R (on the application of Prathipati) v Secretary of State for the Home Department (discretion – exceptional circumstances) [2018] UKUT 00427 (IAC)

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Leeds Combined Court Centre,

1, Oxford Row, Leeds LS1 3BG

Judgment handed down at:

Civil Justice Centre,

1 Bridge Street West

Manchester M60 9DJ

Heard on: 10 October 2018
Handed down on: 26 October 2018

BEFORE

THE HONOURABLE MR JUSTICE KERR

Between

SNEHA SUDHA PRATHIPATI Applicant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT Respondent

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The **Applicant** appeared in person

Mr Colin Thomann (instructed by Government Legal Department) for the **Respondent**

1) The Secretary of State has a discretion to allow an application for leave to remain to succeed even if made outside the 28 day period of grace referred to in paragraph 319C(j) of the Immigration Rules, provided that supporting evidence of exceptional circumstances is produced at the same time as making the application. The temporal requirement must, to avoid unfairness and absurdity, be read as subject to the caveat that it cannot rigidly be applied if ignorance of what constitutes the exceptional circumstances makes it impossible to comply with that requirement.

2) The efficacy of administrative review as an alternative remedy to judicial review depends on the ability of reviewers to detect and reverse decisions flawed by error at the initial stage. The more narrowly the remedy is circumscribed, the greater the risk that it may fail to do so.

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APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

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THE HONOURABLE MR JUSTICE KERR:

Introduction:

1.
I am the seventh judge to consider this claim for judicial review of the refusal of the respondent on 21 August 2015 (upheld on administrative review on 17 September 2015) of the applicant's application for leave to remain as the unmarried partner of a Tier 2 Migrant. The delays that have beset this case occurred because permission to apply for judicial review was at first refused at an oral hearing but was eventually granted by the Court of Appeal over two years later.

2.
The Court of Appeal referred the case back to this tribunal for the substantive hearing, which took place before me in Leeds on 10 October 2018. The parties agreed that the applicant's application for leave to remain was considered on a basis that was unsatisfactory in two respects. First, the applicant was unaware that she would be regarded as an overstayer, because a decision of this tribunal did not reach her. Second, documents sent to the respondent, on which she relied, were not considered by the respondent.

3.
The question for me is whether those two points, or either of them, make the respondent's decision unlawful, as contended by the applicant who represented herself with eloquence and courtesy; or whether, as contended by the respondent ably represented by Mr Thomann of counsel, those shortcomings in the decision making process did not result in any unfairness to the applicant and do not make the decision challenged unlawful.

Facts:

4.
The applicant is an Indian national, born in June 1990. She came to this country with a Tier 4 (General) Student Migrant visa, valid until 30 October 2013 and then extended until 31 May 2014. The day before it expired she applied for a further extension, on the same basis, but that was rejected in July 2014, with a right of appeal which she exercised.

5.
The First-tier Tribunal (FTT) rejected her appeal, in a written decision dated 24 November 2011. The judge decided that the applicant had not made her case that she had adequate funds; a loan agreement she produced was not in her name. Her case had not been adequately made. On 2 December 2014, she applied for permission to appeal against that decision to the Upper Tribunal (Immigration and Asylum Chamber).

6.
While awaiting the outcome of that application, on 28 January 2015 she moved from [ ], Newcastle-upon-Tyne, to different accommodation at [ ], also in Newcastle. The same day, her then solicitors wrote to the FTT by fax, notifying the change of address. An authority to act signed by the applicant was enclosed. The fax number used (ending 987) was the one designated as "IAFT4 (Permission to Appeal)" at the time, in the FTT's guidance for users.

7.
On the same day, the solicitors emailed the customer services email address of the "IAC" (Immigration and Asylum Chamber) of the FTT, notifying the change of address but without the signed authority to act. On 2 February 2015, IAC emailed back saying that the request to log the change of address could not be processed without a signed written notification of authority to act as legal representative. The

email also gave an address and a different fax number, ending 895, designated as for “General Correspondence”.

8.
On 3 February 2015, the solicitors repeated their request, enclosing the signed written authority to act but sending it to the “Permission to Appeal” fax number, ending 987. They did not, as they should have done, fax that letter and the signed written authority to the “General Correspondence” fax number, ending 895. So the change of address was not registered with the FTT.

9.
Then, on or before 19 February 2015, the FTT refused the application for permission to appeal. Notification of the decision was sent by post to the applicant’s old address at [ ], together with reasons for the decision which I have not seen. The applicant did not receive the notification letter, having moved to [ ]. The letter also mentioned the right to apply to the Upper Tribunal for permission to appeal.

10.
The FTT’s decision has been assumed by everyone in this case to have been validly promulgated and effective and binding on the applicant from 19 February 2015, even though the applicant knew nothing about it until months later. The decision was, indeed, sent to the address at [ ] which was the only address accepted by the FTT as an address of record for the applicant.

11.
On that assumption, on expiry of the time limit for making a further application to the Upper Tribunal for permission to appeal, the applicant became “appeal rights exhausted”. The time limit expired on 6 March 2015. The consequence of that was she was, and is, regarded by the respondent as having become an “overstayer” from that date. She did not know this at the time and nor did her solicitors.

12.
On 18 June 2015, having heard nothing, the solicitors emailed the IAC customer services email address referring back to the previous correspondence, expressing concern that “you may have sent correspondence to our client’s previous address” and asking what was the status of “our client’s appeal (IAFT-4) and when we can expect to receive a decision on same”. That email was not copied to the respondent. The FTT did not reply to it.

13.
The applicant, not knowing she would be regarded as an overstayer, decided her best strategy was to withdraw her application for permission to appeal and instead to make a fresh application for leave to remain as the unmarried partner of a Tier 2 Migrant. On 14 July 2015, her solicitors wrote to the FTT, again to the fax number ending 987, saying they had “instructions to withdraw her appeal with immediate effect”. This must be taken to refer to the application for permission to appeal that had already been refused.

14.
There is no evidence that the FTT ever responded to this request, which from its perspective would be academic since the application had already been refused, though it was evident from the request to withdraw that the solicitors were unaware of that. The applicant, under the same misapprehension, applied on or about 12 July 2015 for leave to remain as the unmarried partner of a Tier 2 Migrant. She made an appointment to attend personally, paying a fee for the “premium service”.

15.
On 15 July 2015, she attended the appointment with her partner. She met the respondent's case worker, Mr Christopher Duncan Wood. She produced documents to show a subsisting relationship with her partner of at least two years' duration. These are the documents in the first exhibit to her witness statement. The documents were a tenancy agreement, bank statements, joint account bank statements, utility bills, photographs, letters, appeal letters and the solicitors' letter seeking to withdraw her appeal.

16.
The case worker went through the documents and asked the applicant to provide further documents, to show a genuine and subsisting relationship covering the period from February to August 2013. He said nothing about the applicant being an overstayer. I infer that he may not have known about the FTT's decision and may not have checked the position at the time. But the respondent as an organisation, the Home Office, knew of it then or soon afterwards, because it relied on the FTT's decision just over a month later.

17.
The applicant provided the requested documents by post, about a week after the appointment. These are the documents in the second exhibit to her witness statement. The documents dated from the period from February to August 2013, to which reference had been made by Mr Duncan Wood, the case worker. They were prints and photographs from gmail conversations, a car rental receipt, uploads and posts on Facebook, telephone bills and further photographs and letters.

18.
On 21 August 2015, the respondent wrote to the applicant refusing her application. The refusal letter was in the name of Mr Duncan Wood. Among the reasons for the decision was the news to the applicant that her permission to appeal application to the Upper Tribunal "was refused on 19 February 2015, and your Appeal Rights were exhausted on 06 March 2015". That was how the applicant found out about the FTT's decision. Mr Duncan Wood went on to explain that the application had been made 130 days after expiry of the applicant's leave to remain and was therefore refused.

19.
The reasons also included reference to the first tranche of documents, but not the second tranche which Mr Duncan Wood had himself requested. He went on to say in the decision letter that "[b]ased on the above", i.e. based on the first tranche of documents, "it is not accepted that you have provided evidence to show that you have been living together in a relationship akin to marriage for 2 years prior to your application on 15 July 2015".

20.
The decision letter included advice that the applicant could seek an administrative review if she thought an error had been made. She sought administrative review. The application was submitted online on 3 September 2015. Her solicitors helped her complete the part of the form giving details of why she contended that the respondent had "applied the Immigration Rules incorrectly". The solicitors addressed each of the two grounds of refusal separately.

21.
They explained the misapprehension about the status of the application for permission to appeal and the request to withdraw the appeal made under that misapprehension; and pointed out that the case worker had been shown the letter requesting withdrawal. They said the case worker should have "considered the background and considered exercising discretion for the delay", given that the

applicant did not know she had stayed beyond the 28 days after exhaustion of appeal rights that are normally disregarded.

22.
The solicitors also pointed out that the second tranche of documents had been returned with the refusal letter, proving that they had been received after being sent by recorded delivery. Despite that, they pointed out, it was clear from the refusal letter that the second tranche of documents "was not considered at all". Yet the evidence sent "clearly demonstrates that the relationship had been subsisting for the required time …".

23.
The administrative review application did not succeed. The response was a letter of 17 September 2015 stating that the applicant should leave the United Kingdom, or she would be liable to be detained and removed and could be prosecuted. The reasons given restated that the applicant had become an overstayer after the FTT's decision and that the applicant had not demonstrated the necessary two year relationship with her partner. The reasons did not engage with the points made by the solicitors in the administrative review application.

24.
They included repetition of the statement that the FTT's decision meant the applicant was "appeal rights exhausted" from 6 March 2015. They stated that the respondent had "no evidence that your appeal was withdrawn". Further, the reasons stated, based on the first tranche of documents only – there was no mention of the second tranche – that the applicant had not shown the necessary two year relationship. The result was therefore that the original decision was maintained.

25.
After that, correspondence and the present judicial review claim ensued. The next few years saw the matter proceed through twists and turns at the permission stage. This took an unusually long time, as I have said. Permission was at first refused in this tribunal but was eventually granted by Singh LJ and Henderson LJ on 17 May 2018, for reasons given in Singh LJ's judgment given that day, with which Henderson LJ agreed.

Law and Policy Framework:

26.
At the relevant time and so far as material here, paragraph 319C of the Immigration Rules provided that for a person to qualify for entry clearance or leave to remain as the unmarried partner of a "Relevant Points Based System Migrant":

"… an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance or leave to remain will be granted. If the applicant does not …. the application will be refused… .

….

(c) An applicant who is the unmarried …. partner of a Relevant Points Based System Migrant must also meet the following requirements: …

(iii) the applicant and the Relevant Points Based System Migrant must have been living together in a relationship similar to marriage … for a period of at least 2 years.

…

(j) The applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days will be disregarded."

27.
I was shown relevant policy guidance dating from November 2015 which, I was assured, was not materially different in July to September 2015 when the applicant's case was considered. On the topic of applications made "after expiry of last period of leave", paragraph 37 stated, so far as material:

"Applications for leave to remain under the Points Based System will fall for refusal if you have overstayed for more than 28 days on the date of application, unless there were exceptional circumstances which prevented you from applying within the 28 day period. The 28 day period of overstaying is calculated from the latest of:

•
....

•
the end of any extension of leave under sections 3C or 3D of the Immigration Act 1971, or

•
.... .

If there are exceptional circumstances which prevented you from applying in time you must submit evidence of the exceptional circumstances with your application. The threshold for what constitutes 'exceptional circumstances' is high and will depend on the individual circumstances of the case, but for example may include delays resulting from unexpected or unforeseeable circumstances such as the following:

•
serious illness ....

•
travel or postal delays ...

•
inability to provide necessary documents. This would only apply to exceptional or unavoidable circumstances beyond your control, such as the Home Office being at fault in the loss of, or delay in returning, travel documents, or delay in obtaining replacement documents following a loss as a result of theft, fire or flood (where supported by evidence of the date of loss and the date replacement documents were sought)."

28.
The wording of the provision has since changed so as to substitute a requirement to show "good reasons" rather than "exceptional circumstances", but at the relevant times in 2015 the wording was as set out above.

29.
Paragraph 319C of the Immigration Rules was considered by Nicholas Padfield QC, sitting as a deputy judge of the High Court, in R (Binaura) v. Secretary of State for the Home Department [2016] EWHC 1578 (Admin). The applicant had leave to remain as the dependent spouse of a Tier 4 (General) Student. When her leave to remain expired, she made a further application for leave to remain, within

28 days of her leave expiring. When that was refused (without a right of appeal), she applied again, 183 days after expiry of her leave to remain.

30.
The Secretary of State refused that application on the ground that she had overstayed by more than 28 days when she made the application. On administrative review, the secretary of State's decision was maintained. Having obtained permission to bring a judicial review, Ms Binaura argued that her application had been refused "solely because she was an overstayer" by more than 28 days, i.e. outside the 28 day period provided for at paragraph 319C(j) of the Immigration Rules: see the judgment at [13].

31.
The Secretary of State, it was argued, should have exercised a "discretion" and had, among other failings, omitted to follow her "published policy" (ibid. at [16]). The deputy judge held that the Secretary of State had no discretion. The rule was prescriptive; while an overstay of 28 days or less would be disregarded, an overstay of more than 28 days was necessarily fatal to an application.

32.
The judge rejected an argument that the rule was too rigid and should be applied flexibly and relaxed where fairness so required. Mandatory rules were consistent with high authority and not unfair or ultra vires . The principle that discretion must not be fettered by rigidity in applying a policy does not apply where the rule being applied contains no discretion. The only remedy was to make a fresh application outside the Immigration Rules.

33.
The judge also dismissed an argument that the Secretary of State had failed to follow her established policy by failing to consider the guidance on "exceptional circumstances". The argument did not assist Ms Binaura because the policy guidance provided that an applicant must submit evidence, with her application, of the exceptional circumstances precluding her from applying within the 28 day period provided for in paragraph 319C(j).

34.
Ms Binaura had not done so: see the judgment at [32]-[36]. This was a "mandatory requirement" (ibid. at [33]). The Secretary of State was only under a duty to consider the question of exceptional circumstances if the applicant had fulfilled the requirement to supply evidence of them at the point of submitting the application. The guidance provided that the evidence must be supplied "at the same time as her application for leave to remain is made" [36].

35.
I also need to refer to the remedy of administrative review. In 2014 and 2015, measures were introduced to reduce substantially the scope of immigration related decisions against which there was a right of appeal. In many cases where the right of appeal was stopped, a right to seek an "administrative review" of a decision was substituted. The remedy of administrative review was described at the time as a means of correcting simple errors.

36.
It is common ground that in this case, the decision challenged by the applicant was an "eligible decision" susceptible to administrative review and, indeed, the applicant invoked that remedy. When her case was considered, the applicable provisions were, then as now, set out in an Appendix "AR" (administrative review) to the Immigration Rules. Paragraph AR2.1 provided that administrative

review “is the review of an elegible decision to decide whether the decision is wrong due to a case working error ”.

37.
A case working error is “an error in decision making listed in paragraph AR3.4…”. There is no paragraph AR3.4, but the parties agreed that the decision making covered by administrative review covered the applicant’s case. A reviewer could not consider any evidence that was not before the original decision maker “except where evidence that was not before the original decision maker is submitted to demonstrate that a case working error as defined in paragraph AR2.11(a), or (b) has been made” (AR2.4).

38.
So you have to look at AR2.11(a) and (b) to see in what circumstances fresh evidence can be looked at by the reviewer. He or she can do so where the “case working error” arises because the original decision maker’s decision on various specific bases involving false representations (not relevant to this case) “was incorrect” ((a)); or, pertinently for this case, “where the original decision maker’s decision to refuse an application on the basis that the date of application was beyond any time limit in these Rules was incorrect” ((b)).

39.
The relevant provision here is (b), because of the limit of 28 days for disregard of overstaying. I was also shown Home Office guidance dating from April 2015, on the subject of administrative review. This replicates the effect of the rules on administrative review, which I have just quoted. Examples are then given in the guidance of particular types of case working errors that might be encountered. None of them fits the facts of the present case.

Issues, Reasoning and Conclusions:

40.
The applicant, Ms Prathipati, submitted that the respondent failed to consider the reasons for her overstaying, which occurred without her knowledge, was inadvertent and unintentional. She could not have known that her appeal rights were exhausted in March 2015 and, had she known, she would have taken steps to preserve her rights and not allowed the overstay to happen.

41.
She pointed out that the letter withdrawing the appeal had been explained to the case worker at the appointment on 15 July 2015 and the case worker had said nothing about the earlier refusal of permission to appeal, for reasons that are unclear. She had only discovered the refusal of permission on receipt of the refusal letter of 21 August 2015. If Mr Duncan Wood, the case worker, had mentioned the point at the appointment on 15 July, she would have been able to present the evidence in support of her “exceptional circumstances” straight away.

42.
She added that, on the administrative review, the respondent did not consider properly the evidence either in relation to the overstay and the exceptional circumstances in which it occurred, or in relation to her subsisting relationship with her partner, documented in the unconsidered second tranche of documents in addition to the first tranche of documents, said to be insufficient. The case made in the online application for administrative review was simply ignored.

43.

The applicant pointed out that she had made enquiries of her former solicitors about the reason why her new address was not substituted for her old address on the FTT's system. She had done everything she could to discover the status of appeal. It was not realistic or fair to say that she could have withdrawn her application for permission to appeal earlier; she had no reason to do so. If the appeal went against her, she would have up to 28 days in which to make a fresh application.

44.
In the event, she did not wait for the outcome of the FTT proceedings, once she had tried and failed to discover the true position. The faxes that were sent by the solicitors had been sent to the "IAFT4", "permission to appeal" department as indicated by the FTT and "if that's not where we [were] supposed to send the fax they could have reverted with some sort of communication or at least they shouldn't be accepting it".

45.
For the respondent, Mr Thomann did not dispute the applicant's proposition that the second tranche of documents was overlooked. He accepted that this was a procedural flaw. He accepted also the applicant's factual case that she had been unaware of the outcome of the FTT proceedings until she received the decision letter. He said that despite all that, the decision was not unlawful because there was no possibility of the applicant being able to establish the necessary "exceptional circumstances".

46.
He pointed out that, according to the mandatory guidance, to show exceptional circumstances, an applicant for leave to remain had to produce the supporting evidence at the same time as making the application for leave to remain. Without such evidence, there could be no exceptional circumstances that could, according to the guidance, confer a discretion to allow the application to succeed even if made outside the 28 day period of grace referred to in paragraph 319C(j) of the Immigration Rules.

47.
Mr Thomann's argument was that the mix up over fax numbers was the fault of the applicant's solicitors and could not qualify as exceptional circumstances since it was a fault attributable to the applicant. Furthermore, as demonstrated by the Binaura case, the regime under paragraph 319C created "bright line" rules admitting of no discretion except as provided for in the mandatory guidance, which required to be done what was not done in this case: producing the evidence supporting special circumstances at the same time as making the application for leave to remain.

48.
Mr Thomann submitted that where an application for leave to remain is made outside the 28 day period of grace, even if the applicant does not know that period has expired, and the application is made without any evidence to support a case of exceptional circumstances, the respondent is not required to consider exercising any discretion. It does not help the applicant that ignorance of the evidence supporting the special circumstances is what constitutes the special circumstances.

49.
He went on to submit that at the administrative review stage, the review process is confined to remedying case working errors. At that stage, the reviewer is presented with a decision for review which was, at the time, made without evidence supporting special circumstances for going beyond the 28 day period. Accordingly, Mr Thomann argued, no case working error was made and the reviewer was justified in upholding the decision on the ground of overstay exceeding 28 days.

50.

Therefore, Mr Thomann submitted, the reviewer's adverse decision was correct even though he or she wrongly overlooked the second tranche of documents supporting the existence of the two year relationship. That defect did not matter because there was no prospect of the 28 day threshold being disregarded. That meant the applicant was without a remedy, but that was the fault of her solicitors, a fault attributable to the applicant herself.

51.
As he put it in his skeleton argument: "regardless of the question whether the matters advanced by the Applicant amounted to exceptional circumstances, the Applicant simply did not submit any of this evidence … to the Secretary of State at the time of the impugned decision in August 2015; the failure to exercise discretion was not, it is clear, unlawful". The regime is rigid, he said; the applicant's remedy here is to make a fresh human rights based application.

52.
I come to my reasoning and conclusions. The main grounds of challenge are, first, that the manner in which the application was determined was unfair to the applicant; and second, that the respondent failed to exercise the discretion to recognise exceptional circumstances which would justify a disregard of an overstay lasting longer than 28 days. As will be seen, these two grounds of challenge are linked.

53.
The essence of the applicant's case was helpfully summarised as follows in the judgment of Singh LJ granting permission to appeal, at [29]:

"The Secretary of State has, it is conceded, a discretion. That discretion must be exercised in accordance with her publicly pronounced policy …. . Further, it is submitted that there was an acknowledged failure even to consider exercising that discretion. For that reason it is straightforwardly submitted that the outcome of a reconsideration if there were a correct self direction as to the law, cannot be anticipated by the court or by the Upper Tribunal."

54.
It is noteworthy that the reference to a "discretion" in the respondent's guidance is not found in the Immigration Rules themselves. The text of paragraph 319C contains no reference to any discretion to waive the maximum 28 day overstay disregard. But despite the mandatory language in which paragraph 319C is framed (as pointed out in the Binaura case), the guidance recognises that the inflexibly worded rules must be, to a degree, treated as including an element of flexibility in their application.

55.
Thus, while the rules themselves say nothing about such "exceptional circumstances", the guidance does. Examples are given in it of what might constitute such circumstances. They are stated to be examples, not an exhaustive list. The guidance does also state that evidence to support a case of exceptional circumstances must be presented at the time when the application is made.

56.
In the present case, the time when the application was made was very shortly before 15 July 2015, the date on which the applicant and her partner went to see the case worker, Mr Duncan Wood. Among the documents presented to him that day, potentially supporting a case of exceptional circumstances, was the letter purporting to "withdraw" the application for permission to appeal. That letter was, on its face, inconsistent with the applicant being aware of having overstayed for more than 28 days.

57.
Mr Duncan Wood did not provide a witness statement and nor did anyone else from the respondent. I am therefore left unaware of when and how he, or anyone within the organisational structure of the respondent, became aware of the outcome of the application for permission to appeal against the FTT's decision. It is likely that someone within the Home Office had access to a record of the decision from shortly after 19 February 2015, when it was made. Just as it was sent to the applicant (at her old address), so it was presumably sent to the respondent.

58.
At any rate, Mr Duncan Wood had become aware of it by 21 August 2015, if not earlier. At the oral hearing of this application, I asked Mr Thomann if he could shed light on how and when the respondent, as an organisation, became aware of the FTT's decision. He was unable to do so, being without instructions on the point. In the absence of other evidence, I infer that the respondent as an organisation was probably on notice of the decision from February 2015.

59.
But even if no one at the respondent had become actually aware of the decision by 15 July 2015, Mr Duncan Wood on that date had the letter purporting to withdraw the appeal, which was inconsistent with what he undoubtedly knew by 21 August, namely that the FTT had determined the matter back in February. Yet, the letter purporting to withdraw the appeal was not treated as evidence supporting a case of exceptional circumstances.

60.
The second flaw in the decision making process is agreed: the second tranche of documents was overlooked, both in the first decision and on administrative review. Mr Thomann says that does not matter because there was no possible case on exceptional circumstances; the evidence supporting it was not produced at the time the application was made. So the question for me is whether Mr Thomann is correct and the decision must stand for that reason although the second tranche of documents was overlooked.

61.
In my view, Mr Thomann's submission is incorrect and the decision was unlawful and cannot stand. The categories of exceptional circumstances are not closed. In the guidance, examples are given of what could constitute such circumstances, but they are only examples and each case depends on its facts. In the present case, it was in principle a question of fact and degree whether a case of exceptional circumstances could be made out.

62.
In my judgment, it is far from obvious that the substance of an exceptional circumstances argument would be doomed to fail. In this respect, I respectfully disagree with the learned judge of this tribunal who initially refused permission to proceed. He thought such a case was doomed to fail because of the fault of the applicant's solicitors in failing to establish themselves on the record.

63.
It is true that the solicitors appear to bear (though I emphasise that I have not heard their side of the story) responsibility for failing to send correspondence to the correct "General Correspondence" fax number, to which their attention was drawn. But they were not solely responsible for the breakdown in communications. The "IFT4" fax number denoting "permission to appeal" was, initially, a not unlikely candidate for the correct fax number since the applicant was applying for permission to appeal.

64.
Some responsibility lies with the administration of the FTT for not responding even when sent correspondence later that was plainly inconsistent with the applicant being aware of the FTT's decision; and for providing a bewildering mix of email and fax numbers which a person attempting to communicate has to navigate, not an easy task. Some responsibility lies with the respondent for failing to impart to the applicant the FTT's decision which the respondent, but not the applicant, possessed.

65.
In my judgment, the fault of the applicant's solicitors was a factor to be considered in considering whether the case was one of exceptional circumstances, but was not a necessarily fatal blow to the applicant's case that the circumstances were indeed exceptional. Furthermore, it was procedurally unfair of the respondent, as an organisation, not to alert the applicant to the FTT's decision at any time before 21 August 2015, when Mr Duncan Wood certainly knew about it.

66.
If the applicant could be fixed with constructive knowledge of the FTT's decision without actual knowledge of it, then so could the respondent unless a double standard is to be applied. Furthermore, when the respondent became actually aware of it (whenever that was), and when (at some point on or before 21 August 2015) Mr Duncan Wood personally became aware of it, the respondent and he kept their counsel and did not alert the applicant to the decision and give her the opportunity to comment on the position.

67.
Instead, the applicant was "ambushed" with the FTT's decision in the letter of 21 August 2015. That was not consistent with ordinary standards of plain dealing and procedural fairness required under our administrative law. Mr Duncan Wood made his decision based on factual material of which the applicant was ignorant, and of which he either knew or should (based at least on the letter purporting to withdraw the appeal) have known she was ignorant.

68.
It is true that, in a literal sense, the evidence supporting exceptional circumstances was not produced by the applicant at the same time as her application for leave to remain was made, as the guidance states must be done. The application for leave to remain was made a few days before the appointment with Mr Duncan Wood, at which the letter purporting to withdraw the appeal was produced. But the temporal requirement must, to avoid unfairness and absurdity, be read as subject to the caveat that it cannot rigidly be applied if ignorance of what constitutes the exceptional circumstances makes it impossible to comply with.

69.
The guidance is indeed expressed in mandatory terms and was described as mandatory in the Binaura case; but it is, nonetheless, guidance not statute. It must be interpreted and applied in a manner that does not destroy the respondent's ordinary obligation to observe procedural fairness. Unless the caveat just mentioned is read into the guidance, its operation may be oppressive and procedurally unfair.

70.
In the present case, if the applicant had been capable of complying with the temporal requirement in the guidance, it is likely that the circumstances would not have been exceptional; she would have

been aware of the FTT's decision and would probably not have needed an extension of time beyond the 28 day period of grace.

71.
I conclude that it was incumbent on the respondent to consider the question of exceptional circumstances and to exercise its discretion; and that it failed to do so. The Binaura case is not authority to the contrary. In that case, there was no ignorance of what made the circumstances arguably exceptional.

72.
It is no answer to say that the applicant has another remedy because she can make a fresh application for leave to remain, on human rights grounds. The right to make such an application says nothing about the lawfulness of the manner in which her 2015 application was determined.

73.
It is necessary, finally, to consider also the administrative review decision. Mr Thomann, sensibly, accepted that the applicant's judicial review challenge, expressed as a challenge to the first decision made on 21 August 2015, also embraced, by implication, a challenge to the administrative review part of the process and the maintaining of the decision on review.

74.
As Singh LJ pointed out when granting permission to proceed in this case, the remedy of administrative review is clearly designed, among other things, to create a swift and economic alternative remedy which may avoid the need for protracted and expensive judicial review proceedings. It is a remedy which would, other than in exceptional cases, need to be invoked as an alternative remedy before embarking on judicial review.

75.
However, the efficacy of administrative review as an alternative remedy depends on the ability of reviewers to detect and reverse decisions flawed by error at the initial stage. The more narrowly the remedy is circumscribed, the greater the risk that it may, as in this case, fail to do so. Here, the reviewer was presented with a clear and cogent explanation of what had gone wrong but, instead of correcting the errors, compounded them.

76.
For those reasons, the decision to refuse leave to remain, made on 21 August 2015 and maintained on administrative review on 17 September 2015, must be quashed. The application for leave to remain will be remitted to the respondent for reconsideration. I will deal with any consequential matters arising from this judgment on the basis of brief written submissions, which must be copied to the other party. I am grateful to the applicant Ms Prathipati, and Mr Thomann, for their helpful contributions.