



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

Appeal Number: UI-2021-001858
First Tier Tribunal: PA/01962/2020

THE IMMIGRATION ACTS

**Heard at Edinburgh
On 1 December 2023**

**Decision & Reasons Issued:
On 29th February 2024**

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IRFAN ARIF

Respondent

Representation:

For the Appellant: Mr Lindsay, Senior Home Office Presenting Officer.
For the Respondent: Mr Haddow, instructed by Maguire Solicitors.

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal Judge Kempton allowing the appeal of the respondent whom we shall call “the claimant” against the Secretary of State’s refusal of his protection and human rights claim.
2. The case is, it is fair to say, factually complex, and various characteristics of the history of the claimant himself and his partner, raise further difficulties, which required full consideration in the course of the Secretary of State’s decision and in the course of the appeal.
3. The judge appears to have taken all those circumstances into account in the course of the appeal. We say that even bearing in mind the richness

of the Secretary of State's challenge to the eventual conclusion in the claimant's favour. However, one issue raised by the Secretary of State in her grounds of appeal, is a matter which we have thought it right to deal with in advance of the rest of the consideration of the appeal. It is this. In the course of the appeal it was asserted, first by the claimant's partner in her witness statement, and then in the course of submissions by the claimant's agent at the hearing, that there was a further risk factor in the claimant's case arising from what would be his perceived association with his partner and her family and her marital history.

4. That was a matter which had not been previously considered by the Secretary of State because it had not been previously raised, and which constituted (as we understand in principle, Mr Haddow on the claimant's behalf now accepts) a "new matter" for the purposes of the procedure and the limitations on jurisdiction set out in s 85 of the Nationality, Immigration & Asylum Act 2002. Whether or not it is right to say that Mr Haddow accepts that, we are satisfied that it was a new matter for those purposes. It is right also to say that the Secretary of State had previously given consent for another earlier new matter to be considered; this was a further new matter.
5. That description is not in any sense a criticism of the way the claimant put his case. It was simply the way that things happened in this case: but this last new matter was one which required the consent of the Secretary of State before the Tribunal was entitled to consider it. No such consent was ever given. Despite that, Judge Kempton clearly had it in mind and took it into account in her decision.
6. Under those circumstances there was an error of law, as we decide, in the judge's decision. There was an error of law because to that extent she exceeded her jurisdiction. She took into account a matter which, because of the constraints on her limited statutory powers imposed by s 85, she should not have taken into account.
7. Mr Haddow's response is a detailed and measured one. It is, in substance, that Judge Kempton's determination can be read as allowing the claimant's appeal separately on refugee and human rights grounds in ways which make no reference to the new matter. And he says that in those circumstances first that the new matter and its consideration were immaterial to the conclusions that the judge reached, and secondly that this Tribunal only has power to set aside the decision of the judge if it finds that there was an error of law that was material to the decision.
8. Looking first at that latter submission we are satisfied that that is incorrect. The power of the Tribunal is that set out in s 12 of the Tribunals, Courts and Enforcement Act 2007, and is as follows:

"12. Proceedings on appeal to Upper Tribunal

- (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
- (2) The Upper Tribunal –

- (a) may (but need not) set aside the decision of the First-tier Tribunal, and
- (b) if it does, must either –
 - (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
 - (ii) re-make the decision.”

9. This is a case in which, as we have indicated, we find that the making of the decision concerned involved the making of an error of law. Paragraph 12(2) therefore applies. We may but need not set aside the decision. We have a discretion not limited by statute as to whether the decision should be set aside. Clearly that discretion needs to be exercised in a judicial way and in a typical case not involving an excess of jurisdiction, it would be a waste of time and energy if a decision was set aside for an error of law where it was clear that the error had had no impact on the decision which would have been the same but for the error.
10. However, this is not a routine matter and it seems to us that in circumstances where firstly, there has been an excess of jurisdiction by the judge, secondly, where, as perhaps rather belatedly as Mr Lindsay argued, the result has been that there has been a procedural unfairness that can be credibly argued to have existed, even if not established, in that a matter was taken into account which the Secretary of State had no reason to suppose would be taken into account by a judge who is bound not to take it into account. Those factors themselves give rise to a proper reason for the Tribunal to set aside the decision having determined the error of law. It is set aside not because the error is shown to be material, but because it is just and proper to set it aside in the circumstances we have indicated: the claimant is not entitled to retain a decision affected by procedural unfairness.
11. Suppose, however, that there was a restriction based on materiality, we should nevertheless have reached the same conclusion. We accept that it is sometimes possible in construing a decision which has been written in detail as this one has been written, with numbered paragraphs setting out conclusions on different points, to separate the conclusions on individual points and find them unaffected by the error. But where a judge in the course of her consideration, has avowedly taken into account, something which should not have been taken into account, it is not in usual circumstances possible to say how the decision would have been written if the error had not been made. Matters not expressed may well have been in the judge’s mind; and in all circumstances the decision has to be read as a whole. We therefore decline to say that the judge’s error in this case made no material difference to the outcome of the appeal.
12. For those reasons we find that, as indicated, there was an error of law, and we will set aside the decision.
13. We are then required to give further directions under s 12(3). The directions we give are that the matter be redetermined by a different judge of the First-tier Tribunal. The conclusions reached by the First-tier Tribunal under these circumstances cannot properly be preserved, but we

regard the case as one in which there is no good reason why, if the parties consider it appropriate, the summary given by the First-tier Tribunal judge of the evidence produced before her (not her conclusions on it) should not be produced in the First-tier Tribunal again. Therefore it may be that some of the evidence does not have to be given again because, the judge has summarised what it was. Secondly, we direct that before the matter comes for consideration by the First-tier Tribunal again, the Secretary of State considers the new matter on which this difficulty has arisen, and either gives consent for it to be considered or provides a reason why it should not be considered.

14. This decision was given at the hearing and the parties have been aware of it since then. We regret the delay in sending out this written version, caused by a temporary loss of the recording.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 22 February 2024