



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/14065/2015**

**Appeal Numbers:**

**HU/14066/2015**

**HU/14067/2015**

**THE IMMIGRATION ACTS**

**Heard at Kings Court, North Shields**

**Decision & Reasons**

**On 27 April 2017**

**Promulgated**

**On 28 June 2017**

**Before**

**THE PRESIDENT, THE HON. MR JUSTICE MCCLOSKEY  
DEPUTY UPPER TRIBUNAL JUDGE HOLMES**

**Between**

**MASPS & Three Others**

**Appellants**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation**

For the Appellants: Mr A Jafar, of counsel, instructed by Lyon Legal  
Limited

For the Respondent: Mr A McVeety, Senior Home Office Presenting  
Officer

**ANONYMITY**

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal)  
Rules 2008 (SI2008/269) I make an Anonymity Order. Unless the**

**Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.**

## **DECISION**

1. For the reasons elaborated in our *ex tempore* judgment given at the conclusion of the hearing, this appeal succeeds to the extent that the decision of the First-tier Tribunal (the “FtT”) is set aside and the appeal is remitted to a differently constituted FtT for the purpose of rehearing and fresh decision.
2. Taking as read both the decision of the FtT and the grant of permission to appeal, our reasons for thus deciding can be stated succinctly. The central error of law which we have diagnosed in the decision of the FtT is a failure to properly engage with the medical evidence. Such evidence consisted of two reports of Mr Henman FRCS, Consultant Orthopaedic Surgeon and Dr Perera, Senior Consultant Orthopaedic Surgeon. There are two salient deficiencies in the Judge’s consideration of the medical evidence:
  - (a) First, in identifying the medical evidence, the Judge failed to even acknowledge Mr Henman’s main report, the initial one, which is dated 01 October 2015.
  - (b) Second, the Judge gave determinative weight to a short quotation from an unspecified medical source contained in the Secretary of State’s detailed grounds of defence, dated 26 June 2015, in anterior judicial review proceedings brought on behalf of the family.
3. It is plain from the decision that the Judge did not source this quotation. If this exercise had been performed, the Judge would have been bound to engage with the fact that the brief quotation originates in a laconic letter written by Mr Henman FRCS to the family’s General Medical Practitioner and the date thereof viz 08 January 2014. The Judge would have had to balance this brief letter with the more detailed and more recent medical evidence which came into existence in 2015 and 2016. There was a manifest failure to do so.
4. For these two reasons, the decision of the FtT is unsustainable.
5. We turn next to the issue of the best interests of the three year old child of the family and the Secretary of State’s duty under section 55 of the Borders, Citizenship and Immigration Act 2009. Mr McVeety accepted, correctly, that this is a continuing duty. This means, in practice, that the Secretary of State must be receptive to new evidence and representations and, where these eventuate, should normally be prepared to make a fresh decision. We accept that no new case was made to the Secretary of State in advance of the FtT hearing. However, it is evident that the new medical evidence was duly served. The

indelible fact is that the Secretary of State did not make a fresh decision. We make clear that no one is to be criticised for this. However, one of the consequences of this was that the FtT did not have available to it a fresh decision encompassing a revised and updated best interests assessment. In this respect, the framework of the appeal before the FtT was deficient.

6. For the reasons explained in this Tribunal's decisions in MK (Section 55 – Tribunal Options) Sierra Leone [2015] UKUT 223 (IAC) and R (HN) – v – Secretary of State for the Home Department (JR – Scope – Evidence) IJR [2015] UKUT 437 (IAC) the Secretary of State is the primary decision maker in cases of this kind and it is undesirable that the tribunal, whether at first instance or on appeal, should find itself evaluating evidence which has not first been considered by the Secretary of State in the context of making an original, or fresh, decision. Furthermore, as emphasised in MK and JO (Section 55 Duty) Nigeria [2014] UKUT 517 (IAC), the Section 55 duty imposed upon the Secretary of State has, per section 55(2), an important procedural dimension which the tribunal itself cannot easily replicate.
7. Thus the effect of a setting aside and remittal order will enable the Secretary of State to consider all of the evidence in its totality and to make a fresh decision. This will operate to repair the imbalances and deficiencies in the extant framework. Indeed, it could give rise to a withdrawal of the decision under appeal and the substitution thereof, with all the consequences which would flow therefrom. The important point is that the tribunal, whether in the context of this remitted appeal or some future appeal or, indeed, a judicial review challenge, would be confronted with a completed and updated decision making exercise. While we are not empowered to order the Secretary of State to make a fresh decision, we have no doubt that the public law duty to do so which has materialised will be duly recognised.

### **Decision and Order**

8. Giving effect to the foregoing:
  - (a) The decision of the FtT is set aside.
  - (b) The appeal is remitted to a differently constituted FtT for rehearing and fresh decision.
  - (c) The Secretary of State's representative will copy to the Upper Tribunal any fresh decision of the kind contemplated above.
  - (d) The Appellants' representatives shall, within 28 days of any such fresh decision, compose a "position" letter to the Secretary of State's representative, copy to the FtT.

9. We are satisfied that no more prescriptive order is required. The FtT will, in the events envisaged above, take such procedural steps as it considers appropriate.

*Seamus McCloskey*

**THE HON. MR JUSTICE MCCLOSKEY  
PRESIDENT OF THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER**

**27 April 2017**