Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number AA/00704/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons promulgated**
On 2 October 2014	**On 4 June 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

W W
(Anonymity order made)

Respondent

Representation
For the Appellant: Ms J Isherwood, Home Office Presenting Officer.
For the Respondent: The Appellant in person.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Easterman promulgated on 21 July 2014 allowing WW's appeal against the decision of the Secretary of State dated 14 January 2014 (served 20 January 2014) to remove him from the UK, to the extent that the case was returned to the Secretary of State to make a decision in respect of the ECHR in accordance with the law.

2. Although before me the Secretary of State is the appellant and WW is the respondent, for the sake of consistency with the proceedings before the

First-tier Tribunal I shall hereafter refer to WW as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of Uganda. His personal details are a matter of record on file and are known to the parties: I do not set them out here in keeping with the anonymity order that has been made in these proceedings. Some details of his immigration and personal histories are also apparent in the documents on file - although certain aspects of the immigration history are unclear in the summary set out in the cover sheet to the Respondent's bundle. What is particularly pertinent is that although the Respondent disputed the Appellant's claim to have arrived in the UK in August 2000, there is evidence by way of a screening interview record that confirms he had claimed asylum in September 2000. A substantive asylum interview, however, was not conducted until 1 November 2013 (decision of First-tier Tribunal at paragraph 5). In the meantime, it appears from the Immigration History set out in the covering sheet to the Respondent's bundle before the First-tier Tribunal and the supporting documents at annexes B-F that the Appellant's asylum claim was initially refused, seemingly on the grounds of non-compliance because of a failure to attend interview, but that such a refusal was subsequently withdrawn.

4. These matters are set out in more detail at paragraphs 2–5 of the decision of the First-tier Tribunal.

5. In any event, in due course the Appellant was interviewed on 1 November 2013.

6. The essential bases of the Appellant's asylum claim are summarised at paragraph 13 of the decision of the First-tier Tribunal.

7. The Appellant's application for asylum was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 14 January 2014, and the removal decision, communicated by way of Notice of Immigration Decision of the same date, was made in consequence.

8. The Appellant appealed to the IAC.

9. The First-tier Tribunal Judge dismissed the Appellant's appeal on asylum grounds for reasons set out in his determination. Having set out with thoroughness and detail the evidence (paragraphs 18-62) and the parties' submissions (paragraphs 63-70 and 72-82), the Judge set out his findings of fact and conclusions in respect of the claim for protection (paragraphs 83-94). In essence the Judge was not satisfied that the Appellant had given a credible account of the events upon which he based his asylum claim.

10. The Judge also gave consideration to Article 8 of the ECHR. He noted that "*it was not suggested that [the Appellant] could meet Article 8 under the Immigration Rules*" (paragraph 95). The Judge concluded that in so far as the Respondent had purportedly given consideration to exceptional

circumstances, she had not had proper regard to the procedural history of the Appellant's application and her own role in frustrating the more rapid consideration of his case. The Judge was "*satisfied that the Secretary of State had sent documentation to the wrong address for the appellant, and that as a result there had been the best part of a ten year or more delay in considering the appellant's claim, facts which clearly had not been considered in the Letter of Refusal, where the blame for the delay was placed on the appellant*" (paragraph 71). See similarly paragraph 97, wherein the Judge observes that the Appellant's friend and witness in his appeal made an application at the same time and with the same representatives, which went through a process culminating in him receiving British citizenship; and see also paragraph 98 –

> "The respondent's Letter of Refusal sets out the various facts which simply do not match with the evidence provided in their own file, or from the appellant, and the main difficulty is that the letter requiring the appellant's attendance at interview as long ago as 2001, was sent to a YMCA address at which appellant has never resided. It has not been possible for me to find out why that was so but it can be seen from the letter that it was so. The refusal has been based on the assumption that the appellant has avoided the respondent, whereas by checking their own file they will find that there were letters from a Member of Parliament and indeed in the end Administrative Court proceedings, which brought this matter back to the respondent's attention".

11. In the circumstances the Judge concluded that there had not been due and proper consideration to the issue of exceptional or extenuating circumstances, in particular by reference to policy guidance set out in Chapter 53 of the Respondent's Enforcement Instructions & Guidance (paragraph 99), that the matter had not been considered "*lawfully, that is to say properly, either on the correct facts, or in the light of the respondent's own guidance*" (paragraph 101), "*felt unable to make a full consideration of any possible argument that the appellant should succeed under Article 8 outside the Rules*" (paragraph 101), accordingly declined to hear argument in this regard (paragraphs 71 and 101), and determined that in the circumstances he was "*not satisfied that the decision of the Secretary of State is in accordance with the law*" (paragraph 102). In such circumstances the Judge decided to "*return the appeal under the Human Rights Convention and consideration of exceptional circumstances to the Secretary of State to await a lawful decision*" (paragraph 106).

12. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Foudy on 10 August 2014.

13. The Appellant did not apply for permission to appeal those aspects of the First-tier Tribunal's decision dismissing his appeal under the Refugee Convention and/or on other 'protection' grounds. Nor has the Appellant filed a Rule 24 response.

Consideration

14. The Respondent's grounds, upon which Ms Isherwood relies with amplification in her oral submissions, assert that the Respondent had made a detailed decision including a full consideration of Article 8, and it was for the Judge "*to come to a decision on whether the Secretary of States refusal would result in a breach of the appellant's Human Rights*". In other words, the Judge should have determined the issue rather than remitting it. Moreover it is submitted that the approach of the Judge was in conflict with the decision in **AZ (Asylum - 'legacy' cases) Afghanistan [2013] UKUT 00270 (IAC)**; and further that the Judge had misunderstood Chapter 53 which it was pleaded was not a matter to be considered at the time of an initial refusal – as per paragraph 353B of the Immigration Rules, which was only relevant following consideration of further submissions in the context of a 'fresh claim', or once an appellant was 'appeal rights exhausted'.

15. I accept that the Judge erred in his approach in respect of Chapter 53 of the Respondent's Enforcement Instructions & Guidance. In my judgement the explanation as to the scope and application of the policy set out at paragraph 53.1, 'When to Consider Exceptional Circumstances', indicates that they fall for consideration - under the policy – "*where an asylum or human rights claim has been refused, appeal rights have been exhausted and no further submissions exist*", whereupon paragraph 353B of the Rules is to be applied. Accordingly I accept the Respondent's submission that the policy is to be applied in the context of an asylum claim only where appeal rights have been exhausted, and as such it is premature to apply the policy in the context of the initial asylum consideration, and in turn the policy, just as paragraph 353B, is not a matter for consideration by the Tribunal.

16. However, in my judgement, the Judge's references to Chapter 53 – he references it at paragraph 96 and appears to identify an error on the part of the Respondent in its application at paragraph 99 – amount to an error of 'form' and not 'substance'. The matters identified by the Judge as not having been properly considered by the Respondent were germane both to Article 8, and also to the consideration of 'Exceptional Circumstances' undertaken under that heading in the RFRL. The fact that such matters might also in due course have been relevant to a consideration of exceptional circumstances pursuant to Chapter 53 and/or paragraph 353B does not mean that they were not also relevant to the Respondent's decision taken appropriately without reference to Chapter 53 and/or paragraph 353B.

17. The Respondent does not dispute that the approach taken by the Respondent's decision maker in the RFRL was flawed in its factual premises for the reasons identified by the Judge. Such errors were plainly material to a proportionality balancing exercise under Article 8. In my judgement the First-tier Tribunal Judge is not to be criticised for characterising such fundamental misconceptions of fact to have rendered the Respondent's decision not in accordance with the law. In such circumstances the Judge had power pursuant to section 86(3) of the

Nationality, Immigration and Asylum Act 2000 and so – "*the Tribunal must allow the appeal in so far as it thinks that... a decision against which the appeal is brought was treated as being brought was not in accordance with the law...*"

18. The Respondent's alternative submission is that the First-tier Tribunal's decision was in conflict with the decision in the case of **AZ (Asylum 'legacy' cases) Afghanistan [2013] UKUT 00270 (IAC)**. The case is not directly on point being primarily concerned with the issue of whether or not the Tribunal should adjourn an asylum appeal in circumstances where there might be a 'legacy' consideration pending. The Respondent seeks to argue by approximate analogy that the First-tier Tribunal Judge should have determined the appeal substantively rather than remitting it. In my judgement that analogy does not hold good. The Judge did indeed determine the appeal within the scope of his powers under section 86.

19. In this latter context and generally whilst I accept that it would have been open to the Judge to go on and consider the Article 8 issue substantively and reach a decision notwithstanding the error of approach in the Respondent's consideration, I do not understand anything in section 86 or otherwise to compel the Judge so to do. I find that it was open to the Judge to conclude that in circumstances where the Respondent's decision was not in accordance with the law, and given that proper consideration had not been given to the Appellant circumstances in respect of Article 8 and/or exceptional circumstances, and also given the particular complexity of the history, a resolution by way of effective remittal to the Respondent to take a proper decision in accordance with the law was an appropriate outcome in the appeal.

20. In all such circumstances, notwithstanding the error of approach on the part of the First-tier Tribunal Judge with regard to his understanding of the applicability of Chapter 53, with reference to section 12(2)(a) of the Tribunal's, Courts and Enforcement Act 2007 I determine that it would not be appropriate to set aside the decision of the First-tier Tribunal.

Notice of Decision

21. The decision of the First-tier Tribunal contained no material error of law and stands.

22. The appeal of the Secretary of State against the decision of the First-tier Tribunal is dismissed. It continues to be the case that WW's appeal under the Refugee Convention, humanitarian protection, and the Immigration Rules is dismissed, but the appeal in respect of the ECHR is allowed to the extent that the Secretary of State's decision was not in accordance with the law and the matter must be reconsidered by the Secretary of State in accordance with the law.

Deputy Judge of the Upper Tribunal I. A. Lewis 23 May 2015

Anonymity Order (Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, rule 13)

Unless and until a Tribunal or court orders otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This Order applies to the Appellant and to the Respondent and any other person or business. Failure to comply with this Order could lead to contempt of court proceedings.

Deputy Judge of the Upper Tribunal I. A. Lewis 23 May 2015