



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

Appeal Number: AA/04737/2014

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 11th December 2014**

**Decision & Reasons Promulgated
On 2nd February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

**DUC HOANG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Vokes, of Counsel instructed by Vesey Solicitors
For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the avoidance of confusion, I shall continue to refer to the parties as they were before the First-tier Tribunal.
2. On 20th October 2014 Judge of the First-tier Tribunal Davidge gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal Somal who allowed the appeal on the basis that the respondent's refusal decision was not in accordance with the law without considering the substance of the asylum and Article 8 claims for the appellant, a citizen of Vietnam.

3. In summary, the grounds of application noted that Judge Somal had allowed the appeal because the respondent's reasons for refusing the appellant's asylum, humanitarian protection and human rights claims did not give proper consideration to the directions of Judge of the First-tier Tribunal Pooler who had previously remitted the matter back to the Secretary of State on 3rd June 2014. Judge Pooler had found that the refusal decision of 27th March 2014 was unlawful because it did not adequately consider the alleged failure by the respondent to try to trace the appellant's family. It was also stated that the respondent had failed to consider granting discretionary leave under the respondent's policy relating to unaccompanied asylum-seeking children (UASC) of January 2011, the appellant having previously been found to be 17 years of age. Judge Pooler had directed that the respondent should consider whether, in the light of his determination and an earlier one of 8 February 2011, concerning the appellant's age, a period of leave to remain should be granted and if so, for how long.
4. The respondent argued that the supplementary refusal letter issued following the decision of Judge Pooler had responded to the issues raised, placing reliance on Court of Appeal jurisprudence before reaching the conclusion that it was not appropriate to grant any form of leave to the appellant despite the historic failure to act in accordance with either the UASC policy or the respondent's section 55 tracing duties. The judge had wrongfully concluded that the refusal letter had given "no meaningful consideration" to the issues or ignored the directions of Judge Pooler. If Judge Somal had disagreed with the respondent's conclusions then she should have proceeded with the hearing of the appeal and made findings on any alleged unfairness and the substantive grounds of the appeal.
5. Judge Davidge granted permission on the basis that the respondent's grounds of application were arguable. In particular she observed that the decision only extended to two pages, the majority of which was given to historical recitation, and did not give reasons for the conclusion that the respondent's decision could be regarded as not in accordance with the law.

Error on a point of law

6. At the hearing before me I heard submissions from both representatives.
7. Ms Johnstone confirmed that the respondent relied upon the grounds emphasising that Judge Somal was wrong to conclude that the respondent's supplementary refusal letter (which was stated to be read in conjunction with the original refusal of 27th March 2014) did not gloss over the issues. Whilst she conceded that delay was not an issue covered by either letter that was a matter for the judge to consider and did not create a legal error. She reminded me that paragraph 8 onwards of the supplementary refusal dealt specifically with the issue of discretionary leave with cogent reasons given for refusing.
8. In support of her arguments Ms Johnstone made reference to the Upper Tribunal decision in *Ukus (Discretion: when reviewable) Nigeria* [2012] UKUT 307 (IAC) which concludes that, where the decision-maker has lawfully exercised his discretion, the Tribunal must either uphold the decision or, if it is believed that the decision-maker's discretion should have been exercised differently, reach a different decision in the exercise of its own discretion. She contended that the discretion had been properly

exercised in this case with reasons and so the judge's task was to proceed to hear the appeal substantively.

9. Mr Vokes argued that the decision of Judge Somal was not irrational even if the respondent did not like it. The appellant had been found to be under the age of 17½ years in 2011 by the Tribunal (Judge of the First-tier Tribunal Holmes) and thus the decision to treat the appellant as an adult was not legitimate. Three years later Judge Pooler had pointed out that there were tracing duties which the respondent had not considered and that the appellant had suffered a disadvantage as a result. He had therefore, properly, directed that the respondent should consider whether discretionary leave should be granted. However, the supplementary refusal letter of 25th June 2014 had not considered Judge Pooler's comments or human rights issues connected with the appeal. He contended that the supplementary decision was not in accordance with the law because there was no meaningful consideration of the relevant issue and Judge Somal was entitled to point this out and to declare the decision not in accordance with the law once again.
10. Mr Vokes indicated that if I were to find that the decision showed an error on a point of law a remittal to the First-tier Tribunal might be appropriate he would not want a date to be set for the hearing in order that he could give some thought to the matter.
11. After I had considered the matter for a few moments I indicated that I was satisfied that the decision of Judge Somal showed an error on a point of law such that it should be re-made. My reasons for that conclusion follow.
12. Only one paragraph of the short decision gives any reasons for the conclusion that the supplementary refusal was not in accordance with the law. The Judge states that there is no explanation by the respondent for the delay in dealing with the asylum claim over several years but that, in itself, is not a matter which gives rise to illegality in the decision. The issue is whether or not the respondent has in substance dealt with the refusal to grant discretionary leave taking into consideration the appellant's age at the time he applied for asylum, and the relevant UASC policy and section 55 tracing obligations against the background of relevant case law, particularly that set out in *KA (Afghanistan) and Others* [2012] EWCA Civ 1014. The latter deals the consequences of a failure by the respondent to discharge the duty to endeavour to trace relatives where the claimant has suffered some disadvantage in consequence of that failure.
13. Where the respondent fails to exercise a discretion, as alleged in this case, the consequence is set out in *Ukus*. The lawful exercise of discretion can result in a decision which may favour the appellant or it may not. Where it does not and an appeal has resulted the Tribunal can, if it thinks the discretion should have been exercised differently, reach a different decision.
14. It is quite clear from the original and supplementary refusal decisions (which are to be read together) that the respondent properly exercised the relevant discretions both in relation to it's the UASC policy and tracing obligations by reaching a reasoned conclusion which, in both cases, was unfavourable to the appellant. Both the supplementary refusal and the original refusal of 27th March 2014 give cogent reasons for the unfavourable decisions reached.

15. In paragraph 2 of the supplementary refusal the respondent concisely and correctly sets out the issues and in subsequent paragraphs proceeds to deal with them by reference to relevant case law including *KA* and also by reference to the earlier refusal (from paragraph 40 onwards) covering both discretionary leave and tracing obligations. However, in her decision, Judge Somal makes no reference to any of this detailed reasoning stating simply that the supplementary refusal “glossed over” the important issues. She also states that the “refusal simply records that the [appellant] is now an adult and should not get any discretionary leave”. These comments are an oversimplification when the refusals deal in much greater detail with, for example, the issue of the applicant’s age in conjunction with the guidance of the Court of Appeal *KA (Afghanistan)*. It is evident that the decision of Judge Somal reaches conclusions which, without cogent reasoning, were not open to her. On this basis the decision shows errors on points of law such that it should be re-made.
16. My conclusions are such that the appeal should be remitted to the First-tier Tribunal for hearing afresh on all substantive issues. I reach that conclusion having regard to the Practice Statement of the President of Tribunals dated 25 September 2012 at paragraph 7.2.

Decision

The decision of the First-tier Tribunal shows an error on a point of law such that it should be re-made.

Anonymity

Anonymity was not requested before the Upper Tribunal nor did I consider it appropriate.

DIRECTIONS

1. The appeal will be reheard by the First-tier Tribunal sitting at Stoke on a date to be set by the Regional Judge although I recommend that the hearing should be set as soon as possible in view of the delay which has already occurred in the hearing of the substantive appeal in this case.
2. The time estimate for the hearing is three hours.
3. A Vietnamese interpreter will be required.
4. The appeal should not be heard before Judges Holmes, Pooler or Somal.

Signed

Date **2nd February 2015**

Deputy Upper Tribunal Judge Garratt