

IN THE UPPER TRIBUNAL

JR/2277/2015

Field House,
Breams Buildings
London
EC4A 1WR

13 April 2015

BEFORE

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

Between

**THE QUEEN ON THE APPLICATION OF
RA**

Applicant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(No. 2)**

Respondent

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

Ms Rhee and Ms McArdle, instructed by the Treasury Solicitor 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 R (on the application of RA (a child, by his litigation friend) and BF v Secretary of State for the Home Department JR/2277/2015. In that judgment we held that the Secretary of State in making a decision on representations on behalf of BF, the mother, that there was no fresh claim was in breach of her duty under Section 55 of the Borders Act in not considering the best interests of the child RA, as a primary consideration. On behalf of the claimants, Ms Harrison QC has submitted that RA and her mother should be returned to the United Kingdom since in the light of our decision they were 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 for their return.

2. First, there was the issue of the legality of removal; secondly, there was the issue, in particular, of vindicating the rights which RA has under the Human Rights Act of 1998; and thirdly, there were the practical issues associated with any out of country appeal by RA. A large number of authorities were cited to us but in our view there is no need to go beyond the Court of Appeal decision of R (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, Richards LJ reviewed those authorities and, in particular at paragraph 49, identified the key considerations which bear on the exercise of discretion in a case such as this.

3. Firstly, 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 RA's rights under Section 55 of the Borders Act. That was a powerful factor in favour of return and an order in favour of the return of RA would put him in the position that he would have been had he not been removed.

4. While that is certainly a factor, we do take into account the qualifications in the submissions by Ms Rhee on behalf of the Secretary of State. As we said in the judgment, these representations on behalf of BF came at the very last moment, on the eve of the removal. Moreover, this was not the type of flagrant breach which arose in a number of the single judge decisions which were cited to us. At the time of removal in this case it was apparently lawful. Indeed, as we noted in the judgment, perhaps not as explicitly as we could have, if the 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 and we would not be in the position we now are.
5. The second point which Ms Harrison QC made was the need for a vindication of the rights which BF and RA had, in particular the rights under Section 55 of the Borders Act. Had our decision been available at the time of removal, the Secretary of State would not have made a decision on the fresh claim and under paragraph 353A of the Immigration Rules removal would not have been possible. We acknowledge this point although in this case we would have preferred to put it - as Richards LJ expressed it in the YZ (China) decision - that a factor in favour of a person's return is to restore him to the position he would have been in under the legislation if the Secretary of State had acted lawfully.
6. The third bracket of Ms Harrison QC's submissions concerned the practical implications of an out of country appeal by RA. Again, we would discount some of the submissions which Ms

Harrison QC made. The key point is that as a result of our judgment, the Secretary of State has not at this point made a decision on the representations taking into account her duty under Section 55 of the Borders Act. So at present there is no in-country 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 will not turn heavily on any oral evidence which either RA 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.

7. In our judgment, there are three factors which tip the balance in favour of our exercising discretion to order return. First, this is a case involving a child. In saying that we acknowledge that over a substantial period of time running up to the removal the Secretary of State obtained information from both the local authority and RA's school about his position. Moreover, the Secretary of State involved the office of the children's champion within the Home Office. As we have described in the judgment, the work of the independent panel was thorough albeit that it was focused on the mechanics of return. However, at the end of the day the decision on the eve of removal, as we have held, 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 that we are not seeking in any way to prejudge any decision which will subsequently be made. We note in passing that the authorities which were canvassed before us did not involve children.

8. The second point is that we cannot turn a blind eye to the evidence which the current solicitors 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. However, that evidence post-removal does raise concerns about the position of RA, turning as it does primarily on the deteriorating mental health of the mother.

9. Thirdly, there are practical factors which enter on our decision. Ms Rhee on behalf of the Secretary of State informed us that the decision on the representations could be taken by 24 April, possibly earlier. However, 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 and delay beyond that. The possibility of delay does have an important bearing on the position of RA with his mother if he remains in Nigeria.
10. We can well understand the submission which Ms Rhee made that should RA and his mother be returned to this country he might well have a second relocation if he and his mother are ordered to be removed again. 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.
11. Finally, in terms of the practicalities, there are 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 into the balance.
12. As we have indicated, the exercise of our discretion in this case is finely balanced. However, considering the very unusual circumstances in the round we have decided that the Secretary of State should be ordered to take all reasonable steps to ensure the return of RA and his mother to this country.

13. In terms of costs an issue-based approach is appropriate. We can understand when the Secretary of State submits that the claim has succeeded on only one of three issues. However, it seems to us that much of the material would have had to be adduced in any event on that one issue. Trying to do justice with costs in this sort of case is always difficult but we think the appropriate approach would be to give the claimants 70% of their costs.

14. As to permission to appeal, we refuse it to both the claimants and the Secretary of State.