Upper Tribunal
(Immigration and Asylum Chamber)

FA and AA (PBS: effect of *Pankina*) Nigeria [2010] UKUT 00304 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Friday 23 July 2010	.....

Before
MR JUSTICE BLAKE, PRESIDENT
MR C M G OCKELTON, VICE-PRESIDENT
SENIOR IMMIGRATION JUDGE ALLEN

Between

FA
AA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Olatejau of Henshaw Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

The effect of the decision of the Court of Appeal in Pankina is not limited to the 'three-month rule' in relation to evidence of funds. Policy Guidance does not have the status of Immigration Rules for the purposes of immigration appeals.

DETERMINATION AND REASONS

1. The principal appellant is a student at the University of the West of England undertaking an MSc in International Management. She started this course on 24 September 2007 and was due to complete it on 2 July 2010.

2. The second appellant is her husband and her dependant in this application.

3. On 29 December 2009 the Home Office refused an application made on or about 8 October 2009 for leave to remain as a Tier 4 (General) Student Migrant under the Points-Based System. The application was refused: the points claimed under Appendix C of the Immigration Rules were not awarded because the first appellant had not provided any evidence of funds. Under the calculation due under the rules she had to provide evidence that she had maintenance funds of £2,800. What she had in fact provided in the application was a number of certified bank statements from a Lloyds TSB account in the name of the second appellant, her husband.

4. There was ample evidence before the Immigration Judge that the first appellant had access to the funds in her husband's bank account but for cultural reasons chose to keep that account in the husband's single name. The evidence to this effect included the contents of the bank statements themselves showing payments out to the University of the West of England; a statement from the husband that the wife was able to access these funds; and a statement from the university that tuition fees had been in the past been paid by Mr Abidemi Adio.

5. The Immigration Judge heard this appeal on 22 February 2010 and dismissed it on 4 March 2010. He identified two reasons for doing so:

   (i) The last date on the bank statement was 24 September 2009 whilst the date of the application was either 3 October as the appellant asserted or 8 October as the respondent asserted and therefore the last entry did not cover the date of the application.

   (ii) The bank statement was in the sole name of the second appellant, the first appellant's husband. According to the Guidance issued by UKBA a student may in certain circumstances use the bank statements of his/her parents. But the Guidance does not permit a student to use the bank statement of his/her spouse to establish his/her case.

> "The fact of the matter is the Immigration Rules and the Guidance require the funds to be available to the appellant. Despite the fact that the appellant's husband may have provided written confirmation that the funds are available to her, that consent may be withdrawn at anytime and so it does not assist the appellant in this appeal. I find that funds in the bank account of the appellant's spouse are not available for the appellant".

6. Permission to appeal to the Upper Tribunal was granted by the Vice-President on 7 July 2010 in the light of the Court of Appeal decision in Pankina v SSHD [2010] EWCA Civ 719, dated 23 June. The appeal was listed before a panel consisting of the President, the Vice-President and SIJ Allen along with other cases concerned with the Points-Based System and the application of UKBA Guidance on 23 July 2010.

7. At the end of the hearing we indicated that we would allow the appeal. We now give our written determination explaining the reasons for doing so.

Issue 1: date of the bank statement

8. The first ground of the IJ's decision can be disposed of shortly. The bank statements that were presented by the first appellant were in fact dated 3 October 2009, as appears from their printed text, and were certified on that date as well. The rubric at the head of the statement says "the personal data on this statement was correct at the date of printing". Whilst it is true that the last transaction on the last sheet of the bank statements, a debit of £10 in favour of the University of Bristol leaving a balance of £3,906, was dated 24 September; but the IJ has been misled into thinking that this was the date of the bank statement and that there was a gap between the last date on the bank statement and the date of application.

9. There was no such gap upon a proper reading of that statement. Whether the application was made on 3 or 8 October, the bank statement covered the position as of the date of application, since there would inevitably be some gap between the bank statement being obtained and its arriving in the Home Office for its evaluation.

Issue 2: use of the bank statement

10. That leaves the more important question, namely whether the appellant can rely upon her husband's bank account to demonstrate that she has funds available to her within the meaning of Appendix C of the Immigration Rules.

11. Para 11 of Appendix C of the Immigration Rules as varied on 31 March 2009 provides:

> "Ten points will only be awarded if the funds shown in the table below are available to the applicant and the applicant provides the specified documents to show this"

12. The first appellant's case is that she did provide evidence that funds were available to her by reason of specified documents namely a certified bank statement from a an acknowledged financial institution in the United Kingdom. The respondent's case is that the Policy Guidance issued in respect of such claims particularly paragraph 127 to 140 requires that apart from "Official Financial Sponsors" the bank statement submitted should be in the first appellant's own name or in the name of parents who are eligible as sponsors.

13. Those are not the requirements of Appendix C or any other part of the Immigration Rules read independently of the Guidance. The first appellant further argues that in the light of the Court of Appeal's decision in Pankina guidance cannot be used to supplement the requirements of the Immigration Rules by imposing an additional obligation on applicants that is not spelt out in the Rules.

14. In the case of Pankina what was in issue was the requirement of the Guidance, not spelt out in the Rules themselves, that funds had to be available not merely on the date of the application but for three months preceding it.

15. The Court of Appeal first posed the following questions:

> "23. Counsel, to whom we are indebted for having together presented an economical and orderly set of documents and arguments, have agreed that the questions for the court are these:
>
> (1) Can the immigration rules lawfully incorporate provisions set out in another document which
>
> (a) has not itself been laid before Parliament
>
> (b) is not itself a rule of law but a departmental policy
>
> (c) is able to be altered after the rule has been laid before Parliament?
>
> (2) If the answer is yes
>
> (a) are the facts to be tested as at the date of the decision or of the appeal?
>
> (b) at whatever point the facts are to be tested, is the policy to be applied as a policy or as a rule?
>
> (c) in applying it, does ECHR art.8 have any application?

(d) If not, does art.8 have any independent application?"

Later in the judgment it addressed them as follows:

"28. The reason lies in questions (1)(b) and (c). A policy is precisely not a rule: it is required by law to be applied without rigidity, and to be used and adapted in the interests of fairness and good sense. To take the present case, the policy guidance standing alone would not only permit but require a decision-maker to consider whether, say, a week's dip below the £800 balance during the three-month period mattered. This would in turn require attention to be given to the object of the policy, which is to gauge, by what is accepted on all sides to be a very imprecise rule of thumb, whether the applicant will be able to support him- or herself without recourse to public funds. If that object was sensibly met, the law might well require the policy to be applied with sufficient flexibility to admit the applicant, or would at least require consideration to be given to doing so. But if the requirement is a rule – and it is the Home Secretary's case that by incorporation it becomes a rule – then there is no discretion and no judgment to be exercised.

29. This in itself would in my opinion require the three-month criterion to form part of the rules laid before Parliament if it was to be effective. But the objection goes deeper. Albeit the first version of the policy guidance was brought into being within the 40 days allowed by s.3(2) for the Parliamentary procedure, it has been open to change at any time. It is this, rather than the fact that it has in the event been changed, which, in answer to question (1)(c), is in my view critical. It means that a discrete element of the rules is placed beyond Parliament's scrutiny and left to the unfettered judgment of the rule-maker.

30. It may be objected that this is pettifogging: all that the three-month provision in the policy guidance is doing is firming up a requirement in the rules. But Ms Giovannetti, with her customary candour, has taken no such point. Instead she has recognised that, if her argument is sound, it means that the Home Secretary may lawfully lay before Parliament a rule which says simply that graduates may be given leave to remain in accordance with such policy as the Home Secretary may from time to time adopt, and that so long as Parliament passes no negative resolution the relevant policies will become rules and, on appeal, law. Indeed it can only be in order to insist on such a principle that the Home Secretary did not long ago take the simple step of amending Appendix C to include the three-month test.

...

33. **...** the operation of the rules qua rules is one thing; what they contain as a matter of law is another. In my judgment the statutory recognition of rules which are to have the character

> and, on appeal, the force of law requires such rules to be certain. That does not shut out extraneous forms of evidence of compliance, so long as these are themselves specified, but it does in my judgment shut out criteria affecting individuals' status and entitlements which – coming back now to the questions in paragraph 23 above - (a) have not themselves been tendered for parliamentary scrutiny, and (c) even if ascertainable at that point of time, may be changed without fresh scrutiny. As to (b), while the fact that the criterion absorbed into the rules comes from a policy document makes nonsense of the notion of policy, this is not critical: the vice would be the same if the reference in the rules were to a categorical criterion in some external but impermanent or undetermined source."

16. In the light of this discussion the Court reached the conclusion at [37] that the three-month criterion formed no part of the rules applicable to these cases.

17. Mr. Avery submitted, on instructions, that the decision in Pankina was confined to the application of the three-month rule. He was unable to expand on why this should be so in the light of the broader discussion leading to the conclusion in the particular case.

18. We cannot agree. In our judgment the Court of Appeal was applying the answers to the constitutional questions it posed at [21] to the particular provision of the Policy Guidance that had led the applicants to fail in their extension applications. Although it is possible that well established practice independent of the proposed rule change that is cross-referred to in the rules themselves may be held to form part of the arrangements established by the Rules that Parliament was content should operate, no such submission was advanced to us about what the Policy Guidance had to say about the name in which the bank account needed to be.

19. We further note that Foskett J concluded that Pankina was of wider application in his judgment in English UK [2010] EWHC 1726 (Admin) at [74] to [77].

Material error of law

20. We are therefore satisfied that the IJ made a material error of law in both reasons for refusing the appeal. We set aside the decision and remake it for ourselves.

Decision on the appeal

21. In our judgment, once it is established that the Policy Guidance does not have the status of the Immigration Rules for the purpose of immigration appeals, there is no reason

why in a particular case an appellant cannot establish that she has funds available to her from a bank account in her husband's name.

22. There is no question that the funds existed at all material times in sufficient quantity and that the husband made the funds available to the wife for the purpose of supporting her during the studies.

23. This is not even a case of third-party support, as for many purposes husband and wife may be regard as a single entity with mutual obligations. We do not know whether the wife has any claim to be the legal or equitable owner of the funds in the husband's account. A bank account in joint names apparently suffices under the Policy Guidance irrespective of the ability of the signatories to withdraw funds for their own purposes or indeed the source of the funds see: PO (Points Based scheme; maintenance: loans) Nigeria [2009] UKAIT 00047 and AM and SS (PBS – Tier 1 – joint accounts) Pakistan [2010] UKUT 169 (IAC).

24. Here the IJ seems to have accepted the explanation that the bank account remained in the husband's sole name for purely cultural reasons, even though the husband was dependent on the outcome of his wife's application to obtain a subordinate ability to reside in the UK in accordance with the Rules.

25. In our judgment, on the evidence before the IJ and accepted by him, this appellant was able to demonstrate that she had funds available to her from a UK bank account and this was sufficient for the purposes of Appendix C. She did not need to go on to comply with additional requirements of the Policy Guidance.

26. This conclusion is sufficient to allow the appeal.

27. The IJ did not consider Article 8 and it has not been argued before us. We heard the appeal along with case CDS where we consider the application of Article 8 in some detail from [16] onwards. If we were wrong about our primary conclusion in the present case, we consider it quite likely that Article 8 would prevent this appellant's course of studies in the United Kingdom being terminated for the reasons that it was.

28. This appeal is allowed.

Signed

C M G Ockelton
Vice-President of the Upper
Tribunal
(Immigration and Asylum Chamber)

Date