Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13349/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 July 2013	**On 12 July 2013**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD JOYNAL ABEDIN

Respondent

Representation:

For the Appellant: Mr Jarvis, a Home Office Presenting Officer
For the Respondent: Mr Hasan, a Legal Representative

DETERMINATION AND REASONS

1. This case has a slightly problematic history which is best approached by a chronological analysis.

(i) The respondent whom I shall refer to as the claimant was the appellant before the F-tT. He is a national of Bangladesh, born 14 July 1983 and made application dated 15 August 2011 for further leave to remain in the United Kingdom as a Tier 4 student.

(ii) On 16 May 2012 that application was refused with the SSHD making two decisions. The first was a refusal to vary leave. The second was a decision to remove the claimant. In essence the application was refused because the SSHD considered the claimant had submitted a false document in support of his claim and relied on paragraph 322(1A) of the Immigration Rules.

(iii) In a determination dated 12 November 2012 First-tier Tribunal Judge Thanki allowed the appeal to the limited extent that the matter be remitted to the SSHD for a lawful decision to be made. This was on the basis that the s.47 notice incorporated in the decision letter was not lawful. The judge also found that the decision by the SSHD under paragraph 322(1A) was correct and furthermore that as a consequence the appellant did not meet the requirements of paragraph 245ZX of the Immigration Rules.

(iv) On 27 November 2012 a Designated Judge of the First-tier Tribunal (DFtTJ French) granted permission to appeal to the Secretary of State who had complained that the judge had failed to determine the variation decision under appeal.

(v) On 5 December 2012 I issued directions observing that there had been no challenge to the findings by the judge under the Immigration Rules. My provisional view was that there was no basis on which the appeal could be allowed against the decision refusing variation of leave. In the absence of any proposal to the contrary being received by 12 December I indicated that the decision of the First-tier Tribunal would be set aside without the need for an oral hearing and the appeal against the variation decision should be dismissed with the appeal against the removal decision being allowed on the basis it was not in accordance with the law.

(vi) On 11 December 2012 the solicitors for the claimant applied to the First-tier Tribunal for permission to appeal explaining why the application had been made late with reference to my directions of 5 December.

(vii) Unaware of this application which had not been linked to the file, on 20 December 2012 I proceeded to determine the appeal in accordance with the above directions.

(viii) On 17 January 2013 the claimant’s solicitors applied to the Upper Tribunal for permission to appeal that decision to the Court of Appeal. This was on the basis that the decision of the First-tier Tribunal had been challenged on 12 December 2012.

(ix) Having regard to the procedural issue arising, on 22 April 2013 I set aside my determination of 20 December 2012 pursuant to Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and directed that the appeal by the Secretary of State be listed for hearing before me.

2. At that hearing Mr Jarvis was without papers. My decision of 22 April indicated that I proposed to treat the application by the claimant in the letter dated 11 December 2011 as a reply under Rule 24 of the Procedure Rules. This was in accordance with the decision in *EG & NG* (UT Rule 17: withdrawal; Rule 24: scope) Ethiopia [2013] UKUT 143 (IAC). Mr Hasan was unaware of this decision and I ensured he had an opportunity of reading it which also gave time for Mr Jarvis to familiarise himself with the case. Mr Hasan also provided a copy of the letter of 11 December 2011 and its accompanying notice of application.

3. Putting aside the jurisdictional issues, it is evident from the determination that the judge reached no conclusions on the Article 8 grounds which were relied on. It may be that he considered this was unnecessary in the light of the appeal having been allowed against the decision to remove.

4. As to the judge's findings on the grounds under the Immigration Rules, it is argued in the grounds of application dated 11 December 2012 that:

(i) the Secretary of State had not followed the procedure set out in her own guidance with regard to *false documents – paragraphs 322(1A) and (2); standard of proof*. It is asserted that the SSHD did not receive any written confirmation as to the TOEIC certificate.

(ii) The Secretary of State had not discharged her duty properly under the principle of common law fairness in verifying the alleged forgery with reference to *R (Q v SSHD)* EWCA Civ 364 and *RP* (proof of forgery) Nigeria [2006] UKAIT 00086 and *OA* (alleged forgery; Section 108 Procedure) Nigeria [2007] UKIAT 00096.

5. Mr Hasan explained that there was no written evidence from the college and that the e-mails had not been produced. Furthermore, this was a matter that he had raised with the judge. Mr Jarvis was unable to throw any light on the matter at not having the Secretary of State's file. Certainly the respondent's bundle does not contain copies of any e-mails passing between the Secretary of State and the college. It is unclear where the judge got the text of the e-mail from as recorded in the determination, however the Record of Proceedings clearly records this text:

> "RFR – rely on it.
>
> 322(1A) mandatory
>
> Rely on e-mail
>
> Bottom of e-mail = correctly identifies A plus all particulars."

6. The record of proceedings relating to submissions on behalf of the claimant does reveal that the judge was directed to policy guidelines and that confirmation in writing was required. If the e-mail was produced, it is difficult to see why those submissions were made.

7. It is unarguable that the First-tier Tribunal Judge erred in failing to determine the variation decision and Mr Jarvis and Mr Hasan considered the best course would be for the case to be remitted to the First-tier Tribunal for that decision to be made. The question is whether that re-making should be confined to Article 8 grounds or whether it would be open to the claimant to re-argue this case under the Immigration Rules. It is clear from the record of proceedings that the issue that the Secretary of State had not acted in accordance with her own policy was raised in submissions.

8. The claimant has been poorly served by his solicitors in that they did not seek to challenge the decision within the time limited by the Rules. However with the Secretary of State accepting that in the light of the error of law having been made by the judge failing to determine the variation decision, I consider it would be unfair to exclude the claimant from further argument on the grounds on which he sought to challenge the immigration decision under appeal. Mr Jarvis and Mr Hasan accepted that in the circumstances it would be appropriate for the case to be remitted to a First-tier Tribunal Judge.

9. I therefore find that the First-tier Tribunal erred in law and remit the case to the First-tier Tribunal for a de novo hearing in accordance with paragraph 7.2 of the Practice Statements for the Immigration and Asylum Chamber of the Upper Tribunal pursuant to s.12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007. In the particular circumstances of this case none of the findings of First-tier Tribunal Judge Thanki is preserved.

Signed

Date 11 July 2013

Upper Tribunal Judge Dawson