Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01229/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 January 2014	**On 4 February 2014**

Before

THE HON MR JUSTICE FOSKETT
UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr L. Tarlow, Senior Presenting Officer
For the Respondent: Mr M. Murphy, instructed by Cleveland & Co Solicitors

DETERMINATION AND REASONS

1. The Respondent to this appeal (the Appellant before the First Tier Tribunal – 'the FTT') is a Kosovan national. His father (who was killed in the civil war) was an ethnic Albanian from Kosovo. The Respondent's mother is Serbian. The family came from Mitrovica where, at least historically, there has been a difficult relationship between the Serbian and Albanian populations. The Respondent left Kosovo in 2000 (when still under the age of 18) and was in due course granted refugee status and indefinite leave to remain in the UK in June 2002. The precise basis for granting this status does not appear from the papers before us, but it was probably because of fears for his safety from Serbians as a result of his Albanian ethnicity.

© CROWN COPYRIGHT 2014

2. In the light of a conviction on 6 May 2009 for the serious offence of wounding with intent to do grievous bodily harm and a consequent sentence of 4 years imprisonment, the Respondent rendered himself liable to automatic deportation. In September 2011 the Appellant (i.e. the Secretary of State) served notice of intention to cease the Respondent's refugee status on the basis of a change of circumstances in Kosovo and by reason of the conviction to which we have referred. (This notification followed an earlier letter of 31 March 2011 to similar effect.) His solicitors replied on 20 October 2011 making representations against the contents of the letter serving notice of intention.

3. In due course, on 4 February 2013, the Appellant wrote to the Respondent indicating that no compelling reasons had been provided as to why the UKBA should not cease his status as a refugee. The letter highlighted what was said to be "significant changes in the country situation" since he left Kosovo 12 years previously. It is to be noted that the decision letter, whilst highlighting various changes in Kosovo that were said to have occurred since 2000, did not refer to the Country Guidance case of *SI v SSHD* [2009] UKAIT 00011, a decision based upon evidence heard in October 2008.

4. Thereafter a deportation order was served on the Respondent and his appeal against that order was heard by the FTT in November 2013. The FTT (Judge Coleman and Ms Endersby) allowed his appeal, essentially holding that there was no evidence that the situation faced by the Respondent in 2002 had changed at all. There would, the FTT concluded, be nowhere in Kosovo where he could be with his ethnic group because his mixed ethnicity would make him "regarded with suspicion by both sides and there was a real risk of persecutory behaviour at the hands of Serbs and Albanians if returned to Kosovo".

5. Although the Secretary of State was represented at the hearing before the FTT, the Tribunal's attention was not drawn to the Country Guidance case to which we have referred above. The Tribunal itself did not refer to it at all.

6. After the FTT's decision was promulgated the Secretary of State lodged a notice of appeal alleging a material error of law on the grounds that the FTT "did not consider the [the country guidance case] … [which] case concerns mixed parentage, similar to this Appellant and in particular … [who] also spoke Albanian which is highly relevant to this case given the issue of perception." It is also asserted in the Grounds of Appeal that had those issues been considered the FTT "would have found that he was not to be at risk and his deportation … proportionate."

7. It is, on any view, deeply unattractive that a point such as this should be taken at this stage when the relevance of the Country Guidance case was not raised (a) in the decision letter itself and (b) at the contested hearing before the FTT. That, of course, might go to the issue of its true relevance when the case is considered on its merits. However, subject to the argument of Mr Murphy that the Secretary of State is precluded from relying on this point now (see paragraph 9 below), there is little doubt that a failure to address the significance of an arguably relevant Country Guidance case can amount to a material error of law. Such a viewpoint is plainly articulated in the Senior President's Practice Direction dated 10 February 2010, the relevant paragraphs of which read as follows:

> "12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-
>
> (a) relates to the country guidance issue in question; and
>
> (b) depends upon the same or similar evidence.
>
> 12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a particular country will be expected to be conversant with the current "CG" determinations relating to that country.
>
> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

8. A judge of the FTT granted permission to appeal on that basis and the preliminary issue before us was whether this failure of the FTT to consider the country guidance case did indeed constitute a material error of law.

9. Mr Murphy contended, in the first instance, that the point was not open to the Secretary of State. He submitted that the process before the FTT is an adversarial process and that a point such as this ought to be taken at the appropriate stage and when it is not, it should not be permitted to be raised subsequently. He reminded us of the well known approach in *Ladd v Marshall* and said that no good reason had, or could be, shown for the failure to draw attention to the Country Guidance case. As an alternative submission, he suggested that raising the point after the initial hearing constituted an abuse of process.

10. We did not hear full argument on the issue, but we do not consider that it is right to describe the procedure before the FTT as a purely adversarial process. It was described by Sedley LJ (with whom Munby J and Mummery LJ agreed) as "as much inquisitorial as it is adversarial" in *Shirazi v SSHD* [2003] EWCA Civ 1562 and in the following passage that appears in the judgment of Neuberger LJ, as he then was, in *HK v SSHD* [2006] EWCA Civ 1037 (with whose judgment Jacob LJ expressly agreed):

> " … Relatively unusually for an English Judge, an Immigration Judge has an almost inquisitorial function, although he has none of the evidence-gathering or other investigatory powers of an inquisitorial Judge. That is a particularly acute problem in cases where the evidence is pretty unsatisfactory in extent, quality and presentation, which is particularly true of asylum cases. That is normally through nobody's fault: it is the nature of the beast."

11. We respectfully agree that these descriptions match the process involved. We think that Mr Murphy would, with considerable justification, be complaining vigorously if a client of his lost an appeal before the FTT and it emerged that a country guidance authority had been overlooked by everyone that, if considered, would have led to a different result. Plainly, there comes a time when it is no longer appropriate for matters that were overlooked to be considered at the appellate level, but where the point which amounts to an error of law is taken within the time limit for appealing, then in our view there would be little, if any, discretion available to prevent the issue being considered on appeal. When the time limit for appeal has expired, it would require the exercise of discretion to enable the point to be taken, discretion to be exercised in all the circumstances of the particular case, including the reason for the delay in raising the point and the intrinsic strength of the point sought to be raised.

12. As we have said, it is unattractive for an argument such as this to be raised in the way it has been raised in this appeal, but

it was raised very soon after the decision of the FTT and within the time limit for appealing. Accordingly, we do not consider that it is inappropriate for it to be raised or that to do so amounts to an abuse of process.

13. In our judgment, the failure to consider the Country Guidance case was an error of law and, given the nature of the conclusions in the Country Guidance case, it was a material error in the sense that, if the findings in that case were applied to the circumstances of this case, it could have made a difference to the outcome. Mr Murphy contended otherwise and suggested that the FTT had addressed relevant material when it came to its decision and that the Country Guidance case would not have affected the conclusion.

14. We can see the force of that argument, but it would be far more persuasive if that material had been addressed against the background of the findings in the Country Guidance case. Our conclusion that there was a material error of law does not, of course, mean that the FTT that considers this matter afresh (because this, in our judgment, is a case that should be remitted for re-consideration by a differently constituted FTT) will necessarily conclude that the Country Guidance case affects the outcome: it is possible that the same result will emerge depending on the evidence and the argument. However, as we have indicated, it will be far more satisfactory for a properly constituted hearing to take place where the implications, if any, for this case of the Country Guidance case are taken into account.

15. We do not consider that the Respondent should be disadvantaged at the remitted hearing by opening up any credibility findings already made in his favour. He was found credible on a number of issues raised before the FTT and, in our judgment, the findings to that effect should stand. If he raises new material then, of course, it will be open to the FTT to consider his credibility and reliability on these matters in the usual way, as it will be open for it to re-visit the findings made in relation to Article 8 ECHR in light of any additional material relied upon.

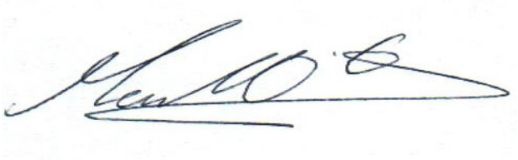
Decision

The determination of the First-tier Tribunal contains an error on a point of law capable of affecting the outcome of the appeal and, consequently, it is set aside.

The appeal is remitted to the First-tier Tribunal.

The First-tier Tribunal made an Anonymity Direction. No application was made before us to discharge such direction and it therefore remains in place in the terms identified in the First-tier Tribunal's determination of 15 November 2013.

Signed:



Upper Tribunal Judge O'Connor
On his own behalf and on behalf of The Honourable Mr Justice Foskett
Date: 30 January 2014