20 November 2013

PRESS SUMMARY

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)

[2013] UKSC 72

On appeal from [2012] EWCA Civ 741; [2012] EWCA Civ 960

JUSTICES: Lord Mance, Lord Kerr, Lord Reed, Lord Carnwath and Lord Hughes

BACKGROUND TO THE APPEALS

These appeals concern refusals of leave to remain. Mr Patel and his wife, Mrs Patel ("the Patels"), arrived from India in the UK on 24 March 2009. Mr Patel had been granted leave to enter as a working holiday-maker until 6 March 2011, and Mrs Patel had been granted leave as his dependant wife. Their only child was born here in 2010. On 26 February 2011, the Patels applied for further leave to remain, relying on article 8 (right to respect for family and private life) of the European Convention on Human Rights ("the Convention"), and rule 395C of the Immigration Rules ("the 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 UK. The Patels argued that 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 was unsuccessful in both the Upper Tribunal and the Court of Appeal.

Mr Alam, a Bangladeshi citizen, entered the UK 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, and 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 show the necessary level of funds for "a consecutive period ending no more than one month before the application". Mr Alam produced the appropriate bank statements by the First-tier tribunal hearing, at which it was held that, whilst this new material was excluded from consideration by section 85A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act", which had come into effect between the date of his appeal and the date of his hearing), this material could be taken into account in the appeal under article 8 of the Convention. The tribunal concluded that, since Mr Alam met the requirements of the rules, it would be disproportionate to refuse his application. The Upper Tribunal reversed this decision, holding that Mr Alam's article 8 rights were not sufficiently strong to make his removal disproportionate.

Mr Anwar, a Pakistani citizen, entered the UK on 26 February 2010 with leave to remain as a student until 1 April 2011. He applied to extend his leave as a Tier 4 student to enable him to complete his course. This application was supported by a Confirmation of Acceptance for Studies ("CAS"). On 10 May 2011 the Secretary of State refused the application because it had not included a document referred to in the CAS. On his appeal to the First-tier Tribunal Mr Anwar produced the relevant document. The First-tier Tribunal allowed his appeal, but this decision was set aside by the Upper Tribunal. Although there was a reference to the 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.

The Court of Appeal heard the appeals of Mr Alam and Mr Anwar together and dismissed them both.

JUDGMENT

The Supreme Court unanimously dismisses all three appeals. Lord Carnwath, with whom the rest of the Court agrees, gives the majority judgment. In the Patel appeal the Court holds that the Secretary of State was under no duty to issue removal directions at the time of the decision to refuse leave to remain, and that the actual decision was not invalidated by her failure to do so. In the Alam and Anwar appeals, although the First-tier tribunal was obliged under section 120 of the 2002 Act to consider the new evidence filed, this evidence did not significantly improve their respective cases under article 8 of the Convention.

REASONS FOR THE JUDGMENT

The sole issue in the Patel appeal relates to the segregation of the decision to refuse leave to remain from the decision to direct removal. The Patels argued, relying on the Court of Appeal decisions in *Mirza* [2011] Imm AR 484 and *Sapkota* [2012] Imm AR 254, that the failure to issue such a direction was not only unlawful in itself, but also undermined the validity of the previous decision to refuse leave to remain [**25-26**]. The Court agrees with the Court of Appeal's reasons for not following the decisions in *Mirza* and *Sapkota*. Neither section 10 of the 1999 Immigration and Asylum Act nor section 47 of the Immigration, Asylum and Nationality Act 2006, which define the Secretary of State's powers of removal, 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 [**27**]. 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 the actual decision was not invalidated by failure to do so. Insofar as the decisions of the Court of Appeal in *Mirza* and *Sapkota* indicate the contrary, they were wrongly decided [**30**].

The Alam and Anwar appeals raise the issue of whether the statements and evidence filed by Mr Alam and Mr Anwar to the First-tier Tribunal amounted to "additional grounds" under section 120 of the 2002 Act, which the First-tier Tribunal was obliged to consider and determine notwithstanding the bar in section 85A of that Act [**10**]. Whether the evidence before the tribunal in support of a putative appeal against the refusal of leave to remain can be taken on human rights grounds depends on two propositions: that the tribunal was obliged to consider the new evidence in that context, 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 [**33**].

In Mr Anwar's case no separate human rights grounds were advanced on his behalf before either tribunal and so the issue as to whether the tribunal would have been obliged to consider them, and if so to what effect, does not arise [**58**].

On the first proposition, the Court holds (agreeing with the majority in *AS(Afghanistan) v Secretary of State* [2011] 1 WLR 385) that section 85(2) of the 2002 Act imposes a duty on the tribunal to consider any potential ground of appeal raised in response to a section 120 notice, even if it does not directly relate to the issues considered by the Secretary of State in the original decision [**34-44**].

On the second proposition, in Mr Alam's case the human rights case was considered but failed before the Upper Tribunal. Some weight was given to the circumstances in which he lost his ability to rely on the new evidence, but against this there was only 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. The Court holds that there was no error in the Upper Tribunal's approach [**59**].

References in square brackets are to paragraphs in the judgment