



# Chambers of Timothy Raggatt QC

4 King's Bench Walk, 2nd Floor,  
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London EC4Y 7DL



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## **Immigration Newsletter** **23rd May 2011**

### **Special Bulletin**

## **Section 19 UK Borders ACT 2007**

### Introduction

**A special bulletin concerning the introduction by the Government of Section 19 UK Borders Act 2007. This introduces a new section 85A into the Nationality Immigration and Asylum act 2002 (NIAA 02).**

*This bulletin was produced by Iain Burnett a practising member of 4KBW.*

UKBA announced on Thursday 19<sup>th</sup> May that the government will introduce section 19 of the UK Borders Act 2007. It will take effect on Monday 23<sup>rd</sup> May 2011 to all appeals heard in the FTIAC for the first time.

In the Ministerial Statement in respect of the introduction Damien Green stated that this was because the Government felt that most PBS appeals were allowed by Immigration Judges after the introduction of evidence not produced to UKBA when the application was made. The Minister went on to state that the introduction was because the Tax payer was paying for the cost of these appeals rather than the individual making a new application. (See Further Ministerial Statement (WMS) made on 19<sup>th</sup> May 2011)

*"Our management information shows that around two-thirds of PBS appeals allowed by the Tribunal are due to submission of further evidence at appeal. It is not right that the taxpayer should foot the administrative and appeals bill where this information should have been put forward as part of the original application or where a second application including all the necessary information (for which we will charge) is the most appropriate route to securing a grant of leave. Section 19 will restrict the type of new evidence that can be taken into account by the Tribunal. It will prevent circumvention of checks, helping restore public confidence in our immigration system and contribute to wider improvements to reduce the overall cost of the appeals system."*



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## **Section 19 (New section 85 A- Matters to be considered: New Evidence: exceptions)**

There are it appears two exceptions to section 85(4) now.

The first exception is the one which was contained within the original section 85(5) and concerns appeals against refusals of entry clearance applications and also appeals against the refusal of a certificate of entitlement. (See new section 85A (2).)

The second exception is the new requirement and will effect PBS refusals. This exception has three criteria.

**The first** is that it is concerned with an appeal against an immigration decision under section 82(a) or (d). These are the refusal of leave to enter the UK and the refusal to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave to enter or remain. It does not include a refusal under (e) variation of a person's leave to enter or remain if when the variation takes effect the person has no leave to enter or remain (le curtailment).

**The second** is that the immigration decision concerns an application of a kind identified in the Immigration rules as requiring to be considered under a "points based system". Hence it will not include any settlement applications, EU applications, and other applications made outside Tiers 1,2 4 and 5 of the PBS.

**The third** criteria is that the appeal must also rely upon in (whole or part) grounds of appeal in section 84 (1) (a), (e) or (f). These are:- the decision is not in accordance with immigration Rules, that the decision was not in accordance with the law, or that the person taking the decision should have exercised differently a discretion conferred by immigration rules.

If these three aspects are met the Tribunal **may only consider evidence adduced** by the appellant if certain conditions are met. These are set out in section 85A(4). There are four subparagraphs (a) to (d). (There is an "Or" after subparagraph (c) but not after the previous subparagraphs).

**The first condition** in subparagraph (a) is that the evidence was submitted **in support of, and at the time of making**, the application to which the immigration decision related. It should also be noted that there has been added to section 106(2) that the Tribunal can now make rules (procedure Rules) to determine what "**in support of and at the time of making**" means.



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(I (the author of this newsletter) have not seen as yet, at the time of drafting this newsletter, any new Rules to address this)

**The second condition** is that the evidence relates to the appeal in so far as it relies on grounds other than those stated in section 85A(3)(c). IE if the evidence relates to Human rights, EU provisions, asylum (refugee convention).

**The third condition** is that the evidence relates to prove that the document is *genuine or valid*.

**The fourth** and final condition is that it is adduced in connection with a discretion under the 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".

## **COMMENT**

This was introduced suddenly and swiftly having been on the statute books for a number of years. The announcement was made on 19<sup>th</sup> May Thursday and its introduction just one working day (Friday 20<sup>th</sup> May) later (23<sup>rd</sup> May-Monday). This may mean that a person had good prospects of succeeding on appeal when they instituted the appeal but now given this change their appeal becomes less viable and other options maybe better.

It is clear that the aim of this introduction is to severely limit the evidence that can be produced on appeal against a Points Based application refusal. UKBA and the Government wish applicants to submit new applications rather than introduce evidence which shows that a person actually met the Rules at the time of application, in an appeal. Part of the reasons given for this introduction is to restore confidence in the system and prevent potential fraud or abuse and cost to the Tax Payer. (See WMS of 19<sup>th</sup> May).

I would like to see UKBA and the Government produce statistics to show how many cases were allowed on appeal where it has been found that there was fraud used. I would also comment that a number of individuals have attempted to submit new applications whilst an appeal has been on going and asked UKBA to look at this application. UKBA usually refuses citing Section 3 of the Immigration Act 1971. If the Government's true aim is to save these costs and wish applicants to submit new applications, why do they not look at applications submitted during the currency of an appeal? If legislative change is needed to allow this, why do they not do so? There needs to be a balance struck between not unduly affecting employees and students who make mistakes, and cutting out any abuse and making **true**



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cost savings. When an appeal was submitted under the “Old system”, why could the PBS department not review the case before the appeal date? If then satisfied by the additional evidence they could grant the person leave and hence avoiding the need for an expensive appeal. There surely cannot be any difference in expense between reviewing the case and considering an entirely new application.

The other comment I would make is that when a caseworker discovers that an applicant is say short of a few days bank statements to show funds, or not submitted a qualification that was provided with a CAS, or perhaps the full birth certificate of the individual to show that the sponsor is a parent, why do they not write to the individual and allow them 28 days to submit it, failing which it would be refused? Surely this would save costs? It also means that UKBA is still checking the specific documents and is the primary decision maker.

The case of **PANKINA v SSHD** also showed us that the Courts found that additional requirements placed in guidance and not placed specifically as part of the rules, was not required to meet the Immigration Rules. It is noted that UKBA still insists upon these additional requirements in guidance and a number of these have not been upheld by the Courts and Tribunal. **Pankina** and a number of other cases have also considered that an appeal might succeed under article 8 depending upon the requirement which the appeal failed under the immigration rules. If someone can show that they did not produce the evidence but did in fact have it at the time of the application and can show that they met the requirements of the Rules (but now cannot introduce it under the new evidence restrictions) would this be a good case to be allowed under article 8? The appeals would potentially still be successful but leave granted would become discretionary (DL)? How does this address the cost of these appeals and save the Tax payer money? The Government has stated that its aim is in essence to prevent appeals against PBS decisions and make applicants submit new applications but is this aim likely to be met?

What of the “one stop notice” and the **AS and NV** argument? Would a new application submitted during the currency of the appeal remedy the situation? (Based upon **AS and NV v SSHD [2009] EWCA civ 1076**, I would comment that the Court of Appeal gave consideration to this in only really one of the Judgments. (See Judgment of Moore Brick LJ at paragraph 84- commented upon the introduction of evidence and that the restrictions upon evidence may cause some appeals to fail. It should be noted that Sullivan LJ agreed with Moore- Brick LJ and Lady Justice Arden dissented)). It would seem from the wording of the new section 85A that **new evidence** to show that an applicant met the requirement of the Immigration rules (under PBS requirements) will not be permitted. This is because the evidence that can be introduced has to be linked to the application to which the immigration decision related.



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Would it be possible to suggest that if the immigration decision is, the refusal to grant leave to remain as interpreted in **AS And NV** (and not the narrow construction- a refusal of leave to remain under the specific rule), and that during the currency of the appeal the applicant submits a new application with supporting documentation, that it could satisfy subparagraph (a) (See section 85A (4)(a))? It rather depends upon the reading given to "THE APPLICATION" in the subsection. However please note the Upper Tier Tribunal's (IAC) decision in **MS Pakistan [2010] UKUT 00117** about submitting an appeal on the basis of the same rule but trying to achieve a late application date, or new application with supporting documents. It is the author's view that the decision is not a correct interpretation of **AS and NV**.

Will the arguments in the case of MIRZA have any application? (CF **Amir MIRZA and others v SSHD [2011] EWCA civ 159**). This case concerned variation appeals where the UKBA had not made a removal decision. It was argued that this was unjust making the person a criminal overstayer whilst they awaited the SSHD deciding whether to make a removal decision. Is more importance going to be placed upon including this as a ground of appeal early on to try to persuade the FTIAC to allow the appeal and remit part so that it keeps the persons "leave alive" whilst they quickly submit a new application?

This approach is likely to have difficulties for Tier 4 Students and the requirement that the course commence 1 month after the last grant of leave expired.

I would also like to comment upon the conditions in subparagraph (4). Although there is only one "or" after subparagraph (c) it is my belief that given the ministerial statement, that the requirements are alternative and not cumulative. I am of this view because evidence to show that a document is genuine or valid is only likely to arise after an application has been made and once the issue has been raised by UKBA and hence the evidence would always be excluded. This is clearly not what the WMS envisages.

It will be very interesting to see the Tribunals approach to this new section and the attitude of the Higher Courts.

This Immigration newsletter is produced by Iain Burnett a member of 4 King's Bench Walk (4KBW). The summaries and opinions reflect the author's views and not the opinions or views of any other member of 4 KBW. (Unless otherwise stated)

Note- the above provides only a summary of the legislation, caselaw and comments upon it. It is important that reliance is not placed upon it as setting out the law. Individuals are advised to consult the legislation, and reports for themselves to determine its scope and application.