



Upper Tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/40205/2014  
IA/40220/2014  
IA/40229/2014  
IA/40240/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 21 July 2016

Decision & Reasons Promulgated  
On 22 July 2016

Before

Deputy Upper Tribunal Judge Pickup  
Between

Secretary of State for the Home Department

Appellant

And

Laval Johnsley Arthee  
Vanessa Marie Helene Arthee  
[M A]  
[S A]  
[No anonymity direction made]

Claimants

**Representation:**

For the claimants: Mr MS Jaufurally, instructed by Callistes Solicitors  
For the appellant: Mr S Walker, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The claimants are respectively husband, wife and their two minor daughters now aged 13 and 8.
2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Emerton promulgated 21.1.16, allowing the claimants' linked appeals against the reconsideration decisions of the Secretary of State, dated 23.9.14 (with letter of 12.3.15), to refuse their applications for leave to remain in the UK on private and family life grounds and to remove them from the UK. The Judge heard the appeal on 6.1.16. The appeal was allowed to the limited extent that Judge Emerton found the decision made by the Secretary of State was not in accordance with the law.
3. First-tier Tribunal Judge Parkes granted permission to appeal on 16.6.16.
4. Thus the matter came before me on 21.7.16 as an appeal in the Upper Tribunal.

### **Error of Law**

5. For the reasons set out herein, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Emerton to be set aside and remade.
6. The relevant background to the appeal can be summarised as follows:
7. The first claimant came to the UK as a family visitor in October 2004. In March 2005 he was granted leave to remain as student, along with his wife and children as dependants. His wife, the second claimant, and their eldest daughter, the third claimant, came to the UK in July 2005. The fourth claimant was born in the UK in 2007. Their last leave expired in December 2010. Thereafter, they have had no lawful leave to remain in the UK.
8. On 10.7.12 they applied for leave to remain on the basis of private and family life outside the Rules. The application was refused on 4.11.13, with no right of appeal.
9. The date of application is relevant, it was one day after the introduction of the changes to the Immigration Rules to incorporate the Secretary of State's response to private and family life rights. There has been considerable legal debate as to whether applications made before this date should be considered under the old or new Rules. This application was clearly made under the new Rules. However, as first drafted and until 13.12.12 paragraph 276ADE provided an absolute right to remain for a child under the age of 18 who had been in the UK for a continuous period of 7 years. At the date of application, the third claimant, the appellant's elder child, had been in the UK over 7 years. Had the application been decided before December 2012, the third claimant would have been entitled to remain in the UK, which would have had significant bearing on the applications of the other claimants. The provision under paragraph 276ADE was tightened up by the introduction on 13.12.12 of the present additional requirement under paragraph 276ADE(1)(iv), "and it would not be unreasonable to expect the applicant to leave the UK."

10. On 21.1.14 they made a further application for leave to remain on the basis of private and family life. This was refused on 22.3.14. The claimants applied for Judicial Review. By a consent order made on 14.7.14, the Secretary of State agreed to reconsider their applications, resulting in the refusal decision of 23.9.14.
11. At the first listed appeal hearing in the First-tier Tribunal on 6.2.15 the presenting officer successfully applied for an adjournment to allow the Secretary of State to reconsider the refusal decision and with a direction of the First-tier Tribunal Judge that the Secretary of State consider that the Immigration Rules in force at the time of the application in 2012, when the reasonableness test did not apply, should have been taken into consideration when making the decision of 23.9.14.
12. Following the adjournment, the Home Office sent a letter, dated 12.3.15, referring to the statement of changes HC 820 which provides that the changes, incorporating the reasonableness test, "shall apply to all applications decided on or after 13 December 2012, regardless of the date the application was made." It follows, as the letter states, the Secretary of State was correct to apply the reasonableness test when deciding the application on 4.11.13.
13. The Secretary of State's position is that the first judge was wrong to adjourn the hearing of 6.2.15 for that reason; the correct Rules were applied when the decision was made and there can be no ground of complaint in that regard.
14. However, Mr Jaufurally has pointed me to paragraph 7.4 of the Statement of Changes of 12.12.12. In terms, this first states that to the extent that the approach of applying the changes to all applications which fall to be decided on or after 13.12.12, regardless as to when the application was made, may disadvantage an applicant whose application made before 13.12.12, it is justified because the changes "correctly reflect the Secretary of State's view of the proper balance to be struck under Article 8 of the European Convention on Human Rights (the right to respect for private and family life) between individual rights and the public interest, and of how best to safeguard the welfare of children."
15. However, paragraph 7.4 continues, "Published UK Border Agency guidance will make clear to caseworkers that such cases should not be refused because they do not meet a new requirement of the family or private life Rules in force from 13 December 2012 without being given a reasonable opportunity to demonstrate whether they meet that new requirement."
16. It was the submission of Mr Jaufurally that the decision had been made on 4.11.13 without giving the third claimant a reasonable opportunity to demonstrate whether he met that new requirement; in other words, to prove that it would not be reasonable to remove him from the UK. Mr Jaufurally also submitted that the Secretary had taken too long to decide the case, thereby prejudicing the appellant.
17. I am not satisfied that there is any practical merit in Mr Jaufurally's submissions on this point. First, the change introducing the reasonableness test took place only a few

months after the application was made on 10.7.12. Had the decision been made on 13.12.12 the outcome would have been the same and there could have been no meritorious delay argument. Whilst there was in fact a delay until November 2013, almost 16 months after the making of the application, it cannot be said that beyond December 2012 such delay was material to the outcome of this issue.

18. Second, in effect the third claimant and indeed all the claimants have had ample opportunity in the intervening period to demonstrate that it was not reasonable to expect him to leave the UK. That is because the decision of 4.11.13 was not the last word on their applications for leave to remain and they were not removed from the UK. There was no right of appeal against the refusal decision of 4.11.13, but the claimants simply made fresh applications for leave to remain on grounds of private and family life outside the Rules. They have had the opportunity both in their applications and in their appeal pleadings and hearings to address the reasonableness test. This point was made by Judge Emerton at §34 of the decision (though there is an error in the judge's reference to the date of decision within this paragraph).
19. In the circumstances, I can see no prejudice to any of the claimants. Incidentally, the regrettable and continuing elapse of time whilst the outcome of the applications has remained unresolved has necessarily increased the length of time the third claimant and indeed all the claimants have now been in the UK, which is a factor they can rely on, accruing to their advantage.
20. It follows that the judge's conclusion at §34 of the decision that the Secretary of State's decision of 2012 was flawed for failure to accord the opportunity to demonstrate compliance with the reasonableness test under 276AE(1)(iv) was moot and not directly relevant to the decision under appeal. The judge also found at §33 that the claimants had been prejudiced by the failure to decide their applications "within a reasonably short period." However, for the reasons set out above, I find there was no procedural unfairness in the decision and thus the judge's conclusion on this point is also in error.
21. It follows that Mr Jaufurally's submissions to me and to Judge Emerton that the decision of 23.9.14 was unlawful, either because the third claimant has been prejudiced, or because the old Rules should have been considered and/or applied, or because there has been prejudice by the delay in making the decision of 4.11.13, cannot succeed.
22. The appeal relisted for 24.7.15 was adjourned for lack of court time and thus did not come up for effective hearing until listed before Judge Emerton on 6.1.16.
23. Before Judge Emerton on 6.1.16, Mr Jaufurally made further submissions to the effect that the decision of 23.9.14 failed to adequately address the best interests of the child claimants, pursuant to the duty under section 55 of the Borders, Citizenship and Immigration Act 2009. Other arguments advanced included, that it was not reasonable to remove the third claimant, and that there were exceptional and

compelling circumstances justifying the grant of leave outside the Rules, pursuant to article 8 ECHR.

24. Section 55 of the Borders, Citizenship and Immigration Act 2009 (the “2009 Act”) provides:

*“(1) The Secretary of State must make arrangements for ensuring that –*

- (a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.”*

This obliges the Secretary of State to devise systems and structures for the purpose specified. This duty is formulated in unqualified terms. Subsection (2) elaborates:

*“(2) The functions referred to in sub-section (1) are –*

- (a) any function of the Secretary of State in relation to immigration, asylum or nationality;*

- (a) any function conferred by or by virtue of the Immigration Acts on an Immigration Officer ...*

*(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1)”.*

The latter is the case-by-case duty to be discharged by the Secretary of State’s decision makers and caseworkers.

25. In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, at [23], it was held that the Secretary of State “..... does not have to record and deal with every piece of evidence in her decision letter”. However, Judge Emerton found, accepting Mr Jaufurally’s submissions to this effect, that the refusal decision of 23.9.14 was defective because, lengthy and, detailed though it was, it had not addressed the individual rights of the children and the impact of removal on them. At §37 the judge acknowledge that the decision referred to section 55, but considered that it did not make any real attempt to apply the duty under section 55 to each of the two children.
26. However, it is clear from §29 of the decision onwards that the judge was able to and did carefully assess the circumstances of the children, the third claimant by then having attained 10 years’ residence in the UK. The judge took account of the additional various relevant factors, including language, education, as well as other factors. The judge had the advantage of hearing evidence from the claimants and considering all the supporting evidence contained in the claimants’ bundle.

27. Further, as held in JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC), the case referenced at §38 of the First-tier Tribunal decision, the decision maker must be properly informed of the position of the child affected by the immigration decision and “thus equipped, the decision maker must conduct a careful examination of all relevant information and factors,” as a pre-requisite to the task of identifying the best interests of the children. JO also held that it is manifestly insufficient for a decision maker to pay mere lip service to the two, inter-related duties imposed by section 55. The substance of the primary duty must be properly acknowledged, the relevant children must be identified and their best interests must then be considered, to be followed by a considered balancing exercise.
28. In Azimi-Moayed and others (decisions affecting children; onward appeals)[2013] UKUT 197(IAC) the Tribunal held that (i) Duties to have regard as a primary consideration to the best interests of a child are so well established that a judge should take the point for him or herself as an obvious point to be considered, where the issue arises on the evidence, irrespective of whether the appellants or the advocates have done so; (ii) Although in some cases this may require a judge to explore whether the duty requires further information to be obtained or inquiry to be made, the judge primarily acts on the evidence in the case.
29. I have also carefully considered MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC), drawn to my attention by Mr Jaufurally. In that case, the panel, including the President, held that:
- “Where the Tribunal finds that there has been a breach of either of the section 55 duties, one of the options available is remittal to the Secretary of State for reconsideration and fresh decision. In considering the appropriate order, Tribunals should have regard to their adjournment and case management powers, together with the overriding objective. They will also take into account the facilities available to the Secretary of State under the statutory guidance, the desirability of finality and the undesirability of undue delay. If deciding not to remit the Tribunal must be satisfied that it is sufficiently equipped to make an adequate assessment of the best interests of any affected child.”
30. The panel also held that it was,
- “incumbent on the Tribunal to examine carefully the letter of decision. In doing so, we would observe that, in the fields of immigration and asylum decision making, the importance of the letter of decision cannot be overstated. In the great majority of cases, this is the only mechanism which conveys to the applicant – and, where challenged, the Tribunal – the substance of the Secretary of State’s decision, the main factors considered, the underlying reasoning and the legal rules to which effect was purportedly given.”
31. The panel also made reference to the need to assess whether the further duty enshrined in section 55 of the 2009 Act, which compels the decision maker to have regard to the Secretary of State’s guidance, has been performed. The statutory

guidance is entitled “Every Children Matters – Change for Children” and was published in November 2009. It is described as “*Statutory Guidance to the UK Border Agency on Making Arrangements to Safeguard and Promote the Welfare of Children.*” It prescribes a series of procedures and arrangements applicable to relevant decisions. It also deals with matters such as service development, the training of staff, effective inter-agency working and information sharing. However, it is not necessary that there be explicit reference to the guidance, provided it can be inferred from a reading of the decision.

32. In AA(Nigeria) [2016] 00106 UKUT, it was held that where it is contended that the decision maker and/or the First-tier Tribunal has acted in contravention of section 55 of the Borders, Citizenship and Immigration Act 2009, the Upper Tribunal will scrutinise the degree of engagement with all material evidence and, in particular, will search for clear findings in the decision of the First-tier Tribunal of what the best interests of any affected child are. Article 24(3) of the EU Charter of Fundamental Rights (which essentially mirrors section 55) creates a free standing right (although not absolute) right. Where this right is engaged, a failure by the decision maker and/or the First-tier Tribunal to acknowledge it and to decide accordingly may constitute a material error of law.
33. At the time of MK, section 86(3) provided that the Tribunal must allow an appeal where a decision against which the appeal is brought was not in accordance with the law. That provision was removed on 20.10.14 and it unclear whether the First-tier Tribunal now has power to allow an appeal on those grounds. However, in the light of my decision on this error of law appeal, it is not necessary for me to resolve that issue.
34. In MK, the Upper Tribunal panel considered whether the First-tier Tribunal was empowered to effectively ‘remit’ a decision to be remade by the Secretary of State where section 55 had not been adequately addressed. Reference was made to the Court of Appeal decision in AJ (India) v Secretary of State for the Home Department [2011] EWCA Civ 1191, in which it was held that the First-tier Tribunal was not obliged to make the decision in the appeal in a way which required the decision to be remade by the Secretary of State. After considering relevant case authorities, at §31 of MK, the panel stated that “in the typical case the Tribunal will be sufficiently armed and equipped to properly assess the child’s best interests... It entails an expectation that, in the great majority of appeals, the Tribunal will have sufficient evidence to enable it to conduct this exercise properly.”
35. After finding there was no guidance in Court of Appeal case authority to answer the question, at §34 of MK, the Upper Tribunal panel stated,

“We would highlight that where either the FtT or the Upper Tribunal finds that there has been a breach by the Secretary of State of either, or both, of the duties imposed by section 55 of the 2009 Act, a further assessment of and decision concerning the best interests of any affected child must be made. The author of such decision will be either the relevant Tribunal or the Secretary of State. There is no other candidate decision

maker. We have raised the question of what test or criterion the Tribunal should apply in deciding which of the two candidate agencies should make the fresh decision.”

36. The panel then went on to consider that issue, noting that the First-tier Tribunal had the power to issue directions for further evidence, and/or to adjourn or postpone an appeal hearing. At §38 the Upper Tribunal panel held:

“We consider that there can be no objection in principle to an order of the Tribunal the effect whereof is to require the Secretary of State, rather than the Tribunal, to perform the two duties imposed by section 55. There is no jurisdictional bar of which we are aware. It has long been recognised that there is a category of cases in which it is open to both tiers to allow the appeal on the basis that the Secretary of State’s decision was not in accordance with the law without further order, thereby obliging the Secretary of State, as primary decision maker, to re-make the decision, giving effect to and educated and guided by such correction and guidance as may be contained in the Tribunal’s determination. This is not contested on behalf of the Secretary of State.”

37. Finally, at §38, the Upper Tribunal panel reached this conclusion:

“Where either the FtT or the Upper Tribunal decides that there has been a breach by the Secretary of State of either of the duties imposed by section 55 of the 2009 Act, both Tribunals are empowered, in their final determination of the appeal, to assess the best interests of any affected child and determine the appeal accordingly. This exercise will be appropriate in cases where the evidence is sufficient to enable the Tribunal to conduct a properly informed assessment of the child’s best interests.

“However, there may be cases where the Tribunal forms the view that the assembled evidence is insufficient for this purpose. In such cases, two options arise. The first is to consider such further relevant evidence as the Appellant can muster and/or to exercise case management powers in an attempt to augment the available evidence. The second is to determine the appeal in a manner which requires the Secretary of State to make a fresh decision. While eschewing prescription, we observe that this course may well be appropriate in cases where it appears to the appellate tribunal that a thorough best interests assessment may require interview of an affected child or children in accordance with Part 2 of the Secretary of State’s statutory guidance.

“In choosing between the two options identified above, Judges will be guided by their assessment of the realities of the litigation in the particular case and the basis on which the Secretary of State has been found to have acted in breach of either or both of the section 55 duties. It will also be appropriate to take into account the desirability of finality and the undesirability of undue delay.”

38. It follows from the above that if the First-tier Tribunal found, on analysis of the decision of the Secretary of State, that the section 55 duties had not been adequately fulfilled by the Secretary of State, it was entirely open to the First-tier Tribunal to go on to make its own section 55 best interests assessment, provided there was sufficient evidence to do so. However, it does not appear that Judge Emerton properly considered whether there was sufficient information before the Tribunal to make it appropriate to conduct a properly informed assessment of the best interests of the



children, before the judge decided to allow the appeal in the way in which it was allowed.

39. On the basis of the conclusion in MK, it is only if the assembled evidence is insufficient to enable the First-tier Tribunal to make its own best interests assessment that the judge should have elected between the two options of either: (1) to deal with such evidence as is available, or manage the case so that any necessary evidence to make the assessment is adduced; or, (2) “determine the appeal in a manner which requires the Secretary of State to make a fresh decision.” In choosing between these two options the Tribunal Judge has to be guided by the realities of the litigation and the basis on which the Secretary of State has breached her duties under section 55. The judge may also consider the undesirability.
40. Considering the evidence available to the First-tier Tribunal, I cannot see that there was any lack of adequate information to enable the judge to make the section 55 best interests assessment for each of the children. On the facts of this case, the judge was in a very good position to properly assess the best interests of the children, even if the assessment contained within the refusal decision of 23.9.14 was found to be less than adequate. Day in, day out, judges of the First-tier Tribunal grapple with these very same considerations.
41. In my view, there is no reason why the judge, having properly identified those best interests, and being in possession of all the evidence, not having found that evidence to be inadequate in any way, should not have gone on to undertake the best interests assessment as a primary consideration in any article 8 Razgar-based proportionality assessment, as clearly the judge contemplated doing at §40 of the decision. I note that even in MK, the Upper Tribunal panel concluded that, notwithstanding having found that the decision in that case by the Secretary of State was deficient and breached the section 55 best interests duties, it was appropriate for the Upper Tribunal Tribunal should proceed to undertake the exercise itself, rather than remitting to the Secretary of State. It can be seen from §41 that this was done in a relatively short paragraph.
42. As stated above, if the judge felt the information available to the tribunal at the hearing on 6.1.16 was insufficient, there was the opportunity to adjourn, issuing directions for further evidence to be adduced, or the option, pursuant to MK, to
43. In the circumstances, I reject Mr Jaufurally’s submission that it was entirely open to the judge to ‘remit’ the decision to the Secretary of State, because as he put it, it was in the range of options open to the judge. The judge might well have reached the point of considering whether to manage the case so that further evidence was adduced, or, alternatively, deal with the appeal in a way which required the Secretary of State to remake the decision, but in reality should only have reached that point after making an assessment as to whether the evidence then before the Tribunal was sufficient to enable the First-tier Tribunal to undertake the best interest exercise itself.

44. It follows that the appeal of the Secretary of State should be allowed and the decision of the First-tier Tribunal set aside.
45. As is clear from the discussion in MK, this was a far from straightforward issue for the First-tier Tribunal and for any judge. The judge was right to have concern as to the assessment of the best interests of the two children. It is also very apparent from the otherwise careful and detailed decision that Judge Emerton was appropriately cautious and attempted to carefully balance the competing factors before finally deciding to allow the appeal in the way in which it was allowed. In my view no criticism attaches at all to the judge who had to make a difficult decision, even though on my analysis of the law ultimately I have found the decision in the appeal was wrong and therefore in error of law.
46. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. In all the circumstances, I relist this case for in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

**Conclusions:**

47. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by remitting it to the First-tier Tribunal to be remade afresh in accordance with the attached directions.



**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

### **Consequential Directions**

1. The appeal is remitted to be reheard afresh, with no findings preserved, in the First-tier Tribunal sitting at Taylor House;
2. The appeal may be listed before any judge, except Judge Emerton;
3. The estimated length of hearing is 2 hours;
4. No interpreter is required;
5. Not later than 10 working days before the relisted hearing the claimants' representatives must serve a revised consolidated bundle, paginated and indexed, comprising all subjective and objective evidence to be relied on, together with skeleton argument and copies of any case authorities relied on. The Tribunal will not accept documents submitted on the day of the hearing.

### **Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I make no anonymity order.

### **Fee Award**

**Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.



**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

**22 July 2016**