

IN THE UPPER TRIBUNAL

R (on the application of RA) v Secretary of State for the Home
Department IJR [2015] UKUT 00292 (IAC)

Field House
London

13 April 2015

BEFORE

**THE HONOURABLE MR JUSTICE CRANSTON
UPPER TRIBUNAL JUDGE REEDS**

Between

**THE QUEEN ON THE APPLICATION OF
R A**

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Ms Harrison and Ms Cronin, instructed by Bhatt Murphy Solicitors
appeared on behalf of the Applicant.

Ms Rhee and Ms McArdle, instructed by the Government Legal
Department appeared on behalf of the Respondent.

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JUDGMENT

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MR JUSTICE CRANSTON: This is an application for the return of a child and her mother to this country following our judgment in Queen on the application of R A, a child, by his litigation friend, v the Secretary of State for the Home Department [2015] UKUT 00242 (IAC). In that judgment we held that the Secretary of State in making a decision on representations that there was no fresh claim was in breach of her duty under Section 55 of the UK Borders Act in not considering the best interests of the child R A. On behalf of R A Ms Harrison has submitted that R A and her mother should be returned to the United Kingdom since in the light of our decision he was removed to Nigeria unlawfully. She advanced a number of points derived from the authorities and against the background of the facts of this case which she submitted should lead to an order in favour of return.

2. First of all there was the issue of legality of removal, then there was the issue of vindicating the rights which R A has or had, in particular under the Human Rights Act of 1998, and thirdly there were the practical issues of any out of country appeal. A large number of authorities were cited to us but in our view there is no need to go beyond the Court of Appeal authority of Queen on the application of YZ (China) v Secretary of State for the Home Department [2012] EWCA Civ 1022 [2013] INLR 60. In that decision, giving the judgment of the court, Lord Justice Richards, in particular at paragraph 49, identified the key considerations which bear on the exercise of discretion in a case such as this.

3. Firstly, at paragraph 49 Lord Justice Richards said that the starting point for consideration in this type of case should be the unlawfulness of the decision to remove. Ms Harrison underlined this point in the light of our decision. There had been a clear breach by the Secretary of State in relation to R A's rights under Section 55 of the UK Borders Act. That was a

powerful factor in favour of his return and an order in favour of return would put him in the position that he would have been had he not been removed. While that is certainly a factor we do take into account the submissions by Ms Rhee on behalf of the Secretary of State. As we identified in the judgment, these representations came at the very last moment on the eve of the removal and this was not the type of flagrant breach which arose in a number of the single judge decisions which were put before us. Indeed, as we noted in the judgment, perhaps not as expressly as we could have, if R A's then solicitors had applied for judicial review with an application for immediate consideration it may well have been that the removal would have been prevented by the grant of interim relief.

4. The second point which Ms Harrison made was the vindication of the rights which R A had, in particular his rights under Section 55 of the Borders Act. Had our decision been available at the time then the Secretary of State would not have made a decision on the fresh claim and under the Immigration Rules his removal would not have been possible. We acknowledge this point although, as we would have preferred to put it, more in terms of the way that Lord Justice Richards expressed it in the YZ (China) decision that a point telling strongly in favour of avoiding a person's return is to restore him to the position he should have been in under the legislation and would have been in if the Secretary of State had acted lawfully.

5. The third bracket of her submissions concerned the practical implications of R A's out of country appeal. Again, we would discount some of the submissions which Ms Harrison made. The key point of course is that at this point the Secretary of State had not made a decision on the representations taking into account her duty under Section 55 of the UK Borders Act,

so there is at present no right of appeal. In terms of the practicalities of the out of country appeal we certainly see force in Ms Rhee's submissions that this is a case which is not going to turn heavily on any oral evidence which either R A or the mother could give. There may be difficulties with video evidence from Nigeria but to our mind that does not necessarily have a heavy bearing on the practicalities of an out of country appeal.

6. However, there are three factors which tip the balance in favour of our exercising a discretion to order return. First of all, this is a case involving a child. In saying that we acknowledge that the Secretary of State over a substantial period of time running up to the removal did obtain information from both the local authority and R A's school about the position of R A. Moreover, the Secretary of State involved the office of the Children's Champion within the Home Office and the work of the independent panel as we have described in the judgment, albeit that was focused on the mechanics of return, was thorough. However, at the end of the day the decision on the eve of removal, as we have held in the judgment, did not properly accord with the legislation and the Secretary of State did not fulfil her duty under Section 55 of the Act. In saying this we are not seeking in any way to prejudge any decision which will subsequently be made. We note in passing as well that the authorities which were canvassed before us did not involve children.

7. The second point is that we cannot turn a blind eye to the evidence which the current solicitors of R A and her mother have now accumulated. Again, we do not prejudge the extent to which this will have a bearing on the Secretary of State's decision. It is a matter for the Secretary of State to take into account relevant factors but that evidence post-removal does raise concerns about the position of R A, turning as it

does primarily on the position of the mental health of the mother.

8. Thirdly there are practical factors which bear on our decision. Ms Rhee on behalf of the Secretary of State informed us that the decision on the representations could be effective by 24 April, possibly earlier, but we cannot ignore the realities of delay because it is clear to us that should the decision be unfavourable there would be a further challenge. The possibility of delay does, however, have an important bearing on the position of R A in Nigeria.
9. We can well understand the submission which Ms Rhee made that should R A be returned to this country there might well be a second relocation if he is ordered to be removed again and that could well have a very detrimental effect on his wellbeing. We have taken that factor into account but we do not find it determinative.
10. Finally, in terms of the practicalities, the changes in the legal aid regime under LASPO, we were not taken to these in detail but in as much as they may have implications for the way any out of country appeal is conducted, again, that is something to go in the balance.
11. As we have said, the exercise of our discretion is finely balanced but in the round we have decided that the Secretary of State should be ordered to take all reasonable steps to ensure the removal of R A and her mother to this country.
12. In terms of costs we are going to take an issue-based approach. We can understand when the Secretary of State says that the claim was based on two or three issues but it does seem to us that much of the material would have had to be adduced in any event. Trying to do justice in this sort of case is always difficult in terms of costs but we think the

appropriate rule would be to give a claimant 70% of their costs.

13. In terms of permission to appeal we refuse permission for both sides.~~~0~~~~