IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31314/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 15th October 2015	**On 23rd October 2015**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHEHZAD ABDUL RAZZAK ABDUL SATTAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Smart
For the Respondent: Mr S Vokes

DECISION AND REASONS

1. I shall refer to the Appellant as "the Secretary of State" and to the Respondent as "the Claimant".

2. The Secretary of State has appealed, with permission, to the Upper Tribunal against a decision of the First-tier Tribunal (Judge North) promulgated on 5th February 2015 allowing the Claimant's appeal against the Respondent's decision of 15th July 2014 refusing to grant him leave to remain in the UK on human rights grounds. The appeal, it is important to

note though, was only allowed on the basis that the decision under challenge was not in accordance with the law such that a lawful decision by the Secretary of State was awaited.

3. By way of background, the Claimant, a national of Malawi, was born on 2nd March 1981. He came to the UK in November 1995. There is a history of his having made a number of applications for leave to remain, all of which were refused. With respect to the application which has led to this appeal, he sought to rely upon his relationship with and subsequent marriage to a British citizen and the fact that the two have a British citizen child who was born on 29th March 2012.

4. The Respondent's position with respect to the Appellant's most recent application was set out in a "refusal letter" of 15th July 2014. The letter contains a consideration of the claim under the Immigration Rules regarding the Appellant's statement as a partner and as a parent. There is consideration as to private life arguments under Rule 276ADE of the Immigration Rules and, with respect to Article 8 of the European Convention on Human Rights (ECHR) a consideration of whether there are exceptional circumstances. All of those matters were resolved against the Appellant. As to any considerations pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009 the author of the refusal letter said this;

> "8. The Immigration Rules stated above reflect the duty of the Secretary of State under Section 55 of the Borders, Citizenship and Immigration Act 2009 and therefore consideration of the best interests of the children have been taken into account when assessing leave under Article 8."

5. There is, though, it is fair to say, very little in the way of, perhaps it is more accurate to say nothing in the way of, a specific consideration directed to the best interests of the child in the context of the Section 55 duty in the remainder of the letter.

6. The First-tier Tribunal was clearly unimpressed with the Secretary of State's treatment of the Section 55 issue. It considered, in light of that concern, that the appropriate course of action would be to allow the appeal on the basis that the decision was not in accordance with the law so that the Secretary of State could go on to make a lawful decision. It explained its reasoning, in this regard, in this way;

> "9. The Appellant's representative argued in the Grounds of Appeal, in the skeleton argument lodged with the Appellant's bundle, and at the hearing that the Respondent had, when considering the Appellant's claim, not given proper consideration to the best interests of the child of the Appellant and his partner as required by Section 55 of the Borders, Citizenship and Immigration Act 2009. The Appellant says that their child was born in 2012 and that he is significantly engaged in the child's upbringing. The Respondent accepts that the child's nationality is British. I am satisfied it was therefore incumbent on the Respondent to consider and promote their child's best interests. On my reading of the refusal letter, there is no substantive reference to

> Section 55, on the information before me the Respondent cannot maintain that the decision was made lawfully after consideration of all relevant factors. It may be that after consideration, the Respondent might reach the same conclusion; however, that is a matter for the Respondent."

7. The First-tier Tribunal, thus, went on to allow the appeal to the extent that the Secretary of State's decision was not in accordance with the law. It was clearly anticipated that, what would follow, would be a new and lawful decision.

8. The Secretary of State, instead of making a new and lawful decision, sought permission to appeal to the Upper Tribunal. The grounds of application were to the effect that the First-tier Tribunal "was seized of the matter" and that it had "a statutory duty to determined the matters put before it". Thus, it was contended, it was "a clear error in law" to fail to determine the appeal. It was said, in support, that the judgment in **AJ (India) [2011] EWCA Civ 1191**, was binding.

9. Permission was granted by a Judge of the First-tier Tribunal (Judge JN Reid) on 17th April 2015.

10. There was, thereafter, a hearing before me. At that hearing Mr Smart acknowledged that the judgment in **AJ**, cited above, did not go so far as to say that a First-tier Tribunal must proceed to determine the Section 55 issues for itself rather than remit. However, in this case, the First-tier Tribunal had failed to properly explain why it was that it was not making a decision itself rather than remitting. Mr Vokes contended, in effect, that the consideration of the Section 55 duties in the refusal letter was perfunctory, that the First-tier Tribunal had concluded that it did not have sufficient facts before it to properly decide the issue and that, therefore, it was the proper course to remit. It was open to it to do that.

11. During the course of argument, in addition to **AJ**, I was referred to **JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC)** and **MK (Section 55 – Tribunal options) Sierra Leone [2015] UKUT 223 (IAC)**.

12. It seems to me that, on the facts, this is a relatively straightforward matter. Although the grounds appeared to suggest that the judgment in **AJ** was to the effect that First-tier Tribunal Judges have to make their own decision regarding Section 55 issues, that is not so. As Mr Vokes points out, with the agreement of Mr Smart, that judgment was to the effect that First-tier Tribunal Judges are able to take that course of action if they wish. It was not said that they were invariably required to do so and it did not shut out the option of allowing an appeal on the basis of the decision not being in accordance with the law such that a new and lawful decision would be, as a consequence, awaited.

13. **JO** was a decision taken into account by the Tribunal in **MK**. The rationale in **MK** was that one option where the First-tier Tribunal found a breach of

the Section 55 duties, on the part of the Secretary of State, was remittal to the Secretary of State for reconsideration and for a fresh decision. It was said that if deciding not to remit, a First-tier Tribunal must be satisfied that it is sufficiently equipped to make an adequate assessment of the best interests of a child for itself.

14. It was said that in choosing between the two options (being deciding matters for itself and remitting) the First-tier Tribunal would be guided by its assessment of the realities of the litigation in the particular case, the basis on which the Secretary of State had been found to have acted in breach of the Section 55 duties and the desirability of finality.

15. It is clear, in this case, that the First-tier Tribunal did find that the Secretary of State had failed in her Section 55 duties through failing to substantively consider the provision at all. It was certainly open to it to reach that conclusion given the very limited reference to the provision and the lack of any subsequent reasoned reference to the best interests of the child. It was implicit in what the First-tier Tribunal had to say in the paragraph of its determination I have set out above, that it did feel it had insufficient information before it to safely make its own decision on the facts. Its reference to what it felt to be the Respondent's inability to maintain that the decision was a lawful one on the basis of the information before it, suggests that to be the case. It was, therefore, acting in accordance with case law, not contrary to case law, particularly having regard to all of what was said in **MK**, when it decided to allow the appeal on the basis of the decision not being lawful and to remit.

16. In light of the above I conclude that there was no error of law such that this appeal to the Upper Tribunal falls to be dismissed.

Conclusions

17. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision.

Anonymity

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

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal I make a full fee award.

Signed Date

Upper Tribunal Judge Hemingway