conclusions

4.
In my judgment, the decision of the Tribunal in this case was correct. A Tribunal's task is to "look back at the position as at the date of application [now decision]" as stated by the Tribunal in the present case at paragraph 14 or, as the Tribunal put it in MS , at paragraph 49, in cases where "the rule in question specifies a fixed historic time-line".

5.
Section 85(2), put by the appellant at the heart of his case, concludes by referring to the availability of grounds of appeal "against the decision appealed against." I agree with Mr Payne that the focus is on the decision of the Secretary of State. In my judgment, the "decision" is clearly the decision of the Secretary of State. In the present context, fresh matters may be raised but are relevant only in so far as they challenge that decision. As Sedley LJ recognised in Pankina , at paragraph 39, there will be cases under the Rules which depend on the situation existing at the time of the Secretary of State's

decision. In my judgment, Rule 245Z is one of those cases. The points to be accumulated must be accumulated at the time of the Secretary of State's decision. That includes, as is agreed, a requirement that the relevant degree has been awarded."

22.
Lord Justice Sullivan gave a brief concurring judgment; he said at [41]:-

"I also agree. In AS the Court was not concerned with decisions made by the Respondent under the "Points-based" system of determining applications for leave to remain. In such cases there is a "fixed historic time-line". The effective operation of a points based system requires the points to have been accumulated at the date of the Secretary of State's decision."

23.
It will thus be seen that the appellant failed in AQ (Pakistan) in his submission that section 120 and section 84(5) permitted him to introduce a points based system application after the decision of the Secretary of State.

24.
However, for present purposes two themes running through the reasoning are important. First as Lord Justice Pill put it at [22] "the application is treated as continuing until the date of the decision". Secondly the previous learning of Tribunal was revised in a points-based system case where there was a fixed historic time line to identify the final period when the material could be adduced as the date of the decision rather than the date of the application.

25.
Although the reasoning of both Lord Justice Pill and Lord Justice Sullivan appears to have been based substantially on the concession of Mr Payne in the light of AS, this is not a case where the Court are simply acknowledging the concession without more. Both judges reach their own conclusions on the issue and those conclusions are binding on us unless varied by subsequent statutory regime or overturned on further appeal.

Submissions before us

26.
In the skeleton submitted before the hearing by Mr Hayes he indicates that the relevant statutory change was precisely section 85A of the 2002 Act introduced as from the 23 May 2011 with which the Court of Appeal expressly did not engage.

27.
It is now time to turn to that section. It is in the following terms.

" Matters to be considered: new evidence: exceptions

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

(2)
Exception 1(not material)

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

a.
the appeal is against a 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: … “

28.
Mr Hayes who has prepared a thoughtful skeleton and a bundle of authorities at extremely short notice and to whom we are extremely indebted for his submissions and who also has extensive experience of the problem, submits that the conclusions in AQ now have to be read subject to section 85A which operates as a further exception to the general power in section 85 (4) for the Tribunal to receive evidence that is not before the Secretary of State because it included matters that arose after the date of the application.

29.
He submits that Exception 2 applies because this appeal is against an immigration decision specified in section 82(2)(d) NIAA, namely a decision to refuse to vary leave by way of the granting of further leave to remain, and the decision concerns an application identified in the Rules as required to be considered under a points based system.

30.
He continues that if Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it was “submitted in support of and at the time of making the application” to which the immigration decision related.

31.
He concludes that in each case the application was made before the awarding body awarded the post graduate qualification. The information that the post-graduate qualification had been awarded came after the application but before the decision of the Secretary of State. Therefore it is excluded from being considered by the Tribunal and accordingly these claimants could not succeed in their appeals. The rules required them to have supplied the information at the time of the application and the law prevented the Tribunal from receiving any further information that was not contained in the application.

32.
Mr Hayes further relies in support of his submission upon a recent decision of the Upper Tribunal in Ali (see above at [7]) where at [20] the Upper Tribunal said this:-

“…. 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** [[2012] UKUT 81 (IAC)] 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)."

33.
Before we consider Mr Malik's answers one final authority of the Court of Appeal should be taken into consideration. That is the decision in the case of Alam and others v SSHD [2012] EWCA Civ 960. In this case a claimant sought to rely on post decision evidence of her eligibility to remain at the time of application and decision that had not been supplied in the original application. Section 85A had come into force shortly before the adjourned hearing of her appeal. The Court of Appeal concluded that the claimant was precluded from relying upon such material. Lord Justice Sullivan giving the principal judgment noted that the purpose of the statutory scheme was as follows at [14] :-

"As enacted, section 85(4) was subject to the exceptions in subsection (5), but those exceptions did not apply to PBS appeals. Thus, if a PBS application had been refused by the Secretary of State because the applicant had failed to produce a specified document or documents, the applicant could remedy the omission on appeal to the Tribunal. Some 63% of successful PBS appeals were allowed because the appellant produced new evidence, which had not been submitted with the application, at the hearing of the appeal before the Tribunal: see Baroness Browning's reply to Lord Avebury's Motion to Regret the Order on 7 th July 2011. The Government believe that the ability to produce new evidence at the appeal stage threatened to undermine the operation of the PBS: ibid."

34.
Mr Malik in his skeleton argument indicated that there were two issues for us to decide:

i. Did section 85A apply to preclude reliance on material that was not submitted when the application was first made albeit that it was before the decision maker at the time of the decision, and

ii. Did the terms of the Immigration Rules and Appendix A to the points based system require the material to be submitted when the application was submitted?

35.
His first submission was that section 85A had no application at all to any of these appeals because in each case the Secretary of State had made two decisions at the same time: to refuse leave to remain and to remove the claimant from the United Kingdom. It is common ground that there were two such decisions and the appeal is a single appeal against any decision made. A separate legal point arises in respect of the second decision which will be considered after we have determined the first issue. Mr Malik submits that 85A(3)(a) only applies where the appeal is against "an immigration decision of a kind specified" and cannot apply when there are two such decisions.

36.
We have no hesitation in rejecting that submission. Just because there is a single appeal against two decisions and only one such decision is a decision to refuse leave to remain specified in section 82(2)(d) does not mean that Exception 2 does not apply to an appeal against such decisions. Further, there is the obvious point that section 6 of the Interpretation Act 1978 provides that, absent contrary intention in the statute, reference to the singular includes the plural.

37.

There is more substance in Mr Malik's second submission which is that even if section 85A (3) applies in this case, the Tribunal was not precluded from having regard to the evidence of an award being made after the application was first submitted because applications are continuing applications and that the time of making referred to in section 85A(4)(a) is not simply a start date of the application but the period of the making of the application at the start date until the end date of the application, ie the date of the decision, as the Court of Appeal has decided in AQ (Pakistan) .

38.
Before considering this submission further we will address Mr Malik's third submission. He submitted that the judges who had decided the case adverse to his client were wrong to conclude that "within twelve months" of obtaining the relevant qualification meant that the qualification had to be obtained within the period of time twelve months before the application was first made.

39.
He submitted that the meaning of "within" is "around" twelve months whether the application or the award happened first as long as the application and the award was not separated by a gap of more than twelve months. In our judgment the natural reading of Table 10 is that an applicant must show he "has been awarded" (past tense) the qualification and that the application for leave to remain is made before the expiry of twelve months from the date of the award. We accept that the language of block 4 of Table 10 does not expressly state that the award must come first, and it is possible that "within" could mean simply that the application and the award are not more than twelve months apart.

40.
We note that paragraph 70 explains that the date of the award is not the degree ceremony itself or the grant of a certificate but the date in which the applicant was notified in writing by the awarding institution that the qualification had been awarded. Although it was not central to any of the appeals before us, it is possible that the awarding institution can delegate to the educational institution communication of the fact that the qualification had been awarded even though the actual degree was not conferred until later.

41.
However, we conclude that the answer to the third submission was not decisive of this appeal. If Mr Malik made good his second submission that applications for leave to remain are continuing applications starting with the time when the application was first made and continuing until such time as the Secretary of State determined it then whatever the proper reading of block 4 of Table 10 of Appendix A each of these claimants could comply with it.

42.
Each can submit that they had obtained their qualifications when they did in the summer of 2012; they submitted the fact of such obtaining to the Secretary of State that supplemented the application which remained live and capable of being supplemented up to the dates of the adverse decisions at the various dates in the autumn 2012. The qualification had thus preceded the concluding time for making the application.

43.
So everything depends on Mr Malik's second submission. He can support that submission by seven observations:

(i)

The most important is Lord Justice Pill's decision that applications for variation including applications for variation of points based system claims for leave are continuing applications starting when the application is first lodged but remaining open until it is decided.

(ii)
Both Lord Justice Sullivan and Lord Justice Pill in AQ concluded that even when there is an historic timeline in PBS cases, that historic timeline is to be decided as at the date of decision rather than the date of application.

(iii)
Lord Justice Sullivan in Alam had identified the mischief to which section 85A was directed: reliance by the Tribunal on fresh evidence that was never placed before the decision maker; but in this case the material evidence was before the decision maker at the time of the decision.

(iv)
There is an inconsistency of approach in the decision itself; the Secretary of State did award each claimant twenty points for the post graduate degree in the first block of Table 10 but not the 15 points for the application being within twelve months of obtaining the qualification in block 4. If the Secretary of State's reliance on section 85A in its strictest sense was a good one then the qualification itself should have been excluded from the award of points since it was not a piece of information provided in the application when it was first made.

(v)
Te Secretary of State's submission involves reading into the words of section 85A the qualifying words 'application first made' rather than leaving 'application' to bear its natural meaning which as Lord Justice Pill has explained is a continuing one . There was no need to read into the section such a word to make sense of the statutory purpose, which was concerned with material that the Secretary of State has not had a chance to consider prior to making a decision.

(vi)
It would be inconsistent with principles of statutory construction to apply a permissive meaning to the strict words in the absence of an unambiguous statement of intention by the legislation.

(vii)
It was always open to the Secretary of State to make a decision on the applications shortly after the 6 April 2012 when the points based system route in question had been withdrawn. However her officials had specifically waited until the awarding bodies had made their awards and communicated with them to clarify the date of the award. There is little purpose in the Secretary of State inquiring and receiving information before the decision is made and then depriving the Tribunal from having access to that information or regard to it on the appeal.

44.
Mr Hayes had no really coherent answer to these submissions. His core submission prefigured in his skeleton argument was that the observations in AQ (Pakistan) were not at all concerned with points based system applications where there was a relevant historic timeline. In our judgment, that was clearly wrong. Both Lord Justice Pill and Lord Justice Sullivan in the paragraph cited above were at pains to distinguish the AS conclusion (where there was no PBS historic timeline point) from the applications in AQ where there were. Both indicated that the historic timeline applied at the date of the decision, not application with Lord Justice Pill explaining that was because the application continued until the decision.

45.
Second, Mr Hayes submitted that the supply of further information fell outside section 3C and therefore outside the principles of JH (Zimbabwe) . We find that wholly unconvincing; manifestly this was not a wholly fresh application for a wholly different purpose which was the striking feature of JH (Zimbabwe) but further information in the same application that was received before the decision was taken. There was no attempt to vary the application after the date of decision in the way that was deprecated both by the section and the authorities reliant upon it .

46.
Third, Mr Hayes raised paragraph 34F of the Immigration Rules that states:

“Any valid variation of a leave to remain application will be decided in accordance with the Immigration Rules at the date such variation is made”.

47.
However, we conclude that that provision does not assist him. Paragraph 34F appears to be linked to 34E dealing with the specific problem of variation of application which introduce a new purpose and paragraph 34G that decides when an application is made in such context. Here there was no such new purpose. Secondly and more significantly, the rules in force at the date when the application was supplemented by the submission of the award criteria, and indeed at the date of the decisions of each of these applications, included the introductory preamble to HC 1888 published on the 15 March 2012:

“The other changes set out in the Statement shall take effect on 6 April 2012. However, if an applicant has made an application for entry clearance or leave before 6 April 2012 and the application has not been decided before that date, it will be decided in accordance with the rules in force on 5 April 2012 ”.

Conclusions

48.
In this case there was a single application for a single purpose made before the 6 April 2012 but supplemented by data supplied before the decision was made.

49.
According to the Court of Appeal in AQ (Pakistan) the application is a continuing one and therefore each applicant provided the information required by Table 10 before the application ceased to be made.

50.
The information from the awarding body was supplied within the application broadly construed and within a period of 12 months of the award.

51.
As the evidence was supplied before the application ceased to be made and was before the decision maker at the time of the decision, it is both admissible for the purposes of section 85A(4) and satisfied the requirement of block 4 of Table 10.

52.
There is nothing in the decision of Ali that precludes our conclusion in this case. First, that case was reliant upon section 120 but that is not an issue in these cases. Second, the Tribunal in Ali appeared

to assume that section 85A operated to preclude material that had not been submitted when the application was first made without considering the concept of continuing application supported by the judgment in AQ (Pakistan) .

53.
It appears that we are the first judicial body to grapple with the true scope of section 85A. We fully recognise that this provision was intended to restrict the material that could be considered by the Tribunal, but in fact the material informing what its stated purpose is, accords with the present decision where the Tribunal has only considered material that was submitted to the Secretary of State and considered by her before she made the decision.

54.
Further, it would be wrong in principle to give the exclusionary rule a wider remit than either the purpose indicated by the promoting body was to be or the concept of continuing application as endorsed by the Court of Appeal.

55.
We recognise that a number of previous decisions of the AIT and the UT relating to the points based system have been overturned by the Court of Appeal where an over-restrictive approach has been applied. We are not endeavouring to apply an over-generous approach but simply to give effect to the meaning of the words according to normal principles of statutory construction and in the light of the conclusion that an application of this sort is a continuing application starting with the date it was first submitted and terminating with the date upon which it is decided.

56.
In our judgment, there is no public policy in favour of a more restrictive approach. After all the Secretary of State did evaluate the material subsequently provided in the application and did award points to each of these claimants on the basis that they “had been awarded” the qualification. It would be inconsistent to then dispute that the qualification that had been awarded had not been awarded within the period of 12 months of the application.

57.
Further there was the practice of the UKBA shortly before the relevant scheme was abolished to occasionally invite the applicant to supplement the application by material not originally contained in the application. There seems no point at all in the Secretary of State having the relevant information at the date of the decision and giving it effect for one purpose but not another and then seeking to prevent the Tribunal from evaluating that information in the course of an appeal which still exists against points based system decisions.

58.
Any other construction would mean that the dimensions of the last group of people to whom this aspect of the points based System was open would depend upon the comparatively arbitrary question of when their courses concluded, leave to remain ended and when the qualifications came into effect.

59.
We fully recognise that the Secretary of State fairly announced the termination of the scheme 1 year in advance and made provision for transitional cases. But for the reasons that we have endeavoured to set out we are persuaded that these were cases within the transitional scheme and for the reasons already given we conclude that Mr Malik’s submission is right.

60.
We therefore conclude that the decisions in the cases of the claimants Khatel, Adhikari and Al Islam did contain a material error of law. We remake the decisions and the consequence of our remaking them on the information that was known to the Secretary of State at the time of the decisions is that such refusal was not in accordance with the rules and the claimants' appeals are accordingly allowed.

61.
In the case of Raju the judge was correct to conclude that the case of Ali was not decisive in displacing the decision of AQ (Pakistan) and the judicial observations already recorded. There was no material error of law made by the judge and the Secretary of State's appeal against this decision is dismissed.

62.
As a subordinate footnote to this appeal, we note that in the case of Khatel the appeals were dismissed on all grounds. In the other three appeals each judge recognised that even if the decision to refuse leave to remain was a lawful one the decision to remove the claimant at the same time was not according to the jurisprudence of the Upper Tribunal on that point most recently summarised in the decision of Adamally and Jaferi (Section 47 Removal Decision: Tribunal Procedures) [2012] UKUT 414 (IAC). We appreciate the Secretary of State is seeking to appeal this decision but unless and until this is set aside it means the judges of the First-tier Tribunal should allow removal appeals where there are simultaneous decisions to refuse leave to remain and remove.

63.
We having raised the matter at the outset of these appeals, Mr Hayes quite properly had no objection to us granting a late application for permission to appeal to Mr Malik to amend his grounds of appeal in Khatel to include this submission. Having now raised the matter there was no objection by Mr Hayes to allowing the appeal against the decision to remove on this basis.

64.
In the event for the reasons we have given for our conclusion now in allowing the appeal on the refusal against the refusal of leave to remain this further decision has no real purchase. However, Mr Khatel should not be in a different position from the other appellants, whatever course these appeals may take in the future.

Disposal:

There is an error of law in the decisions to dismiss the appeals under the Immigration Rules in IA/20856/2012 (Khatel), IA/20567/2012 (Adhikari) and IA/21355/2012 (Al Islam) such that the decisions are set aside to be remade.

We re-make the decision in these appeals by allowing them.

There was no error of law in the decision to allow the appeal under the Immigration Rules in IA/21053/2012 (Raju) such that the decision be set aside. The decision of the First-tier Tribunal stands.

There is an error of law in the decision dismissing the appeal under section 47 (the decision to remove) in IA/20856/2012 (Khatel) such that the decision is set aside to be re-made.

We re-make the decision in that appeal by allowing it.

Both members of the panel have contributed to this decision

Signed

Mr Justice Blake

Chamber President

22 January 2013