



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/02191/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14th August 2013

Determination Promulgated
On 15th August 2013

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR MUHAMMAD TANVEER KHAN

Claimant

and

SECRETARY OF STATE

Respondent

Representation:

For the Claimant: Not Present or represented
For the Respondent: Ms J Isherwood (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Appellant against a determination of the First-tier Tribunal (Judge Tipping) who by a determination promulgated on 6th June 2013 dismissed the Appellant's appeal against the Secretary of State's decision to refuse to vary his leave as a Tier 4 (General) Student Migrant and to remove him under s.47 of the Immigration, Nationality and Asylum Act 2006.

2. When granting permission to appeal First-tier Tribunal Judge Frankish did not deal with the question of timeliness as he was required to do. The time for seeking permission to appeal expired on 17th June but the application was not received by the Tribunal until 2nd July.
3. In Samir (First-tier Tribunal permission to appeal :time) [2013] UKUT 00003 (IAC) it was made clear that in such circumstances the grant of permission is a conditional grant and that I as a First-tier Tribunal Judge must first decide whether to admit the application.
4. The application explains that the Appellant is paying privately for the appeal proceedings and took time to raise funds and as soon as he did so the representatives submitted the application. As the First-tier Tribunal determination does not deal with the s.47 removal decision it is arguable the First-tier Tribunal erred and so I admit the application.
5. Neither the Appellant nor his representative attended the Upper Tribunal for the hearing. Notice of Hearing was sent out by the Tribunal on 19th July. When my clerk telephoned Malik Law Chambers she was told that a fax had been sent to the Tribunal on 12th August asking that it be dealt with on the papers. No such fax has been received and I note that the copy faxed to-day contains no stamp suggesting that it was faxed previously. Be that as it may, as the representatives asked that it be dealt with without their or their client's presence I did so.
6. The grounds are clearly a set piece – used in several cases - indeed I have an identical set in another case before me to-day. They assert that the Judge erred in failing to deal with s.47 which case law (Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC) confirms was an unlawful decision when made at the same time as a refusal to vary leave and that the two are distinct decisions each requiring a determination. Ahmadi [2013] EWCA Civ 512 indicates that where an unlawful s.47 removal decision has been made the appeal in that regard should be allowed.
7. In this case the First-tier Tribunal did not make any decision on the removal decision. The Secretary of State in her Rule 24 reply suggests that the Home Office Presenting Officer withdrew the decision on the day in line with current policy. However the Record of Proceedings gives no indication that was the case and Ms Isherwood, having checked her note of the hearing confirmed that appeared to be the case. Thus the First-tier Tribunal did err in that regard.
8. The grounds also assert that the Judge erred in dealing with Article 8. The Judge did not err in that regard. The Appellant had been in the UK 2 ½ years only (he is aged 40). He had completed his original course of study and now wished to study another different course. His Article 8 claim had no prospect of success.
9. The First-tier Tribunal decision under the Immigration Rules was plainly right and indeed the representative from Malik Law Chambers before the First-tier Tribunal conceded that the Appellant did not meet the Rules.

10. Accordingly the First-tier Tribunal having made an error of law only in failing to determine the s.47 issue I set aside the determination but preserve the findings under the Immigration Rules and Article 8.
11. I redecide the appeal and I dismiss it under the Immigration Rules and Article 8. I allow it in so far as the s.47 removal decision is unlawful.
12. The appeal to the Upper Tribunal is allowed.

Signed

Date 14th August 2013

Upper Tribunal Judge Martin