



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/39976/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11 August 2015

Determination Promulgated  
On 19 August 2015

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAIKH MUTTAHEDUR RAHMAN

Respondent

**Representation:**

For the Appellant: Mr Nath (Home Office Presenting Officer)  
For the Respondent: Mr Biggs (Counsel)

**DECISION AND DIRECTIONS**

1. The respondent is a citizen of Bangladesh born on 29 November 1990. The SSHD appeals with permission, against a decision of the First-tier Tribunal promulgated on 16 April 2015 to allow the respondent's appeal on the basis that it is not in accordance with the law.

**Background**

2. It is helpful in this case to summarise the relevant background facts and procedural history together.

3. The respondent entered the UK with entry clearance as a student on 26 November 2009, when he was 18. He originally studied commercial management at London East Bank College but changed his place of study to London Premier College where he studied travel, tourism and hospitality.
4. On 25 April 2013, and therefore before the expiry of his leave as a student on 30 April 2015, the respondent applied to vary his leave in order to extend it. The SSHD extended his leave to 31 August 2013. The respondent did not know about this decision until his solicitors were informed of this by his MP, many months after his leave expired. It is claimed by the respondent that the SSHD lost his passport and disadvantaged him by preventing him from pursuing his studies, during this process and failed to clearly address what had happened or what was to be done about it.
5. In an application dated 12 November 2013 the respondent sought to persuade the SSHD that because of the failure to communicate her decision, he had been disadvantaged and a further decision should be taken granting him leave to remain. In a decision dated 19 December 2013 the SSHD refused the application for leave to remain outside the Rules.
6. On 14 February 2014 the respondent lodged a claim for judicial review. The grounds submitted that whilst the SSHD addressed Article 8 she failed to address his claim that the negligent handling of his case was such that this should be remedied by a grant of discretionary leave outside the Rules. The grounds relied upon the observations in R (Nagre) v SSHD [2013] EWHC 720 at [49] to the effect that the SSHD should genuinely bear in mind those cases that may be 'exceptional cases within the SSHD's guidance and should:

*"seek to stand back after working through the analysis required under the new rules so as to make an overall assessment of the facts to see whether there might be a good arguable case of disproportionality if leave to remain is not granted, and, if there is, to examine that case with care to see whether removal would be justified. The reasoning in decision letters should seek to demonstrate that this reasoning process has indeed been gone through."*

7. In a consent order sealed on 22 July 2014 the respondent agreed to withdraw his judicial review claim upon the SSHD (1) reconsidering his application as if it were made whilst he had leave to remain, (2) issuing a new decision within three months and (3) providing the respondent with a right of appeal.

8. In accordance with the consent order the SSHD treated the respondent's 12 November 2013 application as if it had been made when he had leave to remain but in a decision dated 19 September 2014 refused to vary his leave to remain and decided to remove the respondent under section 47 of the Immigration, Asylum and Nationality Act 2006. As the decision was treated as if made when the appellant had leave, again in accordance with the consent order, the respondent was given a right of appeal. The SSHD's notice of immigration decision was accompanied by a reasons for refusal letter of the same date. This first considered whether the respondent could meet the requirements of para 276ADE(1) and clearly explained why he did not. The SSHD went on to consider whether leave outside the Rules should be given because of exceptional circumstances but did conclude there were not exceptional circumstances which would make removal disproportionate.
9. The respondent exercised his right of appeal and detailed grounds of appeal dated 7 October 2014 were prepared and lodged with the assistance of his current solicitors. These grounds submit that the decision "*is erroneous; not in accordance with the immigration rules nor is it in accordance with the [SSHD's] published policy*". The grounds do not set out with any degree of precision how the respondent meets the Rules or how the decision breaches policy. The focus of the grounds is really to set out why the removal of the respondent would constitute a disproportionate breach of Article 8.
10. Mr Biggs represented the respondent at the hearing before the First-tier Tribunal. The respondent was unrepresented. Judge Khan accepted Mr Biggs' submissions and found that the respondent has been disadvantaged by the SSHD's actions and in failing to consider this when exercising her discretion or making the decision to remove, the SSHD's decision is not in accordance with the law.
11. The SSHD appealed against this decision on the basis that the Judge failed to identify what the SSHD has not considered or to make any findings on the points made in the refusal letter. The SSHD also pointed out that the Judge mistakenly referred to India instead of Bangladesh. Judge McDade considered these grounds arguable and granted permission to appeal on 11 June 2015.
12. The matter now comes before me to determine whether or not the decision contains a material error of law.

### Hearing

13. At the hearing Mr Nath relied upon the grounds of appeal. Mr Biggs asked me to uphold the decision. I reserved my decision, which I now give with reasons.

## Legal framework

14. The SSHD made two ‘immigration decisions’ for the purposes of the Nationality, Immigration and Asylum Act 2002 in this case: (1) she refused to vary the respondent’s leave to remain under para 276ADE and (2) she decided to remove the respondent under section 47 of the Immigration, Asylum and Nationality Act 2006. Mr Biggs clarified that the respondent accepted he could not meet the requirements of the Rules and the focus of the appeal to the First-tier Tribunal was based on a challenge to the removal decision on the basis that it is otherwise not in accordance with the law (s 84(1)(e) of the 2002 Act). It is unfortunate that this argument was not made clear within the grounds of appeal to the First-tier Tribunal. Mr Biggs nonetheless indicated that it was made clear to Judge Khan who agreed to and did consider it.

15. In Kabaghe (appeal from outside UK - fairness) Malawi [2011] UKUT 00473(IAC) Blake J re-stated the ambit of s 84(1)(e):

“36. Third, we remind immigration judges and the respondent that the statutory jurisdiction to consider whether an immigration decision is in accordance with the law includes consideration of whether the decision has been made fairly because there is a public law duty on the Secretary of State to act fairly: see discussion in Macdonald Eighth Edition at 19.09 citing Singh v Immigration Appeal Tribunal [1986] Imm AR 352; D.S. Abdi v SSHD [1996] Imm AR 148; BO (Nigeria) [2004] UKIAT 00026; AG (Kosovo) [2007] UKAIT 00082; AA (Pakistan) [2008] UKAIT 00003 and HH (Iraq) [2008] UKAIT 00051. These principles have been applied in the Upper Tribunal: see Thakur (PBS decision - common law fairness) Bangladesh [2011] UKUT 151 (IAC) and Patel (revocation of sponsor licence - fairness) India [2011] UKUT 211 (IAC).”

37. Where the appellant challenges a removal decision on the basis that it is unlawful and unfair, and gives an apparently credible account of the treatment constituting the unfairness, the immigration judge is entitled to expect some form of evidential response from the respondent identifying what happened when and what factors informed the decision making. There was no information provided on the file as to how and why the decision to remove was reached apart from the reasons for the detention summary that has turned out to be wholly inaccurate and an immigration summary that is both incomplete and silent on the material issue.

38. We note that that the respondent was not represented before Judge Place and so he would not have been able to ask for the inquiries to be made that Mr Bramble has helpfully conducted for our benefit. This is a completely unsatisfactory state of affairs. While we recognise that resources are scarce and invidious choices need to be made about where to deploy representatives, the judge must be able to determine the appeal on accurate information from the respondent supplied in one form or another, and in any event internal review of such decisions

should have identified the procedural failings in this case long before the Judge was called on to make a judicial decision.

39. We repeat what was said by the AIT in EO (Turkey) at [44] quoted above at [24] namely the decision maker should demonstrate that the relevant considerations were taken into account: either by a contemporaneous file note made by the officer, or a reasoned decision made by someone with access to the relevant information. We note that the UKBA Enforcement Instructions and Guidance “Instructions on Applying Paragraphs 364 to 368 and 395C of the Immigration Rules” chapter 53.1.1 (accessed 28 November 2011) contemplate that a record is made of the relevant circumstances:

“Before a decision to remove is taken on a case, the case-owner/operational staff must consider all known relevant factors (both positive and negative). It is important to cover the compassionate factors in the transcription of the interview and to record them and the fact that you have discussed them with the UKBA officer authorising removal, on the local file minute or IS126E and UKBA internal database records (CID). Removal should not be considered in any case which qualifies for leave under the Immigration Rules, existing policies or where it would be inappropriate to do so under this policy.”

40. In the absence of such information the judge will have to decide whether to allow the appeal on the basis that the lack of the information is probative of the fact that the relevant considerations were not taken into account, or adjourn for further inquiries to be made, causing expense, inconvenience and delay, all of which are contrary to the overriding objective of Tribunal justice.”

16. It is important that these comments are read in the context of what Blake J said in Fiaz (cancellation of leave to remain - fairness [2012] UKUT 57 (IAC)) at [34]:

“We would add that the jurisdiction of this Tribunal to determine that a decision is not in accordance with the law because of a lack of fairness, is not to be degraded to a general judicial power to depart from the Rules where the judge thinks such a course appropriate or to turn a mandatory factor into a discretionary one. Fairness in this context is essentially procedural: a course of action that prevents the claimant from drawing a relevant document or other information to the attention of the decision maker, or preventing the claimant from switching colleges to one that is currently approved by the Secretary of State rather than substantive: an untrammelled exercise of discretion to permit people to remain who have failed to use the previous permission for the purpose for which it was granted and who have no other claim to remain under the rules.”

## Discussion

17. The SSHD’s grounds of appeal are narrowly drafted. The Judge’s reference to India and not Bangladesh is not a mistake of fact that has caused any unfairness and Mr Nath was correct to accept this at the hearing.

18. The alleged errors of law are said to be the Judge's failure to identify what the SSHD has not considered and his failure to make any findings on the points made in the refusal letter. The latter point can be addressed shortly. The Judge did not address the points made in the refusal letter for obvious reasons. Although the grounds of appeal prepared by the appellant's solicitors did not clearly recognise this by the time of the hearing it was clarified that the respondent accepted he could not meet the requirements of 276ADE. This is the subject matter that took up the majority of the reasons for refusal letter.
19. I accept that the Judge's decision is not clearly structured and it is at times difficult to follow the reasoning employed. However when the decision is read as a whole together with the relevant documents available to the Judge the reasons provided are sufficient. The Judge accepted the credibility of the respondent's evidence that he was disadvantaged by the SSHD [24 and 25]. The Judge was clearly concerned about what happened to the respondent in 2013 and the SSHD's failure to explain her actions. The Judge accepted Mr Biggs' submission that the decision to remove did not take into account what had happened and ought to have been considered when 'exceptional circumstances' were considered. The section in the refusal letter under 'exceptional circumstances' is entirely silent on this issue. The reasons for refusal letter may consider exceptional circumstances but it does not in any way consider what happened in this particular case in the manner that Nagre and Kabaghe sets out is necessary (see paras 6 and 15 above). The Judge therefore accepted that the decision to remove unfairly failed to take relevant matters into account and needed to be remade by the SSHD, who should expressly consider what happened to the respondent and this should inform any decision on whether to remove him.
20. I note that this is a case in which there is little evidence from the SSHD to explain what happened. Indeed there was no SSHD representative before the First-tier Tribunal. However this is also a case in which the respondent was seeking a period of discretionary leave to address the past unfairness on the part of the SSHD. For my part it is difficult to see why any past unfairness in 2013 continues to impact upon the respondent in a meaningful manner at present. There is very little to set out what he is studying or doing in the UK. Having said that, I am satisfied that the First-tier Tribunal provided adequate reasons for the SSHD to know why the decision was not in accordance with the law. The SSHD has simply failed to consider the submission advanced on behalf of the respondent that the SSHD's unfairness toward him in 2013 has caused him prejudice and is sufficient to constitute exceptional circumstances such that she should exercise her discretion not to remove the respondent. That is

a matter for the SSHD to address when she reconsiders the claim and not for me to make any further comment on.

**Decision**

21. I find that the decision of the First-tier Tribunal does not contain an error of law and I do not set aside the decision of the First-tier Tribunal.

Signed:

Ms M. Plimmer  
Judge of the Upper Tribunal

Date:  
13 August 2015