Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35697/2014
IA/35695/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 26th August 2015	**On 15th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr AMIN RAMSA

First Respondent

And Mrs RAMZI BASMA

Second Respondent

(ANONYMITY ORDER NOT MADE)

Representation:
For the Appellant: Mr Kandola, Senior Home Office Presenting Officer
For the Respondent: Mr Burrett, instructed by Cardinal Solicitors

DECISION AND REASONS

1 This is an appeal brought by the Secretary of State against the decision of the First tier Tribunal (Judge Adio) sitting at Hatton Cross on 8 April 2015. In this decision, I shall refer to the parties as they were in the First tier, i.e. that Mr Amin Basma is the First Appellant, Mrs Ramsie Basma is the Second Appellant, and the Secretary of State for the Home Department is the Respondent.

2 Judge Adio had allowed the Appellants' appeals against immigration decisions taken by the Respondent on 18th August 2014. Those decisions purported to be decisions to refuse to vary the Appellants' leave to remain in the United Kingdom, together with a decision under section 47 Immigration and Nationality and Asylum Act 2006 to remove them to Lebanon. I will return to the nature of those decisions, below.

Background

3 The Appellants were born in Sierra Leone on 3 March 1951 on 18 January 1958 respectively. This was at the time before Sierra Leone gained independence. They possess, respectively, British Overseas Citizenship ('BOC'), and British Protected Person's ('BPP') status. It is common ground that neither form of citizenship grants a right of abode in the United Kingdom. Both are of Lebanese descent, each having a father of Lebanese nationality.

4 Their immigration history is that in 1999 they left Sierra Leone when civil war broke out. They travelled to the United States of America where they engaged in business, but ultimately having to leave that country in 2010, not having proper permission to remain there.

5 They travelled to the United Kingdom in October 2010. They allege that they were admitted to the United Kingdom without any condition being endorsed onto their passports. The Appellants travelled to Lebanon in 2011, and again 2012 to visit the first Appellant's father when he was ill.

6 Upon returning to the United Kingdom on 5th October 2012, an Immigration Officer queried their entitlement to enter the United Kingdom and allowed them to enter the country only with temporary admission, granted on 5th October 2012, valid until 19th October 2012. That temporary admission was later extended on 30th November 2013 and then again until 28th of February 2014. On 25 February 2014 the Appellants applied for indefinite leave to remain outside of the immigration rules.

7 In her decision dated 18th August 2014 the Secretary of State considered their entitlement for leave to remain under the immigration rules and decided that neither satisfied any relevant rule. It was also recorded that in 2005 the Appellants had been refused to be registered as British citizens when they made an application for the same whilst resident in the United States. The reason for such refusal was on the basis that as either a British Overseas Citizen or a British Protected Person, they would need to demonstrate that they had no other nationality in order to be registered as British citizens. The Secretary of State had asserted in 2005 that both had or were entitled to Lebanese nationality through their respective fathers.

8 On 18th August 2014 the Secretary of State made an immigration decision refusing to vary their leave, and making the section 47 2006 Act removal decisions.

9 The Appellants appealed against those decisions, the appeals coming before Judge Adio on 8th April 2015. The Appellants asserted that they did

not hold Lebanese nationality and referred to a variety of health problems which they experienced. The Judge considered evidence regarding the Appellants' possible entitlement to Lebanese citizenship.

10 The Judge directed himself as to the relevant issue in the appeal by stating:

> "... the issue of whether the Appellants' human rights can be considered has to be linked with whether they can also be removed from the United Kingdom."

11 The Judge found that the fact that the Appellants had possessed Lebanese identity cards did not necessarily mean that they were entitled to Lebanese citizenship, and held that:

> ".. the Secretary of State has not provided enough grounds to show that it was lawful to return the Appellants to Lebanon, a country in which they have never lived and where it is not conclusive that they have Lebanese citizenship.' (Para 18).

12 Further, at para 19:

> "... I have no conclusive evidence before me that either Appellant is a Lebanese citizen and therefore the decision of the Respondent to remove them to Lebanon is unlawful. Any findings with regards to an Article 8 claim will be academic as this cannot be related to any particular country as the Appellants cannot be removed to any country."

13 The appeal was allowed, in the section 'Notice of decision' after para 19 on the grounds that the Respondent's decision was not in accordance with the law.

The appeal to the Upper Tribunal

14 In grounds of appeal dated 7th May 2015 the Respondent argued that the Judge had erred in law in allowing the appeal on the basis that he had purported to find that the proposed destination of Lebanon was not one to which the Respondent could return the Appellants, on the ground that there was no conclusive evidence that they were Lebanese citizens. She referred to paras 60 and 61 of KF Iran [2005] UKIAT 00109. By considering whether or not the proposed removal destination was one to which the Respondent could return the Appellants, this was not a material issue on which a ground of appeal arose before the Tribunal.

15 The Respondent also argued that appearing to require the Respondent to provide conclusive evidence that the Appellants were Lebanese, the Judge reversed the burden of proof onto the Respondent, and failed to direct himself in law that it was for the Appellant to demonstrate that the decision to remove them to Lebanon was unlawful.

16 Permission was granted by Judge of the First tier Tribunal Nicholson on 30.6.15, agreeing that the point raised was arguable, and also referring to MS (Palestinian Territories) v SSHD [2010] UKSC 25.

The hearing before the Upper Tribunal

The nature of the immigration decisions in the present appeal

17 When the appeal came before me I raised with the representatives an issue regarding the validity of the notice of immigration decision dated 18th August 2014. Mr Kandola had in fact identified the same issue.

18 It seems to me whatever immigration decision should have been taken in this matter, it was not a refusal to vary leave. There is no satisfactory evidence that the Appellants have ever had leave to enter or remain in the United Kingdom. Rather, when they last sought entry on 5.10.12, they were granted temporary admission and that was later extended. However, temporary admission is not leave to enter or remain, and therefore when they applied on 25.2.14 for ILR, they cannot be treated as having made applications to vary their leave to remain. A refusal of that application should not have resulted in a refusal to vary leave.

19 The decisions under appeal therefore appear to have made not in accordance with the law.

20 However, this is an appeal which by transitional provisions continues to be governed by Part 5 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') in its form prior to amendment by the Immigration Act 2014. Sections 86(3) and (4) NIAA 2002 provide that:

> "(3) The Tribunal must allow the appeal in so far as it thinks that-
>
> (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or ...
>
> (b) ...
>
> (4) For the purposes of subsection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision."

21 It seems to me that the Appellant's application for indefinite leave to remain, given that they had not entered the UK illegally, nor had they been granted leave to enter or remain, should have been treated as an application for indefinite leave to enter. The Respondent could, if minded to refuse that application, have refused the Appellants leave to enter; an immigration decision under s.82(2)(a) NIAA 2002, which, given that the Appellants' application raised human rights issues, would have attracted an in-country right of appeal under s.92(4)(a) NIAA 2002. Therefore the Respondent's erroneous decision to refuse to vary leave, and to make a removal decision under s.47 of the 2006 Act, would not have resulted in the appeal being allowed by the FtT, if the issue had been identified, as the Respondent could have used her powers under para 8, Schedule 2 of the Immigration Act 1971 to remove the Appellants consequent to a refusal of leave to enter.

22 The issue of the erroneous decision of the Respondent is therefore academic, but it is appropriate to acknowledge the point and to identify

why the error was academic. After discussion of the issue, both parties agreed with my analysis.

23 I therefore then proceeded to consider the grounds of appeal as relied upon by the Respondent Secretary of State.

24 At this juncture, Mr Burrett, for the Appellants, accepted that the Judge had materially erred in law.

25 I agree.

Discussion

26 Whether the relevant immigration decisions were refusals to vary leave such the Appellants had no leave to remain (s.82(2)(d) NIAA 2002), or decisions to refuse leave to enter (s.82(2)(a) NIAA 2002), the relevant grounds of appeal on which the Appellants were entitled to rely in either case would be:

* that the decision was not in accordance with immigration rules (s.84(1)(a) NIAA 2002);
* that the decision is otherwise not in accordance with the law (s.84(1) () NIAA 2002); or
* that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's (ECHR) Convention Rights (s.84(1)(g) NIAA 2002).

27 It has long since been acknowledged that the Tribunal's jurisdiction is to determine the potential human rights considerations arising from the appellant's hypothetical removal; the practical possibility of removal and successful entry into the proposed removal destination are not matters for consideration by the Tribunal in its appellate jurisdiction: see the following cases:

* KF Iran [2005] UKIAT 000109 [paras 60-61 (as specifically relied on by the Respondent in the grounds of appeal:

> "60. Section 84 does not permit an appeal on the grounds that the proposed destination is outside Schedule 2. Removal in consequence of the immigration decision may or may not breach the ECHR or Refugee Convention but that does not turn on whether the country of proposed destination falls within Schedule 2 to the 1971 Act.
>
> 61. This conclusion is not affected by section 84(2)(e); the same question arises as to the content of the "decision" and whether it includes the specified destination country. The "decision" does not include the country of destination."

* JM (Liberia) v SSHD [2006] EWCA Civ 1402, paras 25-29;
* MS (Palestinian Territories) v SSHD [2010] UKSC 25 para 40:

> "There is no right of appeal against an immigration decision under section 82(2)(h) on the ground that the country or territory stated in the notice of the decision is not one that would satisfy the requirements of para 8(1)(c) of Schedule 2 to the 1971 Act."

28 The one caveat to that proposition is when a decision to remove a person from the United Kingdom will take place by a known route, and there is an argument that the journey itself would give rise to a real risk of serious harm: see HH (Somalia) & Ors v Secretary of State for the Home Department [2010] EWCA Civ 426:

> "84. In conclusion, our provisional view is that the Directives read together require that the issues of safety during return (as opposed to technical obstacles to return) should be considered as part of the decision on entitlement. Only technical obstacles of the kind we have sought to identify may legitimately be deferred to the point at which removal directions are being made or considered. We are aware that the entitlements which appear to follow may be considered an unintended consequence of the Directives; but this, as we have said, is an issue for another day. Our provisional view, in the light of the Directive, is that if there is a real issue on safety on return the Secretary of State must engage with it in his decision on entitlement to protection, and his conclusion can be the subject of appeal. In any case in which the Home Secretary did not deal with safety during return (because he did not consider that any issue arose) but where the appellant raises a cogent argument that there might not be a safe route of return, the appeal tribunal would have to deal with that issue, possibly after calling for information from the Home Secretary as to his intentions. In any event, as it seems to us at present, the decision on entitlement must be taken within a reasonable time and cannot be left until the Home Secretary is in a position to set safe removal directions.
>
> ...
>
> 122. It has been sufficient for the purposes of resolving the issues before us to confirm, as this court has said on previous occasions (albeit only obiter) that where the route and manner of return are known or can be implied, the first tier tribunal must consider whether the applicant would be put at risk if returned by that route. We have not found it necessary to resolve the wider question whether that tribunal must always consider that question whenever the applicant puts it in issue, although our strong provisional view is that it must. If that is right, it will inevitably have important consequences for the status of the applicant pending directions finally being issued to secure his removal or deportation. We have not had directly to address that issue but it is bound to arise in the near future. Conceivably it might require a reference to the ECJ in due course, but that is not necessary in this case and no-one has suggested it."

29 However, it was not part of the Appellants' case in the present appeal that any proposed route of return would give rise to risk of harm.

30 Further, there is no burden on the Respondent to establish any individual's nationality. The burden in the present case remained on the Appellants to establish that their proposed removal to Lebanon would be contrary to the immigration rules, not in accordance with the law (ignoring, for that

purpose, para 8, Schedule 2 of the Immigration Act 1971), or whether removal there would be in breach of the Refugee or ECHR conventions.

31 The Judge thus misdirected himself in law as to the statutory function of the First tier Tribunal. This was a material error of law.

32 As a result, no findings of fact have been made as to what circumstances the Appellants may encounter upon their proposed removal to Lebanon. Mr Burrett, for the Appellants, clarified that one ground for resisting removal to Lebanon would be that such removal would be contrary to para 276ADE of the immigration rules: the Appellants contend that there would be very significant obstacles to their integration into the country to which they would have to go if required to leave the UK. They have a variety of health problems, and receive disability benefits here in the UK. Aside from a few weeks on 2 separate visits, their evidence is that they have never lived in Lebanon. No findings have made in relation to any of those matters or as to the extent of any family support within Lebanon; both Appellants have relatives there.

33 Both parties were of the view that the matter was suitable for remittal to the First tier Tribunal. I agree: para 7.2 of the Practice Statement dated 13.11.14 provides that the Upper Tribunal is likely on when setting aside a First tier decision to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-.

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

I am satisfied that both of those conditions apply; the Appellants' real case was never considered by the First tier, and all relevant facts will have to be found.

34 One issue which may need to be determined at any remitted hearing is whether the Appellants actually possess Lebanese nationality. I note that the Appellants have not applied for a certificate of entitlement to a right of abode in the UK, and have not sought to rely upon Part 14 of the Immigration Rules relating to statelessness. Further, as we have seen, it is not necessary to determine the Appellants' nationality for the purposes of considering whether they may be admitted to Lebanon, became that issue is not relevant to the appeal.

35 However, on the hypothetical assumption that they will be admitted to Lebanon, whether they possess Lebanese nationality may affect the quality and security of their residence there, their entitlement to assistance etc. I do not rule that such a finding must be made: I leave it to the First tier Tribunal and the parties to determine whether such a finding

is actually required. However, proper translations of the Lebanese identity cards within the Respondent's bundle should be obtained prior to the remitted hearing.

Decision

36 I find that the making of the First tier decision involved the making of a material error of law.

I set aside the First tier decision.

I allow the Respondent's appeal to the extent that the appeal is remitted to the First tier Tribunal for a complete re-hearing of the appeal, by a Judge other than Judge Adio.

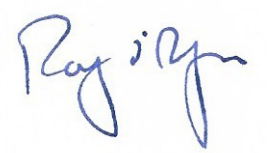
Directions on remittal

(i) All witness or other evidence to be relied on by the Appellants to be filed and served, in a consolidated bundle, 5 days before the remitted hearing before the First tier Tribunal.

(ii) Both parties to file and serve skeleton arguments 5 days before the remitted hearing, setting out clearly the legal arguments to be advanced in the appeals.

(iii) ELH next hearing: 3 hours; no interpreter. (None specified on original form IAFT1. If any required, Appellants to notify Tribunal as soon as possible.)

Signed:



Deputy Upper Tribunal Judge O'Ryan Date: 14.9.14