



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

Appeal Number: IA/43731/2014

THE IMMIGRATION ACTS

Heard at Manchester

On 15th May 2015

**Decision &
Promulgated
On 27th May 2015**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**FRANK GOMANI
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Miss C Johnstone, Senior Home Office Presenting Officer
For the Respondent: Mr B Chimpango of Crown & Law Solicitors

DECISION AND REASONS

Introduction and Background

1. This is an appeal by the Secretary of State against a decision of Judge of the First-tier Tribunal M Davies (the judge) promulgated on 20th January 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the claimant.
3. The claimant is a male citizen of Malawi born 26th December 1979 who applied for leave to remain in the United Kingdom as the dependant of his spouse, a Tier 4 Student.
4. The application was refused on 22nd October 2014, the Secretary of State making a combined decision to refuse to vary leave and to remove the claimant from the United Kingdom.
5. The application was refused with reference to paragraph 319C(i) of the Immigration Rules on the basis that the claimant's spouse was not studying a course that was twelve months or longer in duration.
6. The claimant appealed to the First-tier Tribunal contending that the Secretary of State had erred in considering the Immigration Rules, and further that the decision breached the claimant's right to a family life with his wife, pursuant to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
7. The appeal was heard by the judge on 13th January 2015. The Secretary of State was not represented. The judge heard evidence from the claimant, and indicated that he did not need to hear any submissions from Mr Chimpango. The judge found that the Secretary of State's decision dated 22nd October 2014 was not in accordance with the law, as there had been no consideration of the claimant's Article 8 rights. The judge found that the claimant had been in the United Kingdom with his spouse, and that they had two young children, and the Secretary of State had not given consideration as to how the decision to remove would affect the claimant's family or private life. No consideration had been given to the best interests of the children.
8. In addition the judge had been provided with a previous Tribunal decision which had been promulgated on 21st August 2012, in which the claimant's appeal, against a previous decision, had been dismissed under the Immigration Rules but allowed on Article 8 grounds. The judge found that the Secretary of State had not given any consideration to the previous Tribunal decision.
9. The Secretary of State applied for permission to appeal to the Upper Tribunal, contending in summary that the judge had erred in finding the decision not to be in accordance with the law, as no application had been made by or on behalf of the claimant in relation to Article 8.
10. Permission to appeal was granted by Judge of the First-tier Tribunal Maller in the following terms:
 - (a) The Appellant is a national of Malawi 1985. His appeal against the Respondent's decision to refuse him leave to remain as the dependent partner of a points-based migrant and to remove him was allowed by

FTT Judge M Davies. He found that the Respondent's decision was not in accordance with the law as it was clear from the refusal letter that she had not considered the Appellant's Article 8 rights and their effect if he were to be removed. Throughout his time in the UK he has been here with leave as has his spouse. They have two young children. No consideration had been given as to their best interests [10-11]. He remitted the case to the Respondent for 'him' (sic) to reconsider the matters and make a fresh decision.

- (b) It is arguable, as submitted, that the decision to remit was wrong as no application had been made under Article 8. This was a case relating to PBS only. Moreover, the Tribunal failed to identify any 'compelling circumstances' which required the case to be considered under Article 8 having failed to meet the relevant requirements under the Rules.
- (c) Further a One-Stop Warning was given and the Appellant raised Article 8 as part of his Grounds of Appeal as well as relying on human rights in his witness statement, this enabled the judge to make the Article 8 decision himself as a primary decision maker.

11. Following the grant of permission, directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law, such that the decision must be set aside.

The Secretary of State's Submissions

12. Miss Johnstone relied upon the grounds contained within the application for permission to appeal, and the grant of permission to appeal. I was asked to find that there was no evidence that the claimant had made an Article 8 application, and there was no evidence that his children had made any application. I was asked to find that the judge had erred in law, and the decision should be remitted to the First-tier Tribunal.

The Claimant's Submissions

13. Mr Chimpango confirmed that there had been no response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 but submitted that the judge had not erred in law. Mr Chimpango contended that the Secretary of State should have considered Article 8 when it was found that the claimant did not meet the requirements of the Immigration Rules.
14. In answer to questions that I put, Mr Chimpango accepted that no application had been made under Appendix FM in relation to family life, and that there was no reference to Article 8 in the application form that had been submitted. Mr Chimpango did not believe that a copy of the Tribunal's previous decision had been submitted with the application.
15. Mr Chimpango agreed that if I found an error of law and set aside the decision of the First-tier Tribunal, it would be appropriate to remit this appeal back to the First-tier Tribunal.

My Findings and Conclusions

16. I find that the First-tier Tribunal erred in law and the decision must be set aside. My reasons for reaching this conclusion are that no application was made under Article 8, either with reference to Appendix FM in relation to family life, or paragraph 276ADE in relation to private life.
17. Moreover, no application was made with reference to Article 8 outside the Immigration Rules. The claimant's application form is contained within the Respondent's bundle that was before the First-tier Tribunal, and can be found at Annex A. There is no reference in that form to Article 8, and no reference to the claimant having children. I have not been provided with any covering letter which accompanied the application form, and no such letter was placed before the First-tier Tribunal.
18. I accept Miss Johnstone's submission that a check had been made with the Secretary of State's records, which revealed no application had been made in relation to the claimant's children. I am satisfied that no copy of the previous Tribunal decision was submitted with this application and there was no reference to that previous decision in the application form.
19. The Secretary of State was therefore not requested specifically, or in my view by implication, to consider Article 8, and in any event was given insufficient information to make any informed decision on Article 8. The Secretary of State was asked to consider an application made under paragraph 319C of the Immigration Rules and did so. It was open to the claimant to make an application under Article 8 or request that Article 8 be considered and to provide sufficient information to enable this to be done, but the claimant did not do so.
20. In my view, the Secretary of State's decision to refuse to vary leave and to remove the claimant from the United Kingdom is in accordance with the law, and the First-tier Tribunal erred in finding otherwise.
21. As the decision of the First-tier Tribunal is set aside, it needs to be re-made. Both representatives agreed, and I conclude that it is appropriate to remit this appeal to the First-tier Tribunal. In making this decision I have considered the Senior President's Practice Statements, and in particular paragraph 7.2 which I set out below:
 - 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:
 - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

22. In this case the appeal has not been substantively considered. The claimant has raised Article 8 as a Ground of Appeal, and the First-tier Tribunal will no doubt be asked to consider Article 8 as well as the Immigration Rules. Because the claimant's case has not yet been substantively considered by the First-tier Tribunal, it is appropriate to remit this appeal back to the First-tier Tribunal to be considered afresh by a judge, other than Judge M Davies.
23. The appeal will be heard at the Manchester Hearing Centre and the parties will be advised of the hearing date in due course. It is understood that no interpreter will be required, but if this is not the case, the claimant's solicitors must notify the Tribunal immediately.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

Anonymity

No anonymity direction was made by the First-tier Tribunal. There has been no request to the Upper Tribunal for anonymity, and no anonymity order is made.

Signed _____ Date 18th May 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

As the decision of the First-tier Tribunal has been set aside, so has the fee award. The Upper Tribunal makes no fee award. This is to be decided by the First-tier Tribunal when the decision is re-made.

Signed _____ Date 18th May 2015

Deputy Upper Tribunal Judge M A Hall