Neutral Citation Number: [2011] EWCA Civ 1320

Case No: C5/2010/2456 & C5/2011/0353

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION & ASYLUM TRIBUNAL)
THE FIRST-TIER TRIBUNAL
(1) IA/25157/2009; (2) IA/06811/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2011

Before:

LADY JUSTICE ARDEN
LORD JUSTICE JACKSON
and
LORD JUSTICE AIKENS

- -

Between :

(1) RAMESH SAPKOTA **(2) KA (PAKISTAN)**	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Zane Malik (instructed by **Messrs Malik Law**) for the **Appellants**
Miss Deok-Joo Rhee (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date: 20 July 2011

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Approved Judgment

Lord Justice AIKENS :

1. These two cases raise common issues concerning the jurisdiction of tribunals and this court and the principles they should apply in cases where the Secretary of State ("SSHD") has refused an application of a foreign national to vary leave to remain in the UK but the SSHD has not, at the same time or promptly thereafter, given a direction for the removal of that person from the UK. In the case of Ramash Prasad Sapkota ("RS") Stanley Burnton LJ gave permission to appeal so that "the jurisdictional and procedural issues raised by ***Mirza,***[1] ***TE (Eritrea),***[2] ***SA (Pakistan)***[3] …and ***AS (Afghanistan)***[4] can be comprehensively considered by the Court". In the case of KA, Hallett LJ ordered that the application for permission to appeal should be heard by the full court at the same time as the appeal in RS, for similar reasons.

2. In both cases the question is: does a failure by the SSHD to make a prompt decision on removal after rejecting the application to vary leave to remain render that first decision "not in accordance with the law" within ***section 84(1)(e)*** of the ***Nationality, Immigration and Asylum Act 2002*** ("the 2002 Act").

3. I am satisfied that permission to appeal in the case of KA should be granted. The two appeals can therefore be dealt with on the same footing.

A. The Facts and the proceedings so far: RS

4. RS is a citizen of Nepal. He was born on 22 November 1972. He arrived in the UK on 19 November 2000 as a student. He had leave to remain as a student from 1 November 2000 until 31 October 2001. He was subsequently granted successive extensions to remain, on the same basis, until 30 September 2008. During this time RS studied at the Boston College of London ("BCL"). That institution is accredited by the British Accreditation Council for Further and Higher Education. RS successfully completed various modules in Computer Literacy and Information Technology and Integrated Business Technology. He has undertaken other courses. None led to a degree. RS began his latest course during the period of his last extension of leave to remain. If successfully completed RS would obtain a BSc degree in Financial and Computer Management, which would be awarded by The Cyprus Institute of Marketing. RS has undertaken the second year of this three year degree course but he has not yet passed examinations towards the degree. RS has asserted that there are extenuating medical and family circumstances which account for this failure.

5. RS is married to Bijaya Laxmi Subedi, who works full time as a carer in a nursing home. RS contends that he has established a family and private life in the UK with his wife. Bijaya Laxmi Subedi has also applied to extend her leave to remain. It is agreed that her position depends on the outcome of RS's appeal.

6. On 26 September 2008 RS made a further application to extend his stay in the UK as a student. That was refused by the SSHD in a Notice of Immigration Decision dated 23 August 2009. The reason given was:

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[1] ***[2011] EWCA Civ 159***
[2] ***[2009] EWCA Civ 8***
[3] ***[2010] INLR 523, [2010] EWCA Civ 210***
[4] ***[2009] EWCA Civ 1076***

> "*In view of the fact that you have been studying in the United Kingdom for nine years below degree level (UK recognised degree), the Secretary of State is not satisfied that you intend to leave the United Kingdom at the end of your studies*".

7. The Decision gave the usual information about "Rights of Appeal". It also contained the usual "One Stop Warning – Statement of Additional Grounds" pursuant to ***section 120*** of the 2002 Act. Finally, the Decision stated, in the usual way, that RS no longer had the right to stay in the UK and that, unless, within the time limits set out, he informed the UK Border Agency of any reasons why he should be allowed to stay in the UK, he must leave as soon as possible. The Decision added that if RS did appeal, he had the right to stay in the UK until the appeal process was completed or he abandoned any appeal. The Decision Notice was not accompanied by any Removal Directions, nor was one issued subsequently. RS had not asked the SSHD to make removal directions in the event that she rejected his application to extend the leave to remain; nor did RS invite the SSHD to take account of all or any of the factors referred to in paragraph 395C of the Immigration Rules (set out in the appendix to this judgment). RS did not advance any further grounds pursuant to the "One Stop Warning" notice.

8. RS appealed this "immigration decision" to the First-Tier Tribunal (Immigration and Asylum Chamber) – the "FTT". Immigration Judge Digney dismissed the appeal in a decision promulgated on 26 October 2009. IJ Digney accepted that RS had been properly studying in accordance with the Immigration Rules. He held that the only issue was whether RS could prove, on a balance of probabilities, that he intended to leave the UK at the end of his studies, pursuant to paragraph 57(vi) of Part 3 of the Immigration Rules ("paragraph 57(vi)").[5] The judge found, at [6] of his decision, that RS "*has comfortably settled here and I can see no reason to suppose that he has any intention of leaving this country*".

9. RS appealed to the Upper Tribunal (Asylum and Immigration Chamber) – the "UT", after Mr Timothy Corner QC, sitting as a Deputy High Court Judge, had said, on a renewed application, that there should be reconsideration. The Deputy High Court Judge considered that there was no force in the first ground, viz. the paragraph 57(vi) point. However, counsel for RS, Mr Zane Malik, had introduced a new ground before Mr Corner. This concerned the fact that the SSHD had made a decision not to renew leave to stay but she had not, at the same time or promptly thereafter, given a Removal Direction; she had "segregated" the two decisions. The new ground was summarised at [10] of the subsequent determination of Senior Immigration Judge Moulden dated 24 August 2010 as whether:

> "*…the [SSHD's] segregation of the immigration decision under challenge from the decision as to the removal renders the immigration decision "not in accordance with the law" and therefore the appeal should have been allowed*".

[5] Para 57(vi) is set out in the appendix to this judgment. Paragraph 57of Part 3 of the Immigration Rules deals with the requirements for leave to enter the UK as a student. It was deleted as from 1 March 2009, but not with retrospective effect so that, on its face, paragraph 57 applies to those who had entered before then and subsequently applied to renew their leave to remain as students. Mr Malik, for RS, urged a contrary argument, as appears below.

10. Senior Immigration Judge Moulden dismissed the appeal on the first ground, viz. whether RS intended to leave at the end of his studies, holding that the FTT had not erred in law: [7] of his determination and reasons. On the second ground, the judge concluded, at [20], that the UT did not have jurisdiction to entertain the issue, whilst accepting that RS had the possibility of making an application to the Administrative Court for judicial review of the matter. In doing so he said he was following the decision of the Court of Appeal in ***SA (Pakistan) v SSHD*** and rejecting an argument based on ***section 25*** of the Tribunals, Courts and Enforcement Act 2007.

11. The judge did, however, set out his conclusions on the merits of the point. Mr Malik had argued that the SSHD's decision not to grant further leave to remain was "not in accordance with the law" within ***section 84(1)(e)*** of the 2002 Act, because (a) it was made in isolation from the decision to remove; (b) the SSHD had not *invited* submissions from RS prior to the decision not to renew on why removal should not follow refusal to renew; (c) there was no good reason for not doing (a) and (b), so that "segregation" of the decision not to renew from a decision on removal was unfair to RS and so "not in accordance with the law".

12. Senior Immigration Judge Moulden considered this court's decision in ***TE (Eritrea) v SSHD***[6] and the decision of Moses LJ (sitting at first instance) in ***Mirza v SSHD.***[7] He rejected Mr Malik's arguments. He decided that he should follow Moses LJ's decision in ***Mirza.*** He therefore held, at [26], that the SSHD was entitled to make the immigration decision in isolation from any decision to remove RS and that there was no duty to invite submissions from RS prior to refusing the immigration application. Moreover, he held that this was not unfair to RS. The judge pointed out, at [27], that "*the decision against which [RS] appealed was made only on the basis that he had not established an intention to depart at the end of his studies. What is now being argued as creating unfairness is his wish to remain indefinitely*". He concluded that the SSHD's decision was "in accordance with the law" and that the FTT had made no error of law.

13. The UT refused RS permission to appeal to this court but, as already noted, permission was granted by Stanley Burnton LJ.

B. The facts and the proceedings so far: KA

14. KA is a Pakistani national. He was born on 19 January 1969. He arrived in the UK on 19 September 2005 with his wife and two children. KA had leave to remain as a student until 31 January 2007. He was subsequently granted an extension of leave (as a student) until 30 November 2008. On 28 October 2008 KA applied for leave to remain in the UK as a Tier 1 (Post-Study Work) Migrant. At the time of that application his wife and two children were named as his dependants. In support of his application KA submitted a Post Graduate qualification in Business Management and an academic reference from the Cambridge College of Learning ("CCoL").

15. KA's application was refused by the SSHD in a decision letter dated 6 February 2009. This stated that the SSHD was "*satisfied that all the documents submitted from the [CCoL] were false because the [CCoL] has never offered a legitimate Post Graduate*

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[6] ***[2009] EWCA Civ 174, [2009] INLR 558***
[7] ***[2010] EWHC (Admin) 2002***

Qualification in Business Management". The letter went on to refer to paragraph 322(1) of the Immigration Rules, which provides that leave to remain in the UK may be refused "*where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge)…*". The letter also stated that, as the documents were false, this meant that KA had not achieved any points under the points system set out in Appendix A of the Immigration Rules for Tier 1 Migrants. The SSHD also concluded that KA also did not have a knowledge of English to the required standard. Therefore, the application to stay as a Tier 1 Migrant was refused.

16. The decision letter set out KA's rights of appeal and the "One Stop Warning". It stated that if he appealed he would not have to leave the UK whilst the appeal was in progress. It pointed out that if the appeal was unsuccessful and he did not leave the UK voluntarily he would be removed to Pakistan. No additional grounds were advanced by KA pursuant to this notice.

17. However, no Removal Direction was given to KA at the time of the immigration decision letter or subsequently. KA had not asked the SSHD to consider making removal directions in the event that she rejected his application to extend his stay in the UK. Nor did KA invite the SSHD to consider factors set out in paragraph 395C of the Immigration Rules when determining his application for an extension of his leave to stay in the UK.

18. KA appealed to the FTT, but indicated that the appeal could be dealt with on paper. Immigration Judge Omotosho promulgated his decision on 1 June 2010. He referred to the finding in another case (referred to as ***NA and others)***[8] which had been heard in June/August 2009 by three Senior Immigration Judges who had concluded that CCoL did not run the relevant post-graduate course and that any person claiming to have undertaken that course must have appreciated that he was making a false representation. The judge concluded that KA's position was no different from that of the appellants in the previous case concerning CCoL. Therefore, KA had failed to prove that he had undertaken a postgraduate diploma course of study at CCoL: see [15]. Further, Immigration Judge Omotosho held, at [17], that KA had "*knowingly made a false representation and by submitting the certificate to the [SSHD] in support of the application for leave to remain, knowingly submitted a false document*". He dismissed the appeal.

19. KA appealed to the UT. Senior Immigration Judge Eshun promulgated his decision on 10 November 2010. He held that there had been no error of law by the FTT and dismissed the appeal. KA did not attempt to raise any argument based on the "segregation" of the decision to refuse to vary his leave to remain from any decision concerning a removal direction. As already noted, the application for permission to appeal was adjourned to the full court by Hallett LJ.

C. The relevant statutory provisions, Immigration Rules and Article 8 of the ECHR

[8] ***NA and others v. SSHD (Cambridge College of Learning) [2009] UKAIT 0031***

20. I have set out all the relevant sections and rules in an appendix to this judgment. I will describe here what I think are the key provisions and how they fit into the overall statutory and regulatory scheme.

21. At the time that RS sought leave to enter and remain in the UK as a student, the requirements were set out in paragraphs 57 and 60 of Part 3 of the Immigration Rules. Paragrah 57(vi) stipulated that the applicant had to demonstrate that he "*intends to leave at the end of his studies*".

22. In order that a person can qualify to enter the UK as a Tier 1 (Post Study Work) Migrant, he must satisfy the criteria set out in Immigration Rule 245FB. Paragraph (c) of that Rule stipulates that the applicant must have a minimum of 75 points under paragraphs 66 to 72 of Appendix A to the Rules, which is headed "Attributes". If a person has entered the UK already and wishes to remain as a Tier 1 (Post-Study Work) Migrant, he has to apply for leave to remain under Immigration Rule 245FD, which has similar requirements including the need to have 75 points under the same paragraphs of Appendix A. In the case of KA, the SSHD refused his application to extend his stay with the status of being a Tier 1 Migrant under Paragraph 322(1A) of the Immigration Rules because KA was found to have knowingly submitted false documents in relation to his application. As a consequence KA also failed to obtain the 75 points required.

23. The decisions by the SSHD in the case of RS and KA constitute "immigration decisions" within the terms of ***section 82(2)*** of the 2002 Act. They fall within ***section 82(2)(d),*** because they constituted a "…*refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain.*" By ***section 82(1)*** a person may appeal an "immigration decision" that is within ***section 82(2).***

24. By virtue of ***section 3C*** of the Immigration Act 1971 (as amended), ("the 1971 Act"), if a person who has limited leave to enter or remain in the UK applies to the SSHD to vary that leave and does so before the leave expires and then the existing leave expires before the application is determined, leave to remain will be extended whilst the issue of whether or not the variation should be granted is being determined. Thus if the application to vary is refused by the SSHD and the person could bring an appeal under ***section 82(1)*** of the 2002 Act against the SSHD's decision, the leave to remain in the UK will be extended by virtue of ***section 3C*** for the period during which the appeal "*could be brought"* or "*is pending*": see respectively ***section 3C(2)(b)*** and ***(c).***

25. ***Section 3D*** of the 1971 Act (as amended) applies where a person's leave to enter or remain in the UK has either been varied (so he has no further right to remain) or is revoked. The section extends the person's leave during the period when an appeal under ***section 82(1)*** of the 2002 Act against the variation or revocation "*could be brought"* or when such an appeal "*is pending*" : see respectively ***section 3D(2)(a)*** and ***(b).***[9]

[9] ***Section 104*** of the 2002 Act defines what is included by the term *"pending appeal"*. It starts when the appeal is instituted and finishes when it is finally determined, withdrawn or abandoned.

26. ***Section 10(1)*** of the Immigration and Asylum Act 1999 ("the 1999 Act") provides that a person who is not a British citizen may be removed from the UK, in accordance with directions given by an immigration officer, in four situations. Sub-paragraphs (a) and (b) are relevant to these appeals. Sub-paragraph (a) states that such a person may be removed if, having only a limited leave to enter or remain in the UK, he does not observe a condition attached to the leave or he remains beyond the time limited for the leave. Sub-paragraph (b) permits removal if a person has used deception (whether successful or not) in seeking leave to remain. A person who is subject to a removal order is often referred to as an "overstayer". His presence in the UK is unlawful and, indeed, if he dos not leave voluntarily, he commits a criminal offence by remaining in the UK.[10] He cannot lawfully work, nor is he entitled to claim benefits. It is a criminal offence for someone to employ an unlawful "overstayer".[11]

27. By virtue of paragraph 395C of the Immigration Rules, before a removal direction is made under ***section 10*** of the 1999 Act, regard has to given to "*all relevant factors*" known to the Secretary of State at the time, which includes 8 specifically identified factors. However, it should be noted that paragraph 395C directs that this exercise must be undertaken only when a removal direction is being considered under ***section 10.***

28. ***Section 47*** of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"), which came into force on 1 April 2008, provides that where a person's leave to enter or remain in the UK is extended by virtue of ***section 3C(2)(b)*** or ***3D(2)(a)*** of the 1971 Act, viz. during the period where an appeal against an "immigration decision" "*could be brought"*, the Secretary of State may decide that that person is to be removed from the UK in accordance with removal directions given by an immigration officer. It would appear, therefore, that the period during which the SSHD can give a removal direction under ***section 47*** is limited to the short period when an appeal against an "immigration decision" *"could be brought"*, which must mean from the time the SSHD has refused to vary the leave or has revoked it and the end of the period for bringing an appeal, which is, generally, 10 working days after proper service of the notice of decision.[12] The effect of ***section 3C(2)(b)*** and ***3D(2)(a)*** is that the SSHD can make a decision to remove a person from the UK pursuant to ***section 47*** whilst he is still *lawfully* in the UK because that person's leave to enter or remain in the United Kingdom has been statutorily extended during the period when an appeal against an "immigration decision " could be brought.

29. ***Section 78(3)*** of the 2002 Act stipulates that the SSHD is not prevented from issuing removal directions in relation to an individual whose appeal under ***section 82(1)*** of the 2002 Act is pending. But ***section 78*** does not grant the SSHD any further power to issue removal directions. ***Section 78 (1)*** prevents the individual from actually being removed from the UK or being required to leave the UK in accordance with the Immigration Acts whilst his appeal under ***section 82(1)*** is pending.

30. As at the time of the hearing of this appeal, the Secretary of State was not obliged under paragraph 395C of the Immigration Rules to consider all relevant factors or the

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[10] ***Section 24(1)(b)*** of the 1971 Act.
[11] ***Section 8*** of the Asylum and Immigration Act 1996.
[12] This is the period for bringing an "in-country" appeal when the appellant is not detained. It is 5 working days if he is detained. See Rules 7 and 57 of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

specific factors identified in that Rule before making a decision on a removal direction under ***section 47***. However, Ms Rhee brought our attention to two matters. The first was that the SSHD had, on 19 July 2011, placed before Parliament a proposed amendment to paragraph 395C of the Immigration Rules so that it would apply to decisions taken under ***section 47*** of the 2006 Act as well as ***section 10*** of the 1999 Act. At the hearing we were shown a "Statement of Changes in Immigration Rules" which would (in the absence of a resolution to the contrary in either House of Parliament) come into force by 9 August 2011.[13] Secondly, Ms Rhee confirmed that the SSHD would amend Chapter 53 of the Enforcement Instructions Guidance ("EIG") on paragraph 395C of the Immigration Rules so it would expressly to refer to ***section 47*** as well as ***section 10.***

31. There are at present 13 paragraphs of ***section 82(2)*** which identify the types of "immigration decision" from which a person can appeal within the statutory machinery provided under the 2002 Act. Other than the "immigration decision" identified in ***section 82(2)(d)*** and noted above, there are two other types of "immigration decision" from which there can be an appeal under ***section 82*** that are relevant to these appeals. First, a decision that a person is to be removed from the United Kingdom by way of directions under ***section 10(1)(a)*** the 1999 Act: see ***section 82(2)(g)*** of the 2002 Act. Secondly, a decision that a person is to be removed from the United Kingdom by way of directions under ***section 47*** of the 2006 Act: see ***section 82(2)(ha)*** of the 2002 Act. There is an "in-country" right of appeal from decisions within ***section 82(2)(d)*** and ***(ha).*** However, there is, generally, only an "out of country" right of appeal in respect of a decision within ***section 82(2)(g),*** unless an appellant has made an asylum or ECHR claim whilst in the UK or a claim that an "immigration decision" is in breach of his rights under EU law: see ***section 92(4)*** of the 2002 Act. Even then the SSHD can certify that such a claim is unfounded: see ***section 94(1A)*** of the 2002 Act.

32. As already noted, in the present two cases, no removal directions, under either ***section 10*** of the 1971 Act or ***section 47*** of the 2006 Act, were made by the SSHD against either RS or KA at the time that they were served with the "immigration decision" refusing an extension of their leave to stay in the UK. Nor has any removal direction (under either Act) been made subsequently. It was common ground before us that there is no *statutory requirement* that any removal decision has to be made before such time as a person who has been refused leave to remain becomes an "overstayer" if and when his appeal against a refusal to extend leave to stay has been finally dismissed, or indeed thereafter. There are only the provisions in ***section 10*** of the 1999 Act and ***section 47*** of the 2006 Act giving the power to make such decisions in the circumstances set out.

33. When a person appeals an "immigration decision" within ***section 82,*** the appeal must be brought on one or other of the grounds set out in ***section 84(1)*** of the 2002 Act. For present purposes there are four grounds that might possibly be relevant. First, that the decision is not in accordance with the immigration rules: ***section 84(1)(a).*** Secondly, that the decision is unlawful under section 6 of the Human Rights Act

[13] The "Statement of Changes" was laid before Parliament by the Secretary of State pursuant to ***section 3(2)*** of the Immigration Act 1971, which permits the Secretary of State to make such proposals which are subject to the "negative resolution" procedure in both Houses of Parliament. If new Rules are "disapproved" by either House, it would be unlawful for the SSHD to act upon them and she could be restrained from doing so.

1998, ("HRA") as being incompatible with the appellant's Convention rights: ***section 84(1)(c).*** Thirdly, that the decision is "otherwise not in accordance with the law": ***section 84(1)(e).*** Lastly, that removal of the appellant from the UK *in consequence of* the relevant immigration decision (my emphasis) would be unlawful under section 6 of the HRA as being incompatible with the appellant's Convention Rights: ***section 84(1)(g).***

34. In ***JM (Liberia) v SSHD,***[14] the Court of Appeal held that where the SSHD had refused to vary the applicant's leave to enter when a legitimate visitor applied for asylum, the AIT, on appeal from that "immigration decision", should have considered the applicant's Article 8 ECHR ground of appeal under ***section 84(1)(g),*** despite the fact that no removal decision or direction had been made at the time when the asylum application was rejected or subsequently. That was because the phrase "*in consequence of*" in ***section 84(1)(g)*** should be broadly construed, so that if a removal decision would be an *indirect* consequence of the refusal to vary the leave to stay, then the applicant was entitled to argue that his removal would be contrary to ***section 6*** of the HRA 1998, even though no removal decision had been taken by the SSHD.

35. Laws LJ gave the principal judgment in that case. He relied on two particular factors in reaching his conclusion on the construction of ***section 84(1)(g).*** First, the consequence of a narrow construction would have been that the appellant could not have had the human rights ground for granting leave to extend his stay considered whilst he was lawfully in the UK; he would either have to leave or be an unlawful "overstayer" who awaited his removal directions.[15] Secondly, the policy of the legislative framework was that it leant in favour of "*what are called "one stop appeals"*".[16]

36. This is a reference to ***section 120*** of the 2002 Act and related provisions. ***Section 120*** provides that if a person has made an application to enter or remain in the UK or an "immigration decision" has been or may be made against him (within the meaning of ***section 82)*** the SSHD can give notice in writing requiring that person to state three things. First, his reason for wishing to enter or remain in the UK; secondly, any grounds on which he should be permitted to enter or remain in the UK; thirdly, any grounds on which he should not be removed from or required to leave the UK. This is the so-called "One Stop" Notice or Warning referred to above. In ***Mirza v SSHD,***[17] Sedley LJ stated that the power of the Secretary of State to serve a "One-Stop" notice was not merely discretionary or elective. Effectively, Sedley LJ held that there was a duty to serve such a notice in order to promote good public administration and to ensure that there was not a multiplication of administrative proceedings and appeals. He added (also at [25]): "*[The SSHD] also has duties of fairness towards individuals whose lives are on hold, and who may well be committing a criminal offence by their mere presence while they await an appealable decision*".

37. Such a notice is in fact given as a matter of routine in immigration decision letters that are sent on behalf of the SSHD to applicants in which an application to extend or vary leave to remain in the UK is refused. By ***section 85(2)*** of the 2002 Act, if a person

[14] ***[2006] EWCA Civ 1402, [2007] Imm AR 293***
[15] See [17] of his judgment.
[16] See [23] of his judgment.
[17] ***[2011] EWCA Civ 159*** at [25].

who has appealed under ***section 82*** of the 2002 Act complies with the "One Stop" Notice and sets out any grounds on which he should be permitted to enter or stay in the UK or on which he should not be removed from or required to leave the UK, then those grounds must be considered on appeal, provided that they constitute one of the statutory grounds of appeal set out in ***section 84(1).***

38. Furthermore, by ***section 85(1)*** of the 2002 Act, any appeal under ***section 82(1)*** against an "immigration decision" shall be treated by the tribunal hearing the appeal as including an appeal against any decision in respect of which the appellant has a right of appeal as identified in the various paragraphs in ***section 82(2).*** In other words, the tribunal will consider all possible "immigration appeals" which an appellant can bring at one and the same time. However, this is subject to the proviso that the matters raised must constitute an available ground of appeal against the "immigration decision" which is being appealed.[18] ***Section 86(2)*** of the 2002 Act states what a tribunal that is hearing an "immigration appeal" must determine. ***Section 86(3)*** states when a tribunal must allow an appeal. ***Section 87*** gives tribunals (and indeed the Court of Appeal) the power to give directions after an appeal has been allowed.

39. Appeals from "immigration decisions" by the SSHD are now dealt with by the FTT, from which there is a right of appeal on a point of law to the UT. ***Section 25*** of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), deals with powers of the UT. ***Section 25(1)*** stipulates that in relation to certain matters identified in ***sub-section (2),*** the UT will have the same powers as the High Court in England and Wales. The matters identified are: the attendance and examination of witnesses; the production of documents and, in paragraph (c) of ***sub-section (2):*** *"all other matters incidental to the Upper Tribunal's functions…*". There is a right of appeal from the UT on a point of law to the Court of Appeal (with permission) by virtue of ***section 13(1)*** and ***(2)*** of the 2007 Act.

D. The arguments of the parties: (1) the appellants

40. Mr Zane Malik appeared for both appellants. In summary, he made the following submissions in relation to both RS and KA. First, the "immigration decisions" that have been made, viz. to refuse them further leave to remain in the UK are "not in accordance with the law" within the terms of ***section 84(1)(e)*** of the 2002 Act because they were made in isolation from giving directions for removal pursuant to ***section 10*** of the 1999 Act. The SSHD should not have made the first without at the same time addressing the second; in short, the SSHD should not have "segregated" them. To do so was contrary to the policy and objects of the primary legislation and was unfair. It was unfair because, Mr Malik submitted, it meant that a person whose application to remain is refused had to appeal that decision only. It is only if that statutory appeal was rejected (and he therefore becomes an "overstayer") that he would be able to challenge any subsequent decision (made pursuant to ***section 10*** of the 1999 Act) that he should be removed from the UK and only then could he rely on grounds based on paragraph 395C of the Immigration Rules, again using the statutory appeal

[18] ***AS (Afghanistan) v SSHD [2009] EWCA Civ 1076***

mechanism. Mr Malik relied particularly on this court's reasoning in ***Mirza v SSHD.***[19]

41. As part of this first submission, Mr Malik argued that the UT and this court has jurisdiction to decide what he called the "segregation issue," notwithstanding the fact that the SSHD has *not yet* made any decision about removal or given any removal directions in respect of either RS or KA, either under ***section 10*** of the 1999 Act or under ***section 47*** of the 2006 Act. Mr Malik submitted that, insofar as the decision of this court in ***SA (Pakistan) v SSHD***[20] stated the contrary proposition, it was either distinguishable or was wrongly decided because that court had not had its attention drawn to ***AS (Afghanistan) v SSHD,***[21] another decision of the Court of Appeal. In the alternative, Mr Malik submitted that a challenge of the present type fell within the UT's jurisdiction by virtue of ***section 25*** of the 2007 Act, thus giving this court the right to review it.

42. Secondly, Mr Malik argued that because the "segregation" of the decision to refuse an extension of leave to stay from a decision for removal meant that the "immigration decisions" that had been made by the SSHD were not "in accordance with the law", therefore the "immigration decision" in each case would thereby amount to an interference with the Article 8(1) ECHR rights of RS and KA respectively; which interference is, itself, therefore "not in accordance with the law" for the purposes of Article 8(2) and ***section 84(1)(e),*** alternatively, ***section 84(1)(g)*** of the 2002 Act.

43. Thirdly, in relation to RS only, Mr Malik argued that the UT had erred in law in upholding the FTT's decision to dismiss RS's appeal on the ground that he had not established that he intended to leave the UK on completion of his studies. Mr Malik accepted that the Immigration Rules had to be read sensibly in accordance with the natural and ordinary meaning of the words used, but he emphasised that it must also be recognised that they are statements of the Secretary of State's administrative policy.[22] He submitted that the SSHD could not rely on paragraph 57(vi) in the light of subsequent statements by the Secretary of State that foreign nationals who had been permitted entry to study for degree courses in the UK were to be encouraged so that the most able would be free thereafter to seek employment in the UK without a sponsor.[23] Mr Malik submitted that the Secretary of State could not, on the one hand, encourage students to switch categories to settle in the UK and then, on the other, demand that students must demonstrate that they intend to leave the UK upon completion of their studies.

44. Mr Malik therefore submitted that a literal reading of paragraph 57(vi) of Part 3 of the Immigration Rules (before 1 March 2009) would be inconsistent with the Immigration Rules read as a whole and with the Secretary of State's statements made in public and to Parliament. So, on a proper construction of paragraph 57(vi), an applicant has to show that he "intends [***to switch into any permissible category or***] to leave the UK at

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[19] ***[2011] EWCA Civ 159***
[20] ***[2010] EWCA Civ 210***
[21] ***[2009] EWCA Civ 1076***
[22] Mr Malik relied on statements of Lord Brown of Eaton-under-Heywood in ***Mahad & others v Entry Clearance Officer [2009] UKSC 16, [2010] 1 WLR 48 at [10].***
[23] Mr Malik relied upon statements in the UK Border Agency's document "*Highly Skilled Migrants under the Points System Statement of Intent*" which, although undated, was produced in 2007 with the announcement that the "points system" would be introduced in early 2008.

the end of his studies". Accordingly, Immigration Judge Digney had misconstrued paragraph 57(vi) and was wrong in law; so too was the UT's decision to uphold the FTT. Mr Malik also noted the fact that the whole of paragraph 57 has now been deleted with effect from 1 March 2009, albeit not with retrospective effect.

45. Mr Malik submitted that, in both cases, the "immigration decisions" actually made by the SSHD were therefore "*…otherwise not in accordance with the law"* within ***section 84(1).*** He sought a direction under ***section 87*** of the 2002 Act that, in both cases, the SSHD should grant leave to remain, or she should issue removal decisions under ***section 10*** of the 1999 Act.

The arguments of the parties: (2) the Secretary of State

46. Ms Rhee, who appeared for the SSHD, made three main submissions. First, she submitted that this court is bound by its decision in ***SA (Pakistan) v SSHD***[24] (hereafter ***"SA (Pakistan)"***). Therefore, as no "immigration decision" had been made to remove either RS or KA, there was no basis for a statutory appeal challenging the fact that the SSHD had *not* made such a decision. Accordingly, neither the FTT, UT nor this court had jurisdiction to consider this "segregation" point. Ms Rhee accepted that, following this court's decision in ***Mirza v SSHD***[25] (hereafter ***"Mirza"***) the SSHD has, generally speaking, a duty as a matter of public law to proceed to the issue of a removal decision before the expiry of the leave of an applicant, including any extension under ***section 3C*** of the 1971 Act. Ms Rhee submitted that the fact of that duty does not grant jurisdiction to the tribunals or this court to consider a challenge to the fact that the Secretary of State has yet to make any removal decision.

47. Secondly, Mr Rhee accepted that the effect of ***JM (Liberia) v SSHD***[26] is that both RS and KA have the right to argue on a statutory appeal against the "immigration decisions" that *have been* made in their cases that such decisions would result in a breach of their respective ECHR rights, relying on either ***section 84(1)(c)*** or ***(g)*** of the 2002 Act. However, the fact that each of the FTT, UT and this court has no jurisdiction to consider the "segregation" point cannot not give rise to a claim that the Article 8 rights of either RS or KA have been infringed. That was because both RS and KA have the right to challenge the refusal to extend leave or to vary it by bringing a statutory appeal against those "immigration decisions" under ***section 82,*** in which Article 8 issues can be raised.

48. As already noted, Ms Rhee brought to our attention the proposed amendment to paragraph 395C of the Immigration Rules and to the EIG so that paragraph 395C factors would have to be considered by the SSHD when deciding whether to make a removal direction under ***section 47*** of the 2006 Act. In the light of these proposals and the decision of this court in ***Mirza*** the Treasury Solicitor wrote to Malik Law Chambers, the solicitors acting for RS and KA, on 18 July 2011.[27] The letter

[24] ***[2010] EWCA Civ 210, [2010] INLR 523***
[25] ***[2011] EWCA Civ 159***
[26] ***[2006] EWCA Civ 1402, [2007] Imm AR 293***
[27] The Treasury Solicitor had written to Malik Law Chambers in relation to RS only on 19 May 2011, proposing that, in the light of the CA's decision in ***Mirza,*** (handed down on 23 February 2011) that matter be remitted to the SSHD for reconsideration of RS's application or leave to remain and for consideration of the relevant factors set out in para 395C of the IR and, should the decision to refuse leave be maintained, then the SSHD would

proposed that the SSHD withdraw the "immigration decisions" that had been made concerning the applications of RS and KA for further leave to remain and that the SSHD should reissue a decision on whether to renew or vary leave alongside a removal decision under ***section 47*** so as to enable her to give consideration of the factors set out in the amended paragraph 395C of the Immigration Rules. The letter said that this would also permit RS and KA to raise paragraph 395C points on appeal "if they so wish". The SSHD sent a draft form of consent and "statement of reasons" in each case.

49. Those offers were rejected by the solicitors acting for RS and KA. Mr Malik submitted that the cases raised important points of principle on the jurisdiction of tribunals and this court to deal with the "segregation" issue, both on the issue of jurisdiction and on the merits, so that it would be wrong to adopt the SSHD's proposals. The court should proceed to give a reasoned judgment on the merits of the appeals. He relied on statements of Pill LJ in ***QI (Pakistan) v SSHD.***[28]

50. On the third ground of appeal which related solely to RS, viz. that the FTT and UT erred in law in treating the absence of an intention to leave the UK as determinative, Ms Rhee submitted that there was no basis on which to challenge that conclusion. She noted that RS had not submitted any information to the SSHD or to the FTT in response to the ***section 120*** notice in the SSHD's Decision Notice which could lead to any contrary conclusion.

51. After the hearing of this appeal and following consideration of the issues, the statutory provisions and the case law, we decided that counsel should be invited to make further written submissions on three specific questions. First, the extent to which this court was bound by this court's decision in ***SA (Pakistan) v SSHD.***[29] Secondly, the interpretation of ***section 84(1)(e)*** of the 2002 Act and whether there had been any observations in cases upon its scope and construction. Thirdly, the interpretation of ***section 13*** of the 2007 Act. Counsel kindly provided those submissions by 26 September 2011. Having considered these submissions, we decided that we did not need further oral submissions from the parties.

52. For my part I accept that these two appeals do raise important issues on which a large number of other cases may depend. In the circumstances I have concluded that, despite the offers of the SSHD, we should proceed to analyse the issues and give a fully reasoned judgment for our conclusions, as was anticipated when Stanley Burnton LJ gave leave to RS and Hallett LJ adjourned the application for permission in the case of KA.

E. The issues for decision

53. The following issues arise in these cases:

    i) Did the UT and does this court have jurisdiction to consider whether the fact that the SSHD had refused leave to extend or vary the leave to remain in the

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agree to issue a removal decision against which RS and his wife could appeal. But that proposal was made before it was decided to make the changes to the substance of para 395C and the proposal was overtaken by the letter of 18 July 2011.

[28] ***[2011] EWCA Civ 614*** at [23]. Longmore and Etherton LJJ agreed with Pill LJ.

[29] ***[2010] EWCA Civ 210, [2010] INLR 523***

UK of RS and KA ("the immigration decision"), but did not, at the same time or promptly thereafter, take any decision to make a removal direction result in the "immigration decision" that actually was made not "in accordance with the law" within ***section 84(1)(e)*** of the 2002 Act? I will call this "the fact of segregation issue: jurisdiction".[30]

ii) If either the UT or this court has jurisdiction to consider this "fact of segregation issue", then were the "immigration decisions" in the case of RS and KA not "in accordance with the law" within ***section 84(1)(e)*** of the 2002 Act? I will call this "the fact of segregation issue: merits".

iii) Does the fact that the SSHD has not made any removal direction infringe the Article 8 rights of either RS or KA; if so what is the consequence? I will call this "the Article 8 issue".

iv) In the case of RS only, did the FTT and UT err in law in holding that RS had to demonstrate that, in accordance with paragraph 57(vi) of the Immigration Rules, he had an intention to leave the UK on completion of his studies and that he had failed to do so, bearing in mind statements of policy about encouraging students to study here and then stay to work as post-graduates? I will call this "the paragraph 57(vi) issue".

F. Issue (I): The "fact of segregation issue: jurisdiction"

54. The starting point on this issue must be the legislation in Part 5 of the 2002 Act which lays down the system for Immigration and Asylum Appeals. ***Section 82*** makes clear which "immigration decisions" a person may appeal to a tribunal. ***Section 82(2)(d)*** gives a person the right to appeal a refusal of the SSHD to vary a person's leave to remain in the UK.

55. In the case of RS, the SSHD could not give a removal direction under ***section 10*** of the 1999 Act before deciding that RS's leave to remain was not to be extended; nor can she do so under that section at present, because, by virtue of ***section 3C*** of the 1971 Act, RS has the right to remain in the UK whilst his appeal against the "immigration decision" that has been made is pending. If any appeal is finally rejected, then at that point RS's leave to remain will have expired and if he then continues to remain in the UK he would do so *unlawfully*, thus entitling the Secretary of State to give a removal direction under ***section 10(1)(a)*** of the 1999 Act**.** A person can, of course, appeal an "immigration decision" in the form of a removal direction under ***section 10,*** (by virtue of ***section 82(2)(g)*** of the 2002 Act), although there is no "in country" right of appeal of such a decision unless the appellant is in the UK and he raises a human rights claim or one of the other conditions set out in ***section 92(4)*** of the 2002 Act is fulfilled.

56. It is therefore more logical, as Ms Rhee submitted, that in the case of a person like RS, whose leave to remain in the UK has been extended by virtue of ***section 3C*** of the 1971 Act, any removal direction then made should be given under ***section 47*** of the 2006 Act. As already noted, in that case the removal direction can be given

[30] I am not calling this "the segregation issue" because that phrase has been used in previous cases for what Mr Malik would call a different argument, although Ms Rhee submitted that the arguments were the same.

whilst the person is still *lawfully* in the UK because the leave to remain has been extended by virtue of ***section 3C.*** But the removal direction will only take effect "*if and when the leave ends":* see ***section 47(1)*** of the 2006 Act. Moreover, as already noted, the time during which that removal decision can be made pursuant to ***section 47*** is very short, viz. generally the period of 10 working days following service of the notice of the SSHD's decision not to vary the leave to remain or to revoke the leave.

57. In the case of KA, it would appear that the SSHD would have been entitled to make a removal direction under ***section 10(1)(b)*** of the 1999 Act because of the finding that KA had knowingly used deception in seeking leave to remain. But once KA had appealed the "immigration decision" not to extend his leave to remain, KA's right to remain was extended by virtue of ***section 3C*** of the 1971 Act. Therefore, in his case also, if the SSHD were then to have given a removal direction, it would, I think, be more logical to have done so under ***section 47(1)*** of the 2006 Act rather than under ***section 10(1)(b)*** of the 1999 Act.[31]

58. Mr Malik accepted that it is only the SSHD's "immigration decision" to refuse to vary the leave to remain of both RS and KA that has been the subject of the appeal to the FTT, then the UT and then to this court in both cases. As the SSHD has made no removal direction of any kind in respect of either RS or KA, Mr Malik was correct to recognise that, on the face of the immigration legislation, there could be no direct statutory means of appealing the fact that the SSHD had *not* made any decision to make a removal direction under either ***section 10*** of the 1999 Act or ***section 47*** of the 2006 Act. The only way in which he could challenge the actual "immigration decisions" that have been made is by attacking the manner in which those decisions were made, viz. without giving any removal direction at the same time or shortly thereafter. Mr Malik's argument is that when mounting their appeals from the "immigration decisions" that have been made, RS and KA are entitled to attack them on the ground that the SSHD did not, at the same time or promptly thereafter, decide to make a removal direction. It was this "fact of segregation" of the decision to refuse leave to extend the stay and the decision on whether to make a removal direction that Mr Malik said made the former decision not "in accordance with the law" within ***section 84(1)(e)*** of the 2002 Act.

The authorities

59. As there are no simple answers in the statutory provisions, in order to see whether the UT and this court has jurisdiction to consider this line of attack on the "immigration decisions" actually made by the SSHD, it is necessary to examine the authorities that have considered this issue in one form or another. These are: ***JM (Liberia) v SSHD ("JM (Liberia)"),[32] TE (Eritrea) v SSHD ("TE (Eritrea)"),[33] AS (Afghanistan) v SSHD ("AS (Afghanistan)"),[34] SA (Pakistan) v SSHD ("SA (Pakistan)"),[35]*** and ***R (Mirza and others) v SSHD ("Mirza").[36]***

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[31] I should note that there was no argument on whether, given the wording of ***section 10(1)(b),*** the SSHD had the right to give a removal direction in KA's case under that provision. There is no need to decide it.
[32] ***[2006] EWCA Civ 1402, [2007] Imm AR 293***
[33] ***[2009] EWCA Civ 174 [2009] INLR 558***
[34] ***[2009] EWCA Civ 1076 [2010] 2 All ER 21***

60. I have already set out the facts and the decision in ***JM (Liberia)*** [34] and [35] above. It is an important decision for two reasons. First, because Laws LJ identified the particular policies and objectives in the immigration legislation already noted and, secondly, because of his broad construction of ***section 84(1)(g)*** of the 2002 Act. Laws LJ's statements in ***JM (Liberia)*** on the policies and objectives of the immigration legislation have been accepted and adopted in subsequent Court of Appeal decisions, including all those mentioned above.

61. In ***TE (Eritrea)*** the appellant had come to the UK as a minor and had applied for asylum. The asylum application was refused but she was given leave to stay whilst a minor. Shortly before that leave expired she applied for an extension of leave to remain. That was refused and she was notified that if she did not leave or if she unsuccessfully appealed she would be removed to Eritrea. The SSHD had not considered matters as set out in paragraph 395C of the Immigration Rules at the time the extension application was decided. The issue before the Court of Appeal was whether the Secretary of State was obliged to consider those factors in the course of dealing with the extension application and prior to making any decision to give a removal direction under ***section 10(1)(a)*** of the 1999 Act once the appellant became an unlawful "overstayer".

62. Sedley LJ gave the first judgment and Jacob LJ agreed with it. Sedley LJ noted the principles established in ***JM (Liberia).*** He emphasised (as had been noted in ***JM (Liberia)***) that when a person becomes an overstayer, it is a criminal offence to remain in the UK; the overstayer is not entitled either to work or claim any mainstream benefits and it is also a criminal offence to employ an overstayer. Sedley LJ concluded that there was practical utility and sound policy in the SSHD considering both the issue of an extension of leave to remain and the issue of whether to give removal directions at the same time. In the light of the statutory policy and objects and the practical effects of a person becoming an overstayer, it was better to consider removal directions before the applicant became one. However, Sedley LJ recognised that there might be cases where it was both practical and fair to segregate the two decisions.[37] It is, I think, implicit in Sedley LJ's judgment that if the SSHD were to consider both questions together, that he believed that paragraph 395C IR factors should be taken into account when making the decision on both questions.

63. Lloyd LJ gave a separate judgment. He concluded that the considerations set out in paragraph 395C IR could be taken into account by the Secretary of State when deciding whether leave to remain should be granted and before the applicant had become an overstayer, if requested to do so. He noted that that had not occurred in this case, because the point had only been raised at a late stage in the appeal process. Lloyd LJ also accepted that a decision of the Secretary of State not to take paragraph 395C IR factors into account at the stage of considering whether leave to remain should be granted (as opposed to when considering whether to make a removal direction) was susceptible to challenge "on *Wednesbury* grounds".[38]

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[35] ***[2010] EWCA Civ 210 [2010] INLR 523***
[36] ***[2010] EWHC 2002 (Moses LJ*** at first instance); ***[2011] EWCA Civ 159***
[37] See [17] – [19] of his judgment.
[38] See [46] of his judgment.

64. Lloyd LJ further stated that, because the SSHD was obliged to consider paragraph 395C IR factors when a removal decision was under consideration, (under ***section 10*** of the 1999 Act), that was a rational basis for the SSHD not to have to undertake the paragraph 395C IR process at an earlier stage, even if asked to do so. However, he agreed that as the issue had now been raised it would be appropriate for the SSHD to undertake the considerations required by paragraph 395C IR. He proposed that the appeal be adjourned so that that exercise could be undertaken before the matter was finally disposed of; that was the order that was made. [39]

65. In my view ***TE (Eritrea)*** therefore establishes: (1) the SSHD can consider the question of an extension of leave to remain and that of making a removal direction at the same time, but is not obliged to do so; (2) if the SSHD does so then paragraph 395C IR factors can be considered, if raised; (3) if the SSHD, having been asked to do so, declines to consider the question of an extension of leave to remain and a removal direction at the same time, then that could be subject to judicial review;[40] (4) it is for the applicant to raise paragraph 395C IR issues if he wishes them to be considered at the earlier stage, ie. at the time of the leave to remain decision. It should be noted that the present argument, viz. that a failure to consider the application to extend leave to remain and a removal direction together or the second promptly after the first rendered the "immigration decision" actually made not "in accordance with the law" within ***section 84(1)(e)***, was not run.

66. In ***AS (Afghanistan)*** the Court of Appeal had to consider the scope of the duties of a tribunal when applicants appealed a decision of the SSHD not to extend leave to remain, the SSHD had then served ***section 120*** notices on them and, in response, the applicants had then raised totally new grounds in support of their appeals. The question before the Court was whether an appeal tribunal was obliged, pursuant to ***section 85(2)*** of the 2002 Act, to deal with such totally new grounds. The majority (Moore-Bick and Sullivan LJJ) held that the tribunal had a duty to consider all matters raised by an appellant in so far as they provided grounds for challenging a substantive decision of a kind identified in ***section 82*** of the 2002 Act that affected the appellant's immigration status. The duty was not restricted to considering only the grounds for the original decision of the SSHD or the original grounds of appeal.[41] All three members of the court stated, in varying ways, that the underlying policy of the immigration legislation is to prevent multiple, or successive applications and appeals.[42] Mr Malik relied on those statements.

67. In ***SA (Pakistan)***[43] the five appellants had obtained limited leave to enter the UK. Four had applied in time to extend their leave. They had (albeit innocently) misrepresented their position to the SSHD and so leave was refused under paragraph 322(1A) of the Immigration Rules. The fifth case (NB) was different and, in the

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[39] See [57] of his judgment.

[40] This conclusion is based on my reading of [19]-[20] of Sedley LJ's judgment. Lloyd LJ said only that if a decision maker was asked to have regard to para 395C IR considerations then "*the decision as to whether or not to accede to the request is subject to challenge on* ***Wednesbury*** *grounds":* [46].

[41] [79] – [81] of the judgment of Moore-Bick LJ; [110]-[113] of the judgment of Sullivan LJ.

[42] [45] Arden LJ; [78] Moore-Bick LJ; [103] Sullivan LJ.

[43] ***[2010] EWCA Civ 210 [2010] INLR 523***

Court of Appeal, his appeal was dismissed on the basis that all necessary and appropriate decision making processes had been undertaken.[44]

68. In the case of the other four, in the AIT there was no argument on the issue of whether the Secretary of State should have considered the question of an extension of leave to remain and the question of a removal direction at the same time - what Laws LJ called for shorthand "the ***TE (Eritrea)*** point". So the AIT had not addressed the question of whether compassionate or human rights considerations might militate against removal. In the Court of Appeal, on behalf of the four appellants, Mr Zane Malik wished to advance, for the first time, (as Mr Malik frankly admitted at the time[45]), the argument that it was irrational or unfair for the SSHD to refuse the variations of leave to remain without at the same time deciding whether removal directions should be issued: viz. the ***TE (Eretria)*** point, Sir Richard Buxton, who had given permission to appeal in all the cases before the court, observed: "*the limits of **TE (Eritrea)** are not entirely clear, so this appeal will give the full court an opportunity to review this jurisprudence*". Paragraph 1 of Mr Malik's written submissions to the Court of Appeal identified the issue that he invited the court to decide, as follows:

> "*The Appellants in these linked appeals seek to challenge the SSHD's policy/practice, as applied in these cases, to segregate the decisions as to variation of leave from decisions as to removal. The key authority which is to be considered is **TE (Eritrea) v SSHD [2009] EWCA Civ 174***".

69. Laws LJ gave the single reasoned judgment. He explained, at [1], that permission to appeal had been granted so that a single issue could be considered, viz. "*…whether the law requires that, where the Secretary of State refused an application by an immigrant for a variation of his leave to enter or remain in the UK, he (the Secretary of State) should at the same time issue removal directions under section 10 of the [1999 Act] for at least that he should do so unless there is some particular justification or taking another course*". Laws LJ said that the importance of this issue lay in the fact that if a person was faced only with a refusal to vary leave to remain, then "*…it may be that he cannot, on appeal to the AIT, urge that he should nevertheless be allowed to remain in the UK on compassionate or human rights grounds because no question of his removal is at that stage live. Arguments based on compassionate or human rights grounds would only become live on an appeal against removal directions…*". But Laws LJ then said, at [2], that the court had concluded that it did not have jurisdiction to entertain this point on the appeals, so they must be dismissed for reasons that he would explain.

70. Laws LJ outlined the relevant statutory provisions, referring specifically to ***section 84(1)(e)*** of the 2002 Act as one of the available grounds of appeal to the AIT against an "immigration decision" of the SSHD, viz. that the "immigration decision" was "*not otherwise in accordance with the law*". Having dealt with the appeal of the fifth appellant, Laws LJ noted that, in relation to the other four, the AIT had not addressed the question of whether compassionate or human rights considerations might militate against removal. Paragraph [6] of Laws LJ's judgment continued:

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[44] See [5] of Laws LJ's judgment.

[45] See para 4 of Mr Malik's written submissions for that appeal which were supplied to us by Ms Rhee with her further written submissions following the hearing in this case.

> "*The argument which the appellants wish to put forward as a matter of substance is that it was irrational or unfair for the Secretary of State to refuse the variations of leave applied for without at the same time deciding whether removal directions should be issued. If the argument were developed we would be required to consider the judgment of my lord Sedley LJ in this court in* ***TE (Eritrea) v Secretary of state for the Home Department [2009] EWCA Civ 174, [2009] INLR 558.*** *It was submitted in that case (para [11] of the judgment) that:*
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> > *'…given the consequences for the individual of separating the two stages, it is both unjust and irrational not to deal with them in immediate sequence'."*

71. Laws LJ noted that Sedley LJ had cited with approval Laws LJ's own judgment in ***JM (Liberia)*** and he quoted from it.

72. Laws LJ then said, at [8], that the question that arose was whether, notwithstanding the grant of permission by Sir Richard Buxton, "… *this court on these appeals possesses the jurisdiction to entertain what may in shorthand be called the* ***TE (Eritrea)*** *point",* ie. to consider whether the SSHD should have decided together the issue of an extension of leave to remain and whether or not to make a removal direction, given that this point had not been raised in the AIT or earlier. He noted that the appeal to the AIT had been against the refusal to vary leave to remain and nothing else and that the AIT was not asked to consider the "***TE (Eritrea)*** point".

73. As the remainder of [8] of Laws LJ's judgment may be crucial to this appeal, it is best that I set it out in full. Laws LJ said:

> "*It seems to me that the complaint sought to be raised by the* ***TE (Eritrea)*** *point is not an assault against the immigration decision to refuse a variation of leave as such. As I indicated earlier, one of the grounds on which an immigration decision may be challenged is 'that the decision is otherwise not in accordance with the law'. It might be sought to be contended that that expression is wide enough to embrace a complaint that the immigration decision to refuse variation of leave ought to have been accompanied by another decision, but it seems to me that the statute cannot be read in that way. It is to be noted that the refusal to vary leave made in each of these cases, pursuant, as I have said, to para 322(1A) of the Immigration Rules, is itself legally secure. The rule allowed no discretion, as the AIT recognised in each of these cases".*

74. Laws LJ continued, at [9], by stating that the complaint in the current appeal was "*…not in truth against the immigration decision…"* that the SSHD had made, but that the SSHD "*…should have done something else as well, namely make a variation decision (sic)*[46]*"*. Laws LJ then referred to ***section 103B(1)*** of the 2002 Act[47] upon

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[46] The words "*variation decision"* appear in both the BAILII version of the judgment and the ***INLR*** report of the judgment. With respect, in the context the word "*variation"* looks odd and the words "*removal direction decision"* would make more sense.

[47] This provides that: "*Where an appeal to the Tribunal has been reconsidered, a party to the appeal may bring a further appeal on a point of law to the appropriate appellate court*". That section has now been

which Mr Malik had relied, and he characterised the submission of Mr Malik as follows:

> "*…[Mr Malik submitted] that, while it may be that the original appeal had to be focused specifically on the immigration decision in question, after a reconsideration an appeal to the appropriate court – here the Court of Appeal – may under s 103B(1), be brought on any point of law whatever, whether or not it was raised before the AIT and whether or not it runs wider than would a mere assault on the immigration decision in question….*".

75. Laws LJ's conclusion on that submission, also at [9], was as follows:

> "*However, I consider that the point of law being referred to in s 103B(1) must generally arise out of the decision of the AIT on the reconsideration; though it is true that that point was stretched somewhat in* ***Bulale v SSHD [2008] EWCA Civ 806, [2009] 1 WLR 992.*** *At all events, the language of s 103B(1) cannot be read so as to allow appeals upon matters travelling beyond the legal merits of the immigration decision originally sought to be appealed. In those circumstances there is no jurisdiction, with the four corners of these appeals as presently constituted, to entertain the* ***TE (Eritrea)*** *point*".

76. The court was led to understand that, based on remarks of Sedley and Lloyd LJJ in ***TE (Eritrea)***, the four appellants might well be advised to seek judicial review of the lawfulness of the SSHD's decision on whether or not to extend those appellants' leave to remain whilst not deciding on whether or not to make removal directions in their cases: ie. to raise "the ***TE (Eritrea)*** point".[48] Therefore it was agreed that although the appeals must be dismissed, that order would not take effect for four weeks so that judicial review could be sought and determined. The intended effect of this suspension was that the appellants' right to remain in the UK pursuant to ***section 3C*** of the 1971 Act would continue until the judicial review had been determined.

77. As already noted, after the hearing of the appeals in this case we asked for further written submissions on what precisely this court had decided in ***SA (Pakistan)*** and the extent to which this court was bound by statements made in that case. Mr Malik submitted that the *ratio decidendi* of that case was that, on the true construction of ***section 103B(1)*** of the 2002 Act and because the point of law had not been raised in the AIT, the Court of Appeal had no jurisdiction to entertain the argument that Laws LJ identified in [1] of his judgment and what he characterised as the "***TE (Eritrea)*** point". Mr Malik submitted that Laws LJ's statements on the construction of ***section 84(1)(e)*** of the 2002 Act were *obiter dicta* and not binding on this court. Mr Malik stated that in fact the court in ***SA (Pakistan)*** had not heard argument on the scope of ***section 84(1)(e).*** In this regard he noted that Laws LJ had used the somewhat tentative phraseology (in [8]) that "*…it might be sought to be contended that the expression ['not in accordance with the law'] is wide enough to embrace a complaint that the immigration decision to refuse variation of leave ought to have been*

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repealed and replaced by ***section 13*** of the 2007 Act which permits an appeal to the Court of Appeal from the UT on a point of law (with permission): see the Appendix for the full wording of ***section 13.***

[48] See [11] of his judgment.

accompanied by another decision…", so demonstrating that that point had not, in fact, been actually contended. Mr Malik submitted that it would be inconceivable that the court would have given a determinative judgment on the scope of ***section 84(1)(e)*** without hearing argument on the point and without considering the authorities on the scope of that provision. Therefore, Laws LJ's observations on ***section 84(1)(e)*** were not part of the *ratio decidendi* of that case.

78. In her further written submissions Ms Rhee contended that ***SA (Pakistan)*** decided that the "segregation point" (which Ms Rhee said was synonymous with "the ***TE (Eritrea)*** point") was not one that could be raised by way of a statutory appeal under the 2002 Act. Ms Rhee submitted that the principal argument raised by the appellants in ***SA (Pakistan)*** was that the SSHD's practice of segregating the variation and removal decisions was "not in accordance with the law".[49] Ms Rhee submitted that the Court of Appeal decided two matters and that both were part of the *ratio decidendi* of the case. First, that the "segregation point" was not one that fell within the scope of ***section 84(1)(e)*** and, secondly, that the court did not have jurisdiction because of the restrictions imposed by ***section 103B(1)*** of the 2002 Act on the points of law that could be raised on appeal to the Court of Appeal. Ms Rhee submitted that Laws LJ's statements at [8] and [9] constituted *"..a clear expression of his view that an immigration decision cannot be impugned on a statutory appeal as being 'not in accordance with the law' for having been issued in isolation from any consequential removal directions".*[50] Ms Rhee argued that although the appellants in the present appeal now focused on the immigration decisions that *had* been taken by the SSHD (ie. not to extend leave to remain), in essence the complaint raised by Mr Malik in the present appeals was the same "segregation point" as had been raised and dismissed in ***SA (Pakistan).*** Therefore, the appellants in this case could not seek to distinguish the present appeals from those considered in ***SA (Pakistan).*** Moreover, the appellants could not draw support from ***Mirza,*** because the very premise of that case was the ruling in ***SA (Pakistan)*** that there was no right of statutory appeal under the 2002 Act on "the segregation point".

79. In my view, the primary decision of this Court in ***SA (Pakistan)*** on jurisdiction concerned the very narrow but important point on the statutory jurisdiction of the Court of Appeal in relation to appeals from the AIT under ***section 103B(1)*** of the 2002 Act. The decision on the construction of that section contains two aspects. First, the "point of law" on which there is a right of appeal to the Court of Appeal "*…must generally arise out of the decision of the AIT on the reconsideration"*. Secondly, the language of ***section 103B(1)*** "*…cannot be read so as to allow appeals upon matters travelling beyond the legal merits of the immigration decision originally sought to be appealed"*. Hence, as Laws LJ said, it followed that the court had no jurisdiction to entertain the ***TE (Eritrea)*** point on those appeals, because that point had not been raised in the AIT and, as he held, the argument centred on the legality of *not* making the removal decision, rather than on the "immigration decision" that had been made.

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[49] However, I note that para 55 of the appellants' written submissions in ***SA (Pakistan)*** invite the court to allow the appeals and "*substitute a decision that the SSHD's* ***decisions*** *were not in accordance with the law"* (my emphasis), which suggests that the objective was to overturn a decision of the SSHD that had been made, not one that had not.

[50] Para 23 of Ms Rhee's further written submissions.

80. However, Laws LJ made other statements in the course of his judgment, with which Sedley and Patten LJJ agreed. It is of vital importance in this appeal to determine the extent to which we are bound by these other statements. Laws LJ made three points. First, in [8], he noted that the "immigration decisions" taken by the SSHD were those to refuse to extend leave to remain. Those were the immigration decisions to which the ***section 82*** appeal (from the SSHD) had been directed. Those decisions were based on paragraph 322(1A) of the Immigration Rules and in the view of Laws LJ they were "*legally secure*".[51] So, it would appear that in ***SA (Pakistan)*** it was not being argued directly that the "immigration decisions" actually taken by the SSHD were not themselves "in accordance with the law" because they were in fact "segregated" from removal direction decisions.

81. Secondly, in [9] Laws LJ said that "*…it might be sought to be contended that..*" the phrase "*not in accordance with the law*" in ***section 84(1)(e)*** of the 2002 Act was wide enough to embrace "*..a complaint that the immigration decision to refuse variation of leave ought to have been accompanied by another decision, but it seems to me that the statute cannot be read in that way*". I read that statement as indicating that Mr Malik might have raised an argument that if the SSHD takes the first decision without also considering the second, then *that* second action (or rather inaction) would not be in accordance with the law. This analysis of what was or was not being argued appears to be borne out by Laws LJ's statement, also in [8], that "*…the complaint sought to be raised by the **TE (Eritrea)** point is not an assault against the immigration decision to refuse a variation of leave as such*".[52] Mr Malik stated in his further written submissions to us that there was no argument before the court in ***SA (Pakistan)*** on the scope of ***section 84(1)(e).*** But, whether or not that is so I would respectfully agree with Laws LJ's view that ***section 84(1)(e)*** can only be concerned with whether the actual "immigration decision" that has been taken, is "in accordance with the law"; it cannot be concerned with whether the fact that another one has not been taken is "in accordance with the law".

82. However, that does not deal with the argument which is now sought to be raised by Mr Malik in the light of this court's decision in ***Mirza.*** To repeat: this is that the actual "immigration decision" rejecting the application to vary leave to remain is challengeable as being not "in accordance with the law" by reason of the failure of the SSHD to consider both the issues of whether to vary the leave to remain application *and* whether or not to make a removal direction *at the same time or the second promptly after the first.* I do not accept Ms Rhee's argument that Mr Malik is effectively raising the same point as was argued and failed in ***SA (Pakistan).*** This court's decision in ***Mirza*** has changed the landscape and, in my view, enables Mr Malik to make the argument he does.

83. Thirdly, Laws LJ also stated, in [9], that the language of ***section 103B(1)*** could not be read "*so as to allow appeals on matters travelling beyond the legal merits of the immigration decision originally sought to be appealed*". This remark underlines the

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[51] As Moses LJ pointed out at [7] in ***Mirza [2010] EWHC 2002 (Admin),*** ie. the sequel proceedings brought by the four appellants in ***SA (Pakistan)***, the result may have been made less "secure" by the decision of the Court of Appeal in ***Adedoyin v SSHD [2010] EWCA Civ 773,*** which held that, on the proper construction of para 322(1A) of the IR, "false representation" had to be read as dishonest or deceptive representation. But that argument had not been made by the appellants in ***SA (Pakistan)/Mirza.***

[52] As already noted, Laws LJ took the view that the "immigration decisions" that had actually been taken were "*legally secure*", viz. could not be challenged in any way as being not "*in accordance with the law*".

principle that the "point of law" raised in the Court of Appeal must relate to the legal merits of the "immigration decision" originally taken and which is being appealed. In the present cases the argument of Mr Malik is indeed to attack the legal merits of the original "immigration decision" of the SSHD not to extend the leave to remain of RS and KA.

84. My conclusions on ***SA (Pakistan)*** are, therefore, as follows: (1) the actual decision is confined to the construction of ***section 103B(1)*** of the 2002 Act concerning the jurisdiction of the Court of Appeal on a point of law upon reconsideration by the AIT. (2) Laws LJ's statements on the construction of ***section 84(1)(e)*** of the 2002 Act were not strictly necessary for the decision of the court on the jurisdiction issue. (3) However, even if they are part of the decision, Laws LJ was confirming that it is only the very "immigration decision" of the SSHD that is being challenged which can be the subject of appeal, in that case on the ground that it is not "in accordance with the law" within ***section 84(1)(e).*** (4) A separate failure to take some other decision, which itself may or may not be an "immigration decision", cannot be attacked on the ground of being not "in accordance with the law" within ***section 84(1)(e).***

85. Mr Malik argued in the present appeal that ***SA (Pakistan)*** was wrongly decided because ***AS (Afghanistan)*** had not been cited or considered by the court, so that the Court of Appeal in ***SA (Pakistan)*** did not have had in mind the statements of the members court in ***AS (Afghanistan)*** that the immigration legislation should be coherent and should encourage fewer rather than more appeals against "immigration decisions". I am quite satisfied that the experienced court in ***SA (Pakistan)*** would have been well aware of those principles. But, in any case, those statements in ***AS (Afghanistan)*** were not relevant to the narrow jurisdiction point that was decided in ***SA (Pakistan)***, so that decision cannot be impugned on this ground.

86. The four appellants (all other than NB) in ***SA (Pakistan)*** did seek permission to bring judicial review proceedings in the subsequent case known as ***Mirza.*** There was a "rolled up" hearing on the issue of permission to bring judicial review proceedings and, if granted, the merits. It was heard by Moses LJ sitting at first instance in the Administrative Court.[53] He characterised the judicial review challenge as follows:[54]

> "*All four claimants now seek permission, by way of judicial review, to challenge the failure of the Secretary of State to make decisions as to their removal and thereby afford them the opportunity of invoking factors identified in paragraph 395C of the Immigration Rules so as to persuade the Secretary of State to refrain from removing them*".

87. Moses LJ pointed out that none of the applicants had asked the SSHD to make removal directions at the time he considered their applications to extend their leave to remain; nor had that point been argued at the time of reconsideration by a Senior Immigration Judge. Moreover, none had tried to rely on any paragraph 395C IR factors that fell to be considered by the SSHD if a removal direction under ***section 10*** of the 1999 Act had been considered. Therefore the appellants had now to argue that

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[53] ***[2010] EWHC 2002 (Admin)***
[54] See [2] of his judgment.

it was a *duty* of the Secretary of State to make a decision on whether or not to remove at the same time as deciding whether or not to extend the leave to remain.[55]

88. Moses LJ reviewed the statutory framework and all the cases referred to above. He concluded[56] that the four claimants for judicial review had failed to establish any obligation on the part of the SSHD to consider removal directions at the same time as the decision to refuse an extension of leave to remain was made. He granted permission for judicial review but rejected the applications.

89. The four claimants appealed. The appeal of a fifth appellant, Bhumila Motee, which raised similar issues, was heard at the same time. She appealed a decision not to grant her indefinite leave to remain on the ground that she had changed her employer and thus disqualified herself from obtaining indefinite leave. The "***TE (Eretria)"*** point had not been argued below in her case. The SSHD did not argue that she could not take that point for the first time in the Court of Appeal.[57] For the purposes of this fifth appeal, the court constituted itself as a Divisional Court.

90. Sedley LJ gave the single reasoned judgment. At [1] he identified the issue before the court as follows:

> *"…whether the Home Secretary, when refusing to extend a foreign national's leave to remain in the United Kingdom, ought at the same time or promptly thereafter to make a removal decision which, if adverse, will enable them to appeal without first breaking the law by overstaying. This court…has previously held, in* ***TE (Eritrea) [2009] EWCA Civ 174,*** *that it may in some cases be unfair and hence unlawful for the Home Secretary not to do so but not that she is obliged in all cases to do so".*

91. Sedley LJ then recounted the history of the five cases before them and he referred to the statutory scheme and the rules. In reviewing the legislation, he noted, first, the effect of ***section 47*** of the 2006 Act. He said that its "*manifest object*" was that when there was a decision by the SSHD not to vary leave to remain in the UK, it "…*should be accompanied or promptly followed by a decision to remove*".[58] Secondly, he regarded ***section 47*** of the 2006 Act and ***sections 84,***[59] ***85*** and ***96*** of the 2002 Act as part of the legislative scheme of immigration control which had, as a legislative objective, a "one-stop" policy of discouraging multiple appeals. It was therefore the duty of the courts as well as the executive to give effect to that legislative objective.[60] Thirdly, he said that ***section 120*** of the 2002 Act, which gives the SSHD the power to serve a so-called "one-stop" notice, is a part of this legislative objective and so "*is to be exercised accordingly except where there is a lawful reason not to do so*".[61] Fourthly, Sedley LJ agreed with Moses LJ's analysis of the decision in ***TE (Eritrea),*** namely that it did not lay down a uniform obligation on the SSHD to decide on

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[55] [3] of his judgment.
[56] [47] of his judgment.
[57] See [6] of Sedley LJ's judgment: the SSHD therefore did not take the ***section 103B(1)*** point raised in ***SA (Pakistan).***
[58] [21] of Sedley LJ's judgment.
[59] The transcript says "85(4)", but I think that must be a typographical error.
[60] [22] of Sedley LJ's judgment.
[61] [25] of Sedley LJ's judgment.

removal directions at the same time as refusing leave to remain and that there were sound reasons why the court should not do so now.[62] Sedley LJ added:[63]

> "*There is no contest in this court that **TE (Eritrea)** decides, and decides only, that, there being no legal inhibition on considering both breach of the immigration rules and the giving of removal directions in close succession, fairness in that particular case required it to be done. But the court expressly left it open to the Home Office in other cases to keep the two exercises apart, recognising that there might in some cases be good reason for doing so".*

92. Sedley LJ then considered the evidence of a senior executive officer in the UK Border Agency (which had been adduced before Moses LJ) on the practice of immigration officials who dealt with applications for leave to remain in the UK at various centres, including Croydon, Sheffield and Liverpool. Sedley LJ concluded that the evidence established that: (1) there was no reason why, generally, removal should not be dealt with promptly following refusal of leave to remain (as fairness required); and (2) the UK Border Agency, an executive agency of the Home Office, was presently organised so that this was not done and could not be done without significant reorganisation.[64]

93. Sedley LJ also referred to the evidence of a partner in a solicitor's firm which specialised in immigration cases, which was admitted for the first time on the conjoined appeals. This evidence suggested that there was a practice of segregating the decision on whether to grant leave to remain from the decision on a removal order, even when officials were pressed to consider them together and even when it was made clear that the unsuccessful applicant would not leave the UK voluntarily.

94. Sedley LJ concluded from the evidence before the court that there was a *"generalised practice, either manifested in or deriving from the internal organisation of the Border Agency, of separating the two decisions by a frequently substantial period of time".*[65] He held that such a practice was contrary to the policy and objects of the legislation which were, as nearly as could be done "*…to deal compendiously with all issues concerning the lawfulness of a person's continued residence in the United Kingdom".*[66] In his view a deferral for a short period was permissible, but not more, generally speaking.

95. Sedley LJ also noted that the SSHD had accepted that even though paragraph 395C factors had not been relied on before by the appellants, that fact was not fatal to the appeals, because they became known to the SSHD when the "immigration decision" concerned was appealed.[67] He commented that whilst it was true that "one-stop notices" required all reasons for staying in the UK to be put forward at the start, it *"..hardly lies in the mouth of the [SSHD] to insist on this when it is her executive*

[62] [29] of Sedley LJ's judgment.
[63] At [30] of his judgment.
[64] [36] of Sedley LJ's judgment.
[65] [40] of Sedley LJ's judgment.
[66] [41] of Sedley LJ's judgment.
[67] [42] of Sedley LJ's judgment.

agency which is frustrating the purpose of the notices by deferring the removal decision".[68]

96. Sedley LJ summed up the position as follows: (1) there can be few cases in which the right course will not be to invite submissions (from an applicant) as to why removal should not follow if a variation of leave to remain is refused and then to make a compendious decision on both questions. (2) It would not be unlawful for a ***section 120*** notice to include a modest but reasonable time for the applicant to respond, (with the warning that a removal decision will be taken at the end of the response time), in which response the applicant should advance any reasons or responses based on the decision not to grant an extension/variation of leave to remain. (3) There may be cases in which segregation of the two decisions is justified. Sedley LJ was therefore not prepared to grant a general declaration that the SSHD must, in general, consider the issue of removal either at the same time or promptly after the decision on leave to remain.[69] However, she should have done so in the case of the four appeals from Moses LJ, which were therefore allowed.

97. Sedley LJ made one final point. He said that "*it may follow*" that, an unjustified deferral of a decision on removal "*…being contrary to law"*, might make it impossible to justify the disruption to family or private life that would follow a refusal to remain and thus infringe an applicant's Article 8 rights. But, in his view there was no need to consider that point, once the unlawfulness of the deferral had been established. Moreover, it could not be presumed that there would be removal.[70]

Discussion and conclusions on the question of this court's jurisdiction to hear the "fact of segregation issue".

98. Ms Rhee's argument that this court has no jurisdiction to hear the "fact of segregation issue" is based on the premise that ***SA (Pakistan)*** held that any failure of the SSHD to consider and decide on a removal direction at the same time (or promptly after) making an adverse "immigration decision" on leave to remain cannot relate to the "immigration decision" that had been made and so cannot be the subject of an appeal under ***section 82(2)*** of the 2002 Act on the ground of not being "not in accordance with the law" within ***section 84(1)(e)*** of the 2002 Act. Therefore, Ms Rhee argued, neither the FTT, nor the UT, nor this court could have jurisdiction to consider any statutory appeal under ***section 82(2)*** based on that ground and this court is bound by ***SA (Pakistan).***

99. As I have already noted, in my view the essential decision in ***SA (Pakistan)*** was that the Court of Appeal did not have jurisdiction under ***section 103B(1)*** because the "segregation issue" argument had not been before the AIT, so the point of law sought to be raised in the Court of Appeal did not "arise out of" the decision of the AIT on reconsideration and, in any case, did not relate to the original "immigration decision" appealed.[71] I accept that Laws LJ also expressed the view that ***section 84(1)(e)*** of the 2002 Act could not be used to attack the fact that the SSHD had failed to consider whether or not to make a removal order at the same time or shortly after making an

[68] [42] of Sedley LJ's judgment.
[69] See [44] and [45] of the judgment of Sedley LJ.
[70] [46] of his judgment.
[71] [9] of Laws LJ's judgment.

"immigration decision" not to extend or vary leave to remain. But, in my view, Laws LJ did not face the argument that is now being raised. At the risk of repetition, I emphasise that the present argument is that the "immigration decisions" themselves were not in accordance with the law within ***section 84(1)(e)*** because the SSHD has a duty to consider the two together or the second promptly after the first, unless there is a lawful reason not to do so; and if she does not consider them thus, then the "immigration decision" actually made can be impugned as being not "in accordance with the law".

100. In my view this argument is only made possible by the decision in ***Mirza,*** in which Sedley LJ concluded that an "*unjustified deferral*" of a decision on removal following a decision to refuse leave to remain would be "*contrary to law*". By that I take Sedley LJ to mean that the action (or rather non-action) of the SSHD would not be in accordance with the SSHD's public law duty. If an unjustified deferral of the removal notice decision is "*contrary to law*" then it seems to me that it is a very short step to saying that the actual "immigration decision" that has been made, viz. to refuse to vary the leave to remain, would then be one which is not "in accordance with the law" within ***section 84(1)(e)*** of the 2002 Act.

101. I accept that the SSHD has to take the variation decision first. I also accept that the removal decision cannot literally be taken at the same time, because, as Sedley LJ acknowledged in ***Mirza,***[72] the right to make a removal decision only arises the moment the initial leave period expires (for ***section 47*** of the 2006 Act) or when the applicant's presence in the UK is unlawful (for ***section 10*** of the 1971 Act). However, once it is established that, in the absence of good reason, the SSHD is obliged to serve a "one-stop" notice under ***section 120***[73] and is obliged to take the removal decision promptly thereafter, that must impinge on the lawfulness of the "immigration decision" concerning variation. It seems to me that if the SSHD takes the variation decision in circumstance where it is *not* contemplated that the removal decision will be promptly taken thereafter and there is no good reason for that delay or "segregation in fact", then that must make the first decision "not in accordance with the law". It would be a decision that was taken in disregard of the SSHD's public law duties. So, on this analysis, there is no question of the variation decision being lawful when first made, then becoming unlawful thereafter, so changing its character after the manner of Schrödinger's cat.

102. Logically, the aim of the judicial review proceedings in ***Mirza*** must have been to have the "immigration decision" that had actually taken withdrawn, so that the two issues (variation of leave to remain and a possible removal direction) could be considered together (including para 395C IR issues), with the aim of persuading the SSHD to grant an extension to the leave to remain. The applicants in that case could not have contemplating remaining in a legal limbo of being refused a variation of leave to remain but also subject to a decision that no removal order would be made against them.

103. I would therefore hold that an argument that an "immigration decision" not to extend leave to remain is flawed because the SSHD failed at the same time or promptly thereafter to consider the question of whether or not to make a removal direction

[72] See [21] and [27].
[73] ***Mirza*** at [25].

(either under ***section 10*** of the 1999 Act, or more appropriately in these cases, under ***section 47*** of the 2006 Act) does fall within the ambit of ***section 84(1)(e)*** of the 2002 Act. In short, an unjustified deferral of the removal decision would mean that the "immigration decision" actually taken is not "in accordance with the law".

104. At the hearing we were not shown any other authority on the construction of ***section 84(1)(e)*** or its statutory predecessors which would preclude this conclusion apart from Laws LJ's statement in ***SA (Pakistan).*** In her further written submissions, Ms Rhee accepted the general proposition that an "immigration decision" can be impugned as not being "in accordance with the law" within ***section 84(1)(e)*** if the decision was taken in breach of public law principles, eg. by failing to take into account a relevant consideration when making the decision. She submitted however that the ground of appeal in ***section 84(1)(e)*** could not be used so as to widen the scope of an "immigration decisions" against which the right of appeal lies – so as to encompass a complaint that the Secretary of State had failed to issue a further consequential decision at the same time as the decision under appeal. Mr Malik, in his written submissions, referred us to decisions of the AIT and the UT which all state that an immigration decision can be challenged on the ***section 84(1)(e)*** ground where it is alleged that the decision was made in breach of public law principles.[74]

105. In my view, the construction of ***section 84(1)(e)*** I propose is preferable for four reasons. First, it would be consistent with one of the statutory policies and objects of the immigration legislation which was reconfirmed by Sedley LJ in ***Mirza,*** viz. to enable the courts within the framework of the immigration legislation to deal compendiously with all issues concerning the lawfulness of a person's continued residence in the UK.[75] It is logical that all issues should be dealt with in the legislative context, rather than outside it.

106. Secondly, the effect of the contrary construction of ***section 84(1)(e)*** can be demonstrated by an example, which shows the result would be clean contrary to the legislative policy and objects confirmed in ***Mirza.*** If a person who has been refused permission to vary leave to remain could not appeal that decision pursuant to the appeal provisions of Part 5 of the 2002 Act on the ground that, in his case, the SSHD ought at the same time or promptly thereafter to have considered the question of a removal direction, but must, instead take separate judicial review proceedings to challenge that failure, it would mean that a person would first have to appeal the "immigration decision" actually taken (although he could not do so on the "fact of segregation" ground). He would do so in the knowledge that the only basis on which he really wished to challenge the decision was not a ground of appeal embraced by ***section 84(1)(e)*** of the 2002 Act (because that did not cover the "fact of segregation" point), but because by appealing he could take advantage of an extension of leave to remain granted by ***section 3C*** or ***3D*** of the 1971 Act, as happened in ***SA(Pakistan)/Mirza.*** But it seems to me doubtful (to say the least) whether the applicant's leave to stay could be extended under the ***section 3C*** or ***3D*** provisions once his appeal against the "immigration decision" had been dismissed, because those sections only contemplate appeals within the statutory framework of the 2002

[74] ***AA and others (Highly skilled migrants: legitimate expectation)Pakistan v SSHD [2008] UKAIT 00003; Thakur (PBS decision – common law fairness) Bangladesh v SSHD [2011] UKUT 00151 (IAC); Patel (revocation of sponsor licence-fairness) India v SSHD [2011] UKUT 00211 (IAC)***

[75] See [41] of Sedley LJ's judgment.

Act. So, unless the device adopted in ***SA(Pakistan)/Mirza*** were used, the applicant would be an unlawful overstayer at the time any judicial review proceedings were started. This all seems both artificial and unnecessarily cumbersome. Moreover, it would put the applicant in the very position that Laws LJ in ***JM (Liberia)*** said was undesirable.

107. Thirdly, even if the construction of ***section 84(1)(e)*** I propose is a broad one, it is consistent with the approach of Laws LJ to the construction of ***section 84(1)(g)*** in ***JM (Liberia).*** The same practical considerations that he gave for his broad construction of paragraph ***(g)*** apply to paragraph ***(e).***

108. Fourthly, it seems to me that the restricted period during which the SSHD can make a removal direction under ***section 47*** of the 2002 Act is consistent with the view that the immigration legislation contemplated the removal direction being given shortly after the variation decision so that if this is not done, then the original decision is flawed.

109. I accept the submission of Ms Rhee that neither ***TE (Eritrea)*** nor ***AS (Afghanistan)*** nor ***SA (Pakistan)*** are themselves positive authority in favour of the construction that I favour. The precise point raised in the present cases was not argued that way in any of the earlier cases. Mr Malik is only able to argue it now because of this court's decision in ***Mirza.***

110. We are bound by what ***SA (Pakistan)*** did decide and we are bound by what ***Mirza*** decides. In my view two conclusions on the jurisdiction issues follow. First, in relation to KA, the fact that he has never argued the "fact of segregation issue" in any tribunal below means, at least in theory, that in his case there is no "*point of law arising from a decision made by the Upper Tribunal*" within the meaning of ***section 13(1)*** of the 2007 Act which this court can consider. Contrary to the further written submissions of Mr Malik, the reasoning of Laws LJ on the construction of ***section 103B(1)*** applies equally to ***section 13(1)*** of the 2007 Act which gives a right of appeal from the UT only on "*any point of law arising from a decision made by the Upper Tribunal other than an excluded decision"*. If the decision of the UT has not considered a particular point of law because it was not raised or argued before the UT, it is difficult to envisage a point of law *"…arising from…"* the decision made by the Upper Tribunal. I would say, generally speaking, that such a point of law does not arise from a decision of the UT at all; it only arises for the first time in the Court of Appeal. Moreover, I would be prepared to accept that the language of ***section 13*** of the 2007 Act cannot be read so as to allow appeals upon matters travelling beyond the legal merits of the immigration decision originally sought to be appealed, to use Laws LJ's phrase. Therefore, following the reasoning of the essential decision in ***SA (Pakistan)*** this court would have no jurisdiction to consider KA's appeal on the "fact of segregation issue" and his appeal would have to be dismissed on that ground alone. I put the matter in that conditional way because this point was not taken by Ms Rhee on KA's appeal.

111. Secondly, in relation to RS I conclude that this court and the UT do have jurisdiction to hear and determine the "segregation issue" and I would therefore hold that Upper Tribunal Judge Moulden was wrong to find to the contrary. He based his decision on jurisdiction solely on [8] and [9] of Laws LJ's judgment in ***SA (Pakistan).*** For the reasons I have given, I have concluded that we are only bound by Laws LJ's

decision concerning the ambit of ***section 103B(1)*** of the 2002 Act. We are not bound, in my view, by Laws LJ's statements concerning the ambit of ***section 84(1)(e)*** of the 2002 Act because he was not addressing the same argument as has now been raised as a result the analysis and decision in ***Mirza.*** If this second conclusion is correct, then, as the "fact of segregation issue" was raised in the UT in RS's case, this court has jurisdiction under ***section 13(1)*** of the 2007 Act to deal with that point of law which arises from a decision of the UT.[76]

112. This also means that I do not need to decide Mr Malik's argument based on ***section 25*** of the 2007 Act. However, in my view that argument is wrong. ***Section 25*** deals with the supplementary powers of the UT and is concerned largely with procedural issues. It has nothing to do with the UT's jurisdiction on substantive issues. ***Section 25(1)*** cannot be used to get around the decision in ***SA (Pakistan)*** on the effect of ***section 103B(1)*** of the 2002 Act and, as I would say, its successor, ***section 13(1)*** of the 2007 Act.

G. Issue (II): The fact of segregation issue: the merits.

113. Ms Rhee did not advance any separate arguments on "the merits" of the "fact of segregation issue" in the sense that she did not submit that, on the facts of the case of either KA or RS, they were instances where segregation of the decision on leave to remain from a decision on removal direction was justified.[77] Ms Rhee also accepted that, in the light of the decision in ***Mirza,*** it could not be argued that either KA or RS was precluded from raising paragraph 395C IR issues at this stage even though they had not been raised before now. This concession by the SSHD is reflected in the proposed changes to paragraph 395C so that the SSHD will consider all factors before making any decision on a removal notice under ***section 47*** of the 2006 Act when an appellant would still lawfully be in the UK.

114. In my view the effect of [45] in ***Mirza*** is that the burden is on the SSHD to initiate the process of dealing with the two decisions together by an invitation to the applicant, at the time a "one stop notice" is issued with the variation decision, to make submissions as to why removal should not follow the refusal to vary leave. Although the decisions on the issue of extending the leave to remain in both the present cases were taken long before this court's decision in ***Mirza,*** that cannot alter the result if there are no countervailing factors. After all, the same position obtained in ***Mirza*** itself, but the appeals were still allowed.

115. Therefore, in the case of RS I would allow the appeal on this ground. I would have allowed it in the case of KA as well, but for the jurisdictional difficulty. However, given the offer of the SSHD in both cases, the disposal of both appeals needs further consideration and I will come to that after dealing briefly with the other two issues I have identified above.

H. Issue (III): The Article 8 issue

[76] I appreciate that RS did not raise the "segregation issue" before the FTT. It could have been argued by Ms Rhee that as it had not been raised there, then the effect of ***section 11(1)*** of the 2007 Act , which is in similar terms to ***section 13(1),*** is that the UT had no jurisdiction to consider the point in any case. But that was not argued on behalf of the SSHD in the UT and it was not argued before us.

[77] As Sedley LJ contemplated could be the case at [43] of ***Mirza.***

116. Mr Malik's argument is that if the fact of the segregation of the variation of leave decision and removal direction decision is unlawful, it therefore follows that the "immigration decisions" which have been made amount to an unlawful interference with the Article 8(1) rights of both RS and KA which interference is itself not "in accordance with the law" for the purposes of Article 8(2) and ***section 84(1)(e)*** of the 2002 Act. Furthermore, any removal in consequence of those unlawful "immigration decisions" would be unlawful under ***section 6*** of the Human Rights Act 1998 and so a ground of appeal under ***section 84(1)(g)*** of the 2002 Act. I think that the short answer to this argument is that even if the fact of the segregation of the decisions is not "*in accordance with the law"*, it does not follow that this itself constitutes an unlawful interference with Article 8 rights. It may lead to one. But, as Sedley LJ pointed out at [46] of ***Mirza,*** there is no need to go down that road once the unlawfulness of the segregation of the decisions is established. Moreover, as he also said, there are obvious difficulties about presuming a removal which, if the law is observed, may never happen. I would therefore reject this ground of appeal.

I. Issue (IV): The paragraph 57(vi) issue (RS only)

117. Mr Malik relies on the statement of Sedley LJ at [10] in ***Pankina v Secretary of State***[78] that the Immigration Rules have long recognised that international students who complete their degrees in the UK can be an asset to this country and successive amendments to the Immigration Rules have been made to give effect to this policy. He referred to paragraphs 6 and 10 of the UK Border Agency's *Highly Skilled Migrants Under the Point Based System: Statement of Intent* which asserted that the "Post Study Work" proposal would boost the UK's attractiveness as a place to study and would aim to retain the most able international graduates who have studied in the UK. Mr Malik emphasised that paragraph 10 of that document claimed that "Post Study Work" would be part of the "Highly Skilled Tier" of Migrants because "*successful applicants will be free to seek employment without having a sponsor….[although] people with Post Study Work leave will be expected to switch to another part of the points system as they are able to do so"*. Mr Malik therefore submitted that paragraph 57(vi) must be construed in the light of these policy statements so that it would read "the applicant intends [***to switch into any permissible category or***] to leave the UK at the end of his studies".

118. I cannot accept this argument. I agree that the Immigration Rules are statements of policy, not the law of the land.[79] I also accept that Rule 57(vi) has to be interpreted against the relevant background, which involves looking at the Immigration Rules as a whole and the function that they serve in the administration of immigration policy.[80] The consequence is that the Immigration Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument, but as Lord Brown of Eaton under Heywood has said: "*sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy"*.[81]

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[78] ***[2010] EWCA Civ 719***
[79] ***See AA (Nigeria) v Secretary of State [2010] EWCA Civ 773*** at [86] per Longmore LJ.
[80] See ***Odelola v Secretary of State [2009] 1 WLR 1230*** at [4] per Lord Hoffmann.
[81] See ***Mahad and others v Entry Clearance Officer [2009] UKSC 16 [2010] 1 WLR 48*** at [10]. The other JJSC agreed.

119. However, as Lord Brown also said in the same paragraph in ***Mahad,*** the intention of the Secretary of State as embodied in the Immigration Rules has to be discerned objectively from the words used; it is not to be divined by reference to "…*supposed policy considerations. Still less is [that] intention to be discovered from the Immigration Directorate's Instructions ("IDIs") issued intermittently to guide immigration officers in their application of the rules".*[82] Therefore the first stop in construing the meaning of a particular Immigration Rule remains the objective construction of the words used in the Rules. If primacy is to be given to statements made *after* the particular rule has been laid before Parliament (pursuant to ***section 3(2)*** of the 1971 Act) and the rule has been approved by Parliament, then it would mean that the Secretary of State would be able to assert that a particular rule meant what she said it meant in a subsequent document, rather than what the rule, as approved by Parliament, stated. Such a "*Humpty Dumpty*" approach to the construction of the rules would be unprincipled and entirely contrary to the rule of law and parliamentary control of the executive. In my view it is unacceptable.

120. Mr Malik relied on the decision of this court in ***Adedoyin v SSHD.***[83] In that case the court had to decide on the correct interpretation of the words "false representations" in paragraph 322(IA) of the Immigration Rules. That paragraph had inserted a new provision that leave to remain in the UK would be refused "*where false representations have been made or false documents or information have been submitted…*". It was accepted that "false" could mean either "dishonest" or "incorrect". This court held that where there was an ambiguity in the meaning of the rule, it was legitimate to consider the executive's public statements about the rule, in particular ministerial assurances as to the meaning which had been given in parliamentary debates upon the proposed amendment and, exceptionally, the published guidance in the relevant IDIs.

121. But the present case is miles away from that one. First, there is no question of an amendment to paragraph 57(vi); for present purposes it remains as it always has been. Secondly, Mr Malik accepted that there had been no statement by a responsible minister at the time this paragraph was introduced to Parliament that would support his construction. Thirdly, there has been nothing since in the form of an assurance or guidance as to the interpretation of this particular paragraph such as there was in ***Adedoyin.***

122. Therefore, I must construe paragraph 57(vi) objectively, taking in all the background circumstances and looking at the Immigration Rules as a whole. Doing that it seems to me that the paragraph must mean what it says; there is no room for interpolating words as Mr Malik suggests.

123. In these circumstances, it is not necessary to consider whether or not RS could have qualified as a Post Study Work Tier One Migrant if he obtained the degree for which he has been studying for the last two years or more. Neither the SSHD, nor the FTT nor the UT made an error of law on this issue. I therefore reject this ground of RS' appeal.

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[82] Lord Brown was quoting from his own speech in ***MO (Nigeria) v SSHD [2009] 1 WLR 1230*** at [33].

[83] ***[2011] 1 WLR 564*** particularly the statements of Rix LJ at [34]-[43], [52]-[53] and [76]. Longmore and Jacobs LJJ agreed with him, Longmore LJ adding the comment already quoted above.

J. Conclusion and Disposal of these appeals: the offer of the SSHD in the case of KA.

124. In the case of RS I would allow the appeal. In his case the direction that I would give pursuant to ***section 87*** of the 2002 Act is that the matter be remitted to the SSHD to reconsider RS's application for leave to remain and, in doing so, the SSHD should consider all relevant factors under paragraph 395C of the Immigration Rules. At the same time the SSHD should consider the issue of a possible removal direction pursuant to ***section 47*** of the 2006 Act. Before the SSHD considers these two issues, RS must be given a reasonable time in which to make any relevant representations including representations concerning relevant factors under paragraph 395C of the Immigration Rules. The SSHD will have to consider such representations when making her decision on leave to remain and any possible removal decision under ***section 47.*** The precise terms of the direction will need to be considered by counsel and I would hope they can be agreed.

125. In the case of KA, as I have already stated, I think that permission to appeal should be granted. In principle the appeal should be dismissed on the narrow jurisdiction issue that I have indicated. However, in the light of the fact that the ***section 13(1)*** jurisdiction point was not taken in this court by the SSHD and given the SSHD's offer, which we understand still stands, it seems to me that in KA's case there should, broadly, be similar directions and a similar order to the one made in the case of RS. Once again, detailed directions will need to be considered by counsel and, hopefully, agreed.

Appendix 1

Statutory Provisions

Immigration Act 1971

3C Continuation of leave pending variation decision

(1) This section applies if—

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

(b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when—

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought [, while the appellant is in the United Kingdom] against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or

(c) an appeal under that section against that decision [, brought while the appellant is in the United Kingdom,] is pending (within the meaning of section 104 of that Act).

3D Continuation of leave following revocation

(1) This section applies if a person's leave to enter or remain in the United Kingdom—

(a) is varied with the result that he has no leave to enter or remain in the United Kingdom, or

(b) is revoked.

(2) The person's leave is extended by virtue of this section during any period when—

(a) an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 could be brought, while the person is in the United Kingdom, against the variation or revocation (ignoring any possibility of an appeal out of time with permission), or

(b) an appeal under that section against the variation or revocation, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).

(3) A person's leave as extended by virtue of this section shall lapse if he leaves the United Kingdom.

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

10. –

(1) Where it appears to the Secretary of State either –

(a) that directions might be given in respect of a person under paragraph 8 or 9 above, but that it is not practicable for them to be given or that, if given, they would be ineffective; or

(b) that directions might have been given in respect of a person under paragraph 8 above [but that the requirements of paragraph 8(2) have not been complied with];

then the Secretary of State may give to the owners or agents or any ship or aircraft any such directions in respect of that person as are authorised by paragraph 8(1)(c).

(2) Where the Secretary of State may give directions for a person's removal in accordance with sub-paragraph (1) above, he may instead give directions for his removal in accordance with arrangements to be made by the Secretary of State to any country or territory to which he could be removed under sub-paragraph (1).

(3) The costs of complying with any directions given under this paragraph shall be defrayed by the Secretary of State.

24 Illegal entry and similar offences.

(1) An immigration officer or constable may arrest without warrant a person who has been released by virtue of paragraph 22 above –

(a) if he has reasonable grounds for believing that that person is likely to break the condition of his recognizance or bail bond that he will appear at the time and place required or to break any other condition of it, or has reasonable ground to suspect that that person is breaking or has broken any such other condition; or

(b) if, a recognizance with sureties having been taken, he is notified in writing by any surety of the surety's belief that that person is likely to break the first-mentioned condition, and of the surety's wish for that reason to be relieved of his obligation as a surety;

Asylum and Immigration Act 1996

8 Restrictions on employment.

(1) Subject to subsection (2) below, if any person ("the employer") employs a person subject to immigration control ("the employee") who has attained the age of 16, the employer shall be guilty of an offence if—

(a) the employee has not been granted leave to enter or remain in the United Kingdom; or

(b) the employee's leave is not valid and subsisting, or is subject to a condition precluding him from taking up the employment,

and (in either case) the employee does not satisfy such conditions as may be specified in an order made by the Secretary of State.

(2)Subject to subsection (3) below, in proceedings under this section, it shall be a defence to prove that—

(a) before the employment began, there was produced to the employer a document which appeared to him to relate to the employee and to be of a description specified in an order made by the Secretary of State; and

(b) either the document was retained by the employer, or a copy or other record of it was made by the employer in a manner specified in the order in relation to documents of that description.

(3) The defence afforded by subsection (2) above shall not be available in any case where the employer knew that his employment of the employee would constitute an offence under this section.

(4) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—

(a) any director, manager, secretary or other similar officer of the body corporate; or

(b) any person who was purporting to act in any such capacity,

he as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(6) Where the affairs of a body corporate are managed by its members, subsection (5) above shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(7) An order under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) In this section—

- "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing;
- "employ" means employ under a contract of employment and "employment" shall be construed accordingly.

Immigration and Asylum Act 1999

10 Removal of certain persons unlawfully in the United Kingdom.

(1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if—

(a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;

[(b) he uses deception in seeking (whether successfully or not) leave to remain;**]**

[(ba)his indefinite leave to enter or remain has been revoked under section 76(3) of the Nationality, Immigration and Asylum Act 2022 (person ceasing to be refugee); or **]**

(c) directions […] have been given for the removal, under this section, of a person […] to whose family he belongs

Nationality, Immigration and Asylum Act 2002

78 No removal while appeal pending

(1) While a person's appeal under section 82(1) is pending he may not be—

(a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or

(b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section "pending" has the meaning given by section 104.

(3) Nothing in this section shall prevent any of the following while an appeal is pending—

(a) the giving of a direction for the appellant's removal from the United Kingdom,

(b) the making of a deportation order in respect of the appellant (subject to section 79), or

(c) the taking of any other interim or preparatory action.

82 Right of appeal: general

(1) Where an immigration decision is made in respect of a person he may appeal **[**to the Tribunal**]**.

(2) In this Part "immigration decision" means—

(a) refusal of leave to enter the United Kingdom,

(b) refusal of entry clearance,

(c) refusal of a certificate of entitlement under section 10 of this Act,

(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,

(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,

(f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,

(g) a decision that a person is to be removed from the United Kingdom by way of directions under **[**section 10(1)(a), (b), (ba) or (c)**]** of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom),

(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal),

(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),

[(ia) a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c. 77) (seamen and aircrews),**]**

[(ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),**]**

(j) a decision to make a deportation order under section 5(1) of that Act, and

(k) refusal to revoke a deportation order under section 5(2) of that Act.

84 Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—

(a) that the decision is not in accordance with immigration rules;

(b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c. 74) (discrimination by public authorities) [or Article 20A of the Race Relations (Northern Ireland) Order 1997] ;

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

85 Matters to be considered

(1) An appeal under section 82(1) against a decision shall be treated by [the tribunal] as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, [the Tribunal] shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.

86.Determination of appeal

(2)[The Tribunal] must determine—

(a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and

(b) any matter which section 85 requires [it] to consider.

(3) [The Tribunal] must allow the appeal in so far as [it] thinks that—

(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

87 Successful appeal: direction

(1) If [the Tribunal] allows an appeal under [section 82, 83 or 83A] [it] may give a direction for the purpose of giving effect to [its] decision.

(2) A person responsible for making an immigration decision shall act in accordance with any relevant direction under subsection (1).

[(3) But a direction under this section shall not have effect while—

(a) an application under section 103A(1) (other than an application out of time with permission) could be made or is awaiting determination,

(b) reconsideration of an appeal has been ordered under section 103A(1) and has not been completed,

(c) an appeal has been remitted to the Tribunal and is awaiting determination,

(4) A direction under subsection (1) shall be treated [as part of the Tribunal's decision on the appeal for the purposes of [section 11 of the Tribunals, Courts and Enforcement Act 2007]] .

92 Appeal from within United Kingdom: general

4)This section also applies to an appeal against an immigration decision if the appellant—

(a) has made an asylum claim, or a human rights claim, while in the United Kingdom, or

(b) is an EEA national or a member of the family of an EEA national and makes a claim to the Secretary of State that the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom.

96 Earlier right of appeal

(1) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies—

(a) that the person was notified of a right of appeal under that section against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined),

(b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision.

(2) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies—

(a) that the person received a notice under section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision,

(b) that the new decision relates to an application or claim which relies on a matter that should have been, but has not been, raised in a statement made in response to that notice, and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice.

(4) In subsection (1) "notified" means notified in accordance with regulations under section 105.

(5) [Subsections (1) and (2) apply to prevent] a person's right of appeal whether or not he has been outside the United Kingdom since an earlier right of appeal arose or since a requirement under section 120 was imposed.

(6) In this section a reference to an appeal under section 82(1) includes a reference to an appeal under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) which is or could be brought by reference to an appeal under section 82(1).

[(7) A certificate under subsection (1) or (2) shall have no effect in relation to an appeal instituted before the certificate is issued.]

120 Requirement to state additional grounds for application

(1) This section applies to a person if—

(a) he has made an application to enter or remain in the United Kingdom, or

(b) an immigration decision within the meaning of section 82 has been taken or may be taken in respect of him.

(2) The Secretary of State or an immigration officer may by notice in writing require the person to state—

(a) his reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which he should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which he should not be removed from or required to leave the United Kingdom.

(3) A statement under subsection (2) need not repeat reasons or grounds set out in—

(a) the application mentioned in subsection (1)(a), or

(b) an application to which the immigration decision mentioned in subsection (1)(b) relates.

Immigration, Asylum and Nationality Act 2006

47. Removal: persons with statutorily extended leave

(1) Where a person's leave to enter or remain in the United Kingdom is extended by section 3C(2)(b) or 3D(2)(a) of the Immigration Act 1971 (c. 77) (extension pending appeal), the Secretary of State may decide that the person is to be removed from the United Kingdom, in accordance with directions to be given by an immigration officer if and when the leave ends.

(2) Directions under this section may impose any requirements of a kind prescribed for the purpose of section 10 of the Immigration and Asylum Act 1999 (c. 33) (removal of persons unlawfully in United Kingdom).

(3) In relation to directions under this section, paragraphs 10, 11, 16 to 18, 21 and 22 to 24 of Schedule 2 to the Immigration Act 1971 (administrative provisions as to control of entry) apply as they apply in relation to directions under paragraph 8 of that Schedule.

(4) The costs of complying with a direction given under this section (so far as reasonably incurred) must be met by the Secretary of State.

(5) A person shall not be liable to removal from the United Kingdom under this section at a time when section 7(1)(b) of the Immigration Act 1971 (Commonwealth and Irish citizens ordinarily resident in United Kingdom) would prevent a decision to deport him.

(6) In section 82(2) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (right of appeal: general) after paragraph (h) insert—

“(ha)a decision that a person is to be removed from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 (removal: persons with statutorily extended leave),”.

(7) In section 92(2) of that Act (appeal from within United Kingdom) after “(f)” insert “ , (ha) ”.

(8) In section 94(1A) of that Act (appeal from within United Kingdom: unfounded claim) for “or (e)” substitute “ (e) or (ha) ”.

Tribunals, Courts and Enforcement Act 2007

11 Right to appeal to Upper Tribunal

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

13 Right to appeal to Court of Appeal etc.

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (14).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by—

(a) the Upper Tribunal, or

(b) the relevant appellate court,

on an application by the party.

(5) An application may be made under subsection (4) to the relevant appellate court only if permission (or leave) has been refused by the Upper Tribunal.

(6) The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and for which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers—

(a) that the proposed appeal would raise some important point of principle or practice, or

(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.

(7) An application falls within this subsection if the application is for permission (or leave) to appeal from any decision of the Upper Tribunal on an appeal under section 11.

(8) For the purposes of subsection (1), an "excluded decision" is—

(a) any decision of the Upper Tribunal on an appeal under section 28(4) or (6) of the Data Protection Act 1998 (c. 29) (appeals against national security certificate),

(b) any decision of the Upper Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c. 36) (appeals against national security certificate),

(c) any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal),

(d) a decision of the Upper Tribunal under section 10—

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal, or

(iii) to set aside an earlier decision of the tribunal,

(e) a decision of the Upper Tribunal that is set aside under section 10 (including a decision set aside after proceedings on an appeal under this section have been begun), or

(f) any decision of the Upper Tribunal that is of a description specified in an order made by the Lord Chancellor.

(9) A description may be specified under subsection (8)(f) only if—

(a) in the case of a decision of that description, there is a right to appeal to a court from the decision and that right is, or includes, something other than a right (however expressed) to appeal on any point of law arising from the decision, or

(b) decisions of that description are made in carrying out a function transferred under section 30 and prior to the transfer of the function under section 30(1) there was no right to appeal from decisions of that description.

(10) Where—

(a) an order under subsection (8)(f) specifies a description of decisions, and

(b) decisions of that description are made in carrying out a function transferred under section 30,

the order must be framed so as to come into force no later than the time when the transfer under section 30 of the function takes effect (but power to revoke the order continues to be exercisable after that time, and power to amend the order continues to be exercisable after that time for the purpose of narrowing the description for the time being specified).

(11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.

(12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate—

(a) the Court of Appeal in England and Wales;

(b) the Court of Session;

(c) the Court of Appeal in Northern Ireland.

(13) In this section except subsection (11), "the relevant appellate court", as respects an appeal, means the court specified as respects that appeal by the Upper Tribunal under subsection (11).

(14) The Lord Chancellor may by order make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of subsection (2).

(15) Rules of court may make provision as to the time within which an application under subsection (4) to the relevant appellate court must be made.

25 Supplementary powers of Upper Tribunal

(1) In relation to the matters mentioned in subsection (2), the Upper Tribunal—

(a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and

(b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.

(2) The matters are—

(a) the attendance and examination of witnesses,

(b) the production and inspection of documents, and

(c) all other matters incidental to the Upper Tribunal's functions.

(3) Subsection (1) shall not be taken—

(a) to limit any power to make Tribunal Procedure Rules;

(b) to be limited by anything in Tribunal Procedure Rules other than an express limitation.

(4) A power, right, privilege or authority conferred in a territory by subsection (1) is available for purposes of proceedings in the Upper Tribunal that take place outside that territory (as well as for purposes of proceedings in the tribunal that take place within that territory).

Appendix Two
Immigration Rules

Paragraph 57 (iv)

The requirements to be met by a person seeking leave to enter the United Kingdom as a student are that he:

…

(vi) intends to leave the United Kingdon at the end of his studies;

Paragraph 245FB

Requirements for entry clearance

To qualify for entry clearance as a Tier 1 (Post-Study Work) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

(a) The applicant must not fall for refusal under the general grounds for refusal.

(b) The applicant must not previously have been granted entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme), or as a Participant in the Fresh Talent: Working in Scotland Scheme.

(c) The applicant must have a minimum of 75 points under paragraphs 66 to 72 of Appendix A.

(d) The applicant must have a minimum of 10 points under paragraphs 1 to 3 of Appendix B.

(e) The applicant must have a minimum of 10 points under paragraphs 1 to 2 of Appendix C.

(f) If:

(i) the studies that led to the qualification for which the applicant obtains points under paragraphs 66 to 72 of Appendix A were sponsored by a Government or international scholarship agency, and

(ii) those studies came to an end 12 months ago or less the applicant must provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.

Paragraph 245FD.

Requirements for leave to remain

To qualify for leave to remain as a Tier 1 (Post-Study Work) Migrant, an applicant must meet the requirements listed below. Subject to paragraph 245FE(a)(i), if the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

(a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.

(b) The applicant must not previously have been granted entry clearance or leave to remain as a Tier 1 (Post-Study Work) migrant.

(c) The applicant must have a minimum of 75 points under paragraphs 66 to 72 of Appendix A.

(d) The applicant must have a minimum of 10 points under paragraphs 1 to 3 of Appendix B.

(e) The applicant must have a minimum of 10 points under paragraphs 1 to 2 of Appendix C.

(f) The applicant must have, or have last been granted, entry clearance, leave to enter or leave to remain:

(i) as a Participant in the Fresh Talent: Working in Scotland Scheme,

(ii) as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme),

(iii) as a Student, provided the applicant has not previously been granted leave in any of the categories referred to in paragraphs (i) and (ii) above,

(iv) as a Student Nurse, provided the applicant has not previously been granted leave in any of the categories referred to in paragraphs (i) and (ii) above,

(v) as a Student Re-Sitting an Examination, provided the applicant has not previously been granted leave in any of the categories referred to in paragraphs (i) and (ii) above,

(vi) as a Student Writing Up a Thesis, provided the applicant has not previously been granted leave as a Tier 1 Migrant or in any of the categories referred to in paragraphs (i) and (ii) above,

(vii) as a Tier 4 Migrant, provided the applicant has not previously been granted leave as a Tier 1 (Post-Study Work) Migrant or in any of the categories referred to in paragraphs (i) and (ii) above, or

(viii) as a Postgraduate Doctor or Dentist, provided the applicant has not previously been granted leave as a Tier 1 (Post-Study Work) Migrant or in any of the categories referred to in paragraphs (i) and (ii) above.

(g) An applicant who has, or was last granted leave as a Participant in the Fresh Talent: Working in Scotland Scheme must be a British National (Overseas), British overseas territories citizen, British Overseas citizen, British protected person or a British subject as defined in the British Nationality Act 1981.

(h) If:

(i) the studies that led to the qualification for which the applicant obtains points under paragraphs 66 to 72 of Appendix A were sponsored by a Government or international scholarship agency, and

(ii) those studies came to an end 12 months ago or less the applicant must provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.

Refusal of leave to remain, variation of leave to enter or remain or curtailment of leave

Paragraph 322

In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave:

Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused

(1) the fact that variation of leave to enter or remain is being sought for a purpose not covered by these Rules.

(1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application.

Paragraph 395 (as amended August 2011)

There may be a right of appeal against refusal to revoke a deportation order. Where an appeal does lie the right of appeal will be notified at the same time as the decision to refuse to revoke the order.

C. Before a decision to remove under section 10 *of the Immigration and Asylum Act 1999 or section 47 of the Immigration, Asylum and Nationality Act 2006* is given, regard will be had to all the relevant factors known to the Secretary of State including:

(i) age;

(ii) length of residence in the United Kingdom;

(iii) strength of connections with the United Kingdom;

(iv) personal history, including character, conduct and employment record;

(v) domestic circumstances;

(vi) previous criminal record and the nature of any offence of which the person has been convicted;

(vii) compassionate circumstances;

(viii) any representations received on the person's behalf.

In the case of family members, the factors listed in paragraphs 365-368 must also be taken into account.

Immigration Rules *Appendix A - Attributes*

Attributes for Tier 1 (Post-Study Work) Migrants

66. An applicant applying for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant must score 75 points for attributes.

67. Available points are shown in Table 10.

68. Notes to accompany the table appear below the table.

Table 10

Qualifications	Points
The applicant has been awarded: (a) a UK recognised bachelor or postgraduate degree, or (b) a UK postgraduate certificate in education or Professional Graduate Diploma of Education, or (c) a Higher National Diploma ('HND') from a Scottish institution.	20
(a) The applicant studied for his award at a UK institution that is a UK recognised or listed body, or which holds a sponsor licence under Tier 4 of the Points Based System, or (b) If the applicant is claiming points for having been awarded a Higher National Diploma from a Scottish Institution, he studied for that diploma at a Scottish publicly funded institution of further or higher education, or a Scottish bona fide private education institution which maintains satisfactory records of enrolment and attendance. The Scottish institution must: (i) be on the list of Education and Training Providers list on the Department of Business, Innovation and Skills website, or (ii) hold a Sponsor licence under Tier 4 of the Points Based System.	20
The applicant's periods of UK study and/or research towards his eligible award were undertaken whilst he had entry clearance, leave to enter or leave to remain in the UK that was not subject to a restriction preventing him from undertaking a course of study and/or research.	20
The applicant made the application for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant within 12 months of obtaining the relevant qualification or within 12 months of completing a United Kingdom Foundation Programme Office affiliated Foundation Programme as a postgraduate doctor or dentist.	15
The applicant is applying for leave to remain and has, or was last granted, leave as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme) or as a Participant in the Fresh Talent: Working in Scotland Scheme.	75

Qualification: notes

69. Specified documents must be provided as evidence of the qualification and, where relevant, completion of the United Kingdom Foundation Programme Office affiliated Foundation Programme as a postgraduate doctor or dentist.

70. A qualification will have been deemed to have been 'obtained' on the date on which the applicant was first notified in writing, by the awarding institution, that the qualification had been awarded.

71. If the institution studied at is removed from one of the relevant lists referred to in Table 10, or from the Tier 4 Sponsor Register, no points will be awarded for a qualification obtained on or after the date the institution was removed from the relevant list or from the Tier 4 Sponsor Register.

72.. To qualify as an HND from a Scottish institution, a qualification must be at level 8 on the Scottish Credit and Qualifications Framework.

Lord Justice JACKSON:

126. I agree that the appeal of RS should be allowed and that the appeal of KA should be adjourned on the terms proposed by Aikens LJ. I agree with the reasoning of Aikens LJ which leads to these conclusions.

127. I regret that that this area of immigration law has now become an impenetrable jungle of intertwined statutory provisions and judicial decisions, with the result that reasonable differences of opinion (such as that between Aikens LJ and Arden LJ) are now perfectly possible. There is an acute need for simplification so that both immigrants and immigration officers may have a clearer understanding of their responsibilities and rights.

Lady Justice ARDEN:

128. I am immensely grateful to Lord Justice Aikens for setting out all the arguments, legislative provisions and authorities in such detail. It will in consequence be unnecessary for me to deliver a long judgment. I agree with him that permission to appeal should be given in both cases. I agree with him on issue (iv) in paragraph 53 of his judgment. I also agree with him on issue (iii): the appellants' article 8 rights are not violated by the fact that the Secretary of State does not simultaneously make removal directions, since there will only be a decision capable of being an interference with private or family life when removal directions are made. I regret, however, that I disagree with him and Jackson LJ on issue (i). Issue (ii) does not then arise (paragraphs 54 – 112 above).

129. The short point is whether this court is bound by the conclusions of Laws LJ in *SA (Pakistan),* with which Sedley and Patten LJJ agreed. He concluded that, where a decision to vary leave has been made but no decision has been taken to remove the appellant, the failure to give removal directions is not a "decision" within s 84(1) (e) of the Nationality, Immigration and Asylum Act 2002 and could not therefore be the subject of a statutory appeal. The effect of this holding is that the course the appellants had to take to test the legality of that failure in their cases was to issue judicial review proceedings. They might also have been able to challenge their potential removal without taking this course if they had responded to the one-stop notices served by the Secretary of State under section 120 of the 2002 Act, but they did not take that step.

130. Before examining *SA (Pakistan),* it is helpful to recall that section 47 of the 2006 Act does not enable the Secretary of State to issue removal directions when she makes a decision not to vary leave. That decision can only be made when leave has been extended by virtue of section 3C(2)(b) or section 3D(2)(a), that is, for a period when an appeal could be brought. The decision to refuse the application, which gave rise to the original extension, must have been taken. Thus the power to give removal directions under section 47 is not exercisable when the decision to refuse to vary leave or to revoke leave is made. The decisions of *SA (Pakistan)* and *Mirza* must be read in the light of these statutory provisions. It is difficult to conclude that one decision is flawed for a failure to consider the exercise of another power which was not presently exercisable. Furthermore, the wording of s.84(1)(e) is in marked contrast to that of s.84(1)(g) of the 2002 Act, which expressly contemplates the possibility of an appeal

against removal in consequence of an immigration decision. (Both those provisions are reproduced in the Appendix to the judgment of Lord Justice Aikens).

131. The restricted nature of section 47 of the 2006 Act seems to me to lie behind the conclusions of Laws LJ in *SA (Pakistan)*. Lord Justice Aikens has set out extensive passages from the judgment of Laws LJ and carefully summarised the submissions we have received. I prefer the submissions of Miss Rhee, which, in my judgment, are correct. In short, I consider that the conclusion of Laws LJ referred to in paragraph 2 of this judgment is part of the ratio of the case, and that accordingly it is not open to us to hold that a decision to refuse an application for a variation of leave to remain is flawed if the Secretary of State fails then or promptly thereafter to consider whether to make a removal direction under s.47 of the 2006 Act.

132. On my reading of *SA (Pakistan)*, Laws LJ holds in a sentence in paragraph 8 of his judgment immediately before the passage set out in paragraph 73 above that "[t]he AIT was never asked to consider the *TE (Eritrea)* point and never did so." But in doing so, he is merely setting out the narrative in the case and I, for my part, do not read paragraph 8 of his judgment as characterising this sentence as the legally relevant fact, i.e. that, if the AIT had in fact considered the point, there would have been jurisdiction to do so on a statutory appeal to this court under section 84(1)(e). Laws LJ decided the issue in paragraph 8 as one of the true interpretation of section 84(1)(e). He repeats his conclusion in the first sentence of paragraph 9 of his judgment (see paragraph 74 above). He returns to the point in the penultimate sentence of that paragraph (set out in the citation at paragraph 75 above).

133. As Lord Justice Aikens has explained, Laws LJ bases his decision on section 103B(1) of the 2002 Act in the next passage in paragraph 9 of his judgment in part on the absence of consideration by the AIT, but section 103B(1) is a ground, which reinforces the ground of decision in paragraph 8 of the judgment of Laws LJ. Accordingly, it, at most, constitutes an additional ratio of his judgment: it is not for us to say that he could have decided it on the section 103B(1) point alone as that is not the course Laws LJ took.

134. The conclusion on the interpretation of section 84(1)(e) in paragraphs 8 and 9 of the judgment of Laws LJ cannot, in my judgment, by reason of his conclusion on section 103B(1), which is in any event connected with his first point, be excluded from being part of the *ratio decidendi* of the case, which is binding on this court. Full weight has to be given to the reasoning on section 84(1)(e) set out in paragraph 8 of Laws LJ's judgment.

135. This conclusion is not undermined from the fact, if it be the case as Mr Malik submits, that the court in *SA (Pakistan)* did not hear full argument on the *TE (Eritrea)* point. Even were the decision on the interpretation of section 84(1)(e) to be wrong, it would still be binding on us.

136. The decision in *Mirza* is not inconsistent with *SA (Pakistan)*, as I read it, as in *Mirza* the court had before it judicial review proceedings to challenge the failure to give removal directions and an appeal from the AIT on the decision to refuse leave to remain. In addition, when Sedley LJ holds that the decision of the Secretary of State not to make simultaneous removal directions is "contrary to law", he is referring in that context to the principles on which decisions of ministers of the Crown can be

judicially reviewed (see the preceding paragraph of his judgment in *Mirza*). He is not saying that the immigration decision was contrary to law, which is, as a result of *SA (Pakistan),* the crucial question as regards the application of section 84(1)(e).

137. If I am correct in my reading of the decision in *SA(Pakistan)*, it is binding on this court. Moreover it cannot be successfully argued that it was per incuriam on the ground that it is inconsistent with the earlier decision in *AS (Afghanistan)* and with the general policy of the legislature to promote one-stop appeals. The decision of the majority in *AS (Afghanistan)* turned on the obligation of the tribunal to consider grounds of appeal of the kind listed in section 84(1) of the 2002 Act "against the decision appealed against", not on the provisions of section 84(1)(e).

138. For these reasons, I do not consider that an immigration decision can be said to be flawed because there was an unjustified failure to give removal directions under section 47 at the first opportunity.

139. I am reinforced in this view by the Statement of Changes to the Immigration Rules laid before Parliament and referred to in paragraph 30 above. These were placed before Parliament and became law under the negative resolution procedure on the basis of the interpretation of section 84(1)(e) laid down by *SA (Pakistan).* That interpretation should not now be disturbed unless it is clearly wrong.

140. In the circumstances, I would dismiss these appeals.