Upper Tribunal
(Immigration and Asylum Chamber)

Castro (Removals: s.47 (as amended)) [2014] UKUT 00234(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on**
On 17 December 2013	.....

Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SINIA CASTRO

FREDDIE CASTRO

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellants: Mr Z Malik, instructed by Malik Law Chambers

For the Respondent: Mr D Blundell, instructed by the Treasury Solicitor

1. In s.47 of the 2006 Act as amended by s.51 of the 2013 Act, sub-paragraphs (i) and (ii) of subsection (1A)(a) refer to the application, not the decision.

2. A decision reported in the Notice of Decision in the form “the Secretary of State has decided that you should be removed” is a decision of which notice under s.47 (as amended) may be given.

3. The amended s.47 is not drafted with reference to s.3C of the 1971 Act and is applicable where the decision refusing leave is made before the original leave expires, as well as where s.3C extends the applicant’s leave.

4. When an applicant has put forward a comprehensive case for extension of leave and the application has been refused, there need be no more reasons for the removal decision than those already expressed as motivating the refusal.

DETERMINATION AND REASONS

1.

When a person who has immigration leave (as distinct from a person whose leave has expired) makes an application to the Secretary of State for a variation of his leave, then, if the leave expires without the application for variation having been decided, s.3C of the Immigration Act 1971 extends the leave. The extension is for three potentially successive periods. The first is a period until the application for variation is decided (or earlier withdrawn): this is the effect of s.3C(2)(a). The second period extends the leave after a negative decision during the period of time in which an appeal could be brought, if the subject of the decision has a right of appeal from within the United Kingdom (ignoring any possibility of an appeal out of time): s.3C(2)(b). The third period applies if an appeal is brought by the appellant from within the United Kingdom and extends while the appeal is pending: s.3C(2)(c).

2.
If the Secretary of State's decision on the application is indeed negative, it follows that the leave will expire at the end of the last of the applicable periods, following which, if the applicant remains in the United Kingdom, he will be remaining without leave. He ought to depart; and, because he is remaining without leave, he is amenable to removal under s.10 of the Immigration and Asylum Act 1999. The decision to remove a person under s.10 is itself an "immigration decision" within the meaning of s.82(2) of the Nationality, Immigration and Asylum Act 2002, and in principle carries a right of appeal. Thus, the decision to refuse leave, albeit often appealable, may not be the end of the matter: if a person is to be removed a further appealable decision will be necessary. And, because of the effect of s.3C, a s.10 decision cannot be given at the same time as the refusal of the variation, because at that time s.3C operates to prevent a person having no leave.

3.
Section 47 of the Nationality, Immigration and Asylum Act 2006 was introduced in order to attempt to make decision-making in this area more effective. It enabled a decision to remove the person to be made during his s.3C leave; but the terms of the section expressly permitted such a decision to be made only during the period specified by s.3C(2)(b). That is to say, the period when the new type of removal decision could be made began on the expiry of the s.3C(2)(a) period and ended when the time allowed for bringing an appeal ended, or on the earlier date on which a person actually gave notice of appeal. But, as the Tribunal decided in Ahmadi v SSHD [2012] UKUT 00147 (IAC), endorsed on appeal [2013] EWCA (Civ) 512, the notice of the s.47 decision could not be given at the same time as the notice of the variation, because the period of leave granted by s.3C(2)(a) did not end until the individual had notice of the decision, so that a purported notice of removal made contemporaneously with the variation decision would be made during the s.3C(2)(a) period, rather than the s.3C(2)(b) period. For that reason, a very large number of purported s.47 decisions were invalid. In Adamally & Jaferi v SSHD [2012] UKUT 00414 (IAC) the Tribunal decided that those decisions were essentially separate, and that the Tribunal should treat the s.47 decision as unlawful but deal on the merits with any appeal against the refusal of variation.

4.
Parliament responded to the decision in Ahmadi in s.51 of the Crime and Courts Act 2013. When it took effect on 8 May 2013 s.51 replaced s.47(1) of the 2006 Act with the following:

"(1) Where the Secretary of State gives written notice of a pre-removal decision to the person affected, the Secretary of State may –

(a) in the document containing that notice,

(b) in a document enclosed in the same envelope as that document,

(c) otherwise on the occasion when that notice is given to the person, or

(d) at any time after that occasion but before an appeal against the pre-removal decision is brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002,

also give the person written notice that the person is to be removed from the United Kingdom under this section in accordance with directions given by an immigration officer if and when the person's leave to enter or remain in the United Kingdom expires.

(1A) In subsection (1) "pre-removal decision" means –

(a) a decision on an application –

(i) for variation of limited leave to enter or remain in the United Kingdom, and

(ii) made before the leave expires,

(b) a decision to revoke a person's leave to enter or remain in the United Kingdom, or

(c) a decision to vary a persons leave to enter or remain in the United Kingdom where the variation will result in the person having no leave to enter or remain in the United Kingdom."

5.
In the present case, the appellants, who are husband and wife and nationals of the Philippines, arrived in the United Kingdom separately, but both had leave. Before their leave expired they sought a variation, extending it so that the first appellant, Mrs Castro, could remain in the United Kingdom and work, her husband, Mr Castro, remaining as her dependant, but also hoping to work. They made their application on the basis of Article 8 of the European Convention on Human Rights and Appendix FM to the Statement of Changes in Immigration Rules , HC 395. They claimed that they had been in the United Kingdom for a sufficient length of time to make their removal disproportionate.

6.
On 21 May 2013 the Secretary of State refused those applications. The appellants were served with notices headed Refusal to Vary Leave to Remain and Decision to Remove. The operative part of the notices read as follows:

" Decision to Refuse to Vary Leave to Enter or Remain

Malik Law Chambers Solicitors applied on your behalf on 06 March 2013 for variation of your leave to remain. That application has been refused. Full details for this decision are provided in the attached letter.

Decision to Remove

Consideration has also been given to your position in the United Kingdom. The Secretary of State has decided that you should be removed from the country by way of directions under Section 47 (Removal: Person with statutorily extended leave) of the Immigration, Asylum and Nationality Act 2006".

The accompanying letter gives full reasons for the refusal of the appellants' applications.

7.
The appellants appealed to the First-tier Tribunal. Judge I Howard considered their appeals on the merits by reference to Article 8 and concluded that they had no proper basis for staying in the United

Kingdom. He thus dismissed their appeals against the refusal to vary their leave. No further issue is taken on that decision. The judge also referred briefly to s.51 of the 2013 Act and stated its effect. He said:

“As a consequence the removal direction given under the new legislation is lawful and having dismissed the substantive appeals I similarly dismiss the section 47 appeals.”

Permission to appeal to this Tribunal was given on grounds asserting that the decisions to remove the appellants are not lawful for failure to comply with the terms of s.47 (as amended) and the Immigration (Notices) Regulations 2003. In his grounds and in his oral submissions Mr Malik makes four points, and we will deal with them in turn.

8.
First, Mr Malik draws attention to the phrase in s.47(1) “where the Secretary of State gives written notice of a pre-removal decision to the person affected”. As Mr Malik correctly points out, the phrase “pre-removal decision” is exclusively defined in s.47(1A). Unless there is a pre-removal decision as defined, there is no power to give a notice of removal under s.47. Clearly in the present case paras (b) and (c) of subsection (1A) are not applicable. If there is a pre-removal decision it must be one within para (a). Mr Malik’s submission is that in the present case there was no pre-removal decision within the meaning of para (a), because the decision was not “made before the leave expires”. In Mr Malik’s submission, the “leave” referred to must be that originally granted, not the leave as extended by s.3C. In the present case that leave expired on 23 March 2013, but the decision was not made until 21 May 2013. Thus, Mr Malik argues, there was no “pre-removal decision” in the present case.

9.
We are confident that that interpretation of the section is incorrect. There are several reasons. The first and most obvious is that the arrangement of the various parts of s.47(1A) makes it clear that sub-paras (1) and (2) are requirements of the application, not requirements of the decision. That is apparent from the two sub-paras’ appearance in parallel, connected by the word “and”. The two sub-paras are clearly intended to qualify the same noun; and that noun cannot be “decision”, because, although sub-para (ii) might grammatically follow either “decision” or “application”, sub-para (i) is phrased in such a way that it can only relate to the application.

10.
The second reason is that if the decision were indeed made before the leave expired, it would be, unlike the decision specified in paras (b) and (c), a decision which carried no statutorily extended leave. The types of decision specified in s.47(1A)(b) and (c) benefit from leave extended by s.3D of the 1971 Act, which is analogous to s.3C, but reflects the fact that decisions of this nature are not made on application by an individual. But, as is apparent from the analysis of s.3C which we have already given, where the variation decision is made before the original leave expires, s.3C has no application: even the s.3C(2)(a) period does not begin. Both the comparison with the other parts of the section and the legislative history of s.47(1A) make it unlikely that para (a) is intended to deal with a decision not previously covered by s.47, and to fail to deal with precisely the situation which the original s.47 was supposed to cover, and in respect of which the amendment was supposed to remedy the defects of the earlier version.

11.
The third reason is slightly more complex. At first sight it looks as though the phrase “made before the leave expires” cannot refer to the application, because on the assumption that para (a) is intended to deal with leave extended by s.3C, there only ever is such leave if the application was made before the

“original” leave expired. It looks, therefore, as though if sub-para (ii) applies to the application, it is entirely unnecessary. That, however, is not quite right. The difficulties arising from the original s.47 were because of its specific reference to the terms of s.3C. The new version makes no specific reference to s.3C. It therefore needs to include, as part of its own terms, the condition which causes s. 3C leave to run.

12.
It is for those reasons that we reject Mr Malik’s first ground. Sub-para (ii) of s.47(1A)(a) qualifies the word “application”. That conclusion has another important consequence. It is that s.47(1) now applies not only to cases where leave is extended by s.3C, but also to those cases where a decision on an in-time application for variation is made before the (original) leave expires. Those cases are, as we have explained, not within s.3C; and, as we have also explained, it is inconceivable that only they were intended to be included now. But the present wording of s.47(1) and 1(A) does not rely on s.3C, does not exclude them, and clearly includes them.

13.
Mr Malik’s second point is that s.47 gives power to the Secretary of State to give written notice that the person “is to be removed… if and when the person’s leave to enter or remain in the United Kingdom expires”, as he points out, that is a power to give a decision which takes effect in the future. The wording of s.47 is paralleled by that specifying the equivalent appealable immigration decision in s.82(2)(ha), “a decision that a person is to be removed from the United Kingdom”. Mr Malik draws attention to the wording of the decision in the present case, which is that “The Secretary of State has decided that you should be removed”. Mr Malik argues that that is not a decision to take effect in the future, but what he calls a contemporary decision.

14.
We disagree. The word “should” has a considerable number of meanings. The meaning here is not a statement of what is desirable in the present, but an injunction for the future, in the appropriate grammatical mood for the direct speech indicated by the proceeding “that”. The Secretary of State’s decision “he shall be removed” is reported as “the Secretary of State has decided that you should be removed”. The words “if and when your leave expires” are in our view unnecessary to validate the decision; the decision itself does not have the defect identified by Mr Malik. It is, in form and in substance, a decision of precisely the sort envisaged by s.47(1).

15.
Mr Malik’s third point is that the decision to remove is ineffective for failure to give reasons. Regulation (5)(1)(a) of the Notices Regulations requires the notice of an immigration decision to “include or be accompanied by a statement of the reasons for the decision to which it relates”. Here the accompanying notice gave full reasons for the decision to refuse the variation which the appellants had sought, but gave no additional reasons for the decision to remove. The question then must be whether the reasons given were adequate for both decisions. In our judgment, they are adequate to meet the circumstances of a case like this one. The appellants have put their case in full in the context of their application. The application has been refused. The necessary consequence is that at the expiry of their s.3C leave the appellants will, if they remain in the United Kingdom, be doing so without leave, which they are not entitled to do. Their application gives their own view on their right to remain in the Untied Kingdom. In the circumstances the reasons for the decision flow, in an obvious sense, from the application and its refusal, and so the reasons for the refusal of the variation, coupled with the application for the variation and the fact that it has been refused (all of which are specified in the reasons letter) are adequate reasons for the s.47 decision.

16.
No authorities were cited to us on the necessary content of reasons for a decision; but if either party had relied on the well-known passage of the speech of Lord Brown in South Bucks District Council v Porter (No.2) [2004] UKHL 33 at [36], we should have reached precisely the same view as a matter of law that we were able to reach applying common sense to the facts of the present case.

17.
In his grounds Mr Malik raised another issue on the Notices Regulations, which was that regulation 5(1)(b) requires a notice of a removal decision to specify the intended removal destination. There is no doubt that the notice complies with this requirement, because it specifies that removal will be to the Philippines.

18.
Mr Malik's fourth point was that a clear interpretation of s.47 is necessary because after a s.47 notice has been given, the person affected may be faced with detention pending his removal. In those circumstances, Mr Malik argued that s.47 should be construed as narrowly as possible.

19.
We would agree if there were any room for ambiguity, but there is not. The meaning of the elements of s.47 identified in this appeal is clear. The s.47 decisions served on the appellants were lawful ones. Their appeals are dismissed.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 7 May 2014