



Upper Tribunal  
(Immigration and Asylum Chamber)

Naved (Student – fairness – notice of points) [2012] UKUT 14(IAC)

THE IMMIGRATION ACTS

At Field House  
on 09.12.2011

Decision signed: 20.12.2011  
sent out: 06.01.2012

Before:

The Hon Mr Justice BLAKE, President  
Upper Tribunal Judge FREEMAN

Between:

Mohd. NAVED

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Osaro Richards, 'Law Clinic', Corby NN17 1BF

For the Respondent: Mr Richard Hopkin, Home Office Presenting Officer

*Fairness requires the Secretary of State to give an applicant an opportunity to address grounds for refusal, of which he did not know and could not have known, failing which the resulting decision may be set aside on appeal as contrary to law (without contravening the provisions of s. 85A of the Nationality, Asylum and Immigration Act 2002).*

DETERMINATION AND REASONS

1. This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge BH Forster OBE), sitting at Newport on 18 July, to dismiss a Tier 4 (general) student migrant appeal by a citizen of Pakistan, against refusal of leave to remain on 31 May. There is only one issue before us, which is whether the appellant was entitled to be treated as having an 'established presence' as a student in this country, on the basis of the

course he had already taken. It is common ground that, if he was entitled to that treatment, then he could show the necessary funding under the points-based system; but if not, then not: there is no issue on the other requirements.

2. The appellant arrived in this country on a student visa on 31 January 2010 (the '2011' in the PF1 seems to be the result of the writer misreading the date obscured by the ornamental border of the passport page attached at (2)). His visa had been issued on 18 December 2009, and was valid till 31 May 2011. The appellant then enrolled on an Association of Computer Professionals [ACP] course at the London College of Research (LCR, based in Reading, despite its name), and duly completed it in March 2011, getting his ACP certificate on the 29<sup>th</sup>. Again it is common ground that, if he had produced evidence of this with his application for further leave to remain, then he would have been entitled to be treated as having an 'established presence' here.
3. The application form runs to 39 pages, and a great many questions that he answered accurately. The appellant was now applying for leave to remain on another course, at a college called 'Eurospeak', and at section K ('Attributes') of the form he gave the Confirmation of Acceptance for Studies [CAS] number and other details for that. Next he completed section L ('Maintenance (funds)'). Again the questions in that referred to his funding for the new course: the only question which referred to his previous one was L4.
4. At L4 the appellant ticked the box entitled 'Application for a further period of study and qualifies for the reduced maintenance level'. This led to question L10: "The student must have £600 for each calendar month of their course up to a maximum of 2 months. Please state what this amount is". He duly did so - £1,200 - and produced the bank or building society statements required at question L24 to vouch for his having that money. What nothing anywhere in the form required him to do was to produce documentary evidence that he had completed his previous course.
5. The appellant made his application on 18 April, and on 19 May the Home Office caseworker, without further reference to him, set about verifying his claim to an 'established presence'. This was done by sending an e-mail to LCR, answered the same day by Zahid Raza, who did not give his position with the college, but said:

"In response to your e-mail I can confirm that Mr Naveed Ahmed was enrolled on ACP computing course with us but he did not complete his course and moved to another college."

The subject line referred, following the Home Office query, to "Muhammad Naveed". There is no issue but that the inquiry was taken to relate to this appellant; or that the answer was in fact incorrect, because the appellant had finished his course and got his certificate.

6. The next thing that happened, again without further reference to the appellant, was that the Home Office refused his application on 31 May, in a standard form which dealt with the result of their inquiries as follows:

"As ... your previous college have stated that you have not completed your course of study you are not eligible for claiming the reduced maintenance rate ..."

7. On 13 June the appellant appealed, completing the form himself, and fully setting out his case at section 8. He also enclosed three documents, entitled
- (a) 'Certificate in Information Technology & Programming' from the ACP, dated 29 March, showing he had passed four subjects in that course, one with a credit, and was entitled to the award of the Certificate, which was to follow;
  - (b) 'Certification of Student Status' from the LCR, dated 14 April, showing his course as starting on 8 February 2010, and finishing in March 2011, with an 88% attendance rate by the appellant: it is signed "K. Shehzad, Principal";
  - (c) 'Confirmation of Student Progress', from the LCR, dated 9 June, showing that he was (clearly meaning had been in the past) enrolled on a full-time ACP course with them, on which he had successfully completed the first of three year-long stages, for the Certificate.
8. It is common ground that, if the appellant had sent in these documents, or the two which were available, with his application on 18 April, then he would have been entitled to be treated as having an 'established presence' in this country, and so to succeed on his appeal. It is also clear that, had the law remained what it was when the appellant applied for his extension of stay, then he could have produced the certificate to the First-tier judge without difficulty and succeeded in his appeal..
9. The general rule for an in-country appeal is at s. 85 (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."
10. However, Mr Hopkin argued that the effect of s. 85A of the 2002 Act, which came into force on 23 May 2011, was to prevent either the judge or us from taking any of those documents into account. We are not concerned with exception 1, introduced by s. 85A (3); but with exception 2, dealt with in s. 85 (A) (3) and (4). Under (3), exception 2 applies in this case, because the application was made under the points-based system. Under (4), the effect of that exception, so far as relevant to the present case, is that the Tribunal may only consider evidence which
- "(a) was submitted in support of and at the time of making the application to which the immigration decision relates;"
- unless it
- "(c) is adduced to prove that a document is genuine or valid."
11. It is common ground that the evidence with which we are concerned was not sent in with the application; so we cannot consider it under s. 85A (4) (a). So far as (4) (c) is concerned, Mr Hopkin argues that it does not apply either here, since no previous document had been produced by the appellant to show that he was entitled to be treated as having an 'established presence'. Technically that is right, since what he said in his application form amounted to an assertion, rather than documentary evidence: it might be true or untrue (though of course we know it was true); but there was no question of its being "genuine or

valid”; or indeed the reverse. More generally it might be said that Parliament intended an appellant to be able to respond in an appeal to an allegation of invalidity made for the first time in determining the application.

### Discussion

12. We are well aware of the mischief s. 85A was passed to put right: appellants would often turn up at the hearing of their appeals, and produce documents which the Home Office had never had a chance to review or investigate, in which case either the appeal had to be adjourned, never encouraged in this field, or allowed. That particular mischief did not apply here, since the appellant’s grounds of appeal and supporting documents would have been sent to the Home Office well in advance of the hearing. However, Parliament did not legislate, as it might have done, to exempt evidence sent in with the grounds of appeal, but only what came with the application for leave itself.
13. The result is that, on a strict reading of s. 85A, the appellant is not entitled to rely on the evidence which would have established his case on a point of which he was neither warned nor informed, until he received the decision deciding it against him, because he had not submitted it with his own application.
14. Nevertheless the appellant’s treatment has been conspicuously unfair. His application for leave to remain is being refused because of his failure to produce a document that he was never asked to produce; that document only became relevant because of inquiries the respondent made on the application, but did not communicate the results to the appellant before the decision was made, or else she would have been made aware that the response from the appellant’s previous college was inaccurate. None of this would have mattered if s.85(4) had remained in force unaltered. We cannot imagine that Parliament intended to produce so clearly unfair a result.
15. In our judgment the problem arises not with the terms of the section, which is in any event binding on us as primary legislation, but with the conduct of the respondent in examining the application and refusing it in the way she did. Given that the respondent was (or should have been) aware of the consequences of s. 85A when she made the decision in this case, the respondent is under a common law duty to act fairly in deciding immigration claims properly made to her. A failure to act fairly is a failure to act in accordance with the law and a failure to make a decision in accordance with the law is a ground of appeal to the tribunal under s.84(1)(e) of the Nationality Immigration and Asylum Act 2002.
16. Two recent decisions of the Upper Tribunal are relevant: Patel (revocation of sponsor licence - fairness) India [2011] UKUT 211 (IAC) and Thakur (PBS decision – ‘common law fairness’) Bangladesh [2011] UKUT 151 (IAC). Both dealt with the problem referred to in the long title of Patel, where a student’s sponsoring college has its licence revoked between the student’s application, and an adverse decision on it, based on the revocation which the student could have known nothing about.

17. The solution found in Thakur was to declare that a decision taken in those circumstances was 'contrary to the law': the result was that the appellant's application remained undecided, and he was to have a period of grace to put in a fresh one, naming a new college with a valid licence. The Tribunal in Patel went into the question further, making it clear at paragraph 28 that the general principle was this:

"Where a judge finds that there was a duty to act fairly that has not been complied with in the particular circumstances of the case, he or she can allow the appeal on the basis that the decision is not in accordance with the law."

18. Both of these decisions were noted by Aikens LJ, writing for the Court of Appeal in Sapkota [2011] EWCA Civ 1320, in the following paragraphs:

"103. I would therefore hold that an argument that an "immigration decision" not to extend leave to remain is flawed because the SSHD failed at the same time or promptly thereafter to consider the question of whether or not to make a removal direction (either under section 10 of the 1999 Act, or more appropriately in these cases, under section 47 of the 2006 Act) does fall within the ambit of section 84(1)(e) of the 2002 Act. In short, an unjustified deferral of the removal decision would mean that the "immigration decision" actually taken is not "in accordance with the law".

104. At the hearing we were not shown any other authority on the construction of section 84(1)(e) or its statutory predecessors which would preclude this conclusion apart from Laws LJ's statement in *SA (Pakistan)*. In her further written submissions, Ms Rhee accepted the general proposition that an "immigration decision" can be impugned as not being "in accordance with the law" within section 84(1)(e) if the decision was taken in breach of public law principles, e.g. by failing to take into account a relevant consideration when making the decision. She submitted however that the ground of appeal in section 84(1)(e) could not be used so as to widen the scope of an "immigration decisions" against which the right of appeal lies – so as to encompass a complaint that the Secretary of State had failed to issue a further consequential decision at the same time as the decision under appeal. Mr Malik, in his written submissions, referred us to decisions of the AIT and the UT which all state that an immigration decision can be challenged on the section 84(1)(e) ground where it is alleged that the decision was made in breach of public law principles.

105. In my view, the construction of section 84(1)(e) I propose is preferable for four reasons. First, it would be consistent with one of the statutory policies and objects of the immigration legislation which was reconfirmed by Sedley LJ in *Mirza*, viz. to enable the courts within the framework of the immigration legislation to deal compendiously with all issues concerning the lawfulness of a person's continued residence in the UK. It is logical that all issues should be dealt with in the legislative context, rather than outside it."

19. The Court of Appeal has accordingly confirmed our appellate jurisdiction to conclude that a particular decision is unfair, and so not in accordance with the law. Applying that to the circumstances of the present case, the decision is not in accordance with the law, and accordingly a lawful decision has yet to be made, because the Home Office never put the appellant on notice that such evidence would be required, or gave him any opportunity to answer the result of their inquiries with his college. There was nothing at all in the application form to show that the appellant needed to include documentary evidence of


his right to 'established presence'; and no chance of his producing any evidence to contradict the result of the inquiries, only revealed in the decision itself.

20. In these circumstances we do not need to explore a more complex argument made in Sapkota itself, to the effect that fairness required the Secretary of State to make a removal decision at the same time as the extension decision with the consequences that the rule 395C discretion would come into play. We would note that in such a case the ACP certificate would be admissible under s.85A(4)(d), as the discretion under rule 395C would not be a points-based system discretion.

#### Conclusions

21. We emphasise that the scheme of s.85A remains undisturbed by this determination. Applicants for extension of leave in a points-based system will need to read carefully the application form, and any lawful guidance associated with it, to ensure that they supply all relevant information in the application they are making. Omissions will no longer be able to be corrected on appeal. An application is outstanding (and therefore information can be supplied to support it) until it is lawfully determined. Parliament enacted the exclusionary rule in s.85A against the background of the Secretary of State's duty to act fairly, and in the expectation that the duty would be complied with.
22. Where that duty has not been complied with, the Tribunal judge can so decide and allow the appeal on that ground. In such cases it remains for the respondent to make a lawful decision in the light of the Tribunal's determination and the information then available to her. The ACP certificate is admissible in further consideration of this application as the application remains outstanding and has yet to be determined.
23. Since it is now accepted that the appellant was entitled, subject to the admissibility of evidence to show it, to be treated as having an 'established presence'; and since there is no other reason for refusal relied on, we should expect him now to be given the leave to remain for which he had applied. However, our legal function is limited to deciding that the decision under appeal was contrary to law, and the appellant's application remains for decision by the Secretary of State.

**Appeal allowed**

A handwritten signature in black ink, consisting of stylized, overlapping letters that appear to be 'JLR' followed by a horizontal line.

(Judge of the Upper Tribunal)