



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/20795/2012

THE IMMIGRATION ACTS

Determined on the papers at Manchester
On 21 August 2013

Determination Promulgated
On 28 August 2013

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

VICENCIO JALDO MENGULLO

Claimant

DETERMINATION AND REASONS

1. The appellant before the First-tier Tribunal, Mr Mengullo, is referred to here for the sake of clarity as the claimant. For the same reason, the Secretary of State who is the appellant in the proceedings before the Upper Tribunal is referred to as the respondent.
2. The respondent appeals with permission against the determination of First-tier Tribunal Judge J M Holmes promulgated on 13 November 2012, allowing the claimant's appeal against the decisions of the Secretary of State made simultaneously on 13 September

2012 to refuse to grant him further leave to remain and to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The claimant is a citizen of the Philippines born on 6 May 1966. He was granted leave to enter the United Kingdom on 18 June 2007 as a work permit holder until 6 June 2012. On 22 May 2013, he applied for indefinite leave to remain, an application refused on 13 September 2012 by reference to paragraphs 134, 276ADE and Appendix FM of the Immigration Rules.
4. In addition to the decision to refuse to vary the claimant's leave to remain, the respondent took a decision on the same day to remove the claimant from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006.
5. The claimant appealed against the decision and on 13 November 2012 the matter came before First-tier Tribunal Judge J M Holmes who found that the decision to refuse to vary the claimant's leave to remain had been considered on the basis of paragraph 134 as amended on 20 July by Cm 8423 [5] and by paragraphs 276 ADE and Appendix FM, introduced by HC 194, despite the changes introduced by the latter being subject to transitional provisions [4]. He concluded that as the respondent had not applied the correct immigration rules, the decision was not in accordance with the law.
6. Judge Holmes also concluded [7] that the section 47 decision was unlawful, relying on Patel v SSHD [2012] EWCA Civ 741 and Ahmadi (section 47 decision: validity; Sapkota) [2012] UKUT00147, as it had had been made at the same time as the decision to refuse to vary leave.
7. The Judge allowed the appeals on the basis that the decisions by the Secretary of State were not in accordance with the law [8]. He also made a fee order in favour of the respondent.
8. The respondent appealed against the decisions on the basis that the judge had made a material error of law in concluding that simultaneous service of a section 47 decision rendered the entire "decision" unlawful; that the variation decision was not affected by the absence of a lawful removal decision; and, that the judge should have dealt with the substantive merits of the appeal against the variation decision.
9. Permission to appeal to the Upper Tribunal was granted on 24 September 2012 by Designated Judge Taylor and standard directions were issued requiring, amongst other things, the appellant to serve any additional material and a skeleton within 21 days, and for the respondent to file a rule 24 letter within 28 days. Neither party has responded to the directions.

10. On 15 January 2013, I issued further directions, stating:

It is my provisional view that, the Rule 24 letter from the respondent's solicitors notwithstanding, that in the light of the decision in **Adamally and Jaferi** [2012] UKUT 00414, that the determination of the FtT Judge did involve the making of an error of law in failing to make findings in respect of the appeal against the decision to refuse to vary leave to remain and that the appeal should be allowed to the extent that it is remitted to First-tier Tribunal Judge J M Holmes for him to make a fresh determination in respect of the appeal against the decision to refuse to vary leave. It is proposed to take such a course of action without any further hearing unless the Upper Tribunal receives within five working days of the written submissions supported by cogent arguments to the contrary.

11. There is on file no response to these directions. I am satisfied that both parties are content for me to determine the matter without a hearing, and that I am able to do so on the material before me. I therefore decided so to do.

Did the determination of the First-tier Tribunal involve the making of an error of law?

12. The judicial headnote in **Adamally & Jafferi (section 47 removal decisions: Tribunal Procedures)** [2012] UKUT 00414 provides:

When a removal decision purportedly under s 47 of the Immigration, Asylum and Nationality Act 2006 is made concurrently with a decision refusing further leave:

- (i) the s 47 decision is unlawful, but*
- (ii) the decision refusing leave is a separate decision, that*
- (iii) requires determination;*
- (iv) s 85(1) of the Nationality, Immigration and Asylum Act 2002 brings the two decisions into one appeal, but*
- (v) s 86 of that Act allows and requires the determination to reflect differences in outcome.*

13. I am satisfied that the judge misdirected himself in law when he concluded, in effect that the decision to refuse to vary leave to remain and the decision to remove pursuant to s47 of the 2006 Act could not be made in the same document.

14. I consider also that the judge erred in law in failing to determine substantively the appeal under the immigration rules. It was incumbent on the judge to make findings as to which provisions of the immigration rules were applicable and to make findings as to whether the requirements of the relevant rules were met. I therefore set the decision aside.

Directions

15. I consider that, following **Adamally & Jafferi** the appropriate course of action would be for the case to be remitted to the First-tier to be heard by Judge J M Holmes. I am

satisfied also that in all the circumstances, that is the appropriate course of action. I therefore make the following directions:-

1. The matter is remitted to First-tier Tribunal Judge J M Holmes.
2. The appeal is to be allowed in so far as it relates to the decision under section 47
3. The First-tier Tribunal Judge is to determine the grounds of appeal raised in relation to the refusal to vary the claimant's leave to remain and to decide whether the appeal falls to be allowed or dismissed in so far as it relates to that decision
4. The fee award is set aside.
5. The First-tier Tribunal Judge must determine whether any fee award is appropriate when he has concluded his determination
6. If the parties wish to rely on any further documentation, it must be served on the First-tier Tribunal and on the opposing party 7 days before the next hearing.

Signed

Date: 21 August 2013



J K H Rintoul
Judge of the Upper Tribunal