Upper Tribunal
(Immigration and Asylum Chamber)

Mushtaq (s 85A(3)(a): scope; academic progress) [2013] UKUT 00061 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 January 2013	.....

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

KAMRAN MUSHTAQ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Z. Malik, Counsel, instructed by Farani Taylor Solicitors LLP

For the Respondent: Mr P. Deller, Senior Home Office Presenting Officer

(1) The effect of section 85A(3)(a) of the Nationality, Immigration and Asylum Act 2002 is such that Exception 2 can apply where an appeal is brought against an immigration decision of a kind specified in section 82(2)(a) or (d), whether or not the appeal includes, or is treated by section 85(1) as including, an appeal against another immigration decision.

(2) The requirement in former paragraph 120A of Appendix A to the Immigration Rules for the Sponsor to confirm that a proposed course of study "represents academic progress from previous study undertaken during the last period of leave as a Tier 4 (General) Student or as a Student" is not displaced where the last period of leave granted to the applicant has been for some other reason than as such a Student. The benchmark for assessing academic progress is the last course of study.

DETERMINATION AND REASONS

1. The appellant, a citizen of India born in 1985, first entered the United Kingdom on 15 January 2004, with entry clearance as a student. He was subsequently granted leave to remain in that capacity until March 2010, when he was granted leave to remain as a Tier 1 (Post-Study Work) Migrant.

2. On 1 March 2012, two days before the expiry of that last period of leave, the appellant applied for leave to remain as a Tier 4 (General) Student.

3. On 15 June 2012, the respondent refused the appellant's application. She did so by reference to paragraph 245ZX(c) of the Immigration Rules. The letter of refusal explained that, amongst other things, a Tier 4 (General) Student applicant must score 30 points under Appendix A (attributes) and score 10 points under Appendix C (maintenance (funds)). Although the appellant scored the claimed 10 points in respect of maintenance (funds), the respondent awarded him no points in respect of attributes. The reason given was this:-

" For points to be awarded for a valid CAS issued on or after 4 July 2011, the Sponsor must confirm that the course for which the CAS has been assigned represents academic progress from previous study undertaken during the last period of leave as a Tier 4 student.

The CAS that you submitted… was issued by Shepherd Business School Limited. As your CAS does not state that your course represents academic progress, you fail to meet the requirements and no points have been awarded for your CAS ."

4. With his notice of appeal to the First-tier Tribunal of 28 June 2012, the appellant enclosed a letter dated 26 June 2012 from Shepherd Business School, to the effect that that school considered the appellant's proposed graduate diploma course in Hospitality, Tourism and Management represented academic progression from his "Advance [sic] Diploma in Business Management from Union College".

5. It is clear from the determination that the First-tier Tribunal Judge considered that the Immigration Rules did indeed contain a requirement, the effect of which was that the appellant was entitled to no points in respect of attributes. At [6] of the determination, the judge set out these provisions of Appendix A to the Rules (as they stood at the relevant time):-

" 113. An applicant applying for entry clearance or leave to remain as a Tier 4 (General) Student must score 30 points for attributes.

114. Available points are shown in Table 16 below…

Table 16

Criterion Points awarded

Confirmation of Acceptance for Studies 30…

120A. Points will only be awarded for a valid Confirmation of acceptance for Studies (even if all the requirements in paragraphs 116 to 120A above are met) if the Sponsor has confirmed that the course for which the Confirmation of Acceptance for Studies has been assigned represents academic progress from previous study undertaken during the last period of leave as a Tier 4 (General) Student or as a Student …".

6. Section 85A of the Nationality, Immigration and Asylum Act 2002 provides as follows:-

" 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.

(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."

7. The First-tier Tribunal Judge held that section 85A operated so as to prevent him from taking account of the letter of 26 June 2012 from Shepherd Business School:-

" 15. The problem for the Appellant is that I am unable to take the letter from Shepherd Business School into account. This is because I am not entitled to because of the statutory restriction in so doing in s.85A of the Nationality, Immigration and Asylum Act 2002 which, in the case of points-based system appeals, provides that I can only consider evidence from the Appellant where it had been submitted in support of and at the time of the making of the application.

16. Self-evidently because of its date, the letter from Shepherd Business School was not and could not have been provided by the Appellant with his application which had been made on 1 st March 2012 ."

8. The judge accordingly found that the appellant could not satisfy the relevant requirements of the Immigration Rules. He therefore concluded that the appeal against the decision to refuse to vary the appellant's leave to remain fell to be dismissed. It is relevant to observe that, although the judge focussed on the date of 1 March, the letter in question post-dated the respondent's decision and so could not in any sense be regarded as having been made at the time of making the application.

9. At [20] the judge correctly identified that two immigration decisions had been made in respect of the appellant. As well as the decision to refuse to vary leave, the respondent had purported to make, at the same time, a removal decision under section 47 of the Immigration, Asylum and Nationality Act 2006. Following the decision of the Upper Tribunal in Ahmadi (s.47 decision: validity: Sapkota) [2012]

UKUT 00147 (IAC), the First-tier Tribunal Judge held that the contemporaneously made section 47 decision could not, in fact, lawfully be made; but that, as was made clear from “paragraph 24 in Ahmadi, this does not mean that the substantive decision to refuse leave to remain” was itself unlawful [24]. The judge accordingly dismissed the appellant’s appeal against what he regarded as “the substantive decision of the respondent to refuse further leave to remain” [25].

10. Permission to appeal to the Upper Tribunal was sought on three grounds. The second of these was that the requirement to show academic progression was effectively invalid, since that requirement was not contained in Immigration Rules but, rather, “incorporated by way of reference from the guidance”. The judgments of the Supreme Court in Alvi v SSHD [2012] UKSC 33 were relied upon.

11. Although the First-tier Tribunal granted permission in general terms, its decision of 4 October 2012 shows that it was particularly attracted by this second ground. At the hearing on 3 January 2013, however, Mr Malik (who did not draft the grounds) conceded that the second ground was hopeless. Paragraph 120A does not exist in guidance but in an Appendix, which is part of the Immigration Rules themselves.

12. Mr Malik also did not seek to rely upon the third ground. This contended that section 85A(4) did not have the effect of precluding the First-tier Tribunal from considering the letter from Shepherd Business School, on the basis that that letter was “not related directly to the acquisition of points under the points-based system” and was therefore covered by section 85A(4)(d). That ground is manifestly misconceived.

13. Instead, Mr Malik submitted that section 85A did not apply for a quite different reason. His submission (which I permitted him to advance insofar as it amounted to an addition to the grounds) was that the effect of section 85A(3)(a) was such that Exception 2 applied only if the appeal was against “an immigration decision of a kind specified in section 82(2)(a) or (d)” and that the present appeal was against two immigration decisions: namely, the refusal to vary the appellant’s leave to remain in the United Kingdom (section 82(2)(d)) and the decision under section 47 of the 2006 Act that the appellant should be removed from this country (section 82(2)(ha)).

14. In support of his submission, Mr Malik relied upon section 85(1) of the 2002 Act:-

“(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)”.

15. Mr Malik also sought to rely on the determination of the Upper Tribunal in Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC), which held that the structure of the 2002 Act is such that there is only “one appeal before the Tribunal” [23] but that such an appeal can be brought against more than one immigration decision, with the result that an appeal can be allowed in part, either in respect of a particular ground of appeal brought against a single immigration decision, or in respect of one of two such decisions appealed.

16. I do not accept Mr Malik’s submission on this issue. I do not consider that it finds any support in Adamally . As Mr Deller pointed out, section 85(1) far from supporting Mr Malik, has the opposite effect. If a person appeals against, say, a refusal of leave to enter (section 82(2)(a)), where a decision has also been made to remove that person from the United Kingdom by way of directions (section 82(2)(g) or (h)), the effect of section 85(1) is automatically to treat the appeal against the refusal of leave to enter as including an appeal against the decision to remove. That this is so does not mean

that the appeal is not, or is no longer, an appeal “against an immigration decision of a kind specified in section 82(2)(a)”. The appeal remains an appeal against such a decision. The fact that the appeal is treated as including some other challenge is, for these purposes, immaterial.

17. There is no reason why, as a matter of logic or policy, the position should be different, where a person expressly appeals against a section 82(2)(a) decision and a section 82(2)(g) or (h) decision. On the contrary, to draw such a distinction would be perverse.

18. Taken on its own terms, Mr Malik’s submission does not serve any discernible purpose. It is difficult to see why person A, in respect of whom both a variation decision and a removal decision have been made, should be in a better position, as regards proving on appeal that he or she meets the “points-based” Immigration Rules, than person B, in respect of whom no such removal decision has been taken, merely as a result of person A appealing against both of the immigration decisions in question.

19. For these reasons, I reject the proposition that one has, in effect, to read section 85A(3)(a) as if the word “only” appeared immediately before the words “against an immigration decision…”.

20. I therefore turn to Mr Malik’s second submission. This also concerns an issue of legislative interpretation and is the first of the grounds of appeal.

21. As I have already indicated, the appellant’s last period of leave was as a Tier 1 (Post-Study Work) Migrant. Mr Malik submitted that, as a result, paragraph 120A of Appendix A did not apply to the appellant. This was because the words “during the last period of leave as a Tier 4 (General) Student or as a student” in that paragraph meant that the last actual period of leave granted to the person concerned had to be as such a student. Since this was not the case with the appellant, there had been no need for him to show academic progress in the form of a confirmation from his sponsor institution.

22. I also reject this submission. To do otherwise would be to ignore the plain meaning of the phrase in question and to impose upon it a strained construction, for which there is no justification. It is, I consider, manifest that paragraph 120A requires academic progress to be shown, as between the proposed new course and the study undertaken during the person’s last period of leave as a Tier 4 (General) Student or as a student. That last period of leave may or may not be the last period of leave actually granted to that person; but it matters not. The benchmark for assessing progress is the last course of study.

23. Mr Malik submitted that the fact that a person may have enjoyed a period of leave in the United Kingdom as (as here) a worker meant that it was illogical to look back before that period, in order to see whether a new proposed course represented academic progress, compared with a course that the person had undertaken in the past. Mr Malik said that, having worked here, the appellant should be able to choose to do a postgraduate diploma in a different subject from that previously undertaken, in the light of the appellant’s experiences or new interests gained during his period of leave as a worker. It seems to me, however, that essentially the same could be said of a person seeking to undertake a new course of study, who has not had any intervening period of leave as a worker, but whose interests may have changed during his or her time as a student.

24. Other things being equal, a person who is not subject to United Kingdom immigration controls is free to study what he or she wishes, whether or not the proposed course represents academic progress from previous study. But that does not mean the respondent cannot legitimately impose a requirement of academic progression upon persons who are subject to immigration control.

25. I find that none of the attacks mounted upon the decision of the First-tier Tribunal Judge disclose any legal error on his part. So far as the appeal against the refusal to vary leave to remain is concerned, the judge's decision to dismiss was entirely open to him. No Article 8 grounds were raised.

26. Although Mr Malik did not seek to make anything of it, the judge ought to have allowed the appeal in respect of the section 47 removal decision. That was an error of law. I re-make that part of the judge's decision by allowing the appellant's appeal against the section 47 decision. The rest of the judge's decision shall, however, stand.

Signed Date

Upper Tribunal Judge Peter Lane