



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

Appeal Number: AA/03361/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 11<sup>th</sup> June 2014**

**Determination Sent  
On 3<sup>rd</sup> July 2014**

**Before**

**LORD JUSTICE MATTHEWS  
SITTING AS JUDGE OF THE UPPER TRIBUNAL  
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE**

**Between**

**MR OMAR MALIK**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A Khan of Counsel instructed by Thompson & Co Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS  
EXTEMPORE JUDGMENT**

1. The case has a complex history. The Appeal process was initiated in respect of two decisions of the respondent made on 11 February 2013. The first was to refuse, under the Immigration Rules, an

extension/variation of leave to remain, as a spouse and on Article 8 family and private life grounds, and the second, contingent on and concurrent with the first, was a removal decision under S47 of the Immigration, Asylum and Nationality Act 2006. The Appellant appealed both decisions to the First Tier Tribunal, inter alia on Asylum grounds. The First Tier Tribunal dismissed his appeal on all grounds. The Appellant appealed the dismissal to the Upper Tier. At the Upper Tier his appeal in respect of the S47 decision was allowed outright. The respondent has not contested that Upper Tribunal decision. In respect of the Immigration Rules decision Upper Tier Judge Kekic found a material error in the consideration of the Asylum ground, and remitted the appeal to the First Tier, with specific directions to resolve particular evidence. On remittal Judge Pedro in a decision dated 19<sup>th</sup> December 2013 instead decided that there was no valid Appeal.

2. Permission was granted on grounds raising concerns about the Judge taking a jurisdictional point not advanced by the Respondent at such a late stage and in the light of the Upper Tribunal express direction to resolve the Asylum issue.
3. The argument before us centred on the very narrow issue.
4. We noted the Respondent's decision dated 11 February 2013 refers to an "in-time" application to vary existing leave, made in December 2012, and in the context of a previous grant of leave to remain as a spouse issued on 07 October 2010 and expiring on 07 January 2013. As such, both of the representatives were in agreement, the Respondent's decision was a refusal to vary extant leave which gave rise to an in country right of appeal. The Respondent's decision was coupled with a S47 removal decision with a reference to a statutory extension of leave through out any appeal process.
5. It is not clear on its face why the Respondent made the decisions she did. She had earlier decided to curtail the Appellant's leave and so it was open to her to make a decision on the basis that as she had already curtailed his leave the decision was not a variation decision which resulted in the Appellant having no leave to remain. If she had done so the Appellant would have had no in country right of appeal. There was no evidence before the First tier tribunal or before us as to the whys and wherefores of that decision outside of the reasons letter. The representatives briefly speculated as to how it came to be: Mr Khan asserted that the Respondent must have considered fresh representations as reopening the original consideration, the reasons for refusal letter referring to the 2012 application. If that is right then the new decision amounts to a re-making of the original decision with a consequent in country right of appeal. Mr Tarlow thought it was entirely possible that the Respondent had overlooked that she had already curtailed leave. However as Mr Khan pointed out, and Mr Tarlow accepted, if so, it was not simply a question of a caseworker mistakenly advising someone of an in-country right of appeal where none lay, the notice was correct in terms of the actual decision

made, the possible error was the decision itself. We note that if that were to be correct then the Appellant has no in-country right of appeal against the decision of the 11<sup>th</sup> February, but would have had to make an application to submit a late appeal against the earlier decision.

6. As the case is there is no evidence as to why the Respondent chose to make this decision as opposed to one which would not give right to an in-country right of appeal.
7. As Mr Tarlow accepted before us, although it may have been open to the Respondent to make a different decision the one in fact made was, as per the notice, a refusal to vary leave with the result that no leave remained. We find that it follows that the Respondent having made an immigration decision within S82 (1) (2) (d) of the Nationality, Immigration and Asylum Act 2002 the Appellant is afforded an in-country right of appeal. Anything beyond that position in the context of why the Respondent decided as she did or what other decisions were available to her amounts to speculation.
8. We find the judge failed to appreciate that even if the Secretary of State could have taken a different decision, and one which would have restricted the Appellant to an out of country appeal right, the actual decision/s made did attract in-country appeal rights.
9. We also find merit in the alternative ground that even if the point were not, as we have found it, speculative, the judge fell into error taking the jurisdictional point, not relied on by the Respondent, so late in the Appeal process, and exceeding the terms of the remittal. The appeal had been remitted for the particular purpose of correcting the earlier found error in the assessment of the Asylum ground, and the matter had been considered in some depth in the Upper Tribunal, with clear directions made by Upper Tribunal Judge Kekic.
10. It follows that we find that the First tier tribunal made an error of law requiring the decision to be set aside. The matter is remitted to the First Tier for the asylum ground requires being determined in accordance with the remittal direction previously given by the Upper Tribunal.

Signed

Date

Deputy Upper Tribunal Judge Davidge