



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

Appeal Number: IA/36247/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21 October 2015**

**Decision & Reasons
Promulgated
On 2 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MS IMEN KEBBACHE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Saeed, Legal Representative, Legal Solutions
For the Respondent: Mr Jarvis, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Maxwell sitting at Richmond Magistrates Court on 7 May 2015) whereby the First-tier Tribunal ("FtT") dismissed her appeal against the decision by the Secretary of State to refuse to vary her leave to remain for a purpose not covered by the immigration rules, and against her concomitant decision made on 3 September 2014 to make directions for her removal pursuant to Section 47 of the 2006 Act. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

2. The appellant is a national of Algeria, whose date of birth is 25 May 1991. On 11 July 2013 she was given limited leave to enter the UK until 11 January 2014 as a visitor. On 3 September 2014 the Secretary of State gave her reasons for refusing her application for leave to remain dated 9 January 2014 based on her relationship with Mr Ali Imran, and her pregnancy in consequence of that relationship. As of 18 August 2014 she was 20 weeks pregnant, and so she was still eligible to travel abroad. As the child was unborn, s55 was not engaged. The evidence provided did not show she was in a genuine and subsisting relationship with Mr Ali, given its short existence. She had also expressed a fear of return to Algeria which would fall for consideration under Article 3 ECHR, and so would constitute a claim for international protection and an asylum application under paragraph 327(b) of the Rules. This claim should therefore be made in person at the ASU.

The Hearing before, and the Decision of, the First-tier Tribunal

3. At the hearing before Judge Maxwell, Mr Saeed appeared on behalf of the appellant. There was no Presenting Officer. Mr Saeed submitted that her circumstances had changed since the refusal decision, as she had now given birth to a child who was a British national.
4. The judge dismissed the appeal for the reasons he gave in paragraphs [4] to [7]. He found that there was no decision to remove the appellant. As her application for leave to remain had been made outside the rules and there was no removal decision, he held that there was no appealable immigration decision and so he dismissed the appeal for want of jurisdiction. The appellant's only recourse was to make a fresh application based on her new circumstances.

The Grant of Permission to Appeal

5. Permission to appeal was granted as it was arguable that the judge was wrong to find that the appellant did not face removal and wrong to find that she did not have a right of appeal, despite the respondent saying that she did have an in-country right of appeal in the Notice.

Discussion

6. As was accepted in the Rule 24 Response and by Mr Jarvis at the hearing, Judge Maxwell was wrong to find that the appellant did not face removal and wrong to find that she did not have a right of appeal, despite the respondent saying that she did have an in-country right of appeal in the Notice of Decision and in the Reasons for Refusal letter. The Notice of Decision dated 3 September 2014 also contained a notice of decision to remove the appellant under s47 of the 2006 Act.
7. The issue which I need to resolve is the future disposal of the appeal. Mr Jarvis submitted that the appeal should be remitted to the FtT. Mr Saeed submitted that the matter should go back to the Secretary of State for fresh consideration in the light of the appellant's changed circumstances. She was now the primary carer of a British national child, her relationship

with the father of the child having broken down. It would be better, he submitted, if the Secretary of State, rather than the FtT, was the primary decision-maker. He relied on **JO and Others (section 55 duty) Nigeria [2014] UKUT 00517** and on **MK (section 55 - Tribunal options) Sierra Leone [2015] UKUT 0023**.

8. It would be better if the Secretary of State was able to assume the role of primary decision-maker, but this can only come about if the appellant abandons her current appeal and makes a fresh application. The fact that her circumstances have changed since the date of decision does not engender a right on her part to have her original application reconsidered by the Secretary of State *as part of her ongoing appeal against the decision*. There is no jurisdiction to compel the Secretary of State to reconsider the decision unless it can be shown that the decision was unlawful, and a lawful decision is still awaited. The decision appealed against was not unlawful. There was no duty to consider the impact on the unborn child of the prospective removal of the mother. As she is facing removal, the appellant can raise additional grounds by way of appeal that did not exist at the date of decision; and, once raised, the FtT has to be the primary decision-maker on these additional grounds. If the FtT is not satisfied that it is sufficiently equipped to make an adequate assessment of the best interests of any affected child, the solution in a case such as this (where there has been no breach of s55 in the assessment of the impact on the child in the refusal letter) is to seek further evidence from the parent(s) and/or their representatives. As stated in **MK**, the onus rests with the appellant to show a past or prospective breach by the Secretary of State of her duties under s55. There is no onus on the Secretary of State.

Notice of Decision

9. The decision of the First-tier Tribunal contained an error of law such that the decision should be set aside and remade.
10. The parties have been deprived of a fair hearing in the FtT, and so the appeal is remitted to the FtT at Taylor House for a de novo hearing before any judge apart from Judge Maxwell.

Signed

Date

Deputy Upper Tribunal Judge Monson