Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02797/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 October 2013	**On 9 December 2013**

Before

THE PRESIDENT, THE HON MR JUSTICE MCCLOSKEY
UPPER TRIBUNAL JUDGE STOREY

Between

KHURSHID AHMAD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant: Mr Z Malik (of Counsel) instructed by Malik Law Chambers, Solicitors
Respondent:Ms A Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION

[1] At the outset of the hearing conducted before this Tribunal on 31st October 2013, the parties were invited to address argument on whether the impugned decision of the Secretary of State for the Home Department (hereinafter "*the Respondent*"), communicated to the Appellant in a letter dated 8th January 2013, was compliant with the order of the Court of Appeal made at an earlier stage of these protracted proceedings. This arose in the following way.

THE EARLIER COURT OF APPEAL ORDER

[2] On 15th November 2011, the Court of Appeal promulgated its decision in **Sapkota and KA (Pakistan) – v – Secretary of State for the Home Department** [2011] EWCA Civ 1320. The second Appellant therein, 'KA', is the Appellant in the present case. The central issue in the appeals in question was one of legality, relating to the Respondent's refusal of applications by foreign nationals to vary their leave to remain in the United Kingdom and the absence of a simultaneous, or prompt, direction to remove such persons. Having failed in their appeals to the First-tier and Upper Tribunals, the Appellants succeeded before the Court of Appeal. In the concluding paragraphs of his judgment, Aikens LJ, delivering the unanimous judgment of the Court, stated:

> "*[124] In the case of RS I would allow the appeal. In his case the direction that I would give pursuant to section 87 of the 2002 Act is that the matter be remitted to the SSHD to reconsider RS's application for leave to remain and, in doing so, the SSHD should consider all relevant factors under paragraph 395C of the Immigration Rules .....*
>
> *[125]* ***In the case of KA ..... there should, broadly, be similar directions and a similar order …***"
>
> [Emphasis added.]

At the hearing, this Tribunal questioned why the order of the Court of Appeal which, presumably, eventuated, did not form part of the evidence before either the First-Tier Tribunal or this Tribunal. No adequate explanation was forthcoming. An appropriate direction was made. This resulted in a certified copy of the order being provided. This confirmed, importantly, that the order reflected paragraphs [124] and [125] of the Court of Appeal's judgment. It contains the following provisions:

> *"4. The Appellant do have until 4pm on Tuesday 13 December 2011 to make any further submissions to the Respondent on the issue of why he should be granted leave to remain or should not be removed;*
>
> *5. The Respondent to reconsider the Appellant's application for leave to remain dated 28 October 2008 in conjunction with any submissions made in accordance with paragraph 3 hereof, and thereafter either grant leave to remain in the United Kingdom or proceed to issue a removal decision under section 47 of the Immigration, Asylum and Nationality Act 2006.*

6. *The Respondent to consider all relevant factors under Paragraph 395C of the Immigration Rules in considering the matters referred in paragraph 3 hereof:*

7. *The Respondent do have until 4pm on Tuesday 7 February 2012 to determine the matters referred in paragraphs 4 and 5 hereof; "*

THE IMPUGNED DECISION

[**3**] The effect of the order of the Court of Appeal was to require the Respondent to reconsider the Appellant's application for leave to remain in the United Kingdom **and** to undertake this exercise in a specified manner. Specifically, the Respondent was ordered to consider any representations relating to any of the factors specified in paragraph 395C of the Immigration Rules. On behalf of the Appellant, it was argued that the ensuing decision of the Respondent (*supra*) had failed to comply with this requirement of the court order. As a result, it was contended, the Respondent's decision was not in accordance with the law, giving rise to the conclusion that the First-Tier Tribunal had erred in law.

[**4**] The submission advanced on behalf of the Respondent was that when the reconsidered decision was made, paragraph 395C of the Immigration Rules had been deleted. It was argued (in terms) that this absolved the Secretary of State of the obligation to comply with the relevant provision of the order of the Court of Appeal. It was further argued (in terms), in the alternative, that a fair and broad evaluation of the Respondent's decision making yielded the analysis that all of the paragraph 395C factors had in fact been considered by the Respondent.

[**5**] In determining this appeal, we draw attention to, firstly, the unexceptional principle that orders of any court are binding on the parties. One of the outworkings of this general principle is that where an order contains provisions of a mandatory nature, full compliance therewith is required of the party to whom they are directed. We observe that there was no appeal by the Respondent against the order of the Court of Appeal and we note that there was no legislative intervention, retrospective or at all, purporting to extinguish or modify this order. We would add, in parenthesis, that the absence of any such Parliamentary intervention is unsurprising, given the doctrine of the separation of powers which underpins the unwritten British Constitution.

[6] Accordingly, the Respondent was obliged to give full effect to the Court of Appeal order. At this juncture, it is appropriate to interpose the terms of the (now repealed) paragraph 395C of the Immigration Rules:

> *"Before a decision to remove under section 10 is given, regard will be had to all the relevant factors known to the Secretary of State, including:*
>
> *i) age ;*

ii) length of residence in the United Kingdom;
iii) strength of connections with the United Kingdom;
iv) personal history, including character, conduct and employment record;
v) domestic circumstances;
vi) previous criminal record and the nature of any offence of which the person has been previously convicted;
vii) compassionate circumstances;
viii) *any representation received on the person's behalf.*
in the case of family members, the factors listed in paragraphs 365-368 must also be taken into account."

Paragraph 395C was deleted from the Immigration Rules by the Statement of Changes in Immigration Rules made by Parliament on 19th January 2012. This post dated the order of the Court of Appeal by some two months.

[7] Applying elementary principles, we reject the submission that the Respondent was absolved from complying with the relevant provision in the order of the Court of Appeal by the subsequent deletion of paragraph 395C from the Immigration Rules. This submission is plainly unsustainable. Accordingly, what was required of the Respondent by the court order was the twofold exercise of undertaking a detailed and conscientious consideration of all of the paragraph 395C factors and doing so in relation to **each** of the family members concerned. We juxtapose this requirement with the ensuing letter of decision, dated 8th January 2013. Having done so, we find that the Respondent's decision fails the test. There are two clearly identifiable defaults. The first is the failure to consider all of the factors listed in paragraph 395C. The second is the failure to do so in relation to each of the family members concerned. In making this assessment, we are mindful of the desirability of substance prevailing over form and of the related principle that decision letters of this kind should be considered fairly and *in bonam partem*. On the other side of the scales, the dominant requirements of the operative legal rules and principles must be given full effect. Adopting this approach, we conclude that the decision of the Respondent was non-compliant with the order of the Court of Appeal. The failure to recognise this deficiency vitiates the decision of the First-Tier Tribunal.

[8] To summarise, we conclude that the Secretary of State's decision was not in accordance with the law by reason of its failure to comply with the order of the Court of Appeal. The First-tier Tribunal, in failing to identify this illegality, erred in law.

PRACTICE: BUNDLES OF AUTHORITIES

[9] We take this opportunity to deprecate the practice of presenting the Upper Tribunal with a substantial bundle of authorities on the day of hearing. In the present case, the hearing began at 2pm. The Appellant's bundle of authorities was presented at this time. To describe this as unacceptable is an understatement. Following enquiry, the justification proffered for this

egregious default appeared to be that (a) there had been no failure to comply with specific case management directions and (b) this kind of practice **furthers** the overriding objective. The unsustainability of the latter submission requires no elaboration. The infirmity blighting the first of these submissions is readily exposed. It overlooks, sadly, the elephant in the room: in the modern litigation era, practitioners are expected to comply with the highest of professional standards. This entails (as we suggested at the hearing) the submission of relevant bundles of evidence, bundles of authorities and skeleton arguments **on the initiative of the parties, irrespective of directions,** a minimum of three working days in advance of the scheduled hearing date. Efficiency and expedition are crucial elements of fairness and justice. The latter are jeopardised when the former are neglected. The public interest is damaged in consequence and the overriding objective is seriously undermined. Practitioners will doubtless take note forthwith, particularly – but not exclusively – having regard to the recently extended judicial review jurisdiction of this Chamber of the Upper Tribunal.

DECISION

[10] It follows that the decision of the First-tier Tribunal must be set aside. The appeal is allowed. The failure which we have identified is not one which can be rectified by either the First-tier Tribunal (upon remittal) or this Tribunal (in the context of a continuation/remaking hearing). Accordingly, it will be incumbent on the Respondent to make a fresh decision, giving full effect to this judgment.

Signed: _____

THE HONOURABLE MR JUSTICE McCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
(ASYLUM AND IMMIGRATION CHAMBER)

27 November 2013