Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Mohamed Bilal Jan) v Secretary of State for the Home Department
(section 10 removal) IJR [2014] UKUT 00265 (IAC)

Heard at Field House **Promulgated**
On 8 April 2014

Before

THE HONOURABLE MR JUSTICE BEAN
MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE LATTER

Between

R (ON THE APPLICATION OF MOHAMED BILAL JAN)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant : Mr Z Nasim, instructed by Mayfair, Solicitors
For the Respondent: Mr Z Malik, instructed by the Treasury Solicitor

1. *In assessing whether there is a proper basis for a challenge to a decision to remove an applicant, as a matter of general principle a decision will not be unlawful simply on the basis that there has been a failure expressly to explain why other options were not followed. However, there may be cases when an issue is raised before the decision is made relating to the course to be followed or to a particular mitigating circumstances relating to the applicant where that should be expressly considered in the decision.*

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2. *A statutory appeal exercisable out of country is regarded by Parliament as an adequate safeguard for those who are removed under s.10 of the Immigration and Asylum Act and in the absence of special or exceptional factors judicial review is not the appropriate remedy: R (on the application of Lim v Secretary of State for the Home Department [2007] EWCA Civ 773 ; R Nepal v Secretary of State for the Home Department [2009] EWCA Civ 359.*

3. *The First-tier Tribunal has jurisdiction to consider issues of procedural fairness and the lawfulness of the exercise of discretion when deciding to make a removal decision under the ground of appeal permitting a challenge on the basis that the decision is "otherwise not in accordance with the law".*

JUDGMENT

1. This is a claim for judicial review challenging the respondent's decision of 26 July 2013 to remove the applicant from the UK under the provisions of s.10 of the Immigration and Asylum Act 1999 ("the 1999 Act"). Permission was refused on the papers on 16 January 2014 but following an application for oral reconsideration was granted on 24 March 2014 on the basis that properly arguable issues arose in the light of the judgment in Thapa v Secretary of State for the Home Department [2014] EWHC 659 (Admin).

The Background

2. The applicant is a citizen of Pakistan who arrived in the UK on 12 February 2011 with valid leave to enter as a Tier 4 (Migrant) Student until 14 June 2012, when he made an in-time application for further leave to remain in the same capacity on 14 June 2012 but his application was refused on 17 January 2013. He appealed against that decision successfully and he was granted further leave to remain until 3 November 2013 with a condition that he take no work except a work placement.

3. On 26 June 2013 he was encountered at a hairdresser's in Ilford working, so the respondent alleges: that would be a breach of the conditions attached to his leave to remain. He was detained and interviewed. He was, on the respondent's account, served with a notice of liability to removal (IS151A) and a notice of an immigration decision (IS151A part 2). The first notice notified the applicant that he was a person in respect of whom removal directions may be given in accordance with s.10 of the 1999 Act as a person who had failed to observe conditions of his leave to enter or remain. The statement of reasons set out on the form is as follows:

> "You are specifically considered a person who has worked in breach of your conditions as a Tier 4 Student because you were encountered working today and you were granted leave to remain as a Tier 4 Student from 3 July 2013 to 3 November 2013 with conditions restricting you to no work."

4. The second notice informed the applicant that a decision had been taken to remove him from the UK and that he was entitled to appeal the decision under s.82(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) but only after he had left the UK. He then sought legal advice and his solicitors made representations on his behalf asserting that he had not breached the conditions of his leave and that his current detention was unlawful (letters of 29 July 2013, 13 August and 22 August 2013).

5. On 24 September 2013 the judicial review claim form was filed. The details of the decision to be judicially reviewed at section 3 assert that it is an ongoing matter and the decision has not been served on the applicant or his representatives. A mandatory order is sought that the refusal/decision is served. However, the grounds raise further issues and challenge the respondent's decision to cancel the applicant's leave to remain as a student without giving him a right of appeal whilst in the UK.

6. The grounds argue firstly that the applicant was not served with the notice of decision and also assert that the respondent erroneously concluded that he was working in the UK in breach of his conditions. It is argued that the applicant was merely observing the trade of hairstyling as he has an interest and a fondness for it. It is then argued that the respondent failed to follow her own policy as set in the IDIs at chapter 50.6, that there was no firm evidence of the applicant working in breach of his conditions and that any breach was not of sufficient gravity to warrant removal. The second ground argues that the respondent erred by failing to give the applicant an in-country right of appeal and that an out of country appeal is not an effective remedy. It is then argued that the respondent acted disproportionately in exercising her discretion to take removal proceedings rather than refusing the application with a right of appeal on curtailment. It is further argued that the decision is flawed for want of service and that there was a failure to consider article 8 properly.

7. The grounds are supported by a witness statement from the applicant in which he agrees that he was present at the hairdresser’s on 26 June 2013 but says that he went to see a friend who was working there and that he had always had a desire to learn hairstyling and cutting; he had asked the owner if he could observe at the shop; the owner had no issue with this and permitted him to do so once or twice a week. He denies that he was working.

8. At the hearing before us a further witness statement was submitted dated 4 April 2014. The applicant confirms that he was present at the hairdressers on 26 July 2013 but says that he was not cautioned or given any sort of warning that he was being formally interviewed. On his account, after the immigration officers came into the shop, he was asked his name and he gave his full name and date of birth. He was then asked to place his fingers in a biometric impression reader and did so. He was asked how many days he worked, how many hours and for how long but

he confirmed that he did not work there but was observing. He mentioned that he attended the shop two days a week and had been doing so for the past two weeks. He asserts that he was not with a customer or cutting anyone's hair as claimed by the respondent and that he had never breached the conditions of his leave to remain. He says that following his arrest, he did not receive the notices of his liability to removal or of the immigration decision.

9. His evidence is in direct contradiction with the evidence now filed on behalf of the respondent. There is a witness statement from an immigration officer saying that when she and other officers went into the hairdresser's, there was one male employee, the applicant, with two customers. He was interviewed under caution and when asked how often he worked here he replied "two days a week, Friday and Saturday." When asked how many hours he worked, he said "between 9.30 to 14.30 / 15.00". When asked how much he was paid he said "I don't get paid I get paid in food". He was asked how long he had worked there and he said he started two months ago. When was asked how the training related to his studies, he replied that after studies he worked, he loved the work. According to the witness statement, the applicant then finished off dealing with the customer, took off his robe and brushed the hair off him before the customer was allowed to leave. The applicant was then arrested.

10. The witness statement is supported by a copy of the notes of interview which, if correct, show that the applicant was cautioned and asked the questions already set out in the witness statement and further questions about any mitigating circumstances. The time of arrest, caution, entry and search are also recorded. The case record sheet has also been produced, repeating in substance what is set out in the witness statement and the notes of interview.

11. The grounds of defence argue that the applicant was personally served with the relevant notices and that this had been acknowledged by him. In consequence his detention was and remained lawful. The applicant was not entitled to an in-country right of appeal as statute provided for an appeal exercisable only once he had left the UK. On the evidence available to the respondent it was reasonable to conclude that the applicant was working in breach of his conditions and to make a removal decision under s.10 of the 1999 Act. There was no evidence to support the contention that the decision engaged article 8. The applicant had been granted leave to remain as a student for the purpose of studying. His arguments lacked substance and seemed little more than a last minute attempt to frustrate removal.

The Legislative Framework

12. We will now set out the statutory framework relevant to this application. It is provided by s.10 of the 1999 Act as follows:

"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; …

(8) When a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the Untied Kingdom previously given to him."

13. An immigration decision is defined in s.82 of the 2002 Act as follows:

"(1) where an immigration decision is made in respect of a person he may appeal to
an adjudicator.

(2) In this part 'immigration decision' means –
"...
(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
...
(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 a person unlawfully in the United Kingdom), ..."

14. The grounds of appeal against an immigration decision are set out in s.84(1) of the 2002 Act and include the following:

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

15. The restrictions on the right to appeal within the United Kingdom are set out in s.92 of the 2002 Act as follows:

"(1) A person may not appeal under Section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.
(2) This Section applies to an appeal against an immigration decision of a kind specified in Section 82(2)(c), (d)(e), (f)(ha) and (j).

...
(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,
..."

16. It is further provided by s.95 of the 2002 Act that:

> "A person who is outside the United Kingdom may not appeal under section 82(1) (on the grounds specified in section 84(1)(g) except in a case to which section 94(9) applies)."

17. We have also been referred to the Enforcement Instruction and Guidance (EIG) and in particular chapter 50 relating to persons liable to removal under s.10. At 50.6 on working in breach it is said:-

> "A person is liable to administrative removal under Section 10 if found to be working in breach of a restriction or prohibition on employment. The breach must be of sufficient gravity to warrant such action.
>
> There must be firm and recent evidence (within six months) of working in breach, including one of the following:
>
> - An admission under caution by the offender of working in breach
> - A statement by the employer implicating the suspect;
> - Documentary evidence such as payslips, of the offender's details on the payroll, NI records, tax records, P45;
> - Sight by the IO, or by a police officer who gives a statement to that effect, of the offender working, preferably on two or more separate occasions, on one occasion over an extended period, or if wearing the employee's uniform, in practice. This should generally be backed by other evidence. Statutory codes of practice (under the Regulation and Investigatory Powers Act 2000, regulate the use of covert surveillance and covert human sources (informants), see 32.8."

18. On the issue of curtailment, the grounds refer to Section 2.2 of Chapter 9 Section 5 of IDI, entitled "Variation of Stay – Curtailment" as follows:

> "Although the provision to curtail exists where a person fails to observe the conditions of leave to enter, it will be more usual to proceed directly with administrative removal for breach of conditions (see chapter 13, section 2, Administrative Removal under s.10 of the 1999 Act).
>
> Curtailment therefore should only be considered where the person's actions are not so serious as to merit enforcement action, but where it would be inappropriate to let him remain for the duration of his leave."

The Submissions

19. In his submissions Mr Nasim challenged the decision under five separate heads. The first related to the respondent's duties before the decision to remove was made. He argued that the decision had to be made properly

and fairly including whether to adopt the enforcement route by removal rather than taking no action or curtailing leave so giving rise to an in-country right of appeal. He submitted that there had been a complete failure on the part of the respondent to exercise or even consider the discretion of what course to take, or to show that the respondent had applied or considered the policy set out in chapter 50 of the EIG. He further argued that the respondent had a duty to consider other factors set out in para 395C, or as that paragraph had been repealed, the factors in chapter 53 of the EIG. He relied in particular on the judgments in Thapa and on the issue of fairness on Kabaghe (Appeal from outside UK – fairness) Malawi [2011] UKUT 00473.

20. He submitted secondly, so far as the duty at the time of making a decision was concerned, that the respondent was under a duty to ensure that the relevant notices were properly served, whereas in the present case they had not been served, and further, that the appeal forms had failed to inform the applicant that it was open to him to make a human rights claim. He submitted, thirdly, that the respondent had also failed in her duties after the decision to remove was made because she had failed to serve a s.120 notice under the 2002 Act. Fourthly, he argued that there was an in-country right of appeal because in substance the fact that the removal decision invalidated the applicant's leave meant that his leave had been varied such as to bring his leave to an end. He argued, finally, that if the applicant only had an out of country appeal, this was not an adequate remedy for the reasons given in Thapa as the First-tier Tribunal would not have jurisdiction to consider the exercise of discretion outside the Immigration Rules and he would not be able to argue that the decision was in breach of his human rights.

21. Mr Malik submitted on behalf of the respondent that the proper focus when challenging the lawfulness of the decision to remove was the rationality and legality of that decision and there was no requirement without more to explain why a different decision such as curtailment or taking no action was not made. He argued that in any event the terms of the notice of the removal decision and the record of interview showed that the decision maker had appreciated that there was discretion and had been entitled to find that this was a proper case for removal under s.10. The exercise of that power was plainly fair, rational and lawful. There had been no obligation on the respondent to serve a notice under s.120. There was clear evidence that the proper notices had been served on the applicant.

22. He submitted that it was not open to the applicant to argue that he had an in-country right of appeal in the light of the judgment of the Court of Appeal in RK (Nepal) v Secretary of State for the Home Department [2009] EWCA Civ 359. Judicial review was not appropriate or necessary as there was an out of country appeal in which all relevant matters could be considered: R (Lim) v Secretary of State for the Home Department [2007] EWCA Civ 773. There were no special or exceptional factors which

justified the exercise of discretion to entertain an application for judicial review. He submitted that the decision of Coulson J in R (Zahid) v Secretary of State for the Home Department [2013] EWHC 4290 (Admin) was correctly decided whereas Thapa was wrongly decided on the issue of the availability of judicial review and should not be followed.

The Issues

(i) The Respondent's Duties Before Making the Decision to Remove

23. We will deal with the issues in the order followed by Mr Nasim in his submissions. We consider firstly the respondent's duties before making a decision to remove. We accept that the respondent has a discretion about the course to be taken when she has evidence that an applicant is working in breach of his conditions of entry. It would be open to her to take no action, to give a warning, to curtail leave or to decide to give a removal direction under s.10. The heart of Mr Nasim's submission on this issue in the present case is that there has been a failure, either to consider the exercise of that discretion or to give reasons why the discretion has been exercised to make a removal decision. He places reliance on Thapa where, on the facts before her, the Deputy Judge noted at [48] that

> "there [was] nothing which [indicated] that the defendant's officer was even aware that she was exercising a discretion"

and at [56] that

> "Once it was conceded that there was a discretion as to whether to take enforcement action and if so which type of enforcement action against those lawfully present but judged to be in breach of condition of leave, the decision maker must record such facts as to enable this court to satisfy itself that the decision as to the existence of precedent fact and consequent exercise of a discretion has been exercised fairly."

24. However, we are not satisfied as a matter of general principle that a decision will be unlawful simply on the basis that there has been a failure expressly to explain why other options were not followed. The issue before us in this case is whether there is a proper basis for a challenge to the respondent's decision to remove the applicant. We are satisfied firstly, that there was a proper basis in the evidence before the decision maker to conclude that the applicant was working. He was seen by immigration officers cutting a customer's hair in a hairdresser's. He was interviewed and was recorded as admitting that he worked two days a week between 9.30 and 14.30 / 15.00 having started two months previously and that, although he did not get paid, he was paid in food. We are also satisfied that the decision was based on the guidance in the EIG chapter 50.6. The applicant's conditions of leave prevented him from working, save on a placement. Working for two days a week for two months was unarguably a breach of sufficient gravity to warrant removal. There was both an admission under caution of working in breach and sight by immigration

officers of the applicant working, albeit on one occasion. In those circumstances we approach the case on the basis of the facts as put forward in the respondent's evidence. The applicant cannot realistically complain of this, since judicial review (as opposed to a statutory appeal) is generally an inappropriate forum for resolving disputed issues of fact.

25. In any event, we are satisfied that the decision maker was clearly aware that he had a discretion. The interview records that questions were asked about any mitigating circumstances, and there would have been no purpose in these questions if the Immigration Officer had not have been aware of the fact that he had a discretion as to the course to be taken when there was a breach of the conditions of working.

26. It was argued that the respondent also erred by failing to consider all relevant factors before making her decision. The grounds refer to the duties under para 395C but that cannot bind the respondent in circumstances when it has been revoked. In the alternative, Mr Nasim argued that exceptional circumstances should be taken into account in accordance with chapter 53 of the EIG and in any event in a removal case there is an obligation arising on grounds of fairness to consider all relevant matters. We are satisfied that the primary focus in a removal case involving working in breach of conditions should be on the facts of the breach and whether it is of sufficient gravity to warrant removal. The provisions of chapter 53 are not applicable to this process.

27. In his submissions Mr Nasim also challenged whether the decision maker had followed the proper procedures when arresting and interviewing the applicant. However it is clear from the notebook that the applicant was cautioned and that the "caution plus 2" procedure, as set out in EIG Chapter 37.2, was followed.

28. In summary, we are satisfied that there was power to make a decision under s.10 to remove the applicant. There was ample evidence to support a finding that he was working and that the breach was serious and would be regarded as such. We are not satisfied that the decision maker was unaware that there was a discretion to be exercised or that there is any error in failing to deal expressly with the issue of discretion in deciding what decision should be made. It is clear from the IDI referred to in the grounds that curtailment would normally only be appropriate in circumstances where the breach was not regarded as of sufficient severity to justify removal. This is a case where a removal decision was rationally and lawfully made and it necessarily follows that the respondent was entitled to take the view that this was not an appropriate case for a curtailment decision or for no action to be taken.

29. We are also satisfied that the notice of decision and the reasons given were adequate to indicate why the decision was taken. This is not a case where there needed to be any express reference to why the discretion was exercised to make a removal decision. There may be cases when an issue

is raised before the decision is made relating to the course to be followed or to particular mitigating circumstances relating to the applicant where that should be expressly considered in the decision. This is not such a case (unlike perhaps the facts in Thapa where there may have been such factors). It has not been argued that any specific factors were not taken into account, simply that factors in general were not considered. We also note that the applicant's own witness statements do not raise any such issue but focus on his denial that he was working.

30. It was argued that the respondent failed in her duty of fairness but in substance this is an aspect of the argument that the reasons for not pursuing the curtailment option had not been specifically addressed. In the light of the respondent's published policy on how removal decisions would be made when there is evidence that an applicant is working, no issue arises of procedural unfairness in the present case.

(ii) The Respondent's Duties at the Time of Making the Decision

31. Under this head it was argued that the respondent was under a duty to ensure that the relevant notices were properly served and that the correct rights of appeal were identified. There is no substance in the argument that the notices were not properly served. There is evidence on the face of the notices that they were given to the applicant. It was argued that the notice does not properly identify the right of appeal but it does indicate that he has a right of appeal on the basis that the decision is unlawful because it is incompatible with his rights under the European Convention on Human Rights. The appeal in this case would be under the provisions of s.84(1)(c) whereas there is no right of appeal under s.84(1)(g) by reason of the provisions of s.95. Mr Nasim sought to rely on the Tribunal determination in Kabaghe but that decision was primarily concerned with issues of fairness in the decision making process. It is not authority for the proposition that there is no right of appeal from outside the United Kingdom under s.84(1)(c). The summary of the statutory scheme at [29] must be read in the light of the fact that whilst s.95 prevents an appeal from outside the UK under s.84(1)(g) there is no similar restriction in respect of an appeal under s.84(1)(c).

(iii) Duties After Making the Decision

32. Under this head it was argued that there was a duty on the respondent to serve a s.120 notice under the 2002 Act but there is no substance in this argument. In Lamichhane v Secretary of State for the Home Department [2012] EWCA Civ 260 the Court of Appeal made it clear that this section conferred a discretionary power, a decision approved by the Supreme Court in Patel v Secretary of State for the Home Department [2013] UKSC 72 by Lord Carnwath at [27]. There was therefore no duty on the respondent to serve a s.120 notice.

(iv) Whether there is an in-Country Right of Appeal

33. We are satisfied that there is not an in-country right of appeal. The applicant's leave is invalidated by virtue of s.10(8) of the 1999 Act when a decision to remove is made. In so far as reliance was placed on the Tribunal determination in CD (s.10 curtailment: right of appeal) India [2008] UKAIT 00055, this was specifically disapproved by the Court of Appeal in RK (Nepal), Aikens LJ saying at [37]:

> "37. Accordingly, I would conclude that CD was wrongly decided and that Saleh was correct. Since the hearing before us I have discovered the decision of Wilkie J in R (Qinuyu) v Secretary of State for the Home Department. It was handed down on 16 October 2008, that is, before the decision in Saleh, which was handed down on 1 December 2008. In his judgment, Wilkie J had to consider whether CD was wrongly decided, as submitted on behalf of the SSHD in that case. He held, at paragraph 29, that it was, for essentially the same reasons I have attempted to give."

34. The judgment in RK (Nepal) makes it clear that there is no right of appeal under s.82(2)(e). It is not arguable that the invalidation of leave by virtue of s.10(8) of the 1999 Act is a variation of leave to enter or remain.

(v) Alternative Remedy: is it appropriate for Judicial Review to be granted?

35. This issue was considered by the Court of Appeal in Lim. The appeal turned on the propriety of using judicial review to challenge the factual basis of a removal decision against which an out of country appeal lay to the AIT. The applicant had been found working in breach of his conditions. It was a less serious breach than in this application as the applicant did not observe a condition of working only at one particular restaurant: he was found working at a different restaurant also owned by his employer. Sedley LJ described the decision as "a colossal over-reaction to what, even if proved, was a venial breach of condition" [27]. Nonetheless, the Court held that judicial review was a remedy of a last resort so that where a suitable statutory appeal was available the Court would exercise its discretion in all save exceptional cases by declining to entertain an application for judicial review. It was held that where a statutory channel of appeal existed, in the absence of special exceptional factors the High Court would refuse any exercise of its discretion to entertain an application for judicial review.

36. That decision was endorsed and approved by the Court of Appeal in RK (Nepal) where Aikens LJ said:

> "33. The importance of that decision lies in its emphasis on the appeal structure that Parliament has laid down in the 2002 Act with respect to various types of 'immigration decision'. The courts must respect that framework, which is not open to challenge in the courts by way of judicial review unless there are 'special or exceptional factors' at play. Therefore, except where such 'special exceptional factors' can

successfully be invoked so as to give rise to a right to judicial review, the court must accept that an out of country right of appeal is regarded by Parliament as an adequate safeguard for those who are removed under section 10 of the 1999 Act.

34. It is plain in this case that the immigration decision made against the applicants was one under section 10(1)(a***)*** of the 1999 Act. That is what was stated in the form IS151A that was served on each of the applicants. There is no issue concerning their non-British citizenship. It is also clear, as a matter of fact, that the reason for the removal from the UK in accordance with directions given by an Immigration Officer is that they both obtained limited leave to enter and remain in the UK and that this leave was subject to conditions. They have broken those conditions in the manner I have already described. Those facts fall squarely within section 10(1)(a) of the 1999 Act.

…

36. Parliament has decided that the SSHD can make a decision to remove a non-UK citizen under Section 10(1) of the 1999 Act, or by using the curtailment provisions of the Immigration Rules. The two routes are distinct and must not be blurred. If the SSHD decides to use the section 10(1) procedure, then that can only be challenged in the very limited circumstances described by Sedley LJ in Lim***.*** If that is not possible (and it has not been attempted at all in this case) then the applicant is confined to an out of country right of appeal."

37. In Thapa, the Deputy Judge took the view that an out of country appeal was not an adequate remedy in that case firstly because the challenge was not to a question of law or fact which would be for consideration by the First-tier Tribunal but to the question of whether the decision to remove rather than some other or no enforcement action was lawful and appropriate. She held that it was not a challenge to the decision under s.10(1) of the 1999 Act but to the prior decision to proceed under that section at all. However, that overlooks the fact that the First-tier Tribunal does have the jurisdiction to consider issues relating both to fairness and to whether the respondent erred by failing to appreciate that there was a discretion whether or not to make a removal decision. These issues can be considered by the First-tier Tribunal and there is nothing to suggest that such arguments could properly be treated as special or exceptional. Further, it is artificial to say that there is a separate prior decision which can be challenged separately from a challenge to the removal decision.

38. These issues fall within the ground challenging a decision on the basis that it was "otherwise not in accordance with the law" as provided in s.84(1)(c) of the 2002 Act. In Kabaghe at [36], the President, Blake J said:

> "Third, we remind immigration judges and the respondent that the statutory jurisdiction to consider whether an immigration decision is in accordance with the law includes consideration of whether the decision has been made fairly because there is a public law duty on the Secretary of State to act fairly: see discussion in Macdonald Eighth Edition at 19.09 citing Singh v Immigration Appeal Tribunal [1986] Imm AR 352; D.S. Abdi v SSHD [1996]

Imm AR 148; BO (Nigeria) [2004] UKIAT 00026; AG (Kosovo) [2007] UKAIT 00082; AA (Pakistan) [2008] UKAIT 00003 and HH (Iraq) [2008] UKAIT 00051. These principles have been applied in the Upper Tribunal: see Thakur (PBS decision - common law fairness) Bangladesh [2011] UKUT 151 (IAC) and Patel (revocation of sponsor licence – fairness) India [2011] UKUT 211 (IAC)."

39. It is of course important that these comments are read in the context of what the President, Blake J, said in Fiaz (cancellation of leave to remain – fairness [2012] [UKUT 00057] IAC at [34]:

> "We would add that the jurisdiction of this Tribunal to determine that a decision is not in accordance with the law because of a lack of fairness, is not to be degraded to a general judicial power to depart from the Rules where the judge thinks such a course appropriate or to turn a mandatory factor into a discretionary one. Fairness in this context is essentially procedural: a course of action that prevents the claimant from drawing a relevant document or other information to the attention of the decision maker, or preventing the claimant from switching colleges to one that is currently approved by the Secretary of State rather than substantive: an untrammelled exercise of discretion to permit people to remain who have failed to use the previous permission for the purpose for which it was granted and who have no other claim to remain under the rules."

40. It must inevitably follow that the Deputy Judge was wrong to take the view that the facts in Thapa raised issues falling outside the jurisdiction of the First-tier Tribunal. Further, there is nothing to suggest that such issues could properly be regarded as special or exceptional, and it is artificial to say that there is a distinct prior decision which can be challenged separately from the decision to remove.

41. The second reason given was that the statutory procedure could not in fact provide a suitable alternative remedy given the nature of the challenge as by the time the matter was before the First-tier Tribunal in an out of country appeal it would be too late for the Tribunal to apply an adequate remedy if it decided that inadequate reasons were given for rejecting the in-country appeal route. However, this logic must apply equally to an appeal on the basis that the applicant was not in fact working. No rational distinction can be drawn between a challenge to whether a discretion was exercised or whether the respondent wrongly concluded that the applicant was working. The view taken by the Deputy Judge in Thapa was, with respect, not open to her given the Court of Appeal decisions to which we have referred; and it is not open to us.

42. The third reason given was that the amended grounds raised points of considerable wider importance as to the fair and appropriate application of discretion and that there was a wider public interest in clarifying this point in the High Court. However, as we have already indicated, the issue identified by the Deputy Judge was one which could be considered by the First-tier Tribunal and if that Tribunal erred in law, there is a right of appeal to the Upper Tribunal which is now the forum which in any event

hears judicial review applications in relation to challenges to remove under s.10.

43. We are therefore not satisfied that these are adequate reasons making it appropriate to apply for judicial review. We have been referred to the decision of Coulson J in R (Zahid) where he declined to entertain judicial review proceedings following Lim and RK (Nepal). We are satisfied that his was the correct approach and that on this issue Thapa was wrongly decided and should not be followed. In the present case there are no special or exceptional factors to justify a challenge by way of judicial review as opposed to the statutory appeal provided in primary legislation.

Conclusion

44. For these reasons, there is, in our judgment, no proper basis for a challenge by judicial review to the respondent's decision to make a removal decision in the circumstances of this case. This application is accordingly dismissed. Subject to any further submissions there appears to be no reason why the applicant should not pay the respondent's costs on the standard basis to be assessed if not agreed.

Signed Dated: 30 May 2014

Upper Tribunal Judge Latter