



IAC-FH-AR-V1

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

Appeal Number: DA/00468/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28 January 2016  
Extempore**

**Decision & Reasons Promulgated  
On 17 February 2016**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**R N**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr P Duffy, Home Office Presenting Officer

For the Respondent: Miss K Cronin, Counsel, instructed by ATLEU

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge C M Phillips promulgated on 20 October 2015 in which she allowed the appeal of [RN] against the decision of the Secretary of State to refuse to revoke a deportation order. The appeal was allowed on a relatively limited basis, the judge recording that, by concession the appeal is allowed on Article 8 human rights to allow the respondent to continue her appeals against the adoption order, the period of Article 8 leave to be granted being in the discretion of the Secretary of State. The judge also made an anonymity order.

2. It is unnecessary to go into the particular facts of this case which are extremely complex and as there are, as accepted, continuing proceedings in the family court.
3. The Secretary of State sought permission to appeal against this decision primarily on the basis that the Secretary of State had not conceded that the appeal should be allowed under Article 8 and also that the judge had failed properly to apply the law as set out in RS (Immigration and Family Court Proceedings) India [2012] UKUT 218.
4. Mr Duffy and Miss Cronin both accepted that the primary issue here is whether in fact there had been a concession and to what extent it was made. It is important to set out exactly what was said in the grounds at paragraph 8:

“The judge has stated at [29] that the Secretary of State’s representative conceded that the appeal should be allowed under Article 8 ECHR. This is not accepted. It is contended that no such concession was made at any time. It is respectfully submitted that the judge’s erroneous indication that the outcome of the appeal was conceded by the Secretary of State amounts to a material legal error.”
5. Whilst it does go on to submit that in the alternative the Secretary of State’s appeal should still be allowed that is not a point which Mr Duffy pressed on me today.
6. Turning to evidence of whether there was a concession or not, I have now belatedly been supplied with a note signed by Miss Ayodele who represented the Secretary of State at the hearing before Judge Phillips. Materially it says:

“During the evidence in chief it turned out that appellant still had a case with COA in relation to getting her child back from adoption ...

At that stage, [that is after examination-in-chief], IJ stated she was minded to allow appeal under Article 8 in light of the case law that SoS should grant some form of DL [discretionary leave] for the appellant to pursue her case with COA.

I asked IJ rather than allow whether she should consider remitting but she had made up her mind to allow. Reps also argued that the appellant should be entitled to D/L. IJ allowed the appeal under Article 8 and will send back to the Secretary of State to grant some form of DL.”
7. There is also a statement from Miss Louise Hooper of Counsel who represented the claimant at the appeal. Attached to the statement are Miss Hooper’s written notes from the hearing which had been typed up. Her statement records [2] as follows:-

“I have a very clear recollection that the presenting officer agree with the Immigration Judge that the appeal should be allowed and Ms N granted leave to remain.”

She then sets out why that is so.

8. Ms Hooper also states [2 iii)] that, after calling live evidence from the respondent:

“ii) ...the Immigration Judge enquired as to whether I would be satisfied if she were to allow the appeal on Article 8 grounds and not deal with the asylum trafficking matters which would remain outstanding and to be dealt with if and when necessary. I stepped outside to take instructions and having explained the implications of the grant of limited leave I obtained the consent of my client to the outcome proposed by the judge.

iv) The Judge then sought confirmation from the Presenting Officer that she was happy with that course of action. The Presenting Officer indicated that this course was acceptable for the Secretary of State as recorded and described in the judge’s determination.”

9. Ms Hooper concludes at [4]:

“I can confirm therefore that the concession was made by the Presenting Officer in the terms outlined by the judge in her determination and that as Counsel I and my client relied upon this concession in agreeing that the asylum and human rights matter could be stayed and reconsidered if necessary after Miss N was granted determinative discretionary leave.

10. It is important to note also what is recorded by Judge Phillips in her notes. She states:

“Both reps agree ... that in line of the case law referred to in the skeleton and Mohammed [2014] UKUT 419 the revocation decision should be remitted i.e. the appeal allowed to the extent that the period of Article 8 leave be granted to allow family proceedings to conclude this would give time for applicants to seek a solicitor if so advised”

The notes then go on with other matters which are less legible.

11. Whilst I note that Mr Duffy submits that the concession does not appear to have been in terms recorded by the judge, taking into account the evidence of Miss Hooper and the judge's Record of Proceedings I am satisfied that in reality the concession made was as set out in the judge’s notes, the decision and in what is said by Ms Hooper. Ms Ayodele’s notes are less detailed than the evidence of Ms Hooper and make no positive statements about what she said. I therefore prefer the evidence of Ms Hooper and the Judge that there was in fact a concession in the terms recorded.

12. I therefore find that the Secretary of State has not satisfied me that there was any error of law in the decision of the First-tier Tribunal capable of affecting the outcome. I do not consider in light of the terms of the concession which was consistent with case law, that the judge was in the alternative bound to consider other matters as is averred in paragraph 9 of the grounds, and I am not satisfied for the sake of completeness that the judge erred in her application of the relevant case law in this case RS (Mohammad).
13. What I find particularly troubling in this case is the assertion in grounds of appeal that “there was no concession whatsoever of this type”. It is difficult to conclude that that statement is entirely candid or complies with the standards that are to be expected from litigants before this Tribunal.
14. I am satisfied therefore that this is a case in which it may well be proper to award the costs incurred by the claimant in responding to this appeal given that it is not at all clear that had the true position been put before the judge who granted permission that permission would have been granted.
15. I therefore adjourn the issue of whether costs should be awarded against the Secretary of State and/or the Secretary of State's representatives in this case to a further hearing in respect of which I will give directions. The Secretary of State is also put on notice that if she unsuccessfully resists the costs order then she may well face the paying the respondent's costs of the further hearing.

### **SUMMARY OF CONCLUSIONS**

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.
2. The issue of whether and to what extent the Secretary of State and/or her representatives must bear the respondent's costs is to be considered at a further hearing in respect of which directions set out below shall apply.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Given that much of these proceedings relate to a child who is involved in proceedings before the Family Courts, and in order to protect the child's identify, unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify the respondent, the respondent's child or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

### **Directions with respect to the adjourned hearing to consider costs.**

- (1) The matter be listed on the first available date after 4 April 2016 with a time estimate of 2 hrs to deal with the following issues:
  - a. Whether the Secretary of State shall be ordered to pay all or part of the Respondent's costs incurred in connection with the appeal before the Upper Tribunal; and/or whether the Secretary of State's representatives shall be ordered to pay all or part of the Respondent's costs incurred in connection with the appeal before the Upper Tribunal;
  - b. The summary assessment of the amount of any such costs.
- (2) Within 7 days of the issue of these directions the Respondent shall file and serve a schedule of costs setting out her costs, including an estimate of future costs include the costs hearing
- (3) Within 14 days of the issue of these directions:
  - a. The Secretary of State shall file and serve a witness statement together with any evidence in support in response to the Respondent's application for costs;
  - b. The Secretary of State and/or her officers shall file and serve a witness statement or statements together with any evidence in support showing cause why they should not be ordered to pay all or part of the Respondent's costs incurred in connection with the appeal before the Upper Tribunal.
- (4) Within 21 days of the issue of these directions the Respondent shall (if so advised) file and serve any evidence in reply.
- (5) If either party fails to comply with these directions within the time period given, they will be deemed to be no longer resisting the application for costs or no longer seeking costs as appropriate.

Signed

Date: 12 February 2016

Upper Tribunal Judge Rintoul