



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/24079/2016
HU/24082/2016
HU/24087/2016

THE IMMIGRATION ACTS

Heard at Field House
On 4 January 2019

Decision & Reasons Promulgated
On 1 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

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(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Hirst of Counsel
For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are all citizens of Nigeria. They appealed against the respondent's decision dated 3 October 2016 to refuse their applications for leave to remain in the United Kingdom.
2. Judge Onoufriou (the judge) allowed the appeals under Articles 3, 8 and 4. Further, the judge said that the appeal was allowed under the Immigration Rules with regard to the third appellant.

3. The grounds claim that the judge did not address the issue of whether the appellants' removal would be contrary to the UK's obligations under the Refugee Convention which was raised both in the appellants' grounds of appeal and written and oral submissions made at the hearing. The appellants had sought to remedy that omission through an application under Rule 31 of the 2014 Procedure Rules, however, the Tribunal's response dated 22 May 2018 refused the application on the basis that it was not an appropriate case for an application of Rule 31. Thereafter, the appellants appealed out of time on asylum grounds only against the First-tier Judge's decision promulgated on 5 March 2019 that it was a material error of law to fail to consider or determine the appellants' asylum grounds of appeal since that was a matter before the judge under S.85(2) and (4) of the 2002 Act.

4. Judge Pickup refused permission to appeal in a decision dated 22 August 2018. He said inter alia:

"2. The application is very substantially out of time. It should have been received no later than 19.3.18 but was not received until 4.6.18. I have considered the explanation for the delay being that the appellants' representatives sought to remedy an alleged omission in the decision by asking the Tribunal to apply Rule 31 of the Tribunal Procedure Rules, which was refused. That does not explain the very significant subsequent delay. In the circumstances I do not extend time."

3. In any event there is no merit in the application. The appellants' claim that the judge erred by failing to address whether the appellants' removal would be contrary to the Refugee Convention, which was raised in the grounds and in submissions. However, the Appellants had made no formal asylum claim, which has to be made in person and not in the course of an appeal on human rights grounds. Although there was a S.120 notice there has been no decision by the Secretary of State on the Convention grounds."

5. The grounds were renewed. In a decision dated 21 November 2018, Dr H H Storey, Judge of the Upper Tribunal granted permission to appeal. He said:

"In light of the more detailed explanation and also the appellants' legal submissions I am prepared to extend time."

6. Given that the first appellant completed a S.120 notice raising asylum grounds of appeal it is arguable that it was incumbent on the judge to make a decision regarding them, notwithstanding that the appellant had not made a formal application for asylum. The grounds therefore disclose an arguable error of law.

7. There was no Rule 24 response.

Submissions on Error of Law

8. The grounds turned upon the narrow issue on whether the judge was obliged to consider and determine the appellant's asylum grounds of appeal. Ms Hirst relied upon the grounds. There was no Rule 24 response, however, Mr Jarvis submitted

that bearing in mind S.82 and S.84(2) there was no obligation on the judge to engage with the asylum claim such that there was no material error of law as the judge had no jurisdiction. He said that in the event that I found there was jurisdiction then given the judge's findings at [44] - [45] of the decision, there was a real likelihood that the appellant would be re-trafficked.

Conclusion on Error of Law

9. Put simply, s.82 and 84 had to be considered in light of the notice under s.120 of the Nationality, Immigration and Asylum Act 2002.
10. S.85(2) provides:
 - “(2) If an appellant under section 82(1) makes a statement under section 120, [the Tribunal] shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in Section 84(1) against the decision appealed against.*
 - (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.”*
11. The respondent's refusal dated 3 October 2016 included a notice under S.120 to which the appellant responded in her original grounds of appeal and in a Statement of Additional Grounds dated 20 July 2017. The appellant clearly stated that she wished the Tribunal to consider Refugee Convention grounds of appeal. Counsel's skeleton before the judge made submissions on asylum and humanitarian protection. That being the case, the judge was obliged by S.85(2) and (4) to consider the asylum appeal.
12. I find the asylum and humanitarian protection issues were before the judge and it was irrelevant that there had been no formal asylum application or any prior decision by the Secretary of State. There was no issue that such issues were before the judge. See [9]1 and [25] of the decision.
13. I find the judge materially erred. It was incumbent upon her to make a decision regarding the asylum and humanitarian protection claim notwithstanding that there had been no formal application. Given Mr Jarvis' helpful acceptance that bearing in mind the judge's findings at [44] - [45] that the appellant was likely to be a victim of re-trafficking on return, I remake the decision by allowing the appeal on asylum and humanitarian protection grounds. For the avoidance of doubt, none of the findings the judge made in her decision are disturbed and my decision is by way of addition, not substitution.

Notice of Decision

14. The appeal is allowed on asylum grounds.
15. The appeal is allowed on humanitarian protection grounds.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him 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.

Signed

Date 4 January 2019

Deputy Upper Tribunal Judge Peart

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid.

Signed

Date 4 January 2019

Deputy Upper Tribunal Judge Peart