Upper Tribunal
(Immigration and Asylum Chamber)

TR (CCOL cases) Pakistan [2011] UKUT 33 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 November 2010	.....

Before

SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TR

Respondent

Representation:

For the Appellant: Ms L Ong, Home Office Presenting Officer
For the Respondent: Mr I Ahmed, Solicitor

1) *Just because findings of fact made by the Tribunal in a reported case are not binding does not mean that immigration judges are free to take account or not to take account of such findings at will: (a) the determination may contain an account of the record of evidence; (b) the Tribunal may have made findings of fact and if these relate to the same factual matrix then they should be followed unless there is a good reason to revisit them: see A (Somalia) [2007] EWCA Civ 1040.*

2) *In cases in which the Secretary of State alleges that a claimant falls foul of para 320(1A) of Statement of Changes in the Immigration Rules HC 395 as amended, it will be important to follow the guidance given by the Court of Appeal in AA (Nigeria) [2009] EWCA Civ 773 that knowing deception is needed to show false representations.*

3) *Given the nature and extent of the evidence found by the Tribunal in NA and Others (Cambridge College of Learning) Pakistan [2009] UKAIT 00033 to point overwhelmingly to a conclusion that CCOL never ran any Postgraduate Diploma in Business Management or in IT, a claimant who relies solely on documents specific to his or her own (claimed) studies in order to maintain the contrary must expect these to be scrutinised closely.*

DETERMINATION AND REASONS

1. This is an appeal against the determination of Immigration Judge (IJ) Elvidge notified on 13 August 2009 allowing the respondent's (hereafter the claimant's) appeal against a decision by the appellant (hereafter "the SSHD") dated 26 January 2009 refusing to vary leave to remain in the UK. The claimant's application was based on his having undertaken and successfully completed a Postgraduate Diploma in Business Management (PgDip in BM) at Cambridge College of Learning (CCOL) between 17 September 2007 and 15 August 2008.

2. This is far from being the first appeal to come before the Tribunal involving CCOL. Following a lengthy hearing before a panel comprising three Senior Immigration Judges in June 2009 the Tribunal reported the decision of NA and Others (Cambridge College of Learning) Pakistan [2009] UKAIT 00031 whose head note stated:

> "Cambridge College of Learning (CCOL) never ran a Postgraduate Diploma in Business Management course or a Postgraduate Diploma in IT course. Accordingly for a person applying for leave to remain under the Tier 1 (Post-Study Work) scheme to rely on a certificate of an award of such a diploma following a course will amount to a false representation and so will fall foul of para 322(1A) of the Statement of Changes in Immigration Rules HC 395. Such a person will also be unable to meet the requirements of para 245Z because he or she could never have undertaken such a course."

3. Notwithstanding the unequivocal findings made in NA and Others there continue to be a number of appeals pursued before the Tribunal in which claimants insist they did undertake PgDip studies at CCOL. This is one of them. Although we are only concerned with this appeal, it raises several points of recurring importance, which we shall try to address shortly.

Our decision on whether there was a material error of law

4. The SSHD appealed on the ground that in allowing the appeal the IJ had failed to take into account the decision in NA and Others. If he had done so, the grounds averred, he would have found (1) that the claimant, in claiming to have undertaken a course of study leading to a PgDip BM at CCOL, and relying on a purported certificate of an award of such a diploma, had knowingly made a false representation so that his appeal stood to be refused under para 322(1A) and para 320(7A) of the Immigration Rules HC 395 as amended; and (2) that the claimant did not meet the requirements of para 245Z because he could never have undertaken such a course.

5. The IJ heard the claimant's appeal on 6 August 2009 and his determination of it was signed on 12 August and notified on 13 August 2009. Those dates are significant because NA and Others was reported on 11 August 2009, i.e. five days after the hearing but one day before he signed his determination and two days before it was notified.

6. The IJ stated that he was aware that there were a "number of test cases pending on CCOL", but that these had not yet been decided and that "I can only decide this appeal on the evidence before me, which concerns one individual student". Noting that the Home Office evidence before him had not been tested by oral evidence and that the absence of a Home Office Presenting Officer meant that the claimant's evidence could not be tested by cross-examination, the IJ concluded:

> "18. I found the appellant to be credible in his evidence. He was able to name the modules he had followed. Even more importantly he was able to produce the four assignments he had written for the course. I have studied these carefully. The first thing to note is that they are written in good English, are logical and well argued. They are of a high standard. They may well have been largely based on what is available on the internet, but this requires application and methodology in itself. The appellant was able in oral evidence to give a description of the contents of the two of the modules, and would have gone on to give others if I had not indicated that that was enough. The appellant's lecture notes are dated, and start on 22.10.07 with a definition of management, and an account of strategic management processes. The notes cover lectures given on different dates, some of the dates are given, and continue to be about different related subjects. I find that they are clearly genuine lecture notes taken over a period of time, and all to do with business management. The spelling is excellent. They fill a small ring backed notebook
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> 19. I find that, whatever the position after the appellant received his diploma, that he was genuinely studying there and received a genuine diploma, which the college was authorised by the respondent to issue. His case has been given no individual consideration, since he is caught by the blanket ban imposed by the respondent as Mr Stewart describes. It may well be that many diplomas were being issued that were false. However, I conclude on all the evidence before me that the appellant's diploma was genuine and was the fruit of going to many lectures and producing written work. He went there because the College was on the approved list, and he ought not to be disadvantaged by the removal of

> the College from the approved list after he left. Since I find that the diploma was genuine and not false, the respondent has not acted in accordance with the law and the Rules, and so I must allow the appeal."

7. We should note that we know from the case of NA and Others that CCOL was taken off the Department for Innovation, Universities and Skills (DIUS) Register on 4 December 2008: that is what the IJ must mean in para 19 by the college being on "the approved list" at the relevant time.

8. Mr Ahmed submitted that the IJ committed no error of law in deciding the appeal as he did. Although he noted in his determination that test cases on appeals involving CCOL (which were reported as NA and Others) were pending, he properly confined himself to the evidence before him in the instant appeal. Mr Ahmed said he accepted that if there exists a higher court or starred Tribunal decision on a matter of law, that is legally binding and an IJ must be taken to err in law if he applies the law contrarily, even if in fact he is unaware of such a decision. He also accepted that similar principles must apply when an IJ decides a case in a way that is at variance with Tribunal country guidance. However, he submitted, NA and Others was neither a higher court or starred case, nor was it a country guidance case. There were two cogent reasons why the IJ should not be seen as having erred. First, there was a reason of practicality. It was not reasonably practical to expect an IJ who has heard a case to check anything further between that date and the date of notification. The judicial norm was and should be to decide the case on the basis of the case as presented at the hearing.

9. Second, submitted Mr Ahmed, even if NA and Others had been reported by the date of the hearing and the IJ had been referred to it, it was not incumbent on the IJ to treat its findings of fact as binding. The IJ had done precisely what every judge is supposed to do in an immigration appeal – he had decided the case on the facts of the particular case. He reminded us that in this case the claimant had not simply relied on the standard documents which he had submitted to the respondent when applying for variation of leave to remain (the original of his award by CCOL of a PgDip in BM; a transcript of his marks in various subjects; and a letter from CCOL). The claimant had also adduced:

(i) A witness statement dated 18 March 2009. This explained, inter alia, how he came to choose CCOL as his institution of study, noting that [at that time] it was listed on the DIUS Register and also had the approval of the British Accreditation Council (BAC); identifying the course structure (eight modules split into two semesters); giving the names of his three regular lecturers (who included the course co-ordinator (Mr Saif Ullah); explaining that the course teaching consisted in lectures and group work with private study in the library; stating that his modules were assessed by way of assignments, each 2,000–3,000 words in length; and specifying that he attended three days a week, Monday to Wednesday.

(ii) The originals of four assignments: on making informed decisions; strategic management; improving marketing strategy; and leading

change in organisation respectively. The IJ noted that these assignments were:

> "headed PGD – Business Management, give the name of the module, and state that this is an assignment for 2007/2008. The group is stated to be Touseef, Afzal, Zahid, and Waqar".

(iii) His lecture notes.

(iv) His oral evidence. This broadly covered the same ground as his witness statement.

10. We asked the parties to address us on the adequacy of the IJ's treatment of the Home Office evidence as it was before the IJ. We explained that although not expressly identified as a ground in the respondent's grounds the latter clearly considered the IJ's approach to the evidence to be flawed. Ms Ong submitted that the IJ had not dealt with this aspect of the IJ's treatment of the evidence properly, Mr Ahmed argued that the IJ had analysed it satisfactorily and was entitled to find it wanting.

11. We consider that the IJ's determination is vitiated by legal error even without reference to the case of NA and Others. In the case we are considering the SSHD had relied on a witness statement from Mr Jon Stewart, a Higher Executive Officer of UKBA together with statements from two CCOL teachers, Mr Malik and Miss S Ullah (not to be confused with Mr Saif Ullah).

12. Mr Stewart's evidence included (1) an account of the circumstances which had led to the relevant section of the UKBA becoming concerned during 2008 about the high number of PgDip certificates from CCOL being submitted in support of Tier 1 Post Study Work applications (far greater than the likely capacity of the college) and eventually issuing an instruction to caseworkers on 31 October 2008 to put such applications on hold; and (2) an account of the findings made by officers who had conducted an intelligence-led enforcement visit on 2 December 2008: "As a result of this visit evidence was collected to prove that the following qualifications have never been taught by the college [he then specifies the PgDip in IT and the PgDip in BM]". Clearly evidence of this kind from a relatively senior UKBA official confirming concerns serious enough to lead to suspension of the processing of all CCOL-related applications and recording unambiguous results of an on-site investigation was potentially evidence of considerable weight and significance. It was not simply evidence about one or two individual cases but about a widely observed problem within UKBA arising with all CCOL-related applications involving PgDips followed up by an on-site investigation. As such it merited careful consideration, notwithstanding that Mr Stewart was not produced as a witness before the IJ.

13. The IJ's treatment of Mr Stewart's evidence, however, was decidedly uncareful. The only specific comment he made related to Mr Stewart's acknowledgment that listed colleges (as CCOL was for a period) were able to issue their own diplomas without external assessment. Noting that there was a conflict between the evidence of Mr Stewart on this point and that of another of

the Home Office witnesses, Ms Ullah, he said: “his evidence, on that point, I find is to be preferred to that of Ms Ullah”. Otherwise the only comment made was that the statements from Mr Stewart and the two tutors “have not been tested by oral evidence”. That, with respect, did not amount to any real engagement with Mr Stewart’s evidence. It was certainly not a reasoned basis for the IJ’s later finding, clearly departing from Mr Stewart’s own (and Mr Stewart’s own department’s) assessment that all PgDips issued by CCOL were false. Nor was there any apparent evidential basis for the IJ’s surmise that “it may well be” that a change in ownership since the time the appellant secured his diploma had “led to the selling of diplomas thereafter”. When one analyses further on what basis the IJ decided the claimant’s PgDip in BM in particular was genuine, it is clear that it was simply on the basis of the claimant’s written and oral evidence appearing to him to be genuine taking that evidence very much at face value. He stated that the appellant had been able to give a relatively detailed account of modules, assignments etc. But he did not show that he had in any way sought to ask the claimant any obvious questions designed to test his evidence. Of course, given that the SSHD was not represented, he was required by the Surendran guidelines [contained in an annex to MNM v SSHD [2000] INLR 576] not to enter into the arena, but he had to ensure that the claimant had at least tried to answer the substance of the respondent’s case. If it was not dealt with in the claimant’s witness statement he, in the absence of a Presenting Officer, had a responsibility to ask a limited number of questions designed to test the evidence, particularly in a case where he was seeking to rely on the fact that he had not had the opportunity of testing the written evidence of the other party’s witnesses (the SSHD). Assuming that the IJ was right to proceed to hear the case (i.e. that he was right to consider he had sufficient evidence before him to determine the appeal), he was correct to say that his decision had to be made on the basis of the evidence before him, but wrong to proceed as if the claimant’s evidence could be considered in isolation from the SSHD’s evidence and taken at face value. The evidence before him did not simply concern “one individual student”. These shortcomings in the IJ’s determination amounted to a material error of law.

Discussion

14. Before turning to the points in contention we should clarify that since the case of NA and Others was decided there have been two Court of Appeal judgments having impact on the legal matters addressed in that case. In AA (Nigeria) [2009] EWCA Civ 773, Rix LJ, whilst approving the view of the Tribunal in NA and Others at para 146 that for deception to arise the false representations must have been made knowingly, disagreed with its view that false representations within the meaning of para 322(1A) of the Immigration Rules could cover innocent representations or matters that were simply untrue or incorrect: on the contrary, “[d]ishonesty or deception is needed, albeit not necessarily that of the applicant himself, to render a "false representation" a ground for mandatory refusal.”(para 76). We are given to understand that the Court of Appeal may take the opportunity in pending cases to give further guidance on the application of para 322(1A), but what we can say here, subject

to any further guidance from this Court, is that on the facts as found in NA and Others the difference over the interpretation of para 322(1A) did not matter because the Tribunal (1) made a clear finding that the respondent had shown that the three appellants concerned had used deception (see paras 149-150) and (2) made a clear finding that no person claiming to have undertaken a PgDip course in IT or BM at CCOL can have done so without knowing that such a claim amounted to a false representation (see para 147). In effect, (2) was a finding that no person can innocently undertake a non-existent course. However, following AA (Nigeria) it will be important for immigration judges dealing with CCOL cases in which a para 322(1A) ground of refusal is raised, to make a specific finding on whether or not it has been shown that knowing deception (albeit not necessarily on the part of the applicant himself) was involved. This links to what we go on to say at para 25 below.

15. In Pankina [2010] EWCA Civ 719 Sedley LJ held that in applying provisions of the Immigration Rules dealing with the Points Based System, it was wrong to treat provisions set out by the respondent in Policy Guidance as mandatory: extrinsic guidance could not be used to make a material or substantive change in existing immigration policy without the negative resolution procedure set out in s.3(2) of the Immigration Act 1971 being implemented. Whilst in NA and Others the Tribunal had taken a different view concerning the status of Policy Guidance – in reliance on another case also called NA and Others (Tier 1 Post-Study Work-funds) [2009] UKAIT 00025 - its reference to such matters was obiter. The reason why the three appellants failed was because they fell foul of para 322(1A) and failed to meet mandatory requirements of para 245Z; such reasons were unconnected with the Policy Guidance.

16. We turn then to the matters in contention in this appeal. Given that we have found a legal error in the IJ's treatment of the evidence he did have before him, it is not strictly necessary for us to rule on whether he should have had regard to evidence he did not have before him, in the form of the decision in NA and Others.

17. That way of formulating matters may help clarify why we think the IJ could not be said to have erred in law in failing to have regard to NA and Others. When he signed the determination on 12 August NA and Others had still not been reported. NA and Others was not a country guidance case or one that was declaratory as a matter of law (we note this is a point that was made by the Rt Hon. Sir Richard Buxton when granting permission to appeal in the case of CW (Sri Lanka) Ref: C5/2010/1225) on 22 December 2010). Nor was it a starred case. Hence it was not a decision that the IJ was legally bound to follow and apply (even if unaware that it had in fact been reported shortly before his decision had been notified). Even had it been a starred case, it would only have been legally binding as to the law, not as to facts.

18. But it may be useful for us to set out what we consider the position to be in a case involving a student claiming to have undertaken a CCOL PgDip where the IJ was or is aware of the reported decision in NA and Others.

19. Just because findings of fact made by the Tribunal in a reported case are not binding does not mean that immigration judges are free to take account or not to take account of such findings at will. There are two reasons for this.

20. The first is free of controversy. It is that the reported case may contain a record of relevant evidence. The fact that it was given in a different case might impact on the weight that should be given it but it is still evidence that has to be considered. A division of the Tribunal will not be assumed to know all the evidence in all of its reported cases in the way that it will be assumed to know the law, but evidence in reported cases (cf the ratio of the decision) is admissible as evidence in other cases. Any evidence relevant to an issue the Tribunal has to decide should be taken into account in any cases where it comes to the attention of the Tribunal and the Tribunal must explain in each case what weight it attaches to the evidence in the reported case when making its decision. This will range from "peripheral" to "almost conclusive" depending on a wide range of factors. Accordingly, not to take account of that evidence may well amount to a failure to take into account relevant matters.

21. The second reason relates to the reported case as an evaluation of relevant evidence. In seeking to identify the correct legal principles to be applied in this situation it is instructive to consider the guidance given by the Court of Appeal in respect of a different but closely analogous situation that arises when a second judicial fact-finder is considering findings of fact made by a previous judicial fact-finder involving the same factual matrix. In A (Somalia) v SSHD [2007] EWCA Civ1040, having reviewed previous authorities including LD (Algeria) [2004] EWCA Civ 804 and Ocampo [2006] EWCA Civ 1276, Carnwath LJ for the majority stated:

> "Consistency as a principle of public law
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> 63. As I understand his submissions, Mr Kovats for the Secretary of State does not accept that a previous decision should be given any particular weight, at least in a case involving a different appellant. The tribunal may have regard to it, but it is not obliged to follow it, whether or not there is new evidence; its duty is simply to decide the case on its own merits on the evidence before it.
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> 64. I could understand this submission on the basis of the law as it stood before Ocampo. The normal principle is that previous tribunal decisions do not establish a precedent (see Mukarkar v Home Secretary [2006] EWCA Civ 1045). "Country guidance" cases are a well-recognised exception (see *S v Home Secretary* [2002] EWCA Civ 539). In Otshudi v Home Secretary [2004] EWCA Civ 893, a case involving inconsistent decisions arising out of appeals by two brothers. Sedley LJ noted that no legal submission had been based on the discrepancy as such, and commented:
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> "This is not the class of case which involves what Laws LJ has called a "factual precedent" - for example a finding about the political situation in a given country at a given moment. It is an illustration, if an alarming one, of the fact that two conscientious decision-makers can come to opposite or divergent conclusions on the same evidence. But it is no more material to

the legal soundness of the present adjudicator's decision than hers would be to the soundness of the second adjudicator's decision...." (para 11)

As he made clear later in the judgment, he regretted that position:

"The discrepancy between the two decisions, while giving rise to no legal challenge, must be a matter of concern. If the second adjudicator is right, this appellant's life too is at risk. If he is wrong, of course, neither brother may be at risk; but asylum law - for example by demanding something less than proof positive - deliberately errs on the side of caution...." (para 23)

He noted that normally arrangements would have been made for such linked cases to be heard together. He invited the Home Office to reconsider the case on humanitarian grounds.

65. That, however, was before the decision in TK (Georgia), that the Devaseelan principles could be extended to such a situation, and before that extension had been approved by this court in Ocampo. In the light of that decision I do not see how we can accept Mr Kovats' argument. I note that Hooper LJ, who was himself a party to Ocampo, takes a different view of its significance. Respectfully, however, the reasoning of Auld LJ's judgment seems to me carefully considered and entirely clear. Whether or not it is technically binding, I would not think it right to depart from it unless I thought it clearly wrong, which I do not.

66. On the contrary the reasoning is in line with the principles relied on by the Secretary of State himself, through Miss Giovannetti, in Devaseelan (see above). They in turn reflect the well-established principle of administrative law, that "persons should be uniformly treated unless there is some valid reason to treat them differently". As was said in Matadeen v Pointu [1998] 1 AC 98 PC (per Lord Hoffmann):

"Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational: see Professor Jeffrey Jowell QC, Is Equality a Constitutional Principle? [1994] Current Legal Problems 1, 12-14 and De Smith, Woolf and Jowell, Judicial Review of Administrative Action, paras. 13-036 to 13-045." (p 109C-D)

The same principle was relied on by this court in the asylum context R(Iran) v Home Secretary [2005] EWCA Civ 982 para 22, in the context of country guidance cases. Looking at the matter in 2004, I might have shared Sedley LJ's doubts as to the application of such principles outside the context of country guidance cases. However, I would have also shared his concerns at the potential unfairness which that limitation can cause. Now that the jump has been made, I see no reason to question it, or to regret it.

67. In one of the present cases, Mr Ockelton appears to have had second thoughts about the width of the approach taken in TK. In *AA* he was party to

a lengthy discussion of the question why a decision of fact in one appeal should be considered of any relevance in an appeal by a related claimant. The discussion included reference to decisions in administrative law (including one of my own, R v Cardiff County Council ex parte Sears [1998] 3 PLR 55), and to cases under the general law of evidence relating to the admissibility of a previous court decision (such as Hollington v Hewthorn [1943] KB 587). The latter line of authority seems to have led the tribunal, while not in terms departing from TK, to express rather more doubt as to the relevance of previous decisions in cases between different parties, suggesting that it is no more than "background" (para 66-71).

68. Unfortunately, the decision in that case was given in July 2006, a few months before Ocampo. Had the tribunal had the benefit of that decision much of the discussion might have been rendered unnecessary. Furthermore, I think the doubts were misplaced. As I have said, the basis of the Devaseelan approach, and of its extension (if correct), must be found, not in the civil or criminal law of evidence, but in general principles of administrative law.

Qualification

69. While I do not think it is open to us to depart from Ocampo I would suggest two qualifications, which seem to me consistent with it. First, Auld LJ said that the guidelines are relevant to "cases like the present" where the parties are not the same but "there is a material overlap of evidence". The term "material" in my view requires some elaboration. It recognises I think that exceptions to the ordinary principle that factual decisions do not set precedents (see above) should be closely defined. To extend the principle to cases where there is no more than an "overlap of evidence" would be too wide, and could introduce undesirable uncertainty. In all the cases in which the principle has been applied so far, including Ocampo, the claims have not merely involved overlapping evidence, but have arisen out of the same factual matrix, such as the same relationship or the same event or series of events. I would respectfully read Auld LJ's reference to "cases such as the present" as limiting the principle to such cases.

70. Secondly, in applying the guidelines to cases involving different claimants, there may be a valid distinction depending on whether the previous decision was in favour of or against the Secretary of State. The difference is that the Secretary of State was a direct party to the first decision, whereas the claimant was not. It is one thing to restrict a party from relitigating the same issue, but another to impose the same restriction on someone who, although involved in the previous case, perhaps as a witness, was not formally a party. This is particularly relevant to the tribunal's comments, in Devaseelan, on what might be "good reasons" for reopening the first decision. It suggested that such cases would be rare. It referred, for example, to the "increasing tendency" to blame representatives for unfavourable decisions by Adjudicators, commenting:

"An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence…"

> I understand the force of those comments where the second appeal is by the same claimant, but less so where it is by a different party, even if closely connected. Although I would not exclude the Devaseelan principles in such cases (for example, the hypothetical series of cases involving the same family, cited in *TK*), the second tribunal may be more readily persuaded that there is "good reason" to revisit the earlier decision. "

22. We derive from this guidance that, subject to being satisfied there is a common factual matrix (and also subject to the "more readily persuaded" qualification set out in para 70 of A (Somalia)), it is incumbent on immigration judges to follow findings of fact made by the Tribunal in a reported case dealing with the same factual matrix unless there is good reason to revisit the earlier decision.

23. Applying the guidance given in A (Somalia) to the present case, we would make three observations. First, we think the IJ should have taken more care to check the latest position regarding the test cases before signing the determination. By having himself described them as "test cases" the IJ must clearly have appreciated that they would involve a panel that would very likely have regard to a great deal more evidence than was available to him and that would make findings having relevance to all CCOL-related cases. There was clearly going to be a common factual matrix. Further, what his determination stated about them – that "these have not yet been decided" – was factually incorrect at the time of promulgation. It might well be said that an IJ cannot be expected to keep an eye out for every freshly reported case, but even if that is so, for that very reason an IJ should not say a case has not been decided without checking.

24. Second, both at the level of the First-tier Tribunal (FTT) and the Upper Tribunal (UT) there is a clear objective and interest in like cases being decided alike. If a jurisdiction has taken active steps to identify test cases and to conduct a hearing for that purpose, it is highly desirable that all other judges then seek to decide their own cases in the light of them. Whether or not such cases should then be treated as determinative will depend (following A (Somalia) on whether there exists any good reason for departing from the findings made in that case; but not to have regard to those findings or (absent good reason) to make divergent findings on the same evidence is erroneous.

25. At the same time, certainly when the Tribunal's findings of fact concern college courses, it must always be recalled that the focus of any appeal is a decision made against an individual applicant. That entails that in order to decide the relevance of those findings of fact to the appeal, individual consideration must be given to the case made by the appellant and the evidence he or she produces in support of it. There can be no mechanical deduction from general findings of fact made in another case that the appellant in the instant case must automatically fail. Indeed, given that (1) in cases in which the respondent considers that an applicant has not submitted genuine educational qualifications (in the CCOL context, genuine PgDips) it is common for para 322(1A) to be invoked; and (2) that for immigration judges to find false representations within the meaning of this paragraph have been made by a

person claiming to have undertaken a PgDip at CCOL he or she must be satisfied that there was knowing deception (see above para 14), the need for focus on the individual appellant and his or her state of mind is even more essential. To that extent (but to that extent only) it remains the case, as Hooper LJ in the minority stated in A (Somalia), that the fundamental obligation of the judge independently is to decide the second case on its own individual merits.

26. We would also add that we are surprised that this IJ, deciding this case when he did, did not at least consider whether he should adjourn or delay promulgation in order to see whether it was necessary to reconvene so he had NA and Others available. We appreciate that immigration judges do their best to work to strict time limits and targets, and we acknowledge that there may have been listing considerations in play that may have had a bearing and might explain the non-adjournment, but there is no public interest in reaching decisions in cases where it is known that a very relevant test case decision from a panel of judges is imminent.

27. Having decided that the IJ materially erred in law we concluded that his decision should be set aside. Our attention turns to the question of what decision we should make in its place.

28. To this end the claimant was called to give oral evidence. In cross-examination he was reminded that whereas he had said to the IJ that he did eight assignments, he had only produced four. The claimant said that the other four had been saved on CCOL laptops and he had not kept copies. Asked why none of the four assignments submitted dealt with any practical examples, the claimant said the other four dealt with practical applications. Asked why none of the four assignments submitted showed any signs of having been marked, the claimant said that the tutors recorded marks separately on a mark sheet which was put up on a notice board.

29. In response to questions from the Tribunal the claimant said all eight of his assignments were the collective work of him and three other students. The tutors gave each of the four the same marks. These assignments accounted for 40% of the total course marks. The tutors gave him and the others feedback on them during lectures; there were no written comments. Asked about the notebook he had produced he said it represented the entirety of the lecture notes he had taken during the duration of the course (which he said, in reply to a further question stretched over two semesters of twenty weeks each for three days a week). He later added in reply to a follow up question from Ms Ong, that he had attended all his lectures. Asked twice why his notebook only seemed to contain notes for a handful of lectures, he was unable to offer any reply, although he did add shortly after that that perhaps his notebook was only his main notebook. Asked if he had tried to contact any of the three other students who had named as having done the assignments with him, the claimant said he was still in contact with one of them but he had not asked that person. He himself had moved house once so he had not kept past materials

such as the syllabus, course notes and handouts once he got his diploma. The claimant said he considered his lecturers/tutors to be good teachers.

30. In closing submissions Mr Ahmed emphasised that the Tribunal should not hold against the claimant that CCOL did not appear to have very good teaching methods. Even if 40% of students' marks were allotted on the basis of group work, there were also individualised exams the results of which had been specified in a document signed by the college and submitted to UKBA with his application. The notebook he had produced was only his main notebook. The claimant had explained why he had not kept course materials and it was now 2-3 years ago. If there was fraud at the college it is likely it occurred after the time this appellant studied there.

31. Ms Ong contended that the claimant's evidence was improbable and contained nothing to justify the Tribunal taking a different view of CCOL PgDip cases than that taken in NA & Others.

Our Assessment

32. Now we are deciding what decision to re-make, we must have regard to all the evidence including that identified and referred to in NA and Others. We must also apply the guidance given by the Court of Appeal in AA (Nigeria) and in Pankina: see above paras 14-15.

33. It follows from our earlier observations on the status of NA and Others that we think it would be an error for an Immigration Judge to dismiss a CCOL-related appeal solely on the basis that NA and Others made a finding of fact that the college never ran PgDip courses. A fortiori it would be wrong to base the dismissal on para 322(1A) grounds without examining whether the particular individual concerned did or did not use knowing deception. There is still a fundamental duty of individual consideration.

34. It would therefore be wrong for Immigration Judges to seek to dismiss CCOL-related cases on the basis of template decisions that make no reference to the individual circumstance of each applicant and do not engage with the evidence he or she has produced, with a view to comparing that with the findings reached in NA and Others before reaching a decision. No judge should wholly shut his or her mind to the possibility at least that findings of fact made in another case were wrong. (Whether however, pro forma dismissals of this kind amount to a material error of law may still depend on what evidence the appellant has produced in support of his or her appeal.)

35. Equally, however, Immigration Judges must have regard to the findings made in NA and Others in two different, interrelated, ways. First, as already adumbrated, quite separately from its findings, the case contains a record of evidence considered. The decision makes clear that the Tribunal had extensive documentary evidence, including evidence from senior UKBA officials and results of their own analysis of relevant data, evidence about the results of an on-site investigation titled "Operation Asterion", evidence relating to CCOL's

dealings with accrediting bodies, evidence of materials placed on the CCOL website, evidence of e-mail correspondence between CCOL staff on the one hand and members of UKBA officials on the other, a number of witness statements from former tutors at CCOL (including further witness statements from two of the tutors whose witness statements were before the Immigration Judge). It also had the benefit of examination by experienced Counsel of the evidence of Mr Stewart, Mr Malik and Miss Ullah as well as the benefit of detailed submissions by the same experienced Counsel.

36. Second, NA and Others also contains an evaluation of this body of evidence, setting out its reasons for concluding that CCOL never ran any PgDip courses. The findings of the panel in that case represent, therefore, a considered view based on an extremely detailed assessment. The fact that these findings were also the subject of a reported case, reflects the fact that it had been considered within the Tribunal judiciary to be a suitable case for citation and wider dissemination.

37. It will also be important for immigration judges to bear in mind that following the reporting of NA and Others, a large number of appellants whose cases were still pending were sent directions by the Tribunal judiciary informing them, inter alia, that this decision had been published. By this means they were surely alerted to the need to produce further evidence and/or reasons, if any, why the Tribunal should not come to the same conclusion as the Tribunal in NA and Others.

38. In consequence, it is right to expect that if a claimant seeks to maintain notwithstanding the findings made in NA and Others that he or she did study on a PgDip course at CCOL he will be able to produce cogent evidence.

39. Potentially that evidence could be of several kinds, including (but not necessarily limited to): (1) evidence directly impugning the evidence of the UKBA research made into CCOL PgDip applications and the SSHD witnesses, which the Tribunal in NA and Others found persuasive; (2) witness statements from one or more other tutors at the college or other CCOL staff in a position to verify by credible evidence what courses were run; (3) evidence from the DIUS relating to the decision to take the college off the register[1] (or from experts in a position to comment on the merits of that decision); (4) evidence from independent persons or bodies who had had direct dealings with CCOL (e.g. accrediting bodies); (5) evidence from the CCOL website over the relevant period (given the ease with which internet documents can be copied, it would be important for any such evidence to be submitted in original form); and (6) documents specific to a person's own claimed studies.

40. If a claimant in seeking to produce evidence and /or reasons why an Immigration Judge should not come to the same conclusions as did the Tribunal in NA and Others relies solely on documents specific to his own claimed studies

[1] Since the period when CCOL was still operating as a college, the register of education and training providers published by the DIUS has been replaced - as from 31 March 2009 - by the UKBA register of sponsors. The register of sponsors lists all organizations that the UK Border Agency has licensed to employ migrant workers or sponsor migrant students.

he or she must expect that evidence to be scrutinised and compared and contrasted with the multi-sourced and diverse documentation and evidence considered and analysed in NA and Others. As noted in NA and Others when it turned from a consideration of the evidence relied upon by the three appellants in that case to the wider evidence:

> "132. By contrast, the respondent was able to assemble some significant pieces of evidence from his own research. We note that the UKBA had formed the view in October 2008 that the evidence relating to such certificates was anomalous since, as was noted by a UKBA Executive Officer, Robin Smith, they were being received in high numbers, well beyond the capacity for a relatively small college (some 2,542 in the two months leading up to 22 December 2008). The documentation submitted was of poor quality, in varying colours, some letters had not been signed by an individual but just a 'Programme Leader', the wording in some letters from the college was identical to others, and there were several cases where the overseas national had entered the UK as a student at another college but had submitted a qualification from CCOL whilst still registered with that other college. In addition, UKBA had undertaken a study of a sample of supporting documents submitted by students claiming to have been awarded a CCOL certificate in either PgDip in BM or IT on 20 August 2008. An Executive Officer, Mr K Ara, found that of 29 individuals who had all submitted PgDip in BM or PgDip certificates, the accompanying 'Transcript of Academic Record', showed that a significant number had obtained identical pass marks to one another, regardless of the course start date, in eight subjects. We would add that all of the certificates refer to candidates 'having satisfied the board of examiners'. We had no evidence to suggest that the college ever had any 'board of examiners'.
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> 143. Then there is the evidence we have from several of the college teachers. In particular we have the evidence of Mr Malik and Miss Ullah which included their oral evidence. Mr Macdonald did not challenge that evidence in any important particular. They were very clear that CCOL has never run such courses and that, if they had, they would have known about it. There were also statements from several other teachers none of whom knew of the existence of such courses. We bear in mind that the CCOL was a relatively small college occupying a ground floor and a basement, having no more than 8 classrooms and consisting in approx. 150-300 students. It is inconceivable that courses said to have run on dates between late 2007 and late 2008 could have taken place, without Mr Malik and Miss Ullah and probably the other teaching staff who gave statements, knowing about it.
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> 144. Of some interest also is the evidence in the form of statements from two individuals who said they had been able to purchase bogus CCOL PgDips in BM or IT: Opeoluwa Atinuke Ehindero and George Ratnaraj. Although not playing a significant part in our assessment, they give some insight into at least one of the ways in which it came about that a very large number of individuals in the second half of 2008 submitted Post-Study Work or student applications to UKBA based on CCOL PgDips in BM or IT. They describe agents selling them bogus certificates. Their description is similar to that given in news articles exhibited to us. Mr

> Macdonald would have it that these show no more than that there were bogus as well as genuine applications made on the basis of such courses. In our view however, it is far more likely that they form part of a wider picture showing that these courses never ran."

41. In the claimant's case, not only was his own evidence not supported by any of the other types of evidence specified in (1)-(5) in para 37 above, but we are unable to attach any credence to the materials he did produce. On the basis of his own answer, given twice before us, the notebook he produced contained all his lecture notes for the entire course. However, that claim even if taken to mean (as he sought to assert belatedly in his oral evidence to us) that this was only his "main notebook" is simply not plausible. On his own evidence he attended all his lectures. We did not establish how many lectures he had on each of the three days he said he attended but he did refer to attending "lectures" on each of those three days and to each of the two semesters being twenty weeks. Hence, at a very minimum, he must have attended over 60 lectures. Yet his notebook contained only 29 A4 pages occupied by large, extremely neat, double-spaced writing. The first page begins with an entry "22/10/07"; three and a half pages later there is an entry "31/10/07"; half a page later one for "06/11/07"; another two pages on, one for "21/11/07"; another two and a half pages on, one for "28/11/07"; another two pages on, one for "02/12/07"; four pages on, one for "18/12/07"; another three pages on, one for "09/01/08"; another six pages on, one for "15/01/08"; another four pages on, one for "11/02/08". There are then 10½ pages without any further date entry. At the end of the notebook there are several pages of workings-out. There are therefore only eleven entries with dates. Although the IJ appeared to think the appellant may not necessarily have remembered to enter all the lecture dates, we consider, given the extreme brevity of the existing entries, that they at best suggest materials relating to eleven lectures. (We also wondered, given how short some of the entries for each date were, how it was that the appellant could describe his lecturers as good; but we decided in the end not to take any point regarding this, as we recognise that (sadly) teaching of low quality is not unknown in today's colleges.) The claimant did not produce or refer to there being any course handouts or textbooks that might perhaps have been thought to supplement the lectures and thus reduce the need for taking his own notes. Nor did he seek to suggest he was so confident of his own abilities that he did not take lectures and taking lecture notes seriously.

42. As regards the assignments, none of the four produced were marked or bore any sign of having been commented on and, indeed, on the claimant's own evidence it was the same with the other four. We find it highly implausible that the appellant could have submitted written assignments amounting to 40% of the potential marks counting towards the award of a PgDip without receiving any written comments either made on the assignments themselves or in a separate personalised note. We are aware that on many courses in IT and business studies, students are assessed for some assignments on the basis of group work, but the notion that all of eight assignments making up a PgDip in BM award be joint products is hard to swallow. In any event, the assignments themselves were in general textbook

form and made no reference to any specific examples, relating to the performance of e.g. of individual firms. In this regard we simply fail to understand why the IJ appeared to think that these assignments showed on the part of the appellant at least "application and methodology in itself": if they had simply been cut and pasted from the internet, the only "application and methodology" would have been on the part of the original author(s). That makes it even harder to accept that they were genuine assignments on a course of this type. The IJ appears to have viewed positively the fact that the English expression in these assignments was of a good standard, yet in our view that only highlights the lack of resemblance they bear to the appellant's own much less proficient standard of English, at least as shown by his oral evidence.

43. Given that the claimant knew in advance of the hearing before us about the case of NA and Others and was notified by the Tribunal of the importance of submitting any further evidence, we find it very surprising that he said he had not taken steps to contact fellow students to see if they could assist with course materials etc, nor had he taken any steps to contact former tutors. He has known since January 2009 that his claim to have pursued a PgDip in BM at CCOL was not accepted by the SSHD and yet he failed to mention taking any steps at that stage to assemble and keep safe such materials as course syllabus, course handouts, lecture timetables and correspondence with tutors.

44. In short, we found the claimant's oral evidence deeply unsatisfactory. Considering that evidence together with the written evidence he had produced and placing that evidence alongside the evidence identified and analysed in NA and Others, we are satisfied that he has deliberately sought to use deception by producing materials that have no relation to any PgDip course undertaken at CCOL. We see no good reason evinced by his evidence to depart from the unequivocal finding made in NA and Others that CCOL never ran any PgDip courses.

45. The effect of the findings we have made are that we are (1) satisfied that the respondent discharged the burden on him of proving that the claimant had made false representations; (2) that in any event the appellant failed to show that he met the requirements contained in para 245Z of the Immigration Rules that the appellant had undertaken study for a PgDip in BM at CCOL.

46. To conclude:

The Immigration Judge materially erred in law and we set aside his decision.

The decision we remake is to dismiss the appellant's appeal.

Signed Date

Senior Immigration Judge Storey
(Judge of the Upper Tribunal)