



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

Appeal Number: IA/18190/2013

THE IMMIGRATION ACTS

Heard at Field House

**On 31 March 2014
Delivered Orally**

**Determination
Promulgated
On 10th April 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

MS RAMINAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The Appellant in person

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge C H Bennett who, sitting at Taylor House on 24 January 2014 and in a determination subsequently promulgated on 6 February 2014 allowed the appeal of the Respondent (hereinafter called the Claimant), a citizen of Indonesia, born on 3 December 1976, against the

decision of the Secretary of State dated 13 May 2013 refusing her application for variation of her leave to enter or remain in the United Kingdom.

2. The Secretary of State sought permission to appeal the decision, the grounds of which contended that First-tier Judge Bennett was procedurally unfair in inter alia refusing the Secretary of State's adjournment request and in materially misdirecting himself in law in finding that the removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006, were unlawful.
3. It would be as well for the sake of completeness, to set out in full, the grounds in support of that application:

"The Judge notes that this case was listed as a 'float case' and the representative for the Secretary of State, Miss Carver, had no papers in relation to this case and was without instructions regarding why the decision to refuse did not make reference to Immigration Rule 159 (paragraph 6 of the determination). Miss Carver requested an adjournment in relation to whether Immigration Rule 159 had been considered by the Secretary of State.

The Judge sets out his reasons for refusing the adjournment request at paragraphs 7 to 9 of the determination. The Judge finds he was not satisfied that the appeal could not be justly determined without there being an adjournment. The Judge then proceeded to hear the appeal on issues that he was without the benefit of a substantive decision made by the Secretary of State and heard oral evidence from two witnesses who had not produced witness statements for the hearing (paragraph 13 and paragraph 14). It is submitted the failure to adjourn has unjustly precluded the Secretary of State from putting her case forward.

Furthermore the Judge in determining the appeal under the Immigration Rules placed himself in the position of the primary decision maker. It is submitted that the Judge's role is not to be the primary decision maker under the Immigration Rules, EA (Section 85(4) explained) Nigeria [2007] UKAIT 00013 relied on. It is clear from the determination that this was not a simple case. The Judge considered the substantive requirements of the Immigration Rule without the benefit of the Secretary of State's decision under the Rules. He heard evidence that had not been put before the Secretary of State in the form of witness statements and made findings in relation to interpretation of 159A (paragraphs 20 to 24), resolved issues in favour of the Appellant in relation to the failure to produce payslips and non-payment of national insurance contributions (paragraph 16) and took into account evidence submitted post hearing (paragraph 15).

The Secretary of State refused the application to vary leave on 13 May 2013 and at the same time made a removal decision under s47 of the Immigration, Asylum and Nationality Act 2006. The Judge finds (paragraph 10 of the determination) that the decision under s47 was unlawful following Ahmadi [2013] EWCA Civ 512. However the decision to remove under s47 was taken after 8 May 2013 and by virtue of s51 of the Crime and Courts Act 2013, the s47 decision made on 13 May 2013 is lawful."

4. In granting permission to appeal, First-tier Tribunal Judge Parkes had this, inter alia, to say:

“The Judge did give careful consideration to the issue of the adjournment request and was placed in an unhelpful position by the nature of the Refusal Letter that had been sent out and the absence of instructions from the Home Office Presenting Officer. That said, the application for an adjournment was justified in the face of evidence that was produced very late and the grounds are arguable.”

5. Prior to the hearing, the Tribunal were advised by the claimant that she could not afford to appoint a firm of solicitors to legally represent her and that she wished to represent herself with the assistance of her employer, her Sponsor, Mr Mohammad. The Tribunal also received her Rule 24 response in relation to which, and mindful that she was not legally represented, contained in large part a re-statement of her case. To the extent that the response was relevant to the basis upon which permission to appeal had been granted, the claimant in summary, explained that as she was not legally represented at the hearing before the First-tier Tribunal, she was not aware of the requirement to file witness statements and was not notified or given directions to provide them. Furthermore the First-tier Tribunal Judge had the benefit of both the Claimant's and her Sponsor's oral evidence, although she accepted that neither she nor her employer had made copies of documentation upon which she relied for the purposes of the hearing. Nonetheless the Claimant maintained that the First-tier Tribunal Judge had reached the correct conclusion on the evidence before him in the appeal.
6. Further, she maintained that the Judge had not materially misdirected herself in law in holding that the Secretary of State's decision to remove her under Section 47 was unlawful.
7. In that latter regard I have had no difficulty in concluding that the Judge did indeed err in law for the reasons stated in the grounds of application.
8. It is quite clear that the decision to remove the claimant under Section 47 was taken after 8 May 2013 and by virtue of Section 51 of the Crime and Courts Act 2013 the Section 47 decision was lawful.
9. Thus the appeal came before me on 31 March 2014 when my first task was to determine whether the substantive determination of the First-tier Tribunal Judge disclosed an error on a point of law such as may have materially affected the outcome of the appeal.
10. The Tribunal Procedure Rules do not prevent individuals from acting both as a representative and as a witness in the same appeal, so long as that person is not in the business of providing immigration services. In that I was so satisfied as regards Mr Mohammed. I was able to inform the Claimant that there was no objection to her being represented by him for

the purposes of this hearing. However for the reasons that I will set out below the Sponsor's assistance was in the event, not required.

11. In his determination, the Judge comprehensively set out the provisions of Rule 21 of the Immigration, Asylum Appeals (Procedure) Rules 2005 which I do not have to repeat. He made a detailed point of explaining within paragraph 7 of his determination the manner in which he had applied the provisions of the Rule to his consideration of the Presenting Officer's adjournment request in concluding, as he proceeded to do over paragraphs 8 and 9 of his determination, to refuse the request.
12. I would only add to the Judge's observations, that although he made no specific reference to the relevant case law, it is quite clear that the manner of his approach to the request was in accordance with the guidance of the Court of Appeal in SH (Afghanistan) [2011] EWCA Civ 1284 in that he, in effect, asked himself what did fairness demand in that as stated by Moses LJ in SH: "the test and sole test was whether (the adjournment decision) was unfair".
13. Indeed the First-tier Tribunal Judge comprehensively explained his reasons for refusing the request and it would be as well to set out those reasons below:
 - "(a) The case was not one of any real difficulty. I had the relevant Rules in front of me. Miss R and Mr M were present at the hearing and able to give evidence as to the terms on which Miss R was and had been employed - from which I could determine whether the requirements of paragraph 159EA were fulfilled.
 - (b) There was no basis for thinking that there was, or might even have been some other document setting out the Secretary of State's reason for refusing the application. If there had been any other document, it ought to have been included in the bundle of documents submitted to the Tribunal. It ought also to have been sent to Miss R - in which case she could be asked to produce it."
14. As I say, his decision insofar as Section 47 of the 2006 Act was concerned was in error. The Judge however at paragraph 9 proffered further reasons for refusing the request in that he stated as follows:
 - "9. As I was not satisfied the appeal could not be justly determined without there being an adjournment, I was precluded by the mandatory provisions of r.21(2) from adjourning the hearing. If I had thought that I had a discretion to grant an adjournment (despite the wording of r.21(2)), I should have exercised it against the grant of an adjournment for the reasons which I have given in paragraph 9 and for the following additional reasons:
 - (a) If there had been a regrettable and accidental failure either to consider Miss R's appeal under paragraph 159EA or simply a failure to give reasons for the decision, the Secretary of State has

been on notice of those matters since Miss R gave notice of appeal on 19 May 2013, now over 8 months ago. There has been ample time to consider Miss R's notice of appeal and to rectify the omissions.

- (b) I had, earlier in the day, had to adjourn another comparatively simple appeal. It was not, in that case, possible to give that (simple) appeal a hearing date earlier than May 2014. A delay of 4 months is, in any event, unsatisfactory. But all the more so in the circumstances of this appeal because if the appeal were allowed, the *maximum* period of leave which could be granted to Miss R was *12 months* (see paragraph 159EB). Additionally, Miss R had indicated in her notice of appeal that the family intended to leave the United Kingdom on the completion of Mr M's wife's studies at the end of 2014.

I therefore refused Miss Carver's application for an adjournment."

Assessment

15. With that guidance in mind I turn to the present case.
16. It is right to say that most helpfully Mr Melvin at the outset of the hearing before me, explained that mindful of the First-tier Tribunal's reasons for refusing the adjournment request, his position was, that whilst he could not invite me to dismiss the Secretary of State's application, he would fully understand the situation if in fact I decided that the First-tier Tribunal Judge's decision should stand.
17. I have indeed decided that the challenge to the First-tier Tribunal's decision insofar as it relates to his refusal to grant the Secretary of State an adjournment, did not disclose an error on a point of law.
18. It is apparent that the Judge, having set out the relevant provisions of Rule 21 proceeded to carefully consider in terms of the Secretary of State's adjournment request what fairness demanded and as I have quoted above, over paragraphs 8 and 9 of his determination, he comprehensively explained as to why he had concluded that the appeal could be justly determined without their being an adjournment.
19. I find that the Judge's observations and reasoning in refusing the adjournment request were properly open to him and beyond reproach.
20. I would add that the Judge's observation at paragraph 9(a) of his determination reflects Rule 13 of the 2005 Procedure Rules, in particular, that when the Respondent is served with a copy of the notice of appeal she must (if she has not already done so) file with the Tribunal all her documents relevant to that appeal in accordance with any directions given by the Tribunal or if no such direction is given, as soon as is reasonably practical, in any event no later than 2:00pm on the business day before the earliest day appointed for any hearing in relation to the appeal.

Further, the Respondent must at the same time, file such documentation and serve it on the Appellant.

21. It is apparent that in the circumstances of the present appeal (that indeed support the reasons given by the First-tier Judge in refusing the Secretary of State's adjournment request) the requirements of Rule 13 failed to meet with the Secretary of State's compliance.
22. Notwithstanding that failure, the Claimant attended the hearing, ready to proceed, and the fact that the appeal was in the float list on the day of the hearing, could not be regarded as absolving the Secretary of State from her responsibility to be in a state of readiness.
23. Indeed I observe that even now, at the date of the hearing before me, the Secretary of State had still not produced what she described in her grounds of application as "the benefits of (her) substantive decision".
24. Further, there is no suggestion in the grounds, that the Judge's identification at paragraph 159A and those of paragraph 159A(i) and (vi) of the Immigration Rules were not the applicable Rules to be applied and considered in determining the claimant's particular circumstances as to whether or not she met those requirements. Indeed no issue is taken in that regard with the reasoning of the Judge in concluding that those requirements were met in the present case.
25. It is however contended in the grounds, that the Judge took into account post-hearing evidence at paragraph 15 of the determination, but that I find, is to take his reasoning out of context, because he pointed out that the copy of the contract between the claimant and her Sponsor was in its terms "for all practical purposes the same as those contained in a letter of 8 April 2013". That was of course evidence that predated the hearing.
26. I also find that there is no merit in the ground that the Judge took upon himself the role of "primary decision maker under the Immigration Rules". Further the reliance in the grounds on the decision in EA, overlook that part of the head note that states "*the focus must always be on the decision actually made in response to the Appellant's application*". In the present case the Judge's focus was on the decision actually made, namely that the decision under appeal, was the refusal to vary the claimant's leave to remain and in that regard the First-tier Judge reached findings that were supported by and open to him on the evidence and thus sustainable in law.
27. Whilst it is apparent that the First-tier Judge erred in law in failing to recognise the decision to remove the claimant under Section 47 was lawful, such error was not in the circumstances material to the outcome of the appeal, given that the Judge had allowed the Appellant's immigration appeal for sustainable reasons.

Conclusions

28. The making of the decision of the First-tier Tribunal in allowing the Claimant's appeal against the decision to refuse to vary her leave to remain in the United Kingdom did not involve the making of an error on a point of law.
29. I do not set aside that decision.
30. The making of the decision of the First-tier Tribunal to allow the claimant's appeal against removal under Section 47 is set aside for error of law, but in the circumstances makes no material difference to the outcome, where, as here, the substantive immigration appeal remains allowed.

Signed

Date 7 April 2014

Upper Tribunal Judge Goldstein