Upper Tribunal
(Immigration and Asylum Chamber)

Ahmadi (s. 47 decision: validity; Sapkota) [2012] UKUT 00147 (IAC)

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination Promulgated**
On 7 March 2012	.....

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

JAVAD AHMADI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Z. Malik, Counsel, instructed by Malik Law Chambers Solicitors

For the Respondent: Mr P. Deller, Senior Home Office Presenting Officer

(1) A removal decision under s. 47 of the Immigration, Asylum and Nationality Act 2006 cannot be made in respect of a person until written notice of the decision to refuse to vary that person's leave to remain has been given to that person. The current practice of the Secretary of State to incorporate both decisions in a single notice is accordingly incompatible with the relevant legislation. As a result, the present usefulness of s. 47 is highly questionable.

(2) The fact that, as the legislation stands, the Secretary of State cannot make a removal decision at the same time as a decision refusing to vary leave, or (for practical purposes) before a person's s. 3C leave begins, underscores the correctness of the Tribunal's determination in Patel (consideration of Sapkota – unfairness) [2011] UKUT 484 (IAC), that what is likely to be decisive in cases of this kind is whether the Secretary of State has, in fact, addressed paragraph 395C removal factors, when taking the variation decision.

DETERMINATION AND REASONS

1. The appellant, a citizen of Afghanistan born on 1 January 1990, arrived in the United Kingdom on 27 February 2007 and claimed asylum two days later. That claim was refused by the respondent who, nevertheless, granted the appellant discretionary leave, because the appellant was at that time a

minor. On 10 June 2009, the appellant applied for a variation of that leave but the application was refused by the respondent on 15 July 2009.

2. The appellant appealed to the Asylum and Immigration Tribunal. His appeal was heard at Hatton Cross on 19 November 2009 by an Immigration Judge, who dismissed it. The appellant was found not to be a credible witness. The judge did not believe the appellant's account of having fled Afghanistan and concluded that it would not be a breach of the United Kingdom's responsibilities under the Refugee Convention, to return the appellant to Afghanistan. By the same token, the judge found that it would not be a breach of Article 3 of the ECHR to return the appellant who, furthermore, was found not to be entitled to the grant of humanitarian protection. None of those findings is challenged by the appellant.

3. In paragraph 44 of the determination, the judge addressed Article 8 of the ECHR. He found that the appellant had formed a private life in the United Kingdom, where the appellant had taken various educational courses. The judge concluded, however, that any interference with the appellant's Article 8 rights, as a result of his removal to Afghanistan, would be proportionate to the legitimate public end sought to be achieved. The Article 8 finding was not appealed by the appellant.

4. The final matter dealt with by the judge was paragraph 395C of the Immigration Rules. That paragraph provided as follows:-

" **395C** . **Before a decision to remove under section 10 [of the Immigration and Asylum Act 1999] 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 records;

(v) domestic circumstances;

(vi) previous criminal record and the nature of any offence of which the person has been convicted;

(vii) compassionate circumstances;

(viii) any representations received on the person's behalf ."

5. In paragraph 46 of the determination, the judge noted that the respondent, in the refusal letter addressed to the appellant, had considered the factors set out in paragraph 395C. The judge considered that the Secretary of State had "exercised her discretion correctly" under paragraph 395C, before making his own finding that there were "no factors in this case which militate against removal".

6. Before the Immigration Judge, Mr Malik had submitted on behalf of the appellant that, although paragraph 395C had been considered by the respondent, the immigration decision to refuse to vary leave to remain was not in accordance with the law, because it had not in fact been accompanied or closely followed by a decision, that the appellant should be removed from the United Kingdom by way of removal directions. In making that submission, Mr Malik relied on the judgments of the Court of Appeal in TE (Eritrea) [2009] EWCA Civ 174. The judge was not persuaded by that submission; but

permission to appeal to the Upper Tribunal was granted on the basis that the matter was properly arguable.

7. It was, thus, the central aspect of the appellant's case before the Upper Tribunal, that the respondent had not, in fact, made a removal decision in respect of him. That was the apparent understanding of the parties, when the appeal came before the Upper Tribunal last year. However, shortly after that Tribunal had made its determination, the respondent disclosed a copy of a letter of 6 July 2011, comprising a combined immigration decision entitled "Refusal to vary leave to enter or remain and decision to remove", which was dated 27 July 2009, and which had not been included in the respondent's bundle. The determination of the Upper Tribunal was, accordingly, set aside under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 14 July 2011, with the result that the appeal came before me on 7 March 2012.

8. On that day it was common ground that the document dated 27 July 2009 comprised both a decision to refuse to vary the appellant's leave to remain in the United Kingdom, and also an actual or purported decision under s.47 of the Immigration, Asylum and Nationality Act 2006, that the appellant should be removed in accordance with directions, if and when his leave ended. The validity of the s.47 decision is in issue between the parties; and, if the s. 47 decision is invalid, the issue arises as to whether the variation decision is in accordance with the law. In a skeleton argument, served shortly before the 7 March hearing, Mr Malik submitted that the respondent's apparent practice of making "combined" decisions of these kinds is unlawful, since on a true construction of the relevant legislation, the decision to refuse to vary leave has to have been both made and served on the person concerned, before a decision can be taken under s.47.

9. The relevant provisions of s.47 are as follows:

" **47** . **Removal: persons with statutorily extended leave**

(1) Where a person's leave to enter or remain in the United Kingdom is extended by section 3C(2)(b) or 3D(2)(a) of the Immigration Act 1971 (c.77) (extension pending appeal), the Secretary of State may decide that the person is to be removed from the United Kingdom, in accordance with directions to be given by an immigration officer if and when the leave ends.

(2) Directions under this section may impose any requirements of a kind prescribed for the purpose of section 10 of the Immigration and Asylum Act 1999 (c.33) (removal of persons unlawfully in United Kingdom) ."

10. The relevant provisions of s.3C of the Immigration Act 1971 are as follows:-

" **3C. Continuation of leave pending variation decision**

(1) This section applies if –

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

(b) the application for variation is made before that leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when –

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought [, while the appellant is in the United Kingdom] against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or

(c) an appeal under that section against that decision [, brought while the appellant is in the United Kingdom] is pending (within the meaning of section 104 of that Act).

…

(6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section; and the regulations –

(a) may make provision by reference to receipt of a notice,

(b) may provide for a notice to be treated as having been received in specified circumstances,

(c) may make different provision for different purposes or circumstances,

(d) shall be made by statutory instrument, and

(e) shall be subject to annulment in pursuance of a resolution of either House of Parliament .”

11. Although neither party drew my attention to them, the Immigration (Continuation of Leave) (Notices) Regulations 2006 are plainly relevant, being made pursuant to s.3(C)(6). Regulation 2 provides as follows:-

“ **2. Decision on an application for variation of leave**

For the purpose of section 3C of the Immigration Act 1971 an application for variation of leave is decided –

(a) when notice of the decision has been given in accordance with regulations made under section 105 of the Nationality, Immigration and Asylum Act 2002; or where no such notice is required,

(b) when notice of the decision has been given in accordance with section 4(1) of the Immigration Act 1971 .”

12. The Immigration (Notices) Regulations 2003 (SI 2003/658) have been made under s.105 of the 2002 Act. The relevant provisions of regulation 4 are as follows:-

“ **Notice of decisions**

4 .-(1) Subject to regulation 6, the decision-maker must give written notice to a person of any immigration decision or EEA decision taken in respect of which is appealable .”

Regulation 6 deals with certain decisions to refuse leave to enter and decisions to vary leave to enter, and is not relevant to the present case.

13. Section 4(1) of the Immigration Act 1971 provides:-

4. Administration of control

(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) (whether as regards duration or conditions), shall be exercised by the

Secretary of State; and, unless otherwise [allowed by or under] this Act, those powers shall be exercised by notice in writing given to the person affected, except that the powers under section 3(3)(a) may be exercised generally in respect of any class of persons by order made by statutory instrument ."

14. Mr Malik drew attention to Chapter 51.3 (Administrative Removal Procedure) of the respondent's Enforcement Instruction Guidance, which says this:-

" Prior to section 47 of the Immigration, Asylum and Nationality Act 2006 a decision to remove could only be made once an individual had no leave to enter or remain (e.g. when they were Appeal Rights Exhausted). This meant that where an individual had continuing leave during an appeal against refusal to vary or curtailment of leave, it was not possible to make a removal decision. Moreover, it meant that when the administrative removal decision was subsequently served, it could trigger a second right of appeal…

Under section 47 a decision to remove can be made where an individual has continuing leave during a period in which an appeal could be brought (statutorily extended leave under sections 3C(2)(b) or 3D(2)(a)). This means that a decision to administratively remove is made at the same time as a variation or curtailment decision. The section 47 decision should be included in the decision letter curtailing or refusing to vary leave. Where it is not included in the decision letter the ICD.4547 decision notice can be used… A section 47 decision cannot be made once an appeal has been lodged.

A section 47 decision will trigger an additional right of appeal under section 82(2)(ha) of the Nationality, Immigration and Asylum Act 2002. However, where an appeal is lodged the issues arising from the two decisions (e.g. refusal to vary leave and the removal decision) will be dealt with in a single in-country appeal ."

15. The essence of Mr Malik's submissions can be shortly put. Section 47, far from mandating the practice described in the respondent's Guidance, that a decision under that section "should be included in the decision letter curtailing or refusing to vary leave", in fact prevents such a practice. The s.47 decision can be taken only after the leave to enter or remain is extended by s.3C(2)(b); and that can happen only while an appeal against the decision regarding leave "could be brought". Such an appeal may be brought only once the person has been given written notice of the decision.

16. Instead of supporting the respondent's practice, as described in the Guidance, Mr Malik submits that the already well-known case law of Mirza [2011] EWCA Civ 159 and Sapkota [2011] EWCA Civ 1320 in fact support him. In particular, Mr Malik relies on paragraph [101] of the judgments in Sapkota :-

"[101]. I accept that the SSHD had to take the variation decision first. I also accept that the removal decision cannot literally be taken at the same time, because, as Sedley LJ acknowledged in **Mirza** , the right to make a removal decision only arises the moment the initial leave period expires (for **section 47** of the 2006 Act) or when the applicant's presence in the UK is unlawful (for **section 10**) of the 1971 Act). However, once it is established that, in the absence of good reason, the SSHD is obliged to serve a 'one-stop' notice under **section 120** and is obliged to take the removal decision promptly thereafter, that must impinge on the lawfulness of the 'immigration decision' concerning variation. It seems to me that if the SSHD takes the variation decision in circumstance where it is not contemplated that the removal decision will be promptly taken thereafter and there is no good reason for that delay or 'segregation in fact', then that must make the first decision 'not in accordance with the law'. It would be a decision that was taken in disregard of the SSHD's public law duties. So, on

this analysis, there is no question of the variation decision being lawful when first made, then becoming unlawful thereafter, so changing its character after the manner of Schrödinger's cat ."

17. It is, I consider, plain that the policy behind the respondent's guidance, involving combined decisions as to leave and removal, is entirely understandable and sensible. It accords with the "one-stop" principle enshrined in s.120 of the 2002 Act and guarantees that the person concerned knows exactly the case he or she must make under that section or on appeal to the First-tier Tribunal. If the removal decision cannot be made contemporaneously with the decision regarding leave, the respondent will have only the short period of time prescribed in rule 7(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, within which to make and communicate the s.47 removal decision. But, as Mr Deller submitted, if a "one-stop" notice is given with the decision regarding leave, it is difficult to see how representations in response to that notice can be made and considered, before a removal decision has to be taken.

18. In fact, the situation is even worse. Irrespective of the issue of the "one-stop" notice, the respondent will not, in practice, be able to assume she has the entirety of the period prescribed in rule 7(1) within which to make a s. 47 decision, since as soon as the person concerned gives notice of appeal to the First-tier Tribunal against the variation decision, his or her leave is no longer extended by s. 3C(2)(b) but, rather, by s. 3C(2)(c). As the respondent will not immediately be aware this has happened (see rule 12(1) of the 2005 Rules), the respondent can have no confidence that any s. 47 decision made after s. 3C(2)(b) leave has started to run will be a valid decision.

19. It is, accordingly, without any enthusiasm that I have come to the conclusion that Mr Malik is, in substance, correct in his submissions regarding the ambit of s. 47 and that the respondent's current practice of including a s.47 decision in the same decision letter as that regarding the refusal or curtailment of leave is incompatible with the relevant legislation.

20. Were it not for the Immigration (Continuation of Leave) (Notices) Regulations 2006, it might have been possible to adopt a construction of s.47(1) and s.3C(2)(b), to the effect that, after an application has in reality been decided by the respondent, s.3C(2)(b) applies for the purposes of s.47, even before the decision is communicated in writing to the person concerned, which is the point at which he or she will realise that there is a right of appeal to the First-tier Tribunal. However, even without the 2006 Regulations such a construction would be open to serious objection. In the light of regulation 2 of those Regulations it is, I find, impossible to take that course. Until notice of the decision has been given in writing, the application has not even been decided, for the purposes of s. 3C(2)(a). Accordingly, s.3C(2)(b) has no application, for the simple reason that there is no "decision on the application for variation".

21. It will be apparent that, in the circumstances of the present case (and others like it), the respondent cannot be said to have failed to contemplate taking a removal decision, in the manner described in paragraph [101] of the judgments in Sapkota . On the contrary, the criticism is that she has purported to make the decision too soon and, as a result, has not made a removal decision at all. Mr Deller did not seek to submit that the removal decision contained in the "combined" document of 27 July 2009 fell to be regarded as, in some sense, inchoate, until the document had been given to the appellant. In any event, any such proposition founders on the clear wording of s.47(1).

22. The result is that, notwithstanding the respondent's obvious and communicated intention or "contemplation" to make a removal decision in respect of the appellant, such a decision remains unmade, and was unmade at the date of the hearing before the Immigration Judge. As the Guidance

correctly observes, a s.47 decision cannot be made once an appeal against the decision regarding leave has been made.

23. It would clearly be possible for Parliament to amend s.47 of the 2006 Act, so as to enable the respondent to make simultaneous decisions, in cases of the present kind. Unless and until that is done, however, a s.47 decision can be made only once the variation decision has been given to the person concerned, compatibly with the Immigration (Notices) Regulations 2003. A s. 47 decision cannot be made once the person concerned has initiated an appeal against the variation decision. For the reasons already indicated, it would appear that a One-Stop Notice under s.120 cannot be issued with the variation decision. In practice, therefore, the present usefulness of s.47 is highly questionable.

24. The fact that I accept Mr Malik's submissions regarding the ambit of s. 47 does not, however, mean that the immigration decision against which the appellant appealed – to refuse to vary leave – inevitably falls to be treated as not in accordance with the law. That is the result for which Mr Malik contended, relying on Sapkota . But, as the Upper Tribunal has held in Patel (consideration of Sapkota – unfairness) India [2011] UKUT 484 (IAC), the correct interpretation of Sapkota , Mirza and the other relevant authorities of the Court of Appeal, is that a failure to take the two immigration decisions together or nearly together is not invariably unlawful in the absence of special justification [30] [31]. What is likely to be decisive is whether the Secretary of State has, in fact, addressed the paragraph 395C removal factors when taking the variation decision and whether the judge at first instance has done so on appeal.

25. In the present case, that is, of course, exactly what happened (see paragraphs 4 and 5 above). The paragraph 395C factors were specifically considered by the respondent and, on appeal, by the judge. The fact that the respondent did so on the mistaken assumption that he was also making a valid decision under s. 47 does not mean that one should ignore the respondent's consideration, or the judge's consideration. At paragraph 33(iii) of Patel, the Tribunal held that:

"The fact that no formal s. 47 decision has been made has had no impact on the reasoning of the decision maker who explains clearly that if there is no voluntary departure following the determination of the appeal, the family will be removed".

26. By analogy with paragraph 33(iii), the fact that, in the present case, no valid s. 47 decision has been made has had no impact on the reasoning of the respondent or the judge, as regards the paragraph 395C factors, which were properly addressed by both, with the judge re-exercising the discretionary decision. Similarly, the fact that, as in Patel, the opportunity to make a s. 47 decision has passed did not invalidate the consideration of paragraph 395C, as it applied to the facts of the appellant's case.

27. What has emerged from the analysis in the present case is that the respondent's assumption that the two immigration decisions can be made together is wrong and that the window of opportunity for making a separate s. 47 decision is, in practical terms, illusory. But, dismal as they are, these conclusions, in my view, serve to underscore the correctness of the analysis in Patel of the effect of the majority judgments in Sapkota . If, contrary to Patel , the effect of Sapkota was (except in some undefined special category of cases) to make any variation of leave decision unlawful if not accompanied or soon followed by a removal decision, then the Court of Appeal has, in effect, required the respondent to do what is, in practical terms, impossible.

28. Mr Malik did not seek to submit that the consideration of paragraph 395C by the judge was flawed on its own terms. His entire submissions on behalf of the appellant were directed to securing the finding that the variation decision was not in accordance with the law because it was unaccompanied or not shortly followed by a removal decision. I can, in any event, see nothing wrong with the judge's decision in that regard or on any other material matter, including Article 8.

Decision

29. The determination of the Immigration Judge does not contain an error of law, such as to make it appropriate for that determination to be set aside. The appellant's appeal is accordingly dismissed.

Signed Date

Upper Tribunal Judge Peter Lane