



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/27736/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons**

**On 23 October 2017**

**Promulgated**

**On 30 October 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE PEART**

**Between**

**SIBGHATULLAH HASMI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Iqbal of Counsel, Malik & Malik Solicitors

For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant Sibghatullah Hasmi is a citizen of Afghanistan. He was born on 10 February 1987. He appealed against the decision of the respondent to refuse his application for further leave to remain.
2. The appellant's appeal against the respondent's refusal was allowed on human rights grounds by a Judge of the First-tier Tribunal (the FTTJ) in a decision promulgated on 12 January 2017. The grounds claimed the FTTJ did not adequately reason why the decision was not in accordance with the law. Further, that there is no authority for the proposition that a

decision which the FTTJ believed should have been decided differently was made illegally, such that the FTTJ made a material error of law.

3. A Judge of the First-tier Tribunal considered the grounds of appeal and found that at [36]-[38] of her decision, the FTTJ was “..... *quite clearly referring to the respondent’s failure to follow her own policy*” such that the FTTJ adequately explained why the respondent’s decision was not in accordance with the law.
4. A renewed application for leave to appeal was submitted by the respondent and a decision made by an Upper Tribunal Judge on 29 August 2017. He observed that the FTTJ found that the respondent’s decision should have been made differently, such that it was “*not in accordance with the law*” and that the FTTJ considered that nothing else was required. The Upper Tribunal Judge found that the approach of the FTTJ was infected by unarguable legal error, material to the decision to allow the appeal on human rights grounds such that permission to appeal to the Upper Tribunal was granted on all grounds.

### **Submissions on Error of Law**

5. Ms Iqbal submitted that the FTTJ considered the relevant policy at [27]-[28] of her decision. Where the criminality thresholds did not apply, a further period of discretionary leave ought to have been granted. The judge accepted at [29] that given the six month sentence, it could not be classed as “*particularly serious*”. At [36] -[37] the FTTJ concluded that the respondent failed to apply the policy. Further, the only material change to the appellant’s circumstances since his grant of leave was the index conviction. The offence did not come within the restricted leave policy and the criminal threshold was not met because the conviction was not of a particularly serious nature.
6. Ms Iqbal submitted that the FTTJ’s approach was correct. Whilst the grant of permission referred to the refusal letter having considered the application on a discretionary basis, the refusal failed to take into account the applicable policy to the appellant’s circumstances. [42] -[52] of the Reasons for Refusal Letter appeared to consider paragraph 353B in force from 13 February 2012, however, the appellant in fact fell to be considered under the transitional provisions, that is, paragraph 395C which was in force at the time.
7. Taking into account the case law, **SC (Article 8 - in accordance with the law) Zimbabwe [2012] UKUT 00056, AG and others (Policies; executive discretions; Tribunal powers) Kosovo [2007] UKAIT 00082** and **R (P and others) [2017] EWCA Civ 321**, the FTTJ was entitled to find that the decision was “*not in accordance with the law*”, sufficient for demonstrating a breach of the appellant’s Article 8 rights. In any case, the FTTJ went on to consider the correct policy and then analysed the appellant’s circumstances including the impact of his criminality in relation to a further grant of leave.

8. Mr Melvin relied upon the grounds. He submitted that the FTTJ failed to engage with part 5A of the 2002 Act. Although she referred to S.117 at [34] she failed to meaningfully engage with the different public interest considerations. The FTTJ did not adequately reason why the decision was not in accordance with the law. There was no authority for the proposition that a decision which the FTTJ believed should have been decided differently was made illegally.

### **Conclusion on Error of Law**

9. The respondent considered the appellant's application on a discretionary basis. It was concluded that no single factor was considered favourable to the appellant's case. That was due to his criminality and non-compliance in the United Kingdom. See refusal [44]-[50]. Although he had the benefit of a period of 3 years' discretionary leave under paragraph 395C his criminality fell to be taken into account.

10. See **Khanum (paragraph 353B) [2013] UKUT 00311 (IAC)**. See Headnote:

*"Paragraph 353B of HC395 is not designed to replace paragraph 395C. In a case where there are no outstanding further submissions and appeal rights are exhausted, the decision whether or not to carry out a review (within the scope of para 353B) is entirely a matter of discretion of the Secretary of State and is not justiciable."*

11. The FTTJ erred in finding the respondent did not consider the application under the relevant policy. The Secretary of State was entitled to consider the application on a discretionary basis. This was not a situation where the FTTJ was entitled to find the decision was "*not in accordance with the law*" pursuant to Article 8(2) and to allow the appeal solely on that basis.
12. I do not accept Ms Iqbal's submission that the FTTJ's findings and reasons were sufficient to satisfy S.117B. The FTTJ failed to adequately reason why the decision was not in accordance with the law. There is no authority for the proposition that a decision which the FTTJ believed should have been decided differently was made illegally.
13. The judge fell into error by allowing the appeal on human rights grounds without proceeding to consider **Razgar** and S.117. Contrary to Ms Iqbal's submissions, the FTTJ did not meaningfully engage with the public interest considerations. **Dube (ss.117A-117D) [2015] UKUT 90 (IAC)** does not assist the appellant in these circumstances.

### **Notice of Decision**

14. The decision of the First-tier Tribunal contains material errors of law and will be reheard de novo in the First-tier by a judge other than the FTTJ.

No anonymity direction is made.

Signed

Date 23 October 2017

Deputy Upper Tribunal Judge Peart