Upper Tribunal
(Immigration and Asylum Chamber)

Kabaghe (appeal from outside UK – fairness) Malawi [2011] UKUT 00473(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 November 2011	
	....

Before

MR JUSTICE BLAKE, THE PRESIDENT

UPPER TRIBUNAL JUDGE H MACLEMAN

Between

BETTY SUSAN KABAGHE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: No representative

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

1) A person who has been removed from the United Kingdom pursuant to an immigration decision may not appeal against that decision to the First-tier Tribunal on human rights grounds (except where a human rights/asylum claim has been certified as clearly unfounded.

2) 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.

3) Where an appellant challenges a removal decision on the basis that it is unlawful and unfair, and gives an apparently credible account of the treatment constituting the unfairness, the judge is entitled to expect some form of evidential response from the respondent, identifying what happened and what factors informed the decision making. As the AIT held in EO (Turkey) [2007] UKAIT 00062, the respondent should demonstrate that the relevant considerations in paragraph 395C of HC 395 were taken into account, in reaching the decision that the appellant should be removed.

DETERMINATION AND REASONS

1.

This is an appeal from a decision of Judge Place sitting in the First-tier Tribunal Immigration and Asylum Chamber on 27 January 2011. He dismissed the appellant's out of country appeal against a decision to remove her from the United Kingdom made on 4 April, 2010. The judge concluded that no valid grounds of appeal had been placed before him, and in particular the appellant could not lodge an appeal based on human rights grounds once she had been removed from the United Kingdom.

2.

The relevant history is as follows. The appellant is a citizen of Malawi, born in 1954. She arrived in the United Kingdom in March 2006 with a valid student visa issued in Botswana granting her permission to enter and remain in the United Kingdom until February 2008. Her student visa was extended to April 2009 when she made an in time application for an extension of stay in order to study for a Higher Diploma at the Leicester Business Academy. This application was refused in October 2009 for her failure to meet the various requirements of the rule. She appealed on 3 November, 2009. She lodged fresh material, submitting that the educational institute was indeed a registered sponsor and she could maintain herself from her own funds. She did not ask for an oral hearing of that appeal. By s. 3C(2) of the Immigration Act 1971 her leave to remain is extended whilst an appeal is pending, ignoring any possibility of an appeal out of time.

3.

On 30 November 2009 the AIT wrote to the appellant at her last known address, explaining that any written representations in support of the appeal had to be received by 4 January 2010. Thereafter the case was placed before a judge for a paper hearing. He considered the matter and reached his conclusion on 5 February 2010. On the law as he understood it to be, the appellant had not made out her case and he accordingly dismissed the appeal. This decision was promulgated by being sent by 1st class post on 9 February 2010. Applying the provisions of the Asylum and Immigration Tribunal (Procedure) Rules 2005 any application for reconsideration of the decision and/or appeal to a higher body should have been made by 17 February 2010. No application was made in time for further appeal, consequently the appellant's appeal rights were exhausted on 17 February and from then on she had no leave to remain.

4.

The next material event was that on 4 April 2010 the appellant complained to the local police about loss of money from her address. A check revealed that she had no authority to remain. An Immigration Officer was called. She was arrested as an overstayer, interviewed and served with Form I51A Part 1, revealing that she was liable to be detained as someone with no authority to be in the UK. Part 2 of that Form was also served that day, indicating that a decision had been made to remove her to Malawi. The appellant was detained pending the giving of removal directions to Malawi on 8 April, to which she responded with representations that she should be removed to Botswana which is where her husband and grown up children were living and where she had previously lived before coming to the United Kingdom. She was removed to Botswana on 12 April.

5.

During the time the matter was under consideration and before she was removed, she had written on 7 April to the UKBA explaining that she had not received notice of the result of her appeal in February 2010 and did not know that the appeal had been dismissed. Although she was advised to seek legal advice, it does not appear that any legal representations by a legal advisor were made on her behalf.

6.

The appellant wrote a lengthy letter on 21 May 2010 in support of her appeal. She contends that the decision to remove her was unlawful and discriminatory because she had not received the decision refusing her appeal and consequently through no fault of her own did not know that she had to leave the United Kingdom. She states that during her interview with the immigration officer she pointed this out and received an apology for the failure to serve her. She explains her dismay that having called the police to investigate the fact that she was a victim of theft she found herself arrested as an overstayer. She points out that she would hardly have contacted the police if she had known her leave had expired. She was seeking legal advice while in detention but was not given an advisor able to act for her. She explained that she was refusing to go because she wanted her money back, which she could not achieve whilst in detention. She complained of the decision to detain her pending removal and pointed out that none of the reasons given in the notice served on her were accurate. She contended that she was treated so unfairly that the inference should be drawn that she was the victim of racial discrimination.

The Judge's decision

7.
In his short determination, judge Place thought that the appellant may have been confused as to whether this was an appeal concerned with her extension of stay application as opposed to removal. It is true that the administration had attached the file for the variation appeal to the removal appeal, but the letter of May 2010 makes it quite clear what the appellant was complaining about and we see no reason to believe the appellant was confused as to the decision subject to appeal. Judge Place found no evidence of racial discrimination and at [11] concluded:

"Whilst it is unfortunate that the appellant was not sooner informed of the Tribunal's decision against her in relation to the student visa, the fact remains that once her appeal was dismissed she had no legal basis to remain in the United Kingdom. There is no evidence before me of any valid ground of appeal against the respondent's decision of the 4 April, 2010 and I dismiss the appeal".

8.
When the appellant received Judge Place's decision she appealed to the Upper Tribunal on 12 February 2011, complaining that the Judge had not dealt with the central contention in her case, namely that she was not subject to removal under s. 10 of the Immigration and Asylum Act 1999 as she had not knowingly remained beyond the time limited by her leave and had not used deception. The Judge, like the immigration officer, had accepted this lack of knowledge but did not go on to consider the legal consequences.

9.
Permission to appeal to the Upper Tribunal was granted because there was some doubt as to whether Judge Place had fully dealt with the appeal on the information that was before him.

Error of law

10.
There is a short answer to the central contention of the appellant's case. For the purpose of liability to remove under s. 10(1) of the Immigration and Asylum Act 1999 it is not necessary for the authorities to demonstrate that the appellant knowingly remained beyond the period of her leave. It is sufficient if she did in fact remain beyond the period of her leave.

11.

On the facts recited above this indeed was the case, irrespective of whether or not the decision promulgated on 9 February ever reached the appellant at her the address to which it was sent by post.

12.
There is no information on the file to suggest that service was ineffective, but effective delivery by post can never be assured and the appellant may well have a point when she says that she would not have gone to the Police Station if she thought she had irregular status. She also points to the fact that on the 25 February she received a letter from the Tribunal returning her documents. This suggests that the Tribunal had the accurate address on record and there is no explanation as to why a decision should not have been sent to her.

13.
A lack of knowledge that the appeal has been dismissed goes to the question of whether she knowingly overstayed, which is relevant to whether she was guilty of a criminal offence under s. 24(1)(b) of the Immigration Act 1971 rather than whether she is liable to removal. There is abundant authority for the proposition that knowledge of a breach of conditions of entry or remaining is not a prerequisite for the exercise of administrative power of removal: see Macdonald's Immigration Law and Practice, 8 th edition at 16.7 and 16.41, citing R v Governor of Ashford Remand Centre ex p Bouzagou [1983] Imm AR 69 and Hanif [1985] Imm AR 57. However, the cases and the textbook both make the point that absence of knowledge of a breach of the terms of entry is highly material to whether removal is justified as a matter of discretion and by reference to the factors set out in the immigration rules.

14.
The judge was accordingly right to find that there was a power to serve a notice upon the appellant that she was liable to detention and removal from the United Kingdom under s. 10 of the 1999 Act as a person who had remained in the United Kingdom without leave.

15.
However, if the judge had engaged with the appellant's complaint as set out in her May 2010 letter, he should have gone on to consider whether the exercise of the power was in accordance with the law and any applicable immigration rules. This was a litigant in person (or a self represented litigant as the Civil Justice Council in its recent report prefers to say) appealing to an expert Tribunal in circumstances where she is unable to attend to advance the appeal herself. Although there is no broad ranging duty to explore every avenue in a complex scheme of immigration law, rules, policy and case law to see if there is a point that may assist an un-represented appellant, the judge must take the trouble to understand the appellant's case and evaluate it against the law and the rules applicable to it.

16.
On the material before him, there was nothing to contradict the appellant's claim that the Immigration Officer was willing to accept that she had not received notice of the adverse appeal decision. The judge appears to have reached the same conclusion. It is obvious that this is a highly material consideration to how the appellant should have been treated.

17.
The legislative changes made in 2000 left those without leave susceptible to administrative removal as opposed to a decision to deport where there was an in-country right of appeal.

18.

A decision to remove is an immigration decision that carries a right of appeal under s. 82(2)(g) of the Nationality, Immigration and Asylum Act 2002. However, that right of appeal can only be exercised from abroad unless in pursuance of s. 92(4) of the 2002 Act the appellant has made an asylum claim or human rights claim whilst in the United Kingdom.

19.

The grounds of appeal are set out in s. 84(1) and include the contentions that the decision was not in accordance with the immigration rules, and/or would breach the UK's obligations under the EU Treaties, the Refugee Convention or the Human Rights Act 1998.

20.

Paragraph 395C of the Immigration Rules HC 395 provides:

" Before a decision to remove under Section 10 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 for 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 to 368 must also be taken into account."

21.

There was little information on the files before us as to decision making process in this case. There was no record of interview and no report from the immigration officer who served the removal decision. We asked Mr Bramble to make some enquiries to what had happened on the 4 April. In particular:

i.

Was consideration given to para 395C;

ii.
Was an opportunity given to the appellant to make representations before a decision to remove was taken?

iii.
Was there any reason to doubt her case that she had remained at the address she had given to the Home Office and the AIT?

22.
We adjourned the matter during the course of the morning for those enquiries to be made. We were informed that the computer system had been consulted and Mr Bramble was able to tell us that there was no record that para 395C had ever been considered in this case. He also confirmed that the appellant had always remained at the address known to the authorities.

23.
He readily accepted that a decision to remove that is taken without consideration of the factors set out in para 395C was not in accordance with the immigration rules and also not a lawful decision, as the law requires the decision maker to consider matters relevant to the exercise of discretion to remove before a lawful decision is made. He therefore conceded the appeal on the ground that the appellant identified in her grounds of appeal, albeit not for the same reasons that she relied on, that the appeal ought to be allowed as not in accordance with the law.

24.
We entirely agree with Mr Bramble's concession on this issue. It applies the law known to UKBA and the judge. The AIT decided as much in the case of EO (Turkey) [2007] UKAIT 62. The italicised summary of the decision reads:

" (8) In determining an appeal against a decision (whether before or after 20 July 2006) to give directions under s 10 (as distinct from directions for removal of an illegal entrant) the Tribunal should first consider whether the decision shows, by its terms, that the decision-maker took into account the factors set out in paragraph 395C and exercised a discretion on the basis of them. If it does not, the appeal should be allowed on the basis that it was not in accordance with the law and that the appellant awaits a lawful decision by the Secretary of State. If the decision was made properly, the Tribunal should secondly consider whether the removal of the appellant would breach his rights under the Refugee Convention or the ECHR, and, if not, thirdly whether the discretion under paragraph 395C should be exercised differently, bearing in mind that paragraph 395C does not have the restrictions contained in the 'new' paragraph 364. The process is somewhat similar to that under the 'old' paragraph 364."

At [44]: the AIT reached its conclusions:

"The first is that, where the decision to give removal directions under s10 does not clearly demonstrate a proper consideration of the matters set out in paragraph 395C and the exercise of a discretion to make the decision, the decision will be one which is challengeable on the ground that it is not in accordance with the law, and the result should normally be that an appellant's appeal is allowed on that basis only, leaving the Secretary of State to make a new and lawful decision in accordance with the Immigration Rules."

25.

Further for reasons given at [13] and [16] above one of the relevant compassionate considerations known to the Secretary of State at the material time was that the appellant had remained at her address on the record and had not received the AIT's decision dismissing her appeal.

26.
In the circumstances, we conclude that Judge Place's consideration of the issue at [7] in the light of his duty set out at [15] was inadequate. He should have proceeded beyond the existence of a power to make a removal decision to examine whether the decision made to remove the appellant was in accordance with the rules and the law. His failure to inquire further is a material error of law and we accordingly set aside his decision dismissing the appeal and re-make it for ourselves.

Conclusions

27.
There are three further issues of concern in this case. We spell them out in the hope that the UKBA will be able to learn from the problems identified in this case: see Administrative Justice and Tribunals Council's report and recommendations "Right First Time", June 2011.

28.
First, one of the reasons why permission to appeal was granted was some concern whether Judge Place was right to conclude that the appellant could not rely on human rights grounds in an out of country appeal against removal. For reasons that we set out below, we conclude he was right to so find, although the terms of the notice served on the appellant are confusing. The notice said:

"You were served with Form IS 151A on the 4 April informing you of your immigration status and liability to detention and removal. A decision has been taken to remove you from the United Kingdom.

You are entitled to appeal this decision under Section 82(1) of the Nationality, Immigration Asylum Act, after you have left the United Kingdom. A notice of appeal is enclosed. ….

The appeal must be made on one of the following grounds:

…….

that the decision is unlawful because it is incompatible with your rights under the European Convention on Human Rights…"

29.
The statutory scheme is complex but may be summarised:-

i)
It is an exception to the broad rule that an appeal against administrative removal can only take place when the appellant is out of the country if the person concerned has made a claim that removal would be contrary to various obligations, including those under the Human Rights Act 1998 (ss. 92(4) and 84(1)(g)).

ii)
Although the language of s. 92(4) is broad - "has made …a human rights claim, while in the United Kingdom"- its meaning is be found in the statutory context that excludes purely historic claims that have been previously disposed of on appeal (see the decision of the Court of Appeal in BA (Nigeria) [2009] EWCA Civ 119 at [10]) and, probably, claims that are made for the first time in response to the decision.

iii)
Where a relevant human rights claim is made before the removal decision, the appeal is to take place before the person is removed unless the Secretary of State certifies it as clearly unfounded under s. 94(2) of the Nationality, Immigration and Asylum Act 2002.

iv)
In the event of certification s. 94(9) provides that the appeal can be considered as if the person had not been removed even though they are outside the United Kingdom.

v)
Section 95 provides that a person who is outside the United Kingdom may not appeal on the ground that the removal will be unlawful and contrary to the Refugee Convention or the Human Rights Act save under s. 94(9).

vi)
We further understand that it is the Secretary of State's policy where human rights etc representations are made after the removal decision to revoke the decision and reach a fresh decision. (See UKBA Directorate Enforcement Instructions and Guidance Administrative Removals Procedures chapter 51 last bullet point (accessed 28 November 2011)):

"If asylum or HR is claimed after serving the IS151A part 2, and removal directions are in place then refer to OSCU for advice before suspending the removal directions. Otherwise withdraw the IS151A part 2 and where the applicant will get an in country appeal right serve an IS151B with any refusal of the claim)"

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vii)
Where the representations amount to a fresh claim within the meaning of paragraph 353 of the Immigration Rules it is the Secretary of State's duty to make a fresh immigration decision: see BA (Nigeria) as applied in ZA (Nigeria) [2010] EWCA Civ 926; [2011] QB 722 at [51] to [59].

30.
Thus a notice given to an appellant stating that she can appeal from abroad on human rights grounds is misleading. It is particularly unfortunate if such a notice is given to an unrepresented person who is in detention and facing summary removal.

31.
In fact there is no reason to believe that the appellant made any representations that to remove her from the United Kingdom would be contrary to the Refugee Convention or the Human Rights Act. She explained that her husband and children lived in Botswana and if she were to be removed she should be removed there. She was unwilling to make a voluntary departure whilst in detention because her concern was to retrieve the money that she said had been stolen from her. In her May 2010 representations the focus as already noted was on the legality of the removal decision rather than the suggestion that it breached her human rights.

32.
Second, she did however complain about the decision to detain her, and this could be said to raise an issue under Article 5 of the ECHR. She drew attention to the reasons for detention notice, where the following boxes on the pro-forma were ticked to explain the decision:

Box B - “There is insufficient reliable information available information to decide on whether to grant you temporary admission or release.”

Box 7 - “You have not produced satisfactory evidence ……… nationality or lawful basis to be in the United Kingdom.”

Box 8 - “you have previously failed or refused to leave the United Kingdom when required to do so.”

33.
The appellant’s commentary on each of these grounds is pertinent:

i)
UKBA knew precisely who the appellant was and her immigration history from 2006 to 2010, and they moreover knew that she remained at her address in Nottingham that she had given for the purpose of the extension application and appeal.

ii)
She had supplied a valid passport to UKBA when called on to do so, had submitted this passport in connection with the appeal and, as we understand it, the passport had been picked up from her premises when the police visited and was with UKBA, so there was no basis to query her nationality.

iii)
If it was accepted that the appellant had not received the notice of the dismissal of the appeal (as the appellant said, without contradiction) there was no evidential basis for a conclusion that she had failed or refused to leave the United Kingdom when required to do so. There can no failure or refusal unless there is knowledge of the requirement.

34.
In summary there are good grounds to believe that not only was every reason given for the decision to detain wrong but was known at the time to be wrong (or should have been known). If this is right, not only was the decision to remove the appellant contrary to the law for a failure to consider the relevant circumstances, but the decision to detain her for no valid reason also has every appearance of being one that it was not open to the immigration officer to make, and violated both her common law right of liberty and her right under Article 5(1) of the ECHR not to be arbitrarily detained (see R (MXL) [2010] EWHC 2397 (Admin) and Walumba Lumba [2011] UKSC 12.

35.
The issue of the legality of detention is not one that is for us to adjudicate on. The jurisdiction of the First-tier and Upper Tribunals is concerned with the legality of immigration decisions as set out in the statute and not with ancillary decisions related to such decisions. If the appellant seeks redress by way of damages for what may be an unlawful detention for a period of up to 8 days she should promptly communicate with the Home Office and would be well advised to seek legal assistance in the United Kingdom to pursue it.

36.
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).

37.
Where the appellant challenges a removal decision on the basis that it is unlawful and unfair, and gives an apparently credible account of the treatment constituting the unfairness, the immigration judge is entitled to expect some form of evidential response from the respondent identifying what happened when and what factors informed the decision making. There was no information provided on the file as to how and why the decision to remove was reached apart from the reasons for the detention summary that has turned out to be wholly inaccurate and an immigration summary that is both incomplete and silent on the material issue.

38.
We note that that the respondent was not represented before Judge Place and so he would not have been able to ask for the inquiries to be made that Mr Bramble has helpfully conducted for our benefit. This is a completely unsatisfactory state of affairs. While we recognise that resources are scarce and invidious choices need to be made about where to deploy representatives, the judge must be able to determine the appeal on accurate information from the respondent supplied in one form or another, and in any event internal review of such decisions should have identified the procedural failings in this case long before the Judge was called on to make a judicial decision.

39.
We repeat what was said by the AIT in EO (Turkey) at [44] quoted above at [24] namely the decision maker should demonstrate that the relevant considerations were taken into account: either by a contemporaneous file note made by the officer, or a reasoned decision made by someone with access to the relevant information. We note that the UKBA Enforcement Instructions and Guidance “Instructions on Applying Paragraphs 364 to 368 and 395C of the Immigration Rules” chapter 53.1.1 (accessed 28 November 2011) contemplate that a record is made of the relevant circumstances:

“Before a decision to remove is taken on a case, the case-owner/operational staff must consider all known relevant factors (both positive and negative). It is important to cover the compassionate factors in the transcription of the interview and to record them and the fact that you have discussed them with the UKBA officer authorising removal, on the local file minute or IS126E and UKBA internal database records (CID). Removal should not be considered in any case which qualifies for leave under the Immigration Rules, existing policies or where it would be inappropriate to do so under this policy.”

40.
In the absence of such information the judge will have to decide whether to allow the appeal on the basis that the lack of the information is probative of the fact that the relevant considerations were not taken into account, or adjourn for further inquiries to be made, causing expense, inconvenience and delay, all of which are contrary to the overriding objective of Tribunal justice.

41.
In the light of above we re-make the decision as follows:-

a.
The decision is not in accordance with the Immigration Rules, because there is no evidence from the Home Office that consideration was given to the relevant rules before the removal decision was made.

b.

The appellant's claim that she had not received the notice of decision on appeal was a material consideration in the exercise of discretion as to whether she should be removed, or removed when she was, in the circumstances that she was. A person who has only just learned of an adverse decision but of whom there is no reason to believe that they would abscond would normally be expected to be given a reasonable period to make representations and/or arrangements for a voluntary departure. Although the claim was not disputed there is no reason to believe that it was a circumstance that was taken into account.

c.

The decision was not in accordance with the law because the law requires the decision maker to inquire into the relevant circumstances and consider them before making a removal decision. There is no evidence that this was done, and we have been informed positively it was not done.

d.

The decision to remove and detain pending removal appears to have been based on irrelevant considerations that were not accurate and were known or should have been known not to be accurate.

e.

We accordingly allow the appeal.

42.

We have considered whether any further direction is expedient to give effect to this appeal under s. 87(1) of the 2002 Act. We have declared the decision to remove the appellant to be an unlawful one. She might well have been the subject of a lawful decision if all the relevant factors had been considered and she had been unwilling to leave voluntarily. The appellant is now in Botswana where she has been for the best part of eighteen months. If she now has any claim to re-enter the United Kingdom within the scheme of immigration control she can apply for entry clearance for that purpose, and the previous removal will not count against her, since it was not lawfully taken. If the appellant seeks compensation for unlawful detention and /or breach of her right to liberty and security under Article 5 ECHR she will have to issue separate proceedings. No further directions will be given, and the respondent is not therefore obliged to bring the appellant back to the United Kingdom.

43.

We express the hope that the respondent will review procedures in the light of the observations made in this judgment and improve practice to ensure that decisions are taken into accordance with the law and the rules and sufficient evidence of this is provided to the appeal judge. We are grateful to Mr Bramble for the assistance he provided in this appeal.

Signed

Mr Justice Blake

President of the Upper Tribunal

Immigration and Asylum Chamber