



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

Appeal Number: IA/41183/2014

THE IMMIGRATION ACTS

Heard at Field House

On 13 October 2015

Determination

Promulgated

On 14 October 2015

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DEEPAK SHARMA GEWALI

Respondent

Representation:

For the Appellant: Mr Melvin, Senior Home Office Presenting Officer

For the Respondent: Ms Bond, Counsel

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, we refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal.

2. The Appellant is a citizen of Nepal. He appeals against the decision of the Secretary of State dated 8 October 2014 refusing him further leave to remain as the dependent of his wife who has leave to remain as a Tier 4 student until 14 April 2017. The decision also gave notice of his removal to Nepal.
3. The Appellant's appeal was allowed by a decision of First-Tier Tribunal Judge Rastogi promulgated on 18 May 2015 ("the Decision"). The Decision was on the basis that the Respondent's decision was not in accordance with the law because it failed to deal with Article 8 ECHR and the best interests of the Appellant's child who had been born in the UK after the Appellant's application to the Secretary of State and after the decision under appeal.
4. There was no criticism of any failure of the Secretary of State to make a decision on the basis of Article 8 ECHR or to consider section 55 of the UK Borders Act 2007. The Appellant's application was a points-based system one. He had raised his personal circumstances in a witness statement submitted shortly before the hearing of the appeal but had not raised those circumstances, particularly the birth of his baby in the statement of additional grounds filed with the notice of appeal (although he had raised the issue of Article 6 ECHR and Article 8 ECHR with no particulars given). However, for reasons set out at [26] to [27] of the Decision, the Judge remitted the case to the Secretary of State for a decision on those aspects. I deal in more detail with this below when giving reasons for my decision.
5. The Appellant's and his wife's immigration background is briefly set out at [10] of the Decision and I do not need to repeat that. Suffice it to say, the Appellant's appeal under the Rules as a dependent spouse of a Tier 4 student was dismissed. There is no challenge to that finding.
6. The Respondent appealed on the grounds that the Judge should have made a finding on Article 8 ECHR and section 55 and should not have remitted to the Secretary of State. The Respondent relies in this regard on MK (Section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 as authority for the proposition that it is for the Appellant to make out his case on the impact of his removal on his baby and there was no evidence in this regard. The Respondent also submitted that the Judge failed to consider the provisions of section 117B when considering proportionality under Article 8 ECHR.
7. Permission to appeal was granted on 15 July 2015 by First-Tier Tribunal Judge Baker on the basis that it was arguable that the Judge erred in remitting the case to the Respondent and arguably erred in finding that the decision was not in accordance with the law, particularly since the Respondent was unaware of the birth of the Appellant's baby until the hearing. The matter comes before the Upper Tribunal to determine whether the First-tier Tribunal decision involved the making of an error

of law. I indicated at the end of the hearing that I found there to be no error of law and would provide reasons in writing which I now set out below.

Decision and reasons

8. I have no difficulty in rejecting the second of the Respondent's two grounds. As Mr Melvin submitted, the Judge embarked on the Article 8 consideration at [24]. However, having directed herself on the law in relation to Article 8 including in relation to section 117B at [25] the Decision on this aspect comes to an abrupt end without a finding. It cannot be said that there is an error of law in applying section 117B to the public interest question when determining proportionality because the Judge simply has not reached that point and has stopped short of making any decision on human rights (other than allowing the appeal on that basis for the Respondent to consider it).
9. The first ground presents more difficulty. As I put to Mr Melvin, the issue is whether the Judge could lawfully do as she has done; if she could, there can be no error of law. The fact that there was little evidence before her as to the impact of removal on the child may be relevant to this aspect although I noted that there is some limited evidence at [7] to [13] and [8] to [10] of the Appellant's and his wife's witness statements (as referred to at [24] of the Decision). Mr Melvin submitted that there would be no impact on the Appellant's child as his wife and child could return to Nepal with him. The Appellant's child is very young and will have no private life apart from with his parents. His best interests lay with remaining with both parents and the family returning to Nepal. I accept that this might be the position but note that the position might be different since the Appellant's wife has the right to remain in the UK until April 2017 and may decide that, because of the impact otherwise on her studies, she should stay in the UK (as indeed her witness statement appears to indicate she would do). If that is the position, then the Secretary of State and/or the Tribunal is obliged to consider the best interests of the child on the analysis that the child will lose the care of one parent, albeit for a limited period. In any event, I repeat the error must be in the Judge's procedural approach and not the substance of the Article 8/section 55 claim as otherwise there is no error.
10. I was assisted in resolving this issue by the Tribunal's decision in MK (above) although not by the passage relied upon by the Respondent. The headnote includes the following passage:-

"(iv) 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"

 That passage appears to find its genesis in [38] of the decision where the Tribunal says:-

“We consider 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....”

11. Although there is no reference to the decision of MK in the Decision, and whilst the Decision is not well expressed in terms of the reasons why the case was remitted to the Secretary of State, the Judge clearly did have in mind that the best interests of the child needed to be considered at [27] and [28] of the Decision.
12. As I note above, the issue for me is whether the Decision contains a material error of law. Based on the above analysis, I find that there is no material error of law. I emphasise however, firstly, that there can be no criticism of the Respondent for failing to consider the best interests of the Appellant’s child prior to the date of the hearing; it was incumbent on the Appellant to raise this issue with the Respondent in order for the Respondent to consider it. Secondly, I emphasise that it would obviously have been open to the Judge to consider the Article 8 claim and the best interests of the child on the basis of the material before her and it might have been preferable in the interests of avoiding delay and expense to the parties had she done so. For the reasons I have given, however, I consider it was open to the Judge to proceed as she did and I find that there is no material error of law in the Decision and I uphold it. The Appellant and Respondent will note what is said in the Decision about the requirement on the Appellant to submit further material to the Respondent if he wishes her to consider it when re-making the decision and the Respondent will note what is said about the timing of such decision.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law.

I do not set aside the decision



Signed

Date

14 October 2015

Upper Tribunal Judge Smith