



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/09082/2013

THE IMMIGRATION ACTS

**Heard at Birmingham
on 28th October 2013**

**Determination
Promulgated
On 30th October 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**NANCY MWENYA CHASHI
(Anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bircumshaw of Coventry Law Centre.

For the Respondent: Mr Smart – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Hawden-Beal promulgated on 5th July 2013 in which she dismissed the appellant's appeal against the refusal to vary her leave under paragraph 245ZX of the Immigration Rules, purported to allow the appeal in relation to section 47 Immigration Asylum and Nationality Act 2006, and make no findings on the appellant's human rights claim. Permission to appeal was refused by a Judge of the First-tier Tribunal but granted on a renewed application by Upper Tribunal Judge C Lane on the basis it was arguable that the Judge was wrong in law to refrain from determining the appeal on Article 8 grounds.
2. I find the Judge erred in law in relation to the section 47 and human rights issues although no legal error is proved in relation to the

dismissal of the appeal under the Immigration Rules. The Judge allowed the section 47 appeal but notes at paragraph 22 of the determination that the removal direction made pursuant to section 47 was withdrawn by the Presenting Officer at the hearing. There was therefore no extant immigration decision permitting the Judge to allow the appeal.

3. In relation to the human rights element, the appellant claims she has protected rights in the United Kingdom and submissions were made in relation to both her private and family life which is an issue raised in the original grounds of appeal. In paragraph 22 of the determination the Judge states "Since there are no removal directions before me the appellant is not at imminent risk of removal and therefore, although the appellant's representative addressed me on her Article 8 rights in so far as her husband and her immediate family are concerned, I have not considered those rights, considering it to be more suitable for a Tribunal in the future to consider if and when there is an appeal against any removal directions".
4. This is an area in which there has been a divergence of opinion, on the one hand it is thought by some that if there are no removal directions there can be no interference with an individual's protected rights and therefore Article 8 will not be engaged. There is, however, a line of authorities including JM v Secretary of State for the Home Department [2006] EWCA Civ 1402 in which the Court of Appeal stated on a variation appeal it was appropriate to consider human rights, SI (variation/curtailment - human rights ground) Pakistan [2011] UKUT 00118 in which the Tribunal held that on appeal against a refusal to vary leave or decision to curtail leave or decision to vary leave such that an individual's leave is effectively curtailed, there is a right of appeal on human rights grounds, and the case of MDB and others v Secretary of State for the Home Department [2012] EWCA Civ 101 in which the Court of Appeal when deciding whether the appellant was entitled to a document certifying permanent residence status, notwithstanding there being no decision to remove, noted it was agreed by both parties that the outstanding issue concerning Article 8 ECHR be remitted.
5. It was accepted before me that the Article 8 element should have been considered by the Judge who could have made appropriate findings in relation to the same. The Judge did not and accordingly there has been no consideration of this element of the appeal by the First-tier Tribunal. In accordance with the Senior Presidents guidance it was agreed that the appropriate way to proceed was for the determination to be set aside in relation to the Article 8 ECHR ground and for the appeal to be remitted to the First-tier Tribunal for a proper hearing relating to Article 8 ECHR. The section 47 decision is set aside but no further order is required as there is no extant removal direction at this time.

6. The following directions shall apply to future conduct this appeal:

Directions

i. The appeal shall be remitted to the First-tier Tribunal sitting at Sheldon Court Birmingham for the purposes of a hearing limited to consideration of Article 8 ECHR only.

ii. The hearing shall take place on a date be advised by Resident Judge Renton subject to the operational requirements of Sheldon Court, Birmingham but, in any event, not before 24th November 2013. It is recorded that both parties have indicated they will accept short notice of hearing. The appeal shall be heard by a salaried judge of the First-tier Tribunal nominated by Resident Judge Renton. Judge Hawden-Beal is excluded. Time estimate three hours (appellant plus two witnesses).

iii. Bundles containing all the evidence to be relied upon shall be filed and served no later than 4PM 14th November 2013. Witness statements contained in the bundle shall stand as the evidence in chief of the maker. Supplementary questions shall not be permitted without permission of the trial judge for which an application explaining the nature of the questions, their relevance to be appeal, and why the evidence was not included in the witness statements is required.

iv. No interpreter is required.

Decision

7. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge relating to Article 8 ECHR. I remit the appeal to the First-tier Tribunal in accordance with the directions above.**

Anonymity.

8. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) as there was no application for anonymity and such an order is not warranted on the facts.

Signed.....
Upper Tribunal Judge Hanson
Dated the 28th October 2013