



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

Appeal Number: DA/01880/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2 June 2015**

**Determination Promulgated
On 8 June 2015**

Before

**UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR BABIHARAN BALAMURALI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: Mr T Bramall, Counsel, instructed by Raj Law Solicitors

DETERMINATION AND REASONS

Introduction

1. For the purposes of this determination, we shall refer to the parties as they were before the First-tier Tribunal (FTT): the Secretary of State is therefore the Respondent, and Mr Balamurali is the Appellant.
2. This is an appeal by the Respondent against the decision of FTT Judge Pedro, promulgated on 26 March 2015, in which he allowed the Appellant's appeal against the Respondent's decision, dated 6 October 2014, to remove him from the United Kingdom pursuant to Regulation 19(3)(b) of

the Immigration (European Economic Area) Regulations 2006 (the Regulations).

3. Permission to appeal to the Upper Tribunal was granted on 14 April 2015 by FTT Judge Grant-Hutchinson.

Background to the Appellant's case

4. The Appellant is a citizen of Norway, born on 15 April 1992. He came to the United Kingdom in June 2006 with his family, consisting of his parents, brother and sister. On 4 January 2007 the Respondent issued the Appellant with a registration certificate under Regulation 16 of the Regulations, on the basis that he was a dependent of his father.
5. On 21 March 2014 the Appellant was convicted at Kingston Crown Court of six offences relating to theft and one of possession of a controlled article for use in fraud. He received sentences of one-year imprisonment for each offence, all to run concurrently. On 7 July 2014 the Appellant was convicted at South West London Magistrates' Court of being drunk and disorderly, and was fined. Then, on 17 July 2014, the Appellant was convicted at Central London Magistrates' Court of possession of a controlled article for use in fraud and theft from a meter, and he was sentenced to twelve and twenty four weeks imprisonment for the respective offences, to run concurrently.
6. As a result of the Appellant's offending (in particular the convictions on 21 March) the Respondent instigated action to remove the Appellant from the United Kingdom on the grounds of public policy. The Appellant duly completed a questionnaire (ICD.0350) in which he set out basic personal details and his circumstances in this country.
7. On 6 October 2014 the Respondent made a decision under the Regulations to remove the Appellant from the United Kingdom.

The Respondent's decision

8. The notice of decision refers to the Appellant's convictions for which he was sentenced to a year's imprisonment (although the date is misstated as being 9 March 2013). It is said that the Appellant posed a sufficiently serious threat to the interests of public policy that his removal from the United Kingdom was justified under Regulation 19(3)(b) of the Regulations, with reference to Regulation 21.
9. The Respondent's reasons for her decision are expanded upon in a detailed letter, dated 16 October 2014. The relevant aspects of the Regulations are set out and considered in light of the Appellant's circumstances. Sentencing remarks and information contained in NOMS and OASys reports is referred to. The Respondent took account not only of the convictions, but also alleged connections to gangs. It is concluded that the Appellant posed a real threat to the public, and that he had not made progress in terms of rehabilitation. It is also said that the Appellant had not acquired a permanent right of residence in the United Kingdom. Even if he had done, this made no difference to the Respondent's ultimate conclusion.

10. As to Article 8, the letter makes several references to the Appellant having no children or partner. It appears to be accepted that his parents reside in the United Kingdom. There is no express mention of the Appellant's brother or sister. The Respondent utilises Part 5A of the Nationality, Immigration and Asylum Act 2002 and Paragraphs A398-399D of the Immigration Rules as a guide for assessing the Article 8 claim. It is concluded that the Appellant's removal would not breach either private or family life (in fact, there is said to be no family life in the first place).
11. The Appellant appealed to the FTT.

The history of the appeal before the FTT

12. Following lodgement of the appeal a CMR was conducted. The Respondent sought to rely on evidence of misconduct by the Appellant not involving convictions. The appeal became what is referred to as a 'NEXUS' case (this being the name of the operation conducted by the Respondent and Metropolitan Police into the activities of foreign nationals thought to be a risk to the public by virtue of their associations).
13. The appeal then came before FTT Judge Adio on 11 February 2015. He adjourned the case on the basis that the Appellant had had insufficient opportunity to see additional evidence submitted by the Respondent as to alleged gang associations.
14. The appeal came before FTT Judge Pedro on 13 March 2015.

The decision of FTT Judge Pedro

15. At paragraph 3 of his decision, FTT Judge Pedro records a preliminary issue that was raised at the hearing. The Respondent's notice of decision and detailed reasons letter made no reference to section 55 of the Borders, Citizenship and Immigration Act 2009 (section 55), notwithstanding the claimed family life between the Appellant and his immediate family, and in particular, his twelve year old sister. The Judge records that the claimed family life had been brought to the Respondent's attention prior to the decision being taken. He states that the Respondent's decision did not consider the section 55 duty either in form or substance.
16. In paragraph 4 the Judge refers to JO and Others (section 55 duty) [2014] UKUT 517 (IAC) and goes on to allow the Appellant's appeal on the limited basis that the Respondent's decision was not otherwise in accordance with the law.
17. An issue relating to whether the Appellant had in fact acquired a permanent right of residence under the Regulations was left undetermined as this matter could be considered by the Respondent when making a fresh decision on the case.

The Respondent's grounds of appeal

18. Ground 1 asserts that FTT Judge Pedro erred in failing to give any or any adequate reasons for why he was allowing the appeal on the basis he did. It is said that there was no reference by the Judge as to what evidence he

relied on when stating that the Respondent was aware of the claimed family life. There is no explanation as to why he reached his conclusion that the Respondent's decision was unlawful.

19. Ground 2 asserts that FTT Judge Pedro should not have relied on JO and Others as this decision is wrong in law in light of cases including AJ (India) [2011] EWCA Civ 1191 and Zoumbas [2013] UKSC 74.

The grant of permission

20. Permission to appeal was granted on both grounds.

The hearing before us

21. Mr Tarlow provided us with the recent decision of the President in MK (section 55 - Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC). He submitted that the onus of showing that the section 55 duty has been breached rests with the Appellant. The Respondent cannot be expected to deal with matters she is not made aware of. Relying upon ground 1, Mr Tarlow submitted that the FTT Judge erred in allowing the appeal.
22. Mr Tarlow maintained his reliance upon ground 2 notwithstanding the fact that MK expressly states that JO and Others is consistent with the other decisions cited in the Respondent's grounds.
23. Mr Bramall provided us with a skeleton argument. We asked him where the evidence was to indicate that the Appellant had in fact put forward a family life claim to the Respondent prior to her decision. He responded by relying on the fact that the Appellant came to the United Kingdom with his parents and siblings. The Respondent had subsequently issued EEA documentations to all the family members. It followed that the Respondent was on notice that the Appellant was here as part of a family household. Page 23 of the core bundle (or G1 of the Respondent's appeal bundle) was also relied on. Mr Bramall submitted that the Appellant's sister would have been known about. He confirmed that there had been no separate representations based on Article 8 family life sent in to the Respondent. The Respondent should have considered section 55. The duty stood apart from the need to consider Article 8. On ground 2, Mr Bramall submitted that section 55 was a free-standing duty. It had to be considered when assessing Article 8 and the Regulations.
24. It was submitted that the FTT Judge was entitled to allow the appeal.

Decision on error of law

25. Having considered the evidence and arguments put to us with care, we found that ground 1 is made out and FTT Judge Pedro did err in law when allowing the Appellant's appeal. We informed the parties of this at the hearing. Our reasons for the decision are as follows.
26. As it currently stands, the case law on section 55 and family life cases in general contains three important points relevant to the appeal before us: that there is an onus on the person asserting the family life to adduce evidence and reasons as to why removal will have adverse consequences

(see for example, SS (Nigeria) [2013] EWCA Civ 550, at paragraph 62); that the burden of showing a breach of the section 55 duty lies with the Appellant (see MK, paragraph 18); finally, that if a breach of the duty is found, the FTT is not bound to 'remit' the case back to the Respondent (see AJ (India) [2011] EWCA Civ 1191, paragraphs 21 and 24, and MK, paragraph 26).

27. In consequence of the above, FTT Judge Pedro was obliged to give adequate reasons for concluding why the section 55 duty was engaged in the first place. This entailed a need to identify what evidence he was relying on when concluding that the Respondent had been made aware of the Appellant's purported family life claim (and in particular that relating to his sister) prior to the decision being made. With respect to the Judge, he simply did not cite any such evidence in his decision. There is an absence of any reasoning in respect of the core issue upon which the appeal was allowed.
28. It cannot be said that relevant evidence on the family life issue was in some other way readily apparent either on the face of the Judge's decision when read as a whole, or indeed from the other evidence before him. There are passing mentions of the family in the ICD.0350 and the NOMS report, but no details whatsoever. There is nothing of substance anywhere else, as far as we can see. Certainly, no representations were made to the Respondent about family life and the consequences of removal upon anyone other than the Appellant himself.
29. Mr Bramall sought to rely on the fact of the issuance of EEA documentation to the whole family in the past as being sufficient for the section 55 duty to arise. We disagree. The mere existence of a family member (in this case a younger sister) does not, in and of itself, create a family life issue which in turn required the Respondent to regard her as being an affected child for the purposes of section 55. Therefore, the FTT Judge's failure to state the evidential basis for his conclusions is not cured by the presence of other information in the case.
30. It follows from the above that FTT Judge Pedro erred in law. The error was clearly material to the outcome of the appeal.
31. Further, in light of the case law on section 55 we find that whilst as a matter of law he was potentially entitled to take the course of action he did (see MK), FTT Judge Pedro was required to provide reasons, albeit brief ones, as to why he decided to allow the appeal on a limited basis, rather than either using case management powers or proceeding to hear relevant evidence at the hearing. As the FTT (or indeed the Upper Tribunal) is not bound to send cases back to the Respondent where the section 55 duty has not been complied with, some explanation from the relevant judge is needed in order to understand the conclusion that one route has been followed as opposed to another. There is no such explanation here, and this constitutes a second error of law. It too was material to the outcome of the appeal before the FTT.
32. Our consideration of this appeal does not turn on ground 2. For the sake of completeness, we do not accept that JO and Others is wrong in law, as

asserted by the Respondent. At paragraph 32 of MK the President specifically addresses the compatibility of JO and Others with previous decisions of the higher courts, and finds that there is no divergence. We respectfully agree with his analysis.

Disposal of the appeal

33. Having announced our decision on the error of law issue, we indicated that a remittal to the FTT might well be the appropriate course of action in this appeal, given the absence thus far of any findings on the substance of the case. Both representatives agreed to this.

Procedural matters

34. We have not obtained a fixed date for the next hearing in the FTT, nor are we issuing specific directions to the FTT in respect of the advancement of the case. This is because it appears sensible to us that a further CMR is arranged in the FTT at which the production of manageable bundles, timeframes for the final hearing of the appeal, and live issues can be canvassed.

35. We would suggest that the Respondent might wish to consider addressing further the issues of the Appellant's claimed family life under Article 8 and permanent residence under the Regulations in light of further evidence provided by the Appellant during the course of this case.

Decision

The making of the decision of the First-tier Tribunal did involve the making of errors on a point of law.

We set aside the decision of the First-tier Tribunal, pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

The case is remitted to the First-tier tier Tribunal, pursuant to section 12(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

Directions

Under section 12(3)(a) of the Tribunals, Courts and Enforcement Act 2007, we direct that FTT Judges Pedro and Adio shall have no further involvement in the remitted hearing.

Signed

Date: 4 June 2015

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal