IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12478/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 April 2015	**On 1 June 2015**

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE LINDSLEY

Between

ENTRY CLEARANCE OFFICER – TASHKENT

Appellant

and

MASTER AA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr P Deller, Home Office Presenting Officer
For the Respondent: Ms F Allen of Counsel instructed by Aston Bond Law Firm

DECISION AND REASONS

1. The respondent (hereafter "the claimant") is a citizen of Uzbekistan born on 19 September 2004. On 10 May 2013, the appellant, the Entry Clearance Officer, Tashkent (hereafter "the ECO") refused his application for entry clearance as a dependent child of his father, but on 20 May 2015 First-tier Tribunal (FtT) Judge Halliwell allowed his appeal against that decision. In allowing the appeal solely on Article 8 grounds the judge stated that where a person's Article 8 rights were at issue he could look at circumstances as they

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stood at the date of hearing, notwithstanding the statutory restriction against doing so imposed by s.85(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The ECO was granted permission to appeal to the Upper Tribunal against that allowance, but in a determination notified on 29 September 2014 Deputy Upper Tribunal Judge (DUTJ) Juss dismissed that application and held that the decision of Judge Halliwell was not vitiated by legal error.

2. What happened next was that on 2 October 2014 the Home Office Presenting Officers Unit (POU) sent a letter headed "Application for review under rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008" stating that the Secretary of State "makes an application, under rule 45(1)(a), and in accordance with rule 46, for a review of the decision, promulgated on 29 September 2014, by DUTJ Juss". In response to that letter UTJ Perkins directed that there be a hearing so that the UT could receive representations concerning this application and whether in the light of it to set aside the decision of DUTJ Juss.

3. Rules 45 and 46 provide:

> "**Upper Tribunal's consideration of application for permission to appeal**
>
> 45.– (1) On receiving an application for permission to appeal the Upper Tribunal may review the decision in accordance with rule 46 (review of a decision), but may only do so if—
>
> (a) when making the decision the Upper Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision; or
>
> (b) since the Upper Tribunal's decision, a court has made a decision which is binding on the Upper Tribunal and which, had it been made before the Upper Tribunal's decision, could have had a material effect on the decision.
>
> (2) If the Upper Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision or part of it, the Upper Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.
>
> (3) The Upper Tribunal must [provide] a record of its decision to the parties as soon as practicable.
>
> (4) If the Upper Tribunal refuses permission to appeal it must [provide] with the record of its decision -
>
> (a) a statement of its reasons for such refusal; and
>
> (b) notification of the right to make an application to the relevant appellate court for permission to appeal and the time within which, and the method by which, such application must be made.
>
> (5) The Upper Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission.

[Note: Words in square brackets in paragraphs (3) and (4) were substituted from 1 November 2013 (IS 2013/2067).]

Setting aside of a decision

46.- (1) The Upper Tribunal may only undertake a review of a decision pursuant to rule 45(1) (review on an application for permission to appeal).

(2) The Upper Tribunal must notify the parties in writing of the outcome of any review and of any rights of review or appeal in relation to the outcome.

(3) If the Upper Tribunal decides to take any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again."

[Note**:** Paragraph (1) was substituted from October 2011 (IS 2011/2343).]

4. "Review" is defined by rule 41 to mean the review of a decision by the Upper Tribunal under Section 10 of the Tribunals, Courts and Enforcement Act (TCEA) 2007 which provides:

"10. Review of decision of Upper Tribunal

(1) The Upper Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 13(1) (but see subsection (7)).

(2) The Upper Tribunal's power under subsection (1) in relation to a decision is exercisable –

(a) of its own initiative, or

(b) on application by a person who for the purposes of section 13(2) has a right of appeal in respect of the decision.

(3) Tribunal Procedure Rules may –

(a) provide that the Upper Tribunal may not under subsection (1) review (whether of its own initiative or on application under subsection (2)(b)) a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules;

(b) provide that the Upper Tribunal's power under subsection (1) to review a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules is exercisable only of the tribunal's own initiative;

(c) provide that an application under subsection (2)(b) that is of a description specified for the purposes of this paragraph in Tribunal Procedure Rules may be made only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules;

(d) provide, in relation to a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules, that the Upper Tribunal's power under subsection (1) to review the decision of its own initiative is exercisable only on grounds

specified for the purposes of this paragraph in Tribunal Procedure Rules.

(4) Where the Upper Tribunal has under subsection (1) reviewed a decision, the Upper Tribunal may in the light of the review do any of the following –

(a) correct accidental errors in the decision or in a record of the decision;

(b) amend reasons given for the decision;

(c) set the decision aside.

(5) Where under subsection (4)(c) the Upper Tribunal sets a decision aside, the Upper Tribunal must re-decide the matter concerned.

(6) Where the Upper Tribunal is acting under subsection (5), it may make such findings of fact as it considers appropriate.

(7) This section has effect as if a decision under subsection (4)(c) to set aside an earlier decision were not an excluded decision for the purposes of section 13(1), but the Upper Tribunal's only power in the light of a review under subsection (1) of a decision under subsection (4)(c) is the power under subsection (4)(a).

(8) A decision of the Upper Tribunal may not be reviewed under subsection (1) more than once, and once the Upper Tribunal has decided that an earlier decision should not be reviewed under subsection (1) it may not then decide to review that earlier decision under that subsection.

(9) Where under this section a decision is set aside and the matter concerned is then re-decided, the decision set aside and the decision made in re-deciding the matter are for the purposes of subsection (8) to be taken to be different decisions.

[Note**:** Subsection (3) in force from 19 September 2007 (IS 2007/2709), Remainder in force from 3 November 2008 (IS 2008/2696).]

5. Notwithstanding the terms of the aforementioned written application made by the Presenting Officer, Mr Deller joined Ms Allen in submitting that because the application had not been an application for permission to appeal but merely an application for review, it had no basis in law. They both asked that if we were in agreement on this matter we should give consideration to reporting this case so as to avoid any similar misunderstanding arising in the future.

Application for permission to appeal as a condition precedent

6. We are in agreement with both representatives about this matter. Rule 45 entails that no issue of a review can arise under 45(1)(a) unless a party has first of all made an application for permission to appeal. We base this conclusion on a number of reasons. First the plain and ordinary meaning of rule 45(1)(a) ("On receiving an application for permission to appeal…") and of rule 46(1) ("The Upper Tribunal may only undertake a review of a decision

pursuant to rule 45(1) (review on an application for permission to appeal)"[1]. Such wording admits of no discretion. Second , the clear purpose behind rule 45, which is to provide a filter mechanism to help ensure that obvious errors based on oversight of a legislative provision or binding authority can be corrected (and set aside under rule 47) without unnecessarily burdening the Court of Appeal. In R (RB) v First-tier Tribunal [2010] UKUT 160 (AAC) [2010] AACR 41, a three-judge panel of the Upper Tribunal (Carnwath, LJ presiding) quoted in this regard paragraph 100 of the explanatory notes to the 2007 Act dealing with the power of review:

> "Sections 9 and 10 provide powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal and, where the tribunal concludes that an error was made, to re-decide the matter. This is intended to capture decisions that are clearly wrong, so avoiding the need for an appeal. The power has been provided in the form of a discretionary power for the Tribunal so that only appropriate decisions are reviewed. This contrasts with cases where an appeal on a point of law is made, because, for instance, it is important to have an authoritative ruling."

The provisions of the Tribunal Procedure (Upper Tribunal) Rules 2008 dealing with review are made pursuant to sections 9 and 10. Third, there is the clear purport of rule 45(2) which stipulates that if it decides not to review, the UT

[1] We observe that the same precondition for a review is applied by rules 34 and 35 of the Tribunal Procedure Rules 2014:

"**Tribunal's consideration of an application for permission to appeal to the Upper Tribunal**

34. (1) On receiving an application for permission to appeal the Tribunal must first consider whether to review the decision in accordance with rule 35.

(2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.

(3) The Tribunal must send a record of its decision to the parties as soon as practicable.

(4) If the Tribunal refuses permission to appeal it must send with the record of its decision -

(a) a statement of its reasons for such refusal; and

(b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the manner in which, such application must be made.

(5) The Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission.

Review of a decision

35. (1) The Tribunal may only undertake a review of a decision -

(a) pursuant to rule 34 (review on an application for permission to appeal); and

(b) if it is satisfied that there was an error of law in the decision.

(2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.

(3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations -

(a) the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside; and

(b) the Tribunal may regard the review as incomplete and act accordingly."

must proceed to give consideration to the still outstanding matter of whether to give permission to appeal. That demonstrates that the application for permission must pre-exist and must remain in existence unless a review is undertaken. Fourth we note that this is also the view taken by the Administrative Appeals Chamber of the Upper Tribunal in JS v Secretary of State for Work and Pensions [2013] UKUT 100 (AAC) (06 March 2013) at [22].

Absence of any provision for an "application" for review

7. There is a further difficulty in the way of the letter from the Presenting Officer being considered as having any lawful basis. It expressed itself as an "application" for a review. However, the relevant rules governing review of a decision of the Upper Tribunal make no provision for such an application: the power to review is simply one which it is left open to the UT to exercise of its own initiative. It is true that s.10 of the 2007 Act contemplates that the Upper Tribunal power of review is exercisable in two different ways: of its own initiative (s.10(2)(a) or "on application by a person who for the purposes of section 13(2) has a right of appeal in respect of the decision." However, s.10(3)(b) states that Tribunal Procedure Rules may provide that this review power "is exercisable only of the tribunal's own initiative". That in our judgement is the effect of rule 45(1). Subparagraph (d) of s.10(3) further provides that such Rules may provide that this power to review the decision of its own initiative "is exercisable only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules". That in our judgment is the effect of rule 45(1)(a) and (b).

Discretion to treat an application as an application for permission to appeal

8. Our above analysis is, of course, predicated on there having been no application for permission to appeal. Neither party sought to suggest that there had been, but we raised that question with them in view of the fact that the Upper Tribunal administration had responded to the Presenting Officer's application made for a review by sending a letter on 5 January 2015 stating: "The Upper Tribunal acknowledges receipt of an application for permission to appeal to the Court of Appeal (or, in Scotland, the Court of Session on 2 October 2014)".

9. Again both parties were of the same mind. Both submitted that this acknowledgement letter could make no difference and did not create any legitimate expectation that what the UT was faced with as a matter of law was an application for permission. We agree. The classification of an application as an application for permission to appeal is a judicial, not an administrative, matter.

10. It remains, however, necessary to decide whether it would be appropriate to exercise our judicial power to treat the application for review as an

application for permission. We are required to consider this by virtue of rule 48. Rule 48 provides:

> **"Power to treat an application as a different type of application**
>
> 48. The [Upper] Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things."

11. We do not consider, in the absence of having heard proper submissions on the matter, that it would be appropriate for us to attempt a ruling on the general issue of when an application for review should be treated as an application for permission to appeal, although we can certainly envisage situations where there may be strong reasons to do so – e.g. in the context of an application from a litigant in person which clearly seeks onward appeal but refers erroneously to an application for review. Any such ruling would have to bear in mind that (i) there is no prescribed form for an application for permission to appeal, only a requirement in rule 44 that such an application be made in writing; and (ii) rule 45 confers a discretion and to exercise it other than sparingly would undermine the clear structure of the Procedure Rules. The general issue is best left for another day.

12. In relation to the actual application made in writing by the Home Office Presenting Officer on behalf of the ECO in this case, there might be said to be a strong argument in the abstract for treating it as an application for permission, consisting of the fact that in our judgement the decision of the DUTJ to uphold the FtT decision manifestly did involve the overlooking of both a legislative provision (which at that the relevant time was s.85A(2) of the 2002 Act[2]) and binding House of Lords authority (AS (Somalia) & Anor v Secretary of State for the Home Department [2009] UKHL 32 (17 June 2009)). Manifestly the DUTJ had erred in considering that it was open to the FtT judge to decide the appeal on the basis of circumstances not appertaining at the date of decision. We bear in mind that in JS v Secretary of State for Work and Pensions [2013] UKUT 100 (AAC) (06 March 2013) a senior panel chaired by Charles J (albeit in the context of the power to review decisions of the First-tier Tribunal, not the Upper Tribunal), having cited R (RB) v First-tier Tribunal [2010] UKUT 160 (AAC) [2010] AACR 41 in support of the proposition that the self-evident purpose of the review provisions was to avoid the need for an appeal (in that case to the Upper Tribunal) in the case of "clear errors", added this observation:

> "As the panel [in R(RB)] decided, the power of review must not be used in a way that subverts the appeal process and bypasses the proper function of the Upper Tribunal. This is consistent with *In the matter of L and B (Children)* [2013] UKSC 8 at [17] and [19], in which the Supreme Court has recently emphasised that the integrity of the appeal process should not be subverted by diverting matters to an alternative process."

13. However, this observation was based on the premise that there was a lawful basis for exercise of a review power; the panel was not considering the exercise of a discretion as a means of creating a lawful basis. Further, insofar

[2] From 23 May 2011, what had been s.85(4) became s.85A(2). Section 85A has since been repealed by Sch 9 Immigration Act 2014 from 20 October 2014.

as the panel sought in that judgment to highlight the need to ensure that the proper role of an appeal is not subverted, we consider that in the instant case we should attach very significant weight to the following four matters. The first is that, Mr Deller, the Senior Presenting Officer representing the ECO at the hearing asked us not to consider the application made by his Unit earlier as an application for permission to appeal. The second matter is that we were informed by Mr Deller that if it had been intended to make an application for permission to appeal that would have been done on the in-house form used by the Presenting Officer's Unit for making an application for permission to appeal, namely one identified as an ICD 4246:App to UT for PTA to CoA or CoS. In light of that information, it is very difficult to assume the application was meant to be one for permission to appeal. Third, the letter referred to an application under rule 45, whereas the rule providing for an application for permission is rule 44. Fourthly, it does not seem to us that decision not to treat it as such an application affronts the interests of justice or the overriding objective as set out in rule 2(3).

14. Here, whilst there were cogent reasons for considering that the DUTJ had overlooked a legislative provision (and indeed binding authority), it was not in dispute that by the date of hearing before the First-tier Tribunal judge (although not the date of decision) the claimant was found to have shown that denial of entry clearance was contrary to his human rights. Onward litigation to the Court of Appeal could only result in further delay and eventually the appeal against the ECO decision being dismissed and the claimant being required to re-apply for entry clearance and pay another fee. We bear in mind in this regard the observations in AS (Somalia) by Lord Hope at [21] and Baroness Hale at [30] (the latter regarding fees). For these reasons we conclude that the application should not be treated as an application for permission to appeal.

Notice of Decision

15. It is not strictly necessary for us to say anything further about the case except to observe that the legal effect of our decision is that there has been no lawful challenge to the decision of the DUTJ upholding the FtT decision and accordingly the determination of the FtT Judge allowing the claimant's appeal must stand.

Signed Date