Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00813/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 April 2016	**On 31 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

K T N
(ANONYMITY DIRECTION MADE)

Appellant

And
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Victor Nwosu (Solicitor)
For the Respondent: Ms Ashika Fijiwala (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge S K Kaler, promulgated on 5th October 2015, following a hearing at Yarl's Wood on 7th September 2015. In the determination, the judge allowed the appeal of the Appellant on the ground that "there has been an error of law in considering Article 8", whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female citizen of Zambia who was born on 26th May 1983 and she appealed the decision of the Respondent dated 30th July 2015, on the grounds that the decision to refuse her asylum status and humanitarian leave, on the basis that she was bisexual, has HIV, and fears people trying to claim the family land in Zambia, was unsubstantiated.

The Judge's Findings

3. In her determination, the judge rejected completely the asylum claim on the basis that, "the Appellant has never previously claimed she is a bisexual, despite having made several applications for leave to remain to the Home Office ..." (paragraph 20). The judge also held that, "her actions show that she is untruthful and prepared to exercise deception" (paragraph 20 and paragraph 21). The judge went on to consider the Appellant's HIV status and made it clear that, "the medical cases have consistently stated that there have to be serious consequences for the returnee before Article 3 would be engaged" (paragraph 24), which was not the case here. The arguments in favour of the Appellant's asylum claim were therefore squarely rejected.

4. With respect to Article 8, however, the judge observed that the Appellant

> "Has been here since the age of 16 years, save for short periods when she has visited Zambia. I accept that she has never worked there. She has two undergraduate degrees and is studying for a masters degree. She has been running her own consultancy business here for several years. She owns property" (see paragraph 30).

5. The judge went on to say that the Secretary of State, notwithstanding these features to the Appellant's claim, had not addressed these aspects of the Appellant's claim (see paragraph 32). In her conclusion, the judge then had regard to the case of **Veerabudren [2015] EWHC 500**, there

> "It was held that it was not enough simply for the Secretary of State to expect an applicant to infer that a separate Article 8 consideration of exceptional circumstances of her case had been carried out if that matter had not been referred to, as the applicant could not know what circumstances had or had not been taken into account" (see paragraph 39).

6. On that basis, the judge held that "the decision is not in accordance with the law" (see paragraph 40). The matter was remitted back to the Secretary of State for a consideration of these outstanding issues.

The Grounds of Application

7. The grounds of application state that in terms of **Dube [2015] UKUT 00090** an oral hearing of that decision would have made it appropriate for the First-tier Tribunal Judge to consider the outstanding requirements herself, as opposed to making a finding that the decision was not in

accordance with the law. The judge had effectively now remitted the matter back to the Secretary of State to fully consider all the aspects specified in paragraph 117A – B of the 2002 Act and make a decision. However, the judge should have exercised her own discretion and made findings herself on these issues.

8. On 13th October 2013, permission to appeal was granted.

Submissions

9. At the hearing before me on 13th April 2016, Ms Fijiwala, appearing on behalf of the Respondent Secretary of State, made the following submissions. First, the issue in this appeal was whether Article 8 had been considered in a fulsome manner, including outside the Immigration Rules, but this was a flawed contention because the refusal letter had plainly had regard to all the circumstances when consideration was given to the "exceptional circumstances" of the case (see paragraphs 64 and 65). Second, the case of **SS (Congo) [2015] EWCA Civ 387** makes it clear that there is a "second stage" to be applied, and unless that second stage can be successfully overcome by the Appellant, an appeal cannot succeed (see paragraph 46). Third, the Secretary of State has a residual discretion under the 1971 Immigration Act and in **SS (Congo)**, where it was held that, given that the Secretary of State has issued instructions to officials regarding the approach to be adopted to granting leave outside the Rules,

> "The text of the instructions makes it clear that the term 'exceptional circumstances' is given a wide meaning in the context of the instructions, covering *any* case in which on proper analysis under Article 8 at the second stage it would be disproportionate to refuse leave" (paragraph 49).

10. The Appellant here could not have succeeded under this wide meaning of "exceptional circumstances". Fourth, this is why a great many refusal letters are couched in exactly the same terms with no problems arising from such a drafting.

11. Fifth, the judge here observed that,

> "Whilst it is clear from the refusal letter that exceptional circumstances have been considered, I note that there is no mention of Section 117(B). That is relevant as to the question of the legitimate aim test in proportionality" (paragraph 28).

12. However, the judge erred in this respect because there is no statutory obligation on the Secretary of State to consider Section 117B, and **Dube [2015] UKUT 00090**, only suggests that it would be desirable for the Secretary of State to do so.

13. Sixth, whereas the judge is of the view that, "I have read the decision letter carefully and I do not find that all of these considerations are addressed by the Respondent. 117B(2) and (3) are highly relevant" (paragraph 32), the fact is that **AM (Malawi) [2015] UKUT 260** makes it

clear that, "an Appellant can obtain no positive right to grant of leave to remain from either Section 117B(2) or (3), whatever the degree of his fluency in English or the strength of his financial resources. Therefore, any failure by the decision maker, if it was a failure, could not have led to the grant of leave on this basis. Indeed, **Forman [2015] UKUT 412** makes it clear that,

> "The public interest inform immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified".

Ms Fijiwala asked me to make a finding of an error of law in the judge having allowed the appeal on the basis that it was not in accordance with the law, and to proceed to allow the appeal of the Respondent Secretary of State.

14. For his part, Mr Nwosu submitted that the fact remained that the Secretary of State's refusal letter was inadequate, and anyone reading that refusal letter could not know to what extent the Appellant's private life matters had been taken into account. First, the Appellant did have substantial private life interests, as explained at paragraph 30 of the determination, because the judge observes that the Appellant has been in the UK since the age of 16 years, has completed undergraduate degrees and has embarked on a masters degree, and is running her own consultancy business, together with ownership of property. These matters were not addressed in the refusal letter at all.

15. Second, insofar as reliance was placed by the Respondent's representative today, upon a consideration of the "exceptional circumstances" all that is said in the refusal letter (see paragraphs 64 to 65 is that it has been decided that no relevant issues are raised in the application with respect to "exceptional circumstances". That is a conclusion and it is not the giving of reasons for the decision. The Appellant is entitled to proper reasons. This is especially important given that the judge had held that the decision maker had gone through paragraph 276ADE and concluded that the Appellant could not succeed under the Immigration Rules, so that in moving to matters further afield in the domain of freestanding Article 8 jurisprudence, it was necessary to address the specific issues that the Appellant raised. This had not been done.

16. Third, the judge states (at paragraph 33) that, "I can carry out the assessment myself, but it is necessary for the Secretary of State to do so first. The latest case law indicates that in Appendix FM cases, a full assessment by the Secretary of State is needed at least in some cases" (see paragraph 33). This showed that the judge was not oblivious to her own discretion in being able to carry out an Article 8 assessment. What the judge was saying was that a primary decision first needs to be made in this respect by the Respondent authority and that this is borne out by the authorities. Given that the Secretary of State had failed to make a

rounded assessment of the Appellant's private life rights, it was entirely correct to say that the decision was not in accordance with the law. In fact, the refusal letter does not even refer to the leading case of **Nagre [2013] EWHC 720** which demonstrates how the second stage must be approached, and a reference simply to "exceptional circumstances", did not show that the Secretary of State had been approached.

Error of Law

17. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are follows. First, it is clear from the Immigration Act 2014 that Part 5A, carrying the title "Article 8 of the ECHR: Public Interest Considerations" contains provisions in relation to the "Application of this Part" that impose a duty in relation to Article 8 considerations only upon "a court or Tribunal". There is no statutory obligation upon the Secretary of State in this respect. All that **Dube [2015] UKUT 00090** states is that although

> "These provisions are only expressed as being binding on a 'court or Tribunal', it may be that the Secretary of State will consider it in the interests of good administration and consistence of decision making on Article 8 claims at all levels to have express regard to Sections 117A – 117B considerations herself, but she is not directly bound to do so".

18. To suggest that a failure of the Secretary of State to have express regard to these matters, is to make a decision that is "not in accordance with the law", is to impose a statutory duty upon the Secretary of State through the backdoor. This is unwarranted. Case law cannot impose a duty where the statute itself emanating from the will of Parliament does not.

19. Accordingly, notwithstanding the otherwise sensible approach of the judge below, it behoved the Tribunal to carry out the Section 117A – D assessment herself. This was not done. If there are indeed issues in relation to the Appellant's private life rights, such as the fact that she has been in the UK since the age of 16, has been running her own consultancy, and owns property in this country (see paragraph 30) these were matters that the judge should have evaluated in the context of Section 117 and the "public interest" requirement in the maintenance of firm and fair immigration control.

Remaking the Decision

20. I remake the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal to the extent that it is remitted back to the First-tier Tribunal Judge, to be determined by a judge other than Judge S K Kaler for a proper assessment to be carried in respect of Section 117. All of the findings remain in tact.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to a First-tier Tribunal Judge after the application of Part 5 of the 2014 Act in relation to the Section 117 consideration. All previous findings remain intact.

An anonymity Order is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 28th May 2016