



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/01173/2014

THE IMMIGRATION ACTS

Heard at Bradford

On 12th August 2014

**Determination
Promulgated**

On 22nd August 2014

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

RAKKEL KAUNAPAWA SHIWEDA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Rogers, Immigration Advice Centre

For the Respondent: Mr McVeety, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Reed made following a hearing at Bradford on 22nd April 2014.

Background

2. The Appellant is a citizen of Namibia born on 2nd February 1979. She made an application for leave to remain as a Tier 4 (General) Student Migrant which was refused on 6th December 2013 on maintenance grounds.
3. The Appellant appealed against the decision and, in response to a Section 120 notice, raised in her grounds of appeal, the fact that she was entitled to remain in the UK on the basis of ten years' lawful residence.
4. It appears to have been argued before the judge that there had never been any application for leave under the long residence provisions, and the ground should not be considered as part of the appeal. The judge disagreed and accepted that he did have jurisdiction to deal with the issue because a One-Stop Notice had been served upon the Appellant. He also accepted that there could be no issue that the Appellant had accrued ten years' lawful residence.
5. However, he applied Section 85A of the 2002 Act against the Appellant, considering that because there were only limited circumstances in a points-based application when evidence not submitted with the original application can be relied upon by an Appellant, he could not take into account the fact that she had accrued ten years' lawful residence. He dismissed the appeal under the Immigration Rules and on Article 8 grounds.

The Grounds of Application

6. The Appellant argued that Section 85A has no application where an alternative ground of appeal is raised under Section 120 and the substance of that ground does not relate to the points-based system. The purpose of Section 85A is to reinforce the requirement that it is mandatory for Appellants under the points-based system to submit all relevant evidence required to support the application as at that date, and reliance on new evidence at appeal is not permitted. However, to suggest that Section 85A prevents reliance on evidence to support an argument raised as an additional ground in an appeal, conflicts with the requirement of Section 120 which requires an Appellant to state all additional grounds.
7. As the Appellant was issued with a One-Stop Warning by the Respondent, and the long residence modern policy guidance specifically acknowledges that an Appellant can reach ten years' long residence whilst on Section 3C leave, Section 85A cannot prevent reliance on new evidence. The Appellant relies on AS (Afghanistan) v SSHD & Anor [2009] EWCA Civ 1076 and submits that the Appellant is clearly entitled to raise alternative arguments in an appeal under Section 120 where a One-Stop Warning has been issued.
8. The grounds also challenge the judge's finding that the Appellant was not able to succeed in her application for further leave to remain as a student under Tier 4.

9. Permission to appeal was granted by Judge De Haney on 17th June 2014.
10. On 1st July 2014 the Respondent served a reply defending the determination.

Submissions

11. Mrs Rogers relied on her principle grounds, but not the additional challenge to the Tier 4 decision, and Mr McVeety did not seek to argue against them.

Findings and Conclusions

12. The Secretary of State was not bound to issue a Section 120 notice but, since she decided to do so in this case, the Appellant was plainly entitled and indeed obliged to raise all grounds upon which she sought to rely in support of her contention that her appeal should be allowed under the Immigration Rules.
13. The restrictions on evidence in points-based applications imposed by Section 85A is not relevant in situations where, as here, an entirely different ground of appeal has been raised under Section 120.
14. As the Court of Appeal stated in AS (Afghanistan):
 - (i) "There would be little point in requiring a person to put forward all the grounds on which he says he should be allowed to enter or remain in this country if he were not able to add to those on which he had previously relied. The whole tenor of the legislation points to the conclusion that the purpose of Section 120 is to flush out all the grounds on which the applicant may seek to rely so that they can be considered at the same time."
15. There is no argument that she could not rely on Section 3C leave as lawful residence for the purpose of the ten year Rule, and, by the time that she submitted her grounds, it is not challenged that she had in fact been in the UK lawfully for ten years.
16. On the findings of the judge the Appellant was entitled to succeed under the Immigration Rules. Furthermore, plainly, in these circumstances, any decision that removal was proportionate must be plainly wrong.
17. On the evidence before the judge she met the requirements of the Rules and the appeal should have been allowed on that basis.

Decision

18. The original judge erred in law and his decision is set aside. It is remade as follows. The appeal is allowed.

Signed

Date

Upper Tribunal Judge Taylor