Upper Tribunal
(Immigration and Asylum Chamber)

) in Scotland)

NRS and Another (NA (Libya Iraq [2020] UKUT 00349(IAC)

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 5 August 2020

.....

Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N R S

Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D K R

Respondent

Representation :

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer.

For the Respondents: Mr Harvey, instructed by Latta & Co. Solicitors

The decision of the Court of Appeal in NA (Libya) v SSHD [2017] EWCA 143 that a Country Guidance decision has effect on other decisions sent out after it is published, will be followed in Scotland.

DECISION AND REASONS

1.

These two appeals raise the same question: in Scotland, when does a country guidance (CG) decision become authoritative, so as to affect the decision on an appeal?

2.
The two respondents, to whom we shall refer as the claimants, are both nationals of Iraq, but are not otherwise connected. NRS made an asylum and human rights claim, which was refused on 6 September 2019. His appeal was heard in the First-tier Tribunal by Judge Cox on 17 December 2019. Judge Cox considered the existing country guidance, including the decisions in AA [2007] EWCA Civ 944 and AAH [2018] UKUT 212. He followed that guidance, despite being asked by the Home Office Presenting Officer to depart from it. He was aware that the Upper Tribunal had heard an appeal with a view to giving CG on Iraq, but the decision, and the guidance contained in it, had not been forthcoming. He indicated that if the decision came out shortly after the hearing the parties should let him know. He heard evidence and submissions and made findings of fact. He applied the existing country guidance to those findings and allowed the appeal. He allowed the appeal on humanitarian protection grounds. His decision bears a typed date 20 December 2019. It was sent to the parties on 31 December 2019.

3.
In the case of DKR, the asylum and protection claim was refused on 23 October 2019. Judge Green heard the appeal on 18 December 2019. The judge noted that on that date the new CG on Iraq was awaited but it had not been published. Judge Green rejected the Home Office Presenting Officer's submission that he should not follow the existing CG on the basis that "things had moved on". He heard evidence and made findings of fact. He allowed DKR's appeal on humanitarian protection grounds. His decision bears a typed date 23 December 2019. It was sent to the parties on 27 December.

4.
On 23 December 2019 the decision of this Tribunal in SMO [2019] UKUT 00400 was published, marked "CG". As we understand it, there is no dispute that the guidance provided in SMO might have had a bearing on the outcome of these appeals and might make it less likely that either of them would succeed on humanitarian protection grounds. The date of the publication of SMO was in each case after the date of the hearing in the First-tier Tribunal. In the case of NRS it was also after the date when the judge signed the decision. In DKR, it was on the same date as the judge signed the decision. In both cases the First-tier Tribunal decision was sent out after SMO was published.

5.
The Secretary of State now appeals, with permission, to this Tribunal on the ground that each of the judges erred in law in failing to take into account the country guidance provided in SMO . We should say at once that there is no suggestion of any criticism of the judges: they had, so far as they knew, completed their work on the case and had no reason to know the date at which their decisions would be sent to the parties.

STATUS OF CG DECISIONS

6.
Section 107(3) of the Nationality, Immigration and Asylum Act 2002 (as amended) provides as follows:

"(3) in the case of proceedings under section 82 or by virtue of section 109, or proceedings in the Upper Tribunal arising out of such proceedings, practice directions under section 23 of the Tribunals, Courts and Enforcement Act 2007 –

(a)
may require the Tribunal to treat a specified decision of the Tribunal or Upper Tribunal as authoritative in respect of a particular matter; and

(b)
may require the Upper Tribunal to treat a specified decision of the Tribunal or Upper Tribunal as authoritative in respect of a particular matter."

"Tribunal" is defined in s.81 as meaning the First-tier Tribunal; and s.107(3A) provides a further definition of the references to a decision of the Tribunal.

7.
There are relevant practice directions. They are to be found at paragraph 12 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal . They were made by the Senior President of Tribunals in 2010; subsequent amendments have not affected this direction which, so far as relevant, is as follows:

"12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:(a)relates to the country guidance issue in question; and(b)depends upon the same or similar evidence.

12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a particular country will be expected to be conversant with the current "CG" determinations relating to that country.

12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

8.
There is thus no room for doubt that, insofar as SMO was applicable to the appeals in this case, the failure to follow the guidance found therein would be likely to result in a decision that the First-tier Tribunal erred in law.

THE ARGUMENTS

9.
On behalf of the Secretary of State, Mr Deller relied on the decision of the Court of Appeal in NA (Libya) v The Secretary of State [2017] EWCA Civ 143. In that case the timescale was similar to that in the present appeals. The hearing in the First-tier Tribunal was on 20 June 2014. At that hearing it was known that the Upper Tribunal had heard a case intended to give country guidance on Libya but had not yet published its decision. The First-tier Tribunal Judge signed her decision on 30 June 2014. It was sent out on 16 July 2014. On 14 July 2014 the Upper Tribunal published its decision in AT [2014] UKUT 318, marked as country guidance. The principal question for determination by the Court of Appeal was whether that guidance applied to the decision of the First-tier Tribunal. After considering the arguments and the authorities, McFarlane LJ (with whom the other members of the Court agreed) said that it did. The First-tier Tribunal remained seised of the case until it has sent out

its decision. A decision sent out subsequent to the publication of the CG is a “subsequent” appeal within the meaning of paragraph 12.2 of the Practice Direction. The principle is not affected by the parties’ failure to draw attention to a country guidance decision which comes out after the hearing. The rule propounded by the Court of Appeal promoted certainty ([28]-[33]). Mr Deller urged us to apply the decision in NA to the present cases.

10.
Mr Harvey reminded us that NA is a decision of the Court of Appeal, binding in England and Wales but of only persuasive authority in Scotland. He invited us not to follow NA . He submitted that, so far from promoting certainty, the decision in NA was prone to the development of uncertainty in the decision-making process in the First-tier Tribunal. A judge cannot know when a decision will be sent out; and, in similar manner, the judge does not know when a CG decision may eventually be published. If NA is followed, then a judge not only does not know what arguments have to be taken into account at the hearing: even after the hearing it remains uncertain what factors need to be taken into account in preparing the decision. There has to be a point at which the matter is closed to further adjustment, and that ought to be the date on which the judge completes the decision, reflected in the date of signing the decision.

11.
Mr Harvey deployed his arguments with great patience and skill. We are grateful to him for presenting every argument that possibly could be presented on that side of the case. We have come to the conclusion, however, that his arguments should be rejected.

12.
In the first place, they are based on what may be described as a very shaky assertion of fact. The basis of them is that certainty can be derived from the date at the end of a judge’s decision. That, however, is not right. First, a judge is under no obligation to date a decision at all. Secondly, a judge is under no obligation to date a decision accurately; and no enquiry is ever made as to whether the date that may appear at the end of a decision is in truth the actual date upon which the judge made any final amendments. It may reflect software printing “today’s date” on a decision in fact finalised a previous day; or the date may be unaltered despite the fact that the judge returns to the decision the following day and makes some amendment to it. The apparent presence of a signature next to the date is, these days, no assurance that the date and the signature were contemporaneous. The signature may itself have been produced without the judge’s pen touching the paper on which the determination has been printed. Mr Harvey’s proposal that the date on which the determination is finalised should be taken as the date for the purposes of the applicability of CG therefore suffers from the difficulty that such a date may not be apparent from the decision or, if apparent, may be incorrect.

13.
Secondly, even if that date were ascertainable, it would be liable to produce exactly the same difficulties as the date of promulgation identified as the correct one in NA . That that is the case is demonstrated by the course of events in the present appeals. Both of the judges were aware that the country guidance might well be imminent. Both of them wrote their decisions in ignorance of the guidance in SMO . One of them finished his decision in such a way that it bore a date before SMO was published; the other on the date that SMO was published. One can readily envisage a further case in which the judgment bore the following day’s date. It is not immediately easy to see why, if the decisions are all sent out at the same time, the law applying to them should be affected by the speed at which the judge wrote the decision.

14.
Thirdly, Mr Harvey's proposal glosses over what we regard as the most important factor, which is that identified by the Court of Appeal in NA . That is that the First-tier Tribunal must be regarded as seised of the appeal until the decision is sent out. That is to say that whatever the judge may have done in the way of preparing and/or signing a decision, it is not final until it is sent out. Before it is sent out, the judge is at liberty to make any alteration in the decision. After it is sent out, the judge does not have that power. If Mr Harvey is right, a judge who noted that the CG had come out, and amended his decision to take account of it, and re-dated it, would produce a decision governed by different principles from the decision of his colleague, who had made no amendment, (despite perhaps having also noting the appearance of a country guidance) and whose decision was sent out on the same day;

CONCLUSIONS

15.
As it appears to us, there are at least three reasons why the date for the ascertainment of whether a CG is applicable to a decision should be regarded as the date on which the decision is sent out.

16.
First, the date on which a decision is sent out is readily and objectively ascertainable. It does not depend on the practice of signing and dating which is neither obligatory nor verifiable. Secondly, the decision is not final until it is sent out. At that point the First-tier Tribunal is no longer able to make any changes to it. It is (so far as that stage of the process of determining the appeal is concerned) final. It leaves, so to speak, the custody of the First-tier Tribunal and enters that of the parties, whose time for challenging it runs from then (not, of course, from any earlier date at which the determination was signed).

17.
Thirdly, although of course we give every respect to the difference in legal cultures between Scotland on the one hand and England and Wales on the other, Mr Harvey's proposal would draw a distinction between the law of England and Wales and that of Scotland for no good reason. The Tribunal is a United Kingdom Tribunal, centrally administered and using identical processes for the promulgation of its decisions. If there had been a good reason for preferring Mr Harvey's argument to that of the Court of Appeal in NA it might have been proper to allow the law of Scotland to depart from that of England and Wales. But in a matter purely of adjectival law there can be no perceptible justification for the differentiation proposed.

DECISION

18.
As we have indicated, there is no realistic doubt that the guidance in SMO might affect the outcome of the present appeals. Indeed, Mr Harvey's vigorous attempt to show that SMO does not apply to these appeals supports that view. Each of these decisions was sent out after SMO became applicable. Each of them shows an error of law. In each case we think it is appropriate to set the decision aside.

19.
The grounds of appeal in DKR are considerably longer than those in NRS, but in neither case is there any challenge that does not depend on the point which we have considered. There is no challenge by either party to the judge's findings of primary fact. In these circumstances we consider it appropriate to remit these appeals to the First-tier Tribunal, to be redetermined in each case by the judge whose decision has been under appeal. That judge is the most appropriate person to consider what (if any)

further evidence is necessary, and to receive submissions, in order to apply the current country guidance to the factual situation already identified by the evidence in the findings he made.

20.
In each case, therefore, the Secretary of State's appeal is allowed and the decision of the First-tier Tribunal is set aside. We remit NRS's appeal to Judge Cox and DKR's appeal to Judge Green, in each case for redetermination in the light of current CG after hearing such further evidence and submissions as each of them may consider appropriate.

C. M. G. Ockelton

C. M. G. OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 23 October 2019