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**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/01347/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 26 January 2016**

**Decision & Reasons Promulgated
On 3 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S P

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Brocklesby-Weller, Home Office Presenting Officer

For the Respondent: Ms Baines, counsel

DECISION AND REASONS

1. The Secretary of State pursues this appeal against the decision of the First-Tier Tribunal to allow an appeal against the cancellation of leave.
2. I maintain the descriptions of the parties as they were in the First-Tier Tribunal, for ease of reference, notwithstanding it is the Secretary of State who pursues this appeal.

3. The appellant is a citizen of India who appealed against the decision to cancel her leave to enter on 28 December 2014. Her appeal against that decision was allowed by Judge of the First-tier Tribunal Povey (“the FTTJ”) in a decision promulgated on 3 August 2015.
4. An anonymity direction was not made in the First-tier Tribunal but given my references to the appellant’s account of physical abuse by her former partner, she is entitled to anonymity in these proceedings.
5. Permission to appeal was granted by Upper Tribunal Judge E B Grant on 19 November 2015 in the following terms:

“The grounds submit the FtTJ erred in law by asking the wrong question when finding that the decision to cancel leave to remain was substantively unfair to the appellant when the question which should have been considered was whether the cancellation was procedurally unfair.”
6. Thus the appeal has come before me.
7. In the grounds of appeal it was submitted for the respondent that the FTTJ ought to have taken into account that the Immigration Officer was aware that the cancellation would have the effect of preventing the appellant from lodging an application under appendix FM; the IO had had regard to the change of circumstances but also to the question of whether or not factors militated against this (a matter of relevance only to whether or not to curtail leave which was a discretionary matter). It was submitted that reasons were given for the decision not to curtail leave but to cancel it, those reasons being that the appellant had not applied for leave as a victim of domestic violence in the six month between her previous relationship breaking down and her attempt to re-enter the UK and that she had not brought to the IO’s attention the change of circumstances until she was specifically questioned further. It was submitted that, relying on **Marghia (procedural fairness) [2014] 00366 (IAC)** the decision was procedurally fair and that the FTTJ had erred in not considering the evidence against the correct question. Ms Brocklesby-Weller also drew my attention to **Fiaz (cancellation of leave to remain - fairness) [2012] UKUT 00057 (IAC)**, paragraph 34. She submitted that the decision-maker was alert to the facts of the appellant’s case.
8. Ms Baines, for the appellant, relied on her skeleton argument (for which I am grateful). She submitted that the FTTJ had directed himself to the correct question and made an appropriate finding that the respondent’s decision “was procedurally flawed”. The FTTJ had relied on the guidance in **Fiaz**, which was cited in the decision. It was relevant that the appellant had a prima facie claim to remain in this country on grounds of domestic violence in her previous relationship. No consideration had been given by the respondent’s decision maker to the existence of domestic violence in the relationship. The further interview with the appellant did not form part of the decision making process regarding the cancellation of leave. It was procedurally unfair not to await the outcome of the respondent’s own investigation into the existence of evidence of domestic violence, before

making a decision. It was submitted that the grounds of appeal amounted to no more than a disagreement with the FTTJ's decision. The FTTJ had given adequate reasons for his decision and those reasons were supported by the evidence. The FTTJ found that the appellant was a victim of domestic violence and that she and her current partner had attempted to contact the respondent. The FTTJ also accepted the appellant's explanation for failing to tell the Immigration Officer at the point of entry that her former relationship was abusive: contact had been in a public place.

9. Ms Baines also noted that there was no reference to domestic abuse in the respondent's decision to cancel the appellant's leave which suggested that it had not been taken into account. Even the document prepared for the appeal hearing (IS 125) made no reference to consideration by the decision maker of the option of curtailment of the appellant's leave. Thus, she submitted, it could not be said that the respondent had considered all the relevant issues.
10. Ms Baines submitted that, in any event, any error of law was not material: the appellant had not misrepresented her position because the FTTJ accepted her evidence on this issues; the decision to cancel had been made in ignorance of the relevant fact that the appellant had attempted to contact the respondent to notify her of her change of circumstances (as found by the FTTJ); and the respondent attached insufficient weight to relevant facts, eg that the appellant was not responsible for the abuse in her relationship with her former partner and the fact she had a prima facie ground for the grant of leave to remain on domestic violence grounds. Ms Baines also relied on **Fiaz** but distinguished the facts of this case in that the appellant had not sought to mislead the respondent, nor had she been responsible for her change of circumstances.

Discussion and findings

11. Whilst the respondent has produced a document which seeks to justify her decision-making (the IS 125) both parties agreed that this had been produced after receipt of the notice of appeal and in readiness for the hearing. It is not therefore a contemporaneous document. It has been prepared with the benefit of hindsight and to contest the appeal in the First-tier Tribunal.
12. I consider my starting point to be those documents which were available to the respondent at the date of decision. In particular, I note the Immigration Officer's (IO's) handwritten notes, the record of interview on 27 December 2014 and the decision notice itself (which sets out, in brief, the reasons for the decision). There is no witness statement by the decision-maker.
13. The IO's note records the name of the appellant's current partner and his date of birth, together with the name of the appellant's former partner and his date of birth. There is also a telephone number, the words "lodger,

OCCUPANTANT [sic]" and an address (which is illegible). The record of interview on 27 December 2014 shows that the appellant had told the IO the date on which she last saw her former partner, that she had been in a common law relationship with him and that the relationship had ended because he was physically abusive and "has a brutish manner" (the handwriting is difficult to read but this is what appears to record). In any event, I am satisfied that it would have been clear to the IO that the appellant reported that her former relationship had broken down as a result of physical domestic abuse.

14. In the notice of decision dated 28 December 2014, it is stated:

"On 25/2/14 you were issued with a UK Resident Permit ... conferring Leave to Enter until 25/8/16 as the Spouse/Partner of [the appellant's former partner]. I am satisfied that there has been a change of circumstances in your case since the leave was granted and that it should be cancelled. This is because you are no longer, since July 2014 in a common law relationship with [the appellant's former partner] and have established a common law relationship with [the appellant's boyfriend].

I consider that this constitutes a significant and material change of circumstances and that the leave conferred by your entry clearance should be cancelled. I therefore cancel your leave under Section 2A(8) of Schedule 2 of the Immigration Act 1971 and paragraph 321A(1) of the Immigration Rules (HC395)."

You have not sought entry under any other provision of the immigration rules."

15. The appellant and her boyfriend gave evidence in the First-tier Tribunal. The FTTJ found their evidence credible and this finding is not challenged by the respondent before me. Nor is it submitted for the respondent that the FTTJ took into account irrelevant evidence when making his decision.
16. The FTTJ's starting point was that it was not in dispute that the appellant's circumstances had changed since the grant of leave in February 2014 (paragraph 30).
17. The unchallenged evidence of the appellant is that, having been threatened by her former partner that he would report their separation to the respondent, she had tried to telephone the respondent, without success. As a result, towards the end of June 2014, the appellant's boyfriend then sent an email on the appellant's behalf to the respondent seeking advice on what the appellant could or should do in the face of this threat regarding her immigration status. As the FTTJ found "questions were asked as to what the Appellant's options were and whether there was another visa she could or should apply for".
18. The FTTJ also accepted that the appellant was a victim of domestic violence. He found that it was reasonable for the appellant not to have volunteered the reason her relationship with her former partner had

broken down when being first interviewed by the IO at the point of entry, ie at the airport immigration desk. He noted that this was a public place and, further, that the IO had not asked the reason for the breakdown of the relationship.

19. The FTTJ also took into account that the appellant's relationship with her former partner had broken down for reasons outside her control; she was the victim of domestic violence. Whilst the FTTJ does not state as much, this is a claim which was known to the respondent at the date of decision, the appellant having reported as much to the IO in interview prior to the decision being taken. The FTTJ found that the appellant had not sought to misrepresent her position to the respondent at any time. He found it relevant (and this is not challenged by the respondent either) that the appellant had "an arguable claim for leave to remain on the grounds of domestic violence" and that this was "a factor that should properly be considered when deciding whether to exercise discretion and [sic] curtail rather than cancel leave" because "if her leave were curtailed rather than cancelled, the Appellant would be afforded the opportunity to make an application under Section DVILR [sic]".
20. It is submitted by the respondent that the FTTJ "ought to have taken into account that the IO was aware that the cancellation would have the effect of preventing the appellant from lodging an application under Appx FM (see Document IS 125 - explanatory statement in R's bundle)". However, this document was prepared for the appeal hearing and not at the date of decision. There is no evidence to suggest that the IO was so aware at the date of decision. The IS125 has been prepared with the benefit of hindsight and with knowledge of the grounds of appeal. It does not appear to have been drafted by the IO who made the immigration decision and cannot therefore be taken to be the evidence of the decision-maker as to what he knew about the impact of cancelling the appellant's leave. Nor can it be taken, as is submitted before me, to be evidence that the IO "had regard to the change of circumstances but also to the question of whether or not factors militated against this"; there is no such evidence that those "mitigating factors" were taken into account by the IO when he made his decision. I reiterate that the IS 125 was prepared after for the appeal hearing; it is not a contemporaneous document or a witness statement.
21. I do not accept the submission before me that the immigration decision "was taken in light of all the facts provided by the appellant and that reasons were given for the decision not to curtail leave but to cancel it". The respondent, in making this submission, has failed to take into account the findings of fact of the FTTJ (which are not challenged) to the effect that the appellant was the victim of domestic violence, that her separation from her former partner was outside her control and that she had sought advice from the respondent as to her immigration position. There is no evidence that the IO had taken any of these factors into account. Indeed the immigration decision is silent on all these matters, merely citing the material change in the appellant's circumstances. This is surprising, given that the IO had been told in interview, the day before making the

immigration decision, that the relationship had broken down as a result of domestic abuse.

22. The FTTJ cited the guidance in **Fiaz**. He considered all the evidence and made findings of fact which are not challenged by the respondent. Nor is it disputed by the respondent that the power to curtail was available to the IO. The FTTJ made the following additional findings:

“35. The above factors support a conclusion that the duty of fairness required leave to be curtailed. The Respondent’s decision was procedurally flawed. It was founded on a mistake as to fact (that the Appellant misrepresented her position). The decision was taken in ignorance of a relevant fact (that the Appellant had contacted the Respondent in June 2014). The decision attached insufficient weight to relevant facts (that the Appellant was not responsible for the change in her circumstances and that she had prima facie grounds for succeeding in any application under Section DVILR of the Appendix FM).

36. Further, whilst the Respondent has provided reasons for why she cancelled the Appellant’s leave to remain, it is less clear, in my judgment, whether she considered her power to curtail leave and, if she did, why she concluded its exercise was not justified on the facts of this case. The Respondent has a duty to consider whether to exercise a power available to her and, if she decides not to do so, to provide clear and cogent reasons as to why. In my judgement, the power to curtail was available to the Respondent in this case. There was an overlap between her power to cancel and her power to curtail leave. She has not provided sufficient reasons as to why she did not choose the latter. This is particularly apposite when, as here, the facts support an argument for curtailment over cancellation.”

23. The respondent, before me, relies on the guidance in **Marghia**, the headnote to which is as follows:

“The common law duty of fairness is essentially about procedural fairness. There is no absolute duty at common law to make decisions which are substantively "fair". The Court will not interfere with decisions which are objected to as being substantively unfair, except the decision in question falls foul of the Wednesbury test i.e. that no reasonable decision-maker or public body could have arrived at such a decision.

It is a matter for the Secretary of State whether she exercises her residual discretion. The exercise of such residual discretion, which does not appear in the Immigration Rules, is absolutely a matter for the Secretary of State and nobody else, including the Tribunal - Abdi [1996] Imm AR 148.”

24. The FTTJ’s findings of fact are sustainable on the evidence and unchallenged. Taking the decision as a whole, it is clear that the FTTJ has addressed the issue of procedural fairness. He has found the decision-maker failed to take into account matters of relevance when making the immigration decision. He gives full reasons for that finding and those reasons are sustainable on the evidence. This appeal is no more than a disagreement with the FTTJ’s decision.

25. For these reasons, there is no material error of law in the FTTJ’s decision.

Decision

26. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

27. I do not set aside the decision.

Signed **A M Black**

Date 1 February 2016

Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed **A M Black**

Date 1 February 2016

Deputy Upper Tribunal Judge A M Black