



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

Appeal Number: IA/27880/2014  
IA/27881/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30<sup>th</sup> November 2015**

**Decision & Reasons Promulgated  
On 19<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAINI**

**Between**

**MR MOHAMED INTHIKHAN TUAN KITCHIL  
MRS FATHIMA INTHIKA SHEERIN MOHAMEN INTHIKHAN**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel; instructed by Chauhan Solicitors  
For the Claimant: Ms K Pal, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellants appeal with permission against the decision of First-tier Tribunal Judge Braybrook dismissing the Appellants' appeals against the Respondent's decision to refuse them further leave to remain under paragraph 276A and 276B pursuant to *AQ (Pakistan) v Secretary of State for the Home Department* [2011] EWCA Civ 833, and challenging removal directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellants appealed against that decision and was granted permission to appeal by Deputy Upper Tribunal Judge Maller. The grounds upon which permission was granted may be summarised as follows:
  - (i) It is arguable that the Appellants were entitled to rely on statutorily extended leave under section 3C of the Immigration Act 1971. No wrongdoing had been alleged and any other approach would undermine the decisions in *Patel v Secretary of State for the Home Department* [2013] UKSC 72 and *AS (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1076.
3. I was provided with a Rule 24 response from the Respondent. Additionally, Ms Pal provided me with a copy of *Ali v Secretary of State for the Home Department* [2013] EWCA Civ 1198 and a copy of Rules A34 and 34E of the current Immigration Rules. Mr Richardson provided me with copies of *Patel v Secretary of State for the Home Department* [2013] UKSC 72, *AS (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1076 and the Long Residence Guidance (version 13.0, published 8 May 2015).
4. I shall refer to the Appellants in the singular form given that the appeal turns upon the consideration of paragraph 276 of the Immigration Rules concerning the 1<sup>st</sup> Appellant's continuous long residence.

### **Error of Law**

5. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I find that there was an error of law in the decision in relation to the treatment of the Appellant's section 120 grounds, such that it should be set aside. My reasons for so finding are as follows.
6. As indicated at paragraph 5 of the judge's determination, in a letter dated 30 October 2014, the Appellant's solicitors issued a section 120 statement of additional grounds (pursuant to the Nationality, Immigration and Asylum Act 2002) served upon the Respondent on basis that the Appellant had acquired 10 years' continuous residence. That statement set out that the Appellant entered the UK as a student on 25 October 2004 and resided lawfully for 10 years till that time. The statement was accompanied by a chronology of the Appellant's absences from the UK between 22 April 2005 and 31 January 2010 and annexed English language test results (dated 17 September 2014) and a Life in the UK test result (dated 21 August 2014).
7. The appeal came before the First-tier Tribunal on 3 March 2015. By the time of the appeal hearing, the Respondent had not replied to the section 120 notice and did not attend the appeal hearing either to argue the point. Therefore, the section 120 additional ground would not have come as a surprise. At paragraph 15 of her determination, the judge considers that *AQ (Pakistan) v Secretary of State for the Home Department* [2011] EWCA Civ 833 precludes her from considering a section 120 notice due to the reasons given by Pill, LJ at [37] of that matter, which reads as follows:

"I do not consider that section 120 was intended, or has the effect, of allowing a fresh application to be made to the Tribunal, under the Rule, relying on events since the Secretary of State's decision. If that were to be so, the effect of section 120 would be contrary to the intention of the section in that the statutory scheme would provide for an application to the Secretary of State and then a fresh application to the Tribunal which could be based on events since the decision of the Secretary of State. I do not consider that to accord with the intention of the section."

8. The judge therefore implicitly considered the Appellant to be making a "fresh application" before her as opposed to lodging additional grounds by way of section 120. However, it is unclear why the judge interpreted the section 120 notice in this manner as no reasons were given by her other than her reliance upon the above passage without qualification.
9. The answer to this simple issue appears in many forms. The first form, as Mr Richardson submitted, appears in section 85 of the Nationality, Immigration and Asylum Act 2002 (as it previously stood prior to its most recent amended form via the Immigration Act 2014 and its various commencement orders). Section 85 (prior to amendment and at the relevant time) states as follows:

Matters to be considered

(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...

10. In essence, a Tribunal may consider any matter including that arising after the date of the decision, pursuant to section 85(2). The use of the word "matter" leaves the subject matter of a section 120 statement wide reaching enough to encompass several different meanings. The term is undefined and to my view, it would be undesirable for me to try defining it. However, to my mind, it clearly encompasses any new matter which may form a ground of appeal in section 84(1) as the above sections reveal. Such grounds of appeal (previously) included that a decision was not in accordance with the Immigration Rules (see section 84(1)(a)); much as has been contended here pursuant to paragraphs 276A and 276B by the Appellant's solicitors.

11. Mr Richardson relied upon *AS (Afghanistan)* and in particular referred my attention to [83-84] of Moore-Bick, LJ's judgment wherein it was stated that "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."
12. Mr Richardson submitted that the substance of the decision (under section 84(5)) meant the effect of the decision. I was also referred to pp.28-29 of the Long Residence Guidance (version 13; published 8 May 2015) which states *inter alia* as follows:

**'The applicant completes 10 years continuous lawful residence while awaiting a decision of an appeal**

A person may complete 10 years continuous lawful residence whilst they are awaiting the outcome of an appeal and submit an application on this basis. Under sections 3C and 3D, it is not possible to submit a new application while an appeal is outstanding. However, the applicant can submit further grounds to be considered at appeal.

If the applicant has an outstanding appeal against a decision to refuse leave to remain or indefinite leave to remain, and submits an application for long residence, you must void the long residence application and refund the fee. You must create a file or sub-file and mark it 'PRIORITY'. You must send the file or sub-file to the presenting officers unit (POU) dealing with the appeal. You must send a letter to the applicant or their representative informing them their application has been linked with their outstanding appeal.'

13. Therefore, the guidance makes clear that new applications cannot be submitted under section 3C and 3D where an applicant completes 10 years continuous lawful residence whilst awaiting a decision in an appeal, but further grounds can be submitted and considered at appeal.
14. For my part, the clearest answer to the issue arises at [80] of Pill, LJ's judgment wherein it is stated *inter alia* as follows:

"... the statement provided under section 120 will generally contain new grounds for challenging the decision rather than additional evidence or material supporting the original grounds. Section 96(2) reinforces that interpretation, because it contemplates a decision made in respect of a new application based on grounds which the applicant could have raised in response to a notice under section 120. That indicates that the matters intended to be raised in response to such a notice are of a kind that would be capable of supporting a fresh application and that the purpose of the notice is to impose on the appellant a duty to put forward in response to it 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."
15. Section 120 notice is designed to 'flush out' matters that an Appellant could raise in the normal course of proceedings which have not already been raised in the course of an application that has failed and is subject to

an appeal. If an Appellant does not raise them when a reasonable opportunity arises, it might be that they fall into difficulty for not relying upon them sooner. Therefore, it was curious that Ms Pal sought to oppose the appeal by suggesting that the Appellant's appropriate course of action would have been to make a fresh application.

16. In pursuance of this submission, Ms Pal relied upon *Ali v Secretary of State for the Home Department* [2013] EWCA Civ 1198 and a copy of Rules A34 and 34E of the current Immigration Rules. Ms Pal submitted that the Respondent could not decide whether the Appellant had spent 10 years' continuous residence in the UK as it would require going through his immigration history to calculate whether he was absent for in excess of 540 cumulative days or 180 consecutive days (although the Respondent's position before the judge below was that the Appellant would have spent approximately 10 years in the UK in October 2014 - see paragraph 16 of the determination). The Respondent would also need to consider the English language and Life in the UK test results, and whether it would be contrary to the public interest under rule 276C for the Appellant to remain indefinitely. For my part, given that *AS (Afghanistan)* establishes that new matters may arise by way of section 120 before the Tribunal, it is not a task that the Respondent is mandated to complete as Ms Pal believed, but one which the Tribunal must complete itself by virtue of statute. As parties are encouraged to assist the Tribunal in all proceedings in discharging the overriding objective, such consideration to those matters by the Respondent may be of benefit to the First-tier Tribunal in future.
17. Ms Pal prayed in aid that by virtue of paragraph 34E of the Immigration Rules, the Appellant was required to make an application and pay the relevant fee. This was because, as set out at 34E and A34 of Immigration Rules, a specified form and specified fee are required for long residence applications. She submitted that pursuant to *Ali*, at [10-11], the Appellant was entitled to make a fresh application instead of a section 120 notice.
18. I queried with Ms Pal whether her submission was open to her to pursue given that it conflicted with section 3C(4) of the Immigration Act 1971 (pursuant to 3C(2)(c)) which prevented an appellant making a fresh or further application whilst their leave was extended by virtue of section 3C(2)(c) whilst pursuing an appeal against an immigration decision, which was the precise scenario the Appellant would have found himself in when his solicitors made the section 120 statement. Ms Pal did not have instructions in relation to this point, but maintained that the Appellant was submitting a fresh application instead of further grounds.
19. I find that the submission that the Appellant could have lodged a fresh application during the pendency of his appeal to be completely baseless. Not only is an appellant prevented from doing so by virtue of section 3C(4) of the Immigration Act 1971, but this rationale is reflected in the Respondent's guidance that Mr Richardson happened to refer to also.

20. To my mind, the judge has clearly misapplied the ratio of *AQ (Pakistan)* which concerns fresh applications, as opposed to further grounds, which the submissions concerning paragraphs 276A and 276B clearly are. At any rate, *AQ (Pakistan)* concerned a points-based appeal where the appellant was attempted to rely upon points-based evidence that the Rules specified should be submitted with the application and could not therefore be complied with later by way of a section 120 notice. That material was suitable for a fresh application as the Court found. The position in *AS (Afghanistan)* is binding and of direct application to the present appeal, having been upheld by the Supreme Court in *Patel v Secretary of State for the Home Department* [2013] UKSC 72, at [34-44] and I find that the judge committed a material error in law in failing to substantively address paragraph 276 of the Immigration Rules due to her misconception that the section 120 grounds were in fact a fresh application and precluded from consideration. The decision consequently must be set aside.
21. In the light of the above findings, I set aside the decision and findings of the judge in their totality.

### **Decision**

22. The appeal to the Upper Tribunal is allowed.
23. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal, to be heard by a differently constituted bench.

### **Anonymity**

24. The First-tier Tribunal did not make an anonymity order and I was not asked to make one and do not see reason to do so at present.

Signed

Date

Deputy Upper Tribunal Judge Saini