Michaelmas Term
[2013] UKSC 72
On appeal from: [2012] EWCA Civ 741; [2012] EWCA Civ 960

JUDGMENT

Patel and others (Appellants) *v* Secretary of State for the Home Department (Respondent)

Anwar (Appellant) *v* Secretary of State for the Home Department (Respondent)

Alam (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Mance
Lord Kerr
Lord Reed
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

20 November 2013

Heard on 3 and 4 July 2013

Appellants (Patel and others)
Zane Malik

(Instructed by Malik Law Chambers Solicitors)

Appellant (Anwar)
Zane Malik
Shahadoth Karim
(Instructed by Malik Law Chambers Solicitors)

Appellant (Alam)
Zane Malik
Shahadoth Karim
(Instructed by Kalam Solicitors)

Respondent

Jonathan Swift QC
David Blundell
(Instructed by Treasury Solicitors)

LORD CARNWATH (with whom Lord Kerr, Lord Reed and Lord Hughes agree)

1. These appeals raise issues as to the respective duties of the Secretary of State and the First-tier Tribunal, on an appeal against refusal of an application to vary leave to enter or remain under the Immigration Act 1971, more particularly as to the operation of the so-called "one-stop" procedures. The Master of the Rolls (para 40), echoing words of Jackson LJ, described the law in this field as "an impenetrable jungle of intertwined statutory provisions and judicial decisions". It is difficult to disagree, although on this occasion the judiciary must share some of the blame.

Facts

The Patels

2. Mr Patel and his wife arrived from India in the United Kingdom on 24 March 2009. He had been granted leave to enter as a working holiday-maker until 6 March 2011, and she as his dependent wife. Their only child was born here in 2010. On 26 February 2011, they applied for further leave to remain in the UK, relying on article 8 of the European Convention on Human Rights, and rule 395C of the Immigration Rules. Their application was refused by the Secretary of State on 30 March 2011. That refusal was neither combined with, nor followed by, a decision to remove the family from the United Kingdom. They had a right of appeal to the First-tier Tribunal, but that was dismissed on 14 July 2011. The merits of the refusal on the issues there raised are no longer in dispute.

3. On further appeal to the Upper Tribunal they took a new point. This was that, in the light of the decision of the Court of Appeal in *R (Mirza) v Secretary of State for the Home Department* [2011] EWCA Civ 159, [2011] Imm AR 484, followed in *Sapkota v Secretary of State for the Home Department* [2011] EWCA Civ 1320, [2012] Imm AR 254, the Secretary of State's failure to make a removal decision at the same time as, or shortly after, the decision to refuse leave to remain was unlawful. This argument, which failed before the Upper Tribunal and the Court of Appeal, is the principal issue in this court.

Mr Alam

4. Mr Alam, a citizen of Bangladesh, entered the country on 26 August 2007, as a Tier 4 student with leave to remain until 12 April 2011. On 1 April 2011 he applied for leave to remain to continue his studies. On 20 April 2011 the Secretary of State refused his application on the basis that he had not produced the required documentation. The bank statements submitted with his application were more than a month old, and therefore did not, as required by the guidance under the "Points-Based System", show that he had held the necessary level of funds for "a consecutive period ending no more than one month before the application".

5. By the time of the hearing before the tribunal, on 10 June 2011, he had produced the appropriate bank statements. The tribunal held that, for the purposes of his appeal under the rules, this new material was excluded from consideration by section 85A of the Nationality, Immigration and Asylum Act 2002 (which had come into effect between the date of his appeal and the date of the hearing). However, the immigration judge held that this did not prevent him taking it into account in the appeal under article 8 of the Convention, on the basis that, since "he clearly meets the requirements of the rules", it was not proportionate to the aims of immigration control to refuse his application.

6. The Upper Tribunal reversed that decision, holding that the judge had erred in treating the new evidence as showing effective compliance with the rules for the purpose of article 8. The tribunal accepted that the appellant having been in the country undertaking studies for some four years had thereby formed "some sort of protected private life" for the purposes of article 8. But no other aspect of his life in this country was relied on. His family ties were all with his native Bangladesh, to which he wished to return after his studies. Although the new evidence was not directly relevant under article 8, it took account of the unusual circumstances in which the right to prove compliance with the rules had been lost:

> "… I have… considered the circumstances in which the claimant has failed to meet the Rules: viz. that he is one of a necessarily fixed class whose ability to prove compliance with the Rules has changed by operation of law since he began his appeal proceedings. Those circumstances do, to some extent, diminish the State's interest in removing the claimant, merely in order to maintain the integrity of the Rules. If the claimant's article 8 rights had been any stronger, I might well have concluded in the circumstances that his removal in consequence of the immigration decision would be disproportionate. As it is, however, I consider that the balance falls to be struck in favour of the Secretary of State." (para 22)

Mr Anwar

7. Mr. Anwar, a citizen of Pakistan, entered on 26 February 2010 with leave to remain as a student until 1 April 2011. On 31 March 2011 he applied to extend his leave as a Tier 4 student to enable him to complete his course. The application was supported by a Confirmation of Acceptance for Studies ("CAS"), which recorded that he had been assessed by reference to a document entitled "ACCA examination Financial Accounting (F3)". The F3 document itself was not included with the application.

8. On 10 May 2011 the Secretary of State refused the application because, contrary to the relevant guidance, it had not included a document referred to in the CAS, and accordingly no points had been awarded for the CAS. On his appeal to the First-tier Tribunal the appellant produced the relevant document, claiming that it had in fact been sent with his application form. The tribunal allowed his appeal, but their decision was set aside by the Upper Tribunal, which held that on the balance of probabilities he had not sent the relevant document with his application. That factual finding is not now in dispute. Although there was a reference to the European Convention in the grounds of appeal to the First-tier tribunal, no separate appeal on human rights grounds was pursued at the hearing before either tribunal.

9. The Court of Appeal heard the appeals of Mr Alam and Mr Anwar together, and dismissed them both on 13 July 2012. The arguments were wide-ranging, summarised by Sullivan LJ under eight grounds. Most are no longer in issue.

The issues

10. According to the agreed statement, the following issues are said to arise in the appeals to this court:

Patel

i) Whether there is an obligation on the Secretary of State to issue a decision to remove at the same time as or immediately after refusing an individual's application for variation of leave to remain in the United Kingdom.

ii) Whether there is an obligation on the Secretary of State to issue a one-stop notice under section 120 of the 2002 Act when refusing an individual's application for variation of leave to remain in the United Kingdom.

iii) Whether the Secretary of State's refusal to vary an individual's leave to remain in the United Kingdom is unlawful if it is issued in isolation from a one-stop notice or a decision to remove.

Alam/Anwar

iv) Whether the conclusion of the majority in *AS (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1076, [2011] 1 WLR 385, that an appeal to the FTT covers not only any ground before the Secretary of State when she made the decision under appeal but also any grounds raised in response to a one-stop notice issued under section 120 of the 2002 Act, even if they had not been the subject of any decision by the Secretary of State and did not relate to the decision under appeal, is correct.

v) Whether the statements and evidence filed by Mr Alam and Mr Anwar to the FTT amounted to "additional grounds" under section 120 of the 2002 Act which the FTT was obliged to consider and determine, notwithstanding the bar in section 85A of that Act.

vi) In an article 8 case, when balancing the demands of fair and firm immigration control against the disruption to the family or private life of a person if removed for non-compliance with the Immigration Rules, whether the nature and degree of the non-compliance is significant or, as the Court of Appeal has held (in *Miah v Secretary of State for the Home Department* [2012] EWCA Civ 261; [2013] QB 35), irrelevant.

11. While these issues were agreed between the parties, and they conveniently identify the main matters on which we heard submissions, it will be necessary to consider in due course the extent to which they do properly arise for decision on these appeals. For example, the question of an obligation to serve notices under section 120 (issue (ii)) does not arise in any of the three cases, since such notices were in fact served in all of them.

The statutory provisions

12. The Immigration Act 1971, and the rules made under it, constitute the principal statutory framework for the control of immigration, and the Secretary of State's functions in that respect. Both the statute and the rules have been subject to frequent amendment and addition. The issues in the present appeals turn principally on the provisions of the Nationality, Immigration and Asylum Act 2002

which established a new statutory code relating to appeals against immigration decisions, including the so-called "one-stop notices" under section 120. In relation to the Secretary of State's powers of removal, it will be necessary also to consider the Immigration and Asylum Act 1999 section 10, and the Immigration, Asylum and Nationality Act 2006 section 47.

13. The starting-point is section 3 of the 1971 Act. It provides that a person who is not a British citizen may not enter the United Kingdom except with leave under the Act. Where leave is given for a limited period, it may be varied by "restricting, enlarging or removing the limit on its duration" (section 3(3)).

14. Section 3C (added by the 2002 Act) is entitled "Continuation of leave pending variation decision". It applies where a person with limited leave applies, before the leave expires, for a variation of the leave. Subsection (2) has the effect that the leave is extended during any period when (a) the application for variation is neither decided nor withdrawn, (b) an appeal under section 82(1) of the 2002 Act could be brought while the appellant is in the United Kingdom, or an appeal brought while the appellant is within the United Kingdom is pending. By section 3C(4), a person may not make a further application for variation of his leave while it is extended under this section, but that does not prevent a variation of the application already made. It is common ground that such a variation may include grounds unrelated to those in the initial application.

15. This provision needs to be understood also in the context of section 92 of the 2002 Act. That makes clear that for most categories of immigration decision, other than asylum or human rights claims made from within the United Kingdom and those decisions listed in subsection (2), an appeal must be brought from outside the country. Section 3C provides a limited exception for applications to extend existing leave made before its expiry.

16. Section 82(1) of the 2002 Act confers a right of appeal to the tribunal in respect of "an immigration decision". By section 82(2) "immigration decision" is defined as including (inter alia) a refusal to vary leave to enter or remain "if the result of the refusal is that the person has no leave to remain" (para (d)); and a decision that a person is to be removed by way of directions under either section 10 of the 1999 Immigration and Asylum Act or section 47 of the Immigration, Asylum and Nationality Act 2006 (paras (g), (ha)). Section 84 enumerates the possible grounds of appeal which include:

> "(a) that the decision is not in accordance with immigration rules;

…

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 … as being incompatible with the appellant's Convention rights;

…

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

17. Section 85 is headed "Matters to be considered". Its present form, along with section 85A, is derived from amendments made by the UK Borders Act 2007, which were brought into effect, subject to transitional provisions, on 23 May 2011. It provides:

"(1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under section 82(1), 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

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

18. The exceptions in section 85A include the following:

"(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. This provision, which is relevant to the Alam and Anwar appeals, needs a little unravelling. It is not in dispute that exception 2 applied to both appeals, because the applications had fallen to be considered under the Points Based System. Accordingly, (under subsection (4)(a)) the tribunal was unable to consider the new evidence in support of the case under the rules. It could only consider it (under subsection (4)(b)) in so far as it related to grounds other than those specified in (3)(c), that is grounds other under section 84(1)(a), (e) or (f). Such other grounds include the human rights grounds under section 84(1)(c) and (g). Accordingly, consideration of the new evidence so far as relevant to such grounds, in particular article 8 of the Convention, was not excluded.

20. Section 86 deals with the determination of the appeal. The tribunal is required to determine any matter raised as a ground of appeal and any matter which section 85 requires it to consider. It must allow the appeal in so far as it thinks that "a decision against which the appeal is brought or is treated as being brought was not in accordance with the law". It may also allow the appeal on the grounds that a discretion exercised in making such a decision "should have been exercised differently" (section 86(3)(b)), but refusal to depart from the immigration rules is not treated as the exercise of a discretion for these purposes (section 86(6)).

One-stop notice

21. Section 120 of the 2002 Act applies to a person (a) who has made an application to enter or remain in the UK, or (b) in respect of whom an immigration decision "has been taken or may be taken". By subsection (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 to 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."

22. There is no express provision dealing with the form of the response, nor imposing on the Secretary of State any express duty to consider it or determine the issues raised by it. Under section 85(2) as already noted, the tribunal, hearing an existing appeal under section 82(1), is required to consider any matter raised in the section 120 statement if it "constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against". Furthermore, by section 96, the section 120 notice opens the way for the Secretary of State to issue a certificate limiting the scope for subsequent appeal. Thus section 96(2) precludes an appeal against an immigration decision ("the new decision") in respect of a person where -

> "… the Secretary of State or an immigration officer certifies:
>
> (a) that the person received notice under section 120… by virtue of a decision other than the new decision,
>
> (b) that the new decision relates to an application … which relies on a matter that should have been, but has not been raised in a statement made in response to that notice, and
>
> (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in a statement in response to that notice."

Removal decisions

23. The Secretary of State's powers of removal are defined by section 10 of the 1999 Act and section 47 of the 2006 Act. The former provides that a person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if –

> "(a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;"

By subsection (9) the reasonable costs of complying with the direction must be met by the Secretary of State.

24. Section 47 of the 2006 Act, as originally enacted, provided:

> "(1) Where a person's leave to enter or remain in the United Kingdom is extended by section 3C(2)(b)…, the Secretary of State may decide that the person is to be removed from the United Kingdom, in accordance with directions to be given by an immigration officer if and when the leave ends."

Again the costs of compliance must be met by the Secretary of State (section 47(4)). For completeness, I note that on 8 May 2013 (after the time relevant for the present appeals) a new form of the section was inserted, providing for notice of a "pre-removal decision" (which includes the decision on an application to vary leave to remain) to be given at the same time as the removal direction under section 47. This change was designed to deal with a practical problem arising from *Sapkota* which had been highlighted by a subsequent decision of the Upper Tribunal (upheld by the Court of Appeal). It is not directly material to the present appeals.

The Patel appeals

25. There is no dispute now as to the merits of the refusal of leave to remain in the Patel cases, under either the rules or the Convention. The sole issue is one of law relating to the form in which the decision was made, more particularly its "segregation" (the word used in some of the cases) from the decision to direct removal. The failure to issue such a direction, it is said, was not only unlawful in itself, but also undermined the validity of the previous decision to refuse leave to remain. A similar issue in relation to service of a section 120 notice, although identified in the agreed statement, does not arise on the facts of the case, since such a notice was in fact served.

26. In support of this argument, Mr Malik relies principally on the decisions of the Court of Appeal in the cases of *Mirza* [2011] Imm AR 484 and *Sapkota* [2012] Imm AR 254 to which I have already referred. It was held, in summary, (in *Mirza*) that a policy of separating the refusal of leave to remain from the decision to remove was contrary to the policy and objectives of the 2002 Act "to deal compendiously with all issues on the lawfulness of a person's residence in the United Kingdom"; and consequently (in *Sapkota*) that an unjustified deferral of the removal decision would mean that the actual immigration decision was not in accordance with the law. Those judgments, and the subsequent Court of Appeal authorities, are discussed in detail in the judgment of the Master of the Rolls in the present case.

27. Without disrespect to the judges involved in those decisions, or to Mr Malik's determined arguments in support of them, I do not propose to add

materially to the voluminous discussion which this issue has already generated. It is sufficient to say that I am in entire agreement with the reasons of the Court of Appeal for not following them. The powers to issue removal directions under section 10 of the 1999 Act and section 47 of the 2006 Act (like the power to issue notices under section 120 of the 2002 Act) are just that – powers. Their statutory purpose is as part of the armoury available to the Secretary of State for the enforcement of immigration control. Any extra protection provided to an appellant is incidental. Neither section can be read as imposing an obligation to make a direction in any particular case, still less as providing any link between failure to do so and the validity of a previous immigration decision. As Burnton LJ said in the Court of Appeal [2013] 1 WLR 63, para 73:

> "This language is clearly and unequivocally the language of discretion, not duty, and it is simply not open to the court to interpret it as imposing a duty. For the court to do so is to amend the legislation, not to interpret it."

28. The contrary argument depends to my mind on a misapplication of the so-called *Padfield* principle (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). Under that principle, it is clear that discretionary powers conferred by statute must not be used in such a way as "to thwart or run counter to the policy or objects of the Act" (per Lord Reid, at p 1030C-D)). It can no doubt be said that one of the purposes of the 2002 Act was to reduce the scope for repeat appeals, and that, as Laws LJ observed, the legislation "leans in favour of what are called one-stop appeals…" (*JM (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1402; [2007] Imm AR 293, para 23). It may be also, as Mr Malik submits, that the exercise of the Secretary of State's powers has the incidental effect in some cases of adding to the range of matters an appellant is able to raise by way of appeal during the period that his leave is extended under section 3C.

29. However, neither such general observations nor such incidental effects can be translated into an overriding policy requiring the Secretary of State to act in a particular way, nor into a right for the appellant to insist that he does so. It is to be borne in mind also that exercise of the powers to direct removal, which alone are at issue in the *Patel* case, is likely to involve both public cost and personal hardship or indignity. The Secretary of State does not "thwart the policy of the Act" if she proceeds in the first instance on the basis that unlawful overstayers should be allowed to leave of their own volition (as on the evidence the great majority do). The Upper Tribunal observed in the present case, commenting on its concerns at the implications of the decision in *Sapkota*:

> "For every person whose real claim is one outside the Rules, there are many who merely want a decision in accordance with the Rules and would either voluntarily depart or make a fresh application if that appeal were to be unsuccessful. Further, the developing jurisprudence of the Upper Tribunal has moved beyond the proposition that human rights only arise on removal decisions, to cases where variation of leave applications may need to take into account a wide variety of aspects of private life under article 8 rights, thereby enabling an independent assessment of this claim to remain without the person concerned running the risk of breaking the law." (para 32)

30. It follows that the Secretary of State was under no duty in the Patels' case to issue removal directions at the time of the decision to refuse leave to remain, and that the actual decision was not invalidated by the failure to do so. In so far as the decisions of the Court of Appeal in the cases of *Mirza* and *Sapkota* indicate the contrary, they were in my view wrongly decided. It is unnecessary to consider whether the Court of Appeal was entitled as a matter of precedent to depart from them. No such inhibition affects this court.

31. I would accordingly dismiss the Patel appeals.

The Alam/Anwar appeals

32. I have set out above the agreed issues said to arise in these appeals. The practical problem faced by the appellants arises from their failure to produce relevant information as required under the Points Based System at the relevant time. Each appellant was able to adduce the relevant evidence in response to the section 120 notice, but was barred by exception 2 of section 85A from relying on it directly in support of his appeal. The issue in short is whether an indirect route could be found to achieve a favourable result.

33. The proposed route depends on using the evidence before the tribunal in support of a putative appeal against the refusal of leave to remain, relying not on the rules, but on human rights grounds (article 8 of the Convention), and thus taking it outside the scope of exception 2. This in turn depends on two propositions: first, that the tribunal was obliged to consider the new evidence in that context ("scope of appeal"), and secondly, that, if it had done so, the evidence that the rules could have been complied with would significantly improve the human rights case under article 8 ("merits of appeal").

Scope of appeal

34. The first issue was the subject of detailed discussion in *AS (Afghanistan) v Secretary of State for the Home Department* [2011] 1 WLR 385. The Court of Appeal by a majority held that section 85(2) was to be construed as imposing a duty on the tribunal to consider any potential ground of appeal raised in response to a section 120 notice, even if it was not directly related to the issues considered by the Secretary of State in the original decision. In *AQ (Pakistan) v Secretary of State for the Home Department* [2011] EWCA Civ 833; [2011] Imm AR 832), it was held that majority's approach did not require consideration of events subsequent to the Secretary of State's decision. That issue does not arise in the present cases, where the new evidence related to material which was available at the time of the decisions.

35. Turning to the judgments in *AS* itself, it would be difficult to expand on or improve the depth of legal and contextual analysis to be found in the judgments of all three judges. The fact that the analysis led such experienced judges to opposite conclusions suggests that the path to enlightenment will not be found by attempting a similar exercise in this judgment. The problem lies in the drafting of the relevant provisions, which defies conventional analysis. It is not only obscure in places and lacking in detail, but contains pointers in both directions.

36. On the one hand, the words "against the decision appealed against" in section 85(2) suggest a focus on the content of the original decision. As Arden LJ said:

> "A ground of appeal is not a ground of appeal 'against the decision appealed against' if it would not, if accepted, lead to its reversal, as opposed to its being superseded by a new decision on the new evidence that leave to enter or remain should be granted." (para 30)

On the other hand the first ground of appeal under section 84(1) is that the immigration decision "is" not (not "was not") in accordance with the Rules; and in considering that question the tribunal is specifically empowered (subject to the exceptions in section 85A) to have regard to evidence concerning "a matter arising after the date of appeal".

37. Moore-Bick LJ (with whom Sullivan LJ agreed) thought that the reference to the "decision appealed against" did not imply a limitation to the original grounds. Having decided that the "decisions" referred to sections 85(1) and (2)

were "immigration decisions" of the kind identified in section 82(1), he said at para 79:

> "... the natural meaning of these provisions is to impose on the tribunal a duty to consider matters raised by the appellant insofar as they provide grounds for challenging a substantive decision of a kind identified in section 82 that affects his immigration status. On the face of it they do not restrict that duty to considering grounds that relate to the reasons for that decision or to the original grounds of appeal."

38. There was a similar lack of agreement on the effect of section 85(4), and in particular of the reference to matters relevant to "the substance" of the decision appealed against. That seems a curiously ambiguous term, which can fairly be read as referring either to the substantive effect of the decision or to the substantive reasons underlying it. Arden LJ took the latter view, which she saw as supporting her interpretation of section 85(2) (paras 31-2). At para 30 she adopted as "plainly correct" the approach of the Asylum and Immigration Tribunal (*EA (Nigeria) v Secretary of State for the Home Department* [2007] UKAIT 00013), which had read these words as meaning that the new evidence had to be "relevant to the decision actually made", and had added at para 6 that:

> "…a decision on a matter under the Immigration Rules is a decision on the detailed eligibility of an individual by reference to the particular requirements of the rule in question in the context of an application that that person has made."

39. Sullivan LJ took the opposite view, seeing section 85(4) as consistent with his view that the tribunal's consideration was not limited to the grounds considered by the Secretary of State:

> "Since section 85(2) is concerned with statements of additional grounds which must include any reasons why an appellant should be allowed to remain, and which are expressly not confined to the reasons why he should be allowed to remain under rule x of the Rules, I am not persuaded that the reference to 'the decision appealed against' must be a reference to the decision to refuse to vary leave to remain under rule x, rather than the decision to refuse to vary leave to remain, being one of the immigration decisions as defined by section 82 (2). Such an approach to section 85 (2) would be consistent with the reference in section 85 (4) to 'the substance of the decision'." (para 113)

40. Moore-Bick LJ thought that section 85(4) itself had "little bearing" on the issues before the court, since it was concerned only with the evidence which the tribunal could consider (para 83). However, his understanding of the word "substance" in this context, agreeing with that of Sullivan LJ, is apparent from his earlier discussion of the appropriate response to a section 120 notice. He saw its purpose as to impose on the appellant a duty to put forward "any grounds he may have for challenging the *substance* of the decision made against him, rather than simply *the grounds* on which it was made" (para 80, emphasis added).

41. The broader approach of the majority seems to me to gain some support from the scheme of section 3C, under which (as is common ground) the initial application for leave to remain, if made in time, can later be varied to include wholly unrelated grounds without turning it into a new application or prejudicing the temporary right to remain given by the section. Thus the identity of the application depends on the substance of what is applied for, rather than on the particular grounds or rules under which the application is initially made. The same approach can be applied to the decision on that application, the identity or "substance" of which in the context of an appeal is not dependent on the particular grounds first relied on.

42. It is of interest that, at an earlier stage, the broader approach seems to have accorded with the reading of those responsible within the Home Office for advice to immigration officers. The Immigration Directorate's Instructions, issued in September 2006, noted that it was not possible under section 3C to make a second application, but continued:

> "On the other hand, it is possible to vary the grounds of an application already made, even by introducing something completely new. A student application can be varied so as to include marriage grounds. If an application is varied before a decision is made, the applicant will be required to complete the necessary prescribed form to vary his application. If an application is varied post decision, it would be open to the applicant to submit further grounds *to be considered at appeal*… Once an application has been decided it ceases to be an application and there is no longer any application to vary under section 3C(5). So any new information will fall to be dealt with *during the course of the appeal* rather than as a variation of the original application." (para 3.2 emphasis added)

43. The same approach is supported by the current edition of *Macdonald's Immigration Law & Practice* 8th ed (2010) para 19.22 (under the heading "The tribunal as primary decision maker"). The only implicit criticism made of the

majority approach in *AS* is that it did not go far enough. They observe that even without a section 120 notice the tribunal should be free to consider any matter –

> "… including a matter arising after the decision which is relevant to the substance of the decision regardless of whether a one-stop notice has been served. The 'substance of the decision' is not the decision maker's reasoned response to the particular application or factual situation that was before it but is one of the immigration decisions enumerated in section 82 and a 'matter' includes anything capable of supporting a fresh application to the decision maker…"

Whether or not such an extension of the majority's reasoning can be supported, that passage indicates that the broader approach in itself is not controversial.

44. In the end, although the arguments are finely balanced, I prefer the approach of the majority in *AS*. Like Sullivan LJ, I find a broad approach more consistent with the "coherence" of this part of the Act. He noted that the standard form of appeal, echoing the effect of the section 120 notice, urged appellants to raise any additional ground at that stage, on pain of not being able to do so later, and observed:

> "... it seems to me that appellants would have good reason to question the coherence of the statutory scheme if they were then to be told by the AIT that it had no jurisdiction to consider the additional ground that they had been ordered by both the Secretary of State and the AIT to put forward." (para 99)

Merits of appeal

45. The second issue is the materiality to the human rights case of evidence that the appellant could in fact have complied with the rules, even though he failed to do so. The argument is that, if it is shown that the appellant could have met the substantive requirements of the rules, the failure to do so should be regarded as purely formal, and that accordingly, in the proportionality balance required by article 8, the objectives of immigration control should carry relatively less weight. A variant of this argument, referred to as the "near-miss" principle, is that the degree of failure to meet the requirements of the rules may be relevant in the proportionality balance.

46. Support for such an approach is said to be found in the judgment of Sedley LJ (agreed by Rimer and Sullivan LJJ) in *Pankina v Secretary of State for the*

Home Department [2010] EWCA Civ 719; [2011] QB 376. The main issue in that case was the extent to which it was permissible for mandatory criteria relevant to the Points Based System to be contained in guidance rather than rules submitted to Parliament under section 3(2) of the 1971 Act. That issue has since been considered in the Supreme Court in *R (Alvi) v Secretary of State for the Home Department (Joint Council for the Welfare of Immigrants intervening)* [2012] UKSC 33; [2012] 1 WLR 2208 and *R (New College London Ltd) v Secretary of State for the Home Department (Migrants' Rights Network intervening)* [2013] UKSC 51, [2013] 1 WLR 2358. However Sedley LJ also considered the application of article 8 under such a system. He said at paras 45 - 46:

> "There appears to me, in this situation, to be no escape from the proposition that in exercising her powers, whether within or outside the rules of practice for the time being in force, the Home Secretary must have regard and give effect to applicants' Convention rights. This will mean in most cases evaluating the extent and quality of their family and private life in the United Kingdom and the implications, both for them and for the United Kingdom, of truncating their careers here.
>
> That in turn will require consideration of the significance of the criteria by which their eligibility has been gauged and found wanting. It is one thing to expect an applicant to have the necessary academic and linguistic qualifications: here a miss is likely to be as good as a mile. It is another for an applicant to fall marginally or momentarily short of a financial criterion which in itself has no meaning: its significance is as a rough and ready measure of the applicant's ability to continue to live without reliance on public funds. Having £800 in the bank, whether for three continuous months or simply at the date of application, is no doubt some indication of this; but people who are able to meet the test may fall on hard times after obtaining indefinite leave to remain, and others who fail it would, if allowed to remain, never become a charge on public funds. The Home Office has to exercise some common sense about this if it is not to make decisions which disproportionately deny respect to the private and family lives of graduates who by definition have been settled here for some years and are otherwise eligible for Tier 1 entry. If the Home Secretary wishes the rules to be blackletter law, she needs to achieve this by an established legislative route."

47. The court can be seen in that passage to have endorsed the view that, at least in relation to financial criteria, a near-miss (a "marginal or momentary" shortfall) might affect the consideration of proportionality under article 8. That

view did not affect the results in any of the cases before it. In the only one to which it might have been relevant (Mrs Maleckia), it was held that there was in any event no prospect of success under article 8 (para 53).

48. Mr Malik also relies on other cases, before and since, which have adopted a similar approach without reference to *Pankina*. In *SB (Bangladesh) v Secretary of State for the Home Department* [2007] EWCA Civ 28, the court when allowing an appeal against the tribunal's decision on other grounds agreed with them that the fact that the appellant "only just failed to qualify for admission" was a fact to be counted in her favour. Ward LJ, at para 30, adopted the observation of Collins J in *Lekstaka v Immigration Appeal Tribunal* [2005] EWHC 745 (Admin) para 38 that:

> "… one is entitled to see, whether in all the circumstances, this case falls within the spirit of the Rules or the policies, even if not within the letter."

Ward LJ added:

> "That seems to us to be the right approach. As Simon Brown L.J. said in *Ekinci* at paragraph 16:
>
> > 'Even if strictly he fails to qualify so that the ECO would be prohibited from granting leave to enter, given the obvious article 8 dimension to the case the ECO would refer the application to an Immigration Officer who undoubtedly has a discretion to admit someone outside the Rules. And if entry were to be refused at that stage, then indeed a section 59 right of appeal would certainly arise in which, by virtue of section 65(3), (4) and (5) the adjudicator would have jurisdiction to consider the appellant's human rights.'"

(I note in passing that those comments of Simon Brown LJ were made with reference to the rather different appeal provisions of the Immigration and Asylum Act 1999, and were directed specifically to a case with an "obvious article 8 dimension".)

49. More recently, in *R (Mansoor) v Secretary of State for the Home Department* [2011] EWHC 832 (Admin), Blake J, sitting on this occasion in the Administrative Court, held that on the facts the interference with the applicant's family life was such as to make it disproportionate under article 8 to remove her,

notwithstanding that she was unable to satisfy a relevant criterion in the rules. He said, at para 35 (without specific reference to *Pankina*):

> "… the terms of the immigration rules are not a legitimate aim in their own right… A judgment needs to be made as to how significant the aim, and how far the removal of the particular claimant in the circumstances of her case is necessary to promote that aim. The mere fact a genuine spouse lawfully admitted with her British citizen husband and settled children can no longer meet one requirement of the rules through no fault of her own is unlikely to amount to a weighty reason to justify interference with family life here that is otherwise to be respected."

50. The opposite approach is supported by the judgment of Stanley Burnton LJ (agreed by Maurice Kay and Lewison LJJ) in *Miah v Secretary of State for the Home Department* [2013] QB 35. In that case the applicant was refused leave to remain as a Tier 2 (General) Migrant at a time when he was two months short of the five years' continuous residence necessary to support a case for indefinite leave to remain under the rules. It was argued that, in assessing whether his removal should be permitted under article 8.2 of the Convention, the weight to be given to the maintenance of immigration controls should be diminished because he had missed satisfying the rules by only a small margin. Burnton LJ observed that, as formulated in the skeleton submissions of Mr Malik (appearing for the appellant in that case as in the present), the argument was not so much "near miss" as "sliding scale", by virtue of which –

> "There is an inverse relationship between the degree to which there is compliance with the rules and the immigration policy imperative which demands that unsuccessful applicants be removed" (paras 9-10).

51. In rejecting that argument, Burnton LJ referred to a passage in the speech of Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, in which he discussed the long-established and central role of the immigration rules in determining those to whom leave to enter or remain should be granted. Although the "near-miss" argument as such was not in issue in that case, Burnton LJ thought it inconsistent with Lord Bingham's approach. He said at para 14:

> "… I find Lord Bingham's reference in para 6 to 'rules, to be administratively workable, [requiring] that a line be drawn somewhere' and in para 16 to

> ‘the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory’

to be helpful and generally inconsistent with a ‘near-miss’ principle.”

52. He referred to two previous Court of Appeal judgments (not cited in *Pankina*) in which similar arguments had been rejected: *Mongoto v Secretary of State for the Home Department* [2005] EWCA Civ 751, and *R (Rudi) v Secretary of State for the Home Department* [2007] EWCA Civ 1326. In the latter case, citing *Mongoto*, I said of the near-miss argument:

> “28. This argument is, in my view, based on a misconception. The Secretary of State is of course entitled to have a policy. The promulgation of the policy normally creates a legitimate expectation that it will be applied to those falling within its scope unless there is good reason for making an exception. So much is trite law. It is also trite law that the existence of the policy does not excuse the decision-maker from due consideration of cases falling outside it. However, the law knows no ‘near-miss’ principle. There is no presumption that those falling just outside the policy should be treated as though they were within it, or given special consideration for that reason.”

53. Faced with the conflict between the approach taken in these authorities and that of *Pankina* Burnton LJ had “no difficulty” in preferring the former, which he regarded as binding on the court (paras 21-25). He could see no principled basis for distinguishing, as Sedley LJ had proposed, between rules to which the near-miss principle did and did not apply. In particular he disagreed with Sedley LJ that a financial criterion “has in itself no meaning”, and could therefore be distinguished from other rules, such as those relating to academic qualifications, in respect of which “a miss is as good as a mile”. In conclusion he said at paras 25 - 26:

> “Finally, quite apart from authority, I prefer the approach stated in *Mongoto’s case*… and *Rudi’s case*…. A rule is a rule. The considerations to which Lord Bingham referred in *Huang’s case*… require rules to be treated as such. Moreover, once an apparently bright-line rule is regarded as subject to a near-miss penumbra, and a

> decision is made in favour of a near-miss applicant on that basis, another applicant will appear claiming to be a near miss to that near miss. There would be a steep slope away from predictable rules, the efficacy and utility of which would be undermined.
>
> For these reasons, I would dismiss the appeal in relation to the 'near-miss' argument. In my judgment, there is no 'near-miss' principle applicable to the Immigration Rules. The Secretary of State, and on appeal the tribunal, must assess the strength of an article 8 claim, but the requirements of immigration control are not weakened by the degree of non-compliance with the Immigration Rules."

54. The difference between the two positions may not be as stark as the submissions before us have suggested. The most authoritative guidance on the correct approach of the tribunal to article 8 remains that of Lord Bingham in *Huang*. In the passage cited by Burnton LJ Lord Bingham observed that the rules are designed to identify those to whom "on grounds such as kinship and family relationship and dependence" leave to enter should be granted, and that such rules "to be administratively workable, require that a line be drawn somewhere". But that was no more than the starting point for the consideration of article 8. Thus in Mrs Huang's own case, the most relevant rule (rule 317) was not satisfied, since she was not, when the decision was made, aged 65 or over and she was not a widow. He commented at para 6:

> "Such a rule, which does not lack a rational basis, is not to be stigmatised as arbitrary or objectionable. But an applicant's failure to qualify under the rules is for present purposes the point at which to begin, not end, consideration of the claim under article 8. The terms of the rules are relevant to that consideration, but they are not determinative."

55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality. I said much the same in *Rudi*. Although I rejected the concept of a "near-miss principle", I did not see this as inconsistent with the Collins J's words in *Lekstaka*:

> "Collins J's statement, on which the court relied [in *SB*], seems unexceptionable. It is saying no more, as I read it, than that the practical or compassionate considerations which underlie the policy are also likely to be relevant to the cases of those who fall just outside it, and to that extent may add weight to their argument for exceptional treatment. He is not saying that there arises any

> presumption or expectation that the policy will be extended to embrace them." (para 31(ii))

(My reference to "exceptional treatment" needs to be read now in the light of *Huang* para 20 in which Lord Bingham made clear that, contrary to previous Court of Appeal case-law, there was no separate "test of exceptionality".)

56. Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.

57. It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for "common sense" in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8.

The present appeals

58. I have discussed the respective arguments on this point in some detail because of its general importance and the conflicting statements found in some of the judgments. However, I can deal relatively shortly with the two cases before us. The near-miss argument was not advanced in the same form before the Court of Appeal, apparently because it was thought to be precluded by *Miah.* Even if otherwise well-founded, it is not in my view available to Mr Anwar, since no separate human rights grounds were advanced on his behalf before either tribunal. So the issue as to whether the tribunal would have been obliged to consider them, and with what effect, did not arise.

59. In Mr Alam's case the human rights case was considered at both levels, but ultimately failed before the Upper Tribunal on its merits. The Upper Tribunal fairly gave some weight to the unusual circumstances in which he had lost his ability to rely on the new evidence (as a result of a change in the rules after the start of the appeal). But there was little or nothing to weigh on the other side of the balance, apart from the time he had spent in this country as a student under the rules. It would be surprising if that status, derived entirely from the rules, was sufficient in itself to add weight to a case for favourable treatment outside the rules. I see no error in the approach of the Upper Tribunal.

Conclusion

60. For these reasons, I would dismiss all three appeals.

LORD MANCE (with whom Lord Kerr, Lord Reed and Lord Hughes agree)

61. I would also dismiss these appeals for the reasons given by Lord Carnwath.

62. Anything that we say about *AS (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1076, [2011] 1 WLR 385 is obiter, since in the case of Anwar no separate human rights ground was advanced in either tribunal and in the case of Alam the Upper Tribunal held correctly that there is nothing in any human rights point that was raised.

63. If we were to disagree with the majority approach in *AS*, that would raise a problem of precedent for lower courts, but since I would on balance also favour leaving the majority view undisturbed, that problem does not arise. In fact, it appears that the whole area of appeals is likely to be reshaped by the Immigration Bill 2013 (HC Bill 110), so that the majority approach in *AS* and any view we express about the correct approach are likely to become irrelevant in future cases.

64. The issue arising under section 85(2) of the Nationality, Immigration and Asylum Act 2002 which was addressed in *AS* is undoubtedly a difficult and very arguable one, and the arguments for and against the rival approaches are comprehensively discussed in *AS*. As I see it, the essential question was well defined by Sullivan LJ at paras 111-113. It is whether "the decision appealed against" to which section 85(2) refers is the generic decision to refuse leave to remain (i.e. in the present cases, within section 82(2)(d)), or the particular decision to refuse leave under a particular head, for example under a particular rule of the Immigration Rules or on a Human Rights ground.

65. The majority approach in *AS* does not mean that section 85(2) enables an appellant, who has sought leave to remain, to go outside the scope of a leave to remain application by adding or substituting an appeal under a different head of section 82(2), e.g. by asserting a wrongful refusal of entry clearance or of a certificate of entitlement: see sections 82(2)(b) or (c)). To that extent, it seems to me that the majority approach is not open to the criticism that it amounts to re-reading section 85(2) as if it used the words "against a decision of a kind listed in section 82(2)" or omitted the words "against the decision appealed against" altogether.

66. Where the Secretary of State chooses to give a section 120(2) notice, the aim is to flush out any new (a) reasons for wishing to enter or remain and/or (b) grounds for being permitted to enter or remain and/or (c) grounds for not being removed or required to leave the UK. The statement in response need not repeat reasons or grounds set out in the existing application or decision which is the occasion for giving the notice: section 120(3).

67. When section 85(2) requires the Tribunal to "consider any matter raised in the [section 120] statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against", it is therefore referring to new reasons or grounds not previously covered by the decision appealed against. So long as they "[constitute] a ground of appeal of a kind listed in section 84(1)", they can be relied upon. By inference, it can be said, it is or becomes legitimate to treat them as constituting a ground of appeal, even though they were not raised before or decided by the Secretary of State.

68. So, instead of relying on the Immigration Rules to justify leave to remain, an appellant can rely on a Human Rights ground, as Alam sought to do. And in *AS* itself, it would follow that the majority was correct to hold that an appellant could invoke a different Immigration Rule to justify leave to remain - in the case of AS herself: that she qualified under the International Graduate Scheme, rather than as a person intending to establish herself in business, in the other case of NV, on the basis that she had ten years' residence, rather than on the basis that she was a student.

69. Section 3C(4) of the 1971 Act certainly provides some forceful arguments to the contrary of the majority conclusion in *AS*. But I am inclined to think that Moore-Bick and Sullivan LJJ deal sufficiently in their paras 84-86 and 102 with the problem of reconciling their conclusion with section 3C(4). Essentially, it is up to the Secretary of State to decide whether to serve a section 120 notice. It is true that the majority approach to section 85(2) means that an applicant may open up issues which would otherwise be closed, at least until conclusion of the existing appeal (after which the applicant, if unsuccessful in the appeal, would be an

overstayer). But it does at the same time close down some further applications which the appellant might, whether as an overstayer or from abroad, make.

70. The fact that the Tribunal will, in a wider area, become primary decision-maker appears to me relatively indecisive, bearing in mind that it anyway acts as decision-maker in some significant areas. The overlap argument advanced by Sullivan LJ at para 106 also seems to me relevant, if one is considering the advantages and disadvantages of each solution.

71. On the other hand, I am not persuaded that there is anything in the "substance" point based on section 85(4). Moore-Bick LJ (para 83), rather than Sullivan LJ (para 113) was in my view right on this. Section 85(4) is dealing only with evidence which goes to the substance ("heart") of the decision, but does not help identify at what level of detail that decision is to be considered.