IAC-TH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34785/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 June 2015	**On 2 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ROUSONARA BEGUM
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms. E. Savage, Home Office Presenting Officer.
For the Respondent: Mr. N. Hasan, Solicitor.

DECISION AND REASONS

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known, before the First-tier Tribunal, with the Secretary of State referred to as “the respondent” and Mrs Begum as “the appellant”.

2. The appellant is a citizen of Bangladesh born on 15 January 1978. She appealed against a decision of the respondent dated 5 August 2013 to refuse to vary leave to remain in the United Kingdom and to remove her

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by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. Her appeal came before Judge of the First-tier Tribunal Adio who in a decision promulgated on 9 March 2015 allowed it to the limited extent that the decision was not in accordance with the law and he remitted the appeal back to the respondent for a lawful decision to be made.

3. The respondent sought permission to appeal. It was granted by Judge of the First-tier Tribunal Osborne on 6 May 2015. His reasons for so doing are as follows:-

> "1. The grounds seek permission to appeal a decision and reasons of First-tier Tribunal Judge Adio who in a decision and reasons promulgated 9 March 2015 allowed the Appellant's appeal for leave to remain in the United Kingdom on the basis that the Respondent's decision is not in accordance with the law.
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> 2. The grounds assert that the Judge erred in finding that the decision is not in accordance with the law. The application was made on 6 July 2012 on the basis that the Appellant wished to stay in the UK as the carer of her aunt. The application was refused on 5 August 2013. At the date of the hearing the Appellant was residing with a partner and had recently had a child. The representative submitted that the decision of 5 August 2013 was not in accordance with the law as the best interests of the child had not been considered. A decision can only be unlawful for a failure to consider Section 55 if the Secretary of State knew or ought to have known that the decision might affect children in the United Kingdom as per **Behary v SSHD [2013] EWHC 3575 (Admin) at [39]**. The case of **JO and Others (Section 55 duty) Nigeria [2014] UKUT 517 (IAC)** provides nothing to contradict **Behary**.
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> 3. The judgment of Judge Grubb in **Behary** at [39] confirms that as a minimum the Section 55 duty can only arise where the Secretary of State knows (or perhaps ought to know) that the immigration decision may affect children in the UK. Were it otherwise, Parliament would be requiring the Secretary of State to engage in a wholly futile exercise with no relevant factual basis to trigger the need for the assessment. That cannot have been Parliament's intention. Merely to establish that a relevant 'function' falling within Section 55 is in play, does not necessarily resolve whether the duty is, in fact, triggered.
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> It cannot be otherwise than in accordance with the law for the Secretary of State not to assess the best interests of a child pursuant to Section 55 if there was no reason to believe that such a child existed or was due to be born. In that context the Section 55 duty as per **JO and Others** had not been triggered (to use Judge Grubb's term). In that context it is at least arguable that the Judge should not have allowed the appeal on the basis that he did and that as there had been a change of circumstances (the birth of a child) it was a matter for the Appellant to make a new application on behalf of that child.
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> 4. As this arguable error of law has been identified, all the issues raised in the grounds are arguable."

4. Thus the appeal came before me today. Both representatives were in agreement that the judge had materially erred as asserted in the respondent's grounds. He had failed to appreciate that the Section 55 duty could only arise where the Secretary of State knows (or perhaps ought to know) that the immigration decision may affect children in the United Kingdom. Plainly here that was the position.

5. I share the analysis of the two representatives. I find that the decision of the First-tier Tribunal contains errors of law and has to be set aside in its entirety. All parties were agreed, that in the circumstances, it was appropriate for the appeal to be considered and all matters decided afresh by the First-tier Tribunal. Mr. Hasan is to provide the respondent with all materials in relation to any additional grounds so that that too can be decided by the respondent ahead of the next hearing and thereby enabling all issues in relation to this particular appellant to be considered, if needs be, at one hearing.

Decision

6. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from Judge Adio.

7. No anonymity direction is made.

Signed Date 1 July 2015.

Deputy Upper Tribunal Judge Appleyard