



AND UPON the Court noting that an anonymity order was made by the Court of Appeal on 6 October 2022 and that order continues to have effect.

Press Summary

23 October 2024

CAO (Respondent) v Secretary of State for the Home Department (Appellant) (Northern Ireland)

[2024] UKSC 32

On appeal from [2023] NICA 14

Justices: Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lady Rose, Dame Siobhan Keegan

Background to the Appeal

This appeal concerns the meaning and effect of section 55 of the Borders, Citizenship and Immigration Act 2009 (“**section 55**”), the interaction of section 55 with article 8 of the European Convention on Human Rights (“**article 8**”) and the interaction of decision-making procedures in the immigration context by the Secretary of State and by a tribunal on an appeal from the Secretary of State. Both section 55 and article 8 are concerned with safeguarding and promoting the welfare of children, including when decisions are made regarding their immigration status.

Section 55(1) places a duty upon the Secretary of State to make arrangements to ensure that any functions in relation to immigration are discharged having regard to the need to safeguard and promote the welfare of children. An ancillary duty is found in section 55(3) in that any person exercising immigration functions, which includes officials at the Home Office acting on behalf of the Secretary of State, must have regard to guidance issued by the Secretary of State (“**the Guidance**”). Article 8 provides a right to respect for private and family life, which also protects the welfare of children. Where an immigration decision affects a child, article 8 requires that the best interests of the child should be treated as a primary consideration, albeit not the only one.

The respondent is a national of Nigeria who arrived in the United Kingdom on 25 September 2018 with her son (then aged 16) and daughter (then aged 12), who are also nationals of Nigeria. On 8 November 2018 she applied for asylum for herself and her children. In the asylum application, the respondent stated that her husband had subjected her to domestic abuse and that he had been making efforts to take the daughter in order to subject her to female genital

mutilation (“FGM”). The respondent said that to protect her daughter she had tricked her husband into giving his consent for her to take the children on a holiday to the United Kingdom. The respondent claimed that her husband would be able to track her and the children down were they returned to Nigeria.

By a decision letter dated 10 April 2019 (“**the Decision Letter**”), the Secretary of State refused the respondent’s asylum application. The Secretary of State was not persuaded that there was a real risk of domestic abuse, since the respondent had long been separated from her husband and could evade him or avail herself of police protection if she were returned to Nigeria. Nor was the Secretary of State persuaded that there was a real risk of FGM for the respondent’s daughter. The reasons included that the respondent had not discussed FGM with her husband for 12 years and it did not appear to be culturally important for him and also that the family could relocate and evade him or avail themselves of police protection if returned to Nigeria. The Decision Letter contained a part headed ‘Section 55 Consideration’ where the Secretary of State considered the impact of his decision on the well-being of the children, having regard to their best interests. Various factors were taken into account and it was considered that it would be in their best interests to be returned with the respondent to Nigeria as a family unit. The letter did not mention section 55(3) or the Guidance.

The respondent exercised their right of appeal to the First-tier Tribunal (“**the FTT**”) under section 82(1) of the Nationality, Immigration and Asylum Act 2002. In its decision of 25 February 2020, the FTT found that the respondent did not have a sound basis to claim asylum. The FTT accepted that the respondent had been subject to domestic abuse, but considered that there was no real risk it would be continued, and it was not satisfied that her husband wanted to subject the daughter to FGM. In her appeal to the FTT, the respondent made no complaint about the lack of reference in the Decision Letter to section 55(3) and the Guidance. The FTT held that the best interests of the children would be to remain with their mother and return to Nigeria.

The respondent sought permission to appeal to the Upper Tribunal, which was refused. The respondent then changed her legal team and brought judicial review proceedings to challenge the Upper Tribunal’s refusal of permission. At this point the respondent complained that the Secretary of State had failed to comply with section 55(3) and the Guidance and that the FTT had erred in law by failing to take this into account. The refusal of permission was quashed by consent and the Upper Tribunal therefore proceeded to reconsider the application for permission to appeal. The Upper Tribunal granted permission, but on consideration of the merits it dismissed the appeal on the grounds that the FTT had made no error of law.

The respondent appealed to the Northern Ireland Court of Appeal (“**the NICA**”). McCloskey LJ gave the leading judgment, with which Horner LJ and Fowler J agreed. The NICA held that the Secretary of State’s failure to refer expressly in the Decision Letter to the duty under section 55(3) and the Guidance meant that the inference had to be drawn that the Secretary of State had breached that duty. This meant that there had been an unlawful interference with the article 8 rights of the respondent’s children, in particular her daughter, which had not been remedied by the consideration of the case by the FTT or the Upper Tribunal. The NICA therefore allowed the respondent’s appeal and ordered that the FTT reconsider her appeal. The Secretary of State appealed to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal. It holds that the FTT committed no error of law in its decision. It applied article 8 properly, as it was required to do, and had regard to the best interests of the respondent’s daughter as a primary consideration. Lord Sales and Dame Siobhan Keegan give the judgment, with which the other members of the Court agree.

Reasons for the Judgment

An appeal to the FTT against the Secretary of State's refusal of an asylum application is a full appeal. This means that the FTT is itself required to determine the merits of any claim made by the person appealing, on the basis of evidence adduced in the FTT itself and having regard to the circumstances applicable at the time of the hearing in the FTT. This is different from judicial review or an appeal confined to an error of law, where the object is to check whether the original decision-maker has made an error of law on the basis of the evidence available to them at the time [37]-[38].

Since on an appeal the FTT looks at matters afresh on the basis of new evidence, and makes its own decision, it acts as an extension of the immigration decision-making process in human rights cases [39]. Therefore, in human rights appeals, the FTT is the new primary decision-maker, whose decision supersedes that of the Secretary of State. Whilst, generally, the FTT is not required to conduct inquiries and is entitled to assume that a parent representing their child has produced the relevant evidence, it has a duty as a decision-maker to make inquiries where this is obviously required. For example, if a decision affected a child and no attempt at all had been made to consider their best interests, that would be an obvious omission and the FTT would be bound to investigate to make sure that proper consideration was given to that issue [47]-[48].

The Court explains three aspects of article 8. First, it requires the best interests of a child to be treated as a primary consideration when making decisions relating to children [49]-[51]. Second, article 8(2) requires the decision to be made 'in accordance with the law', which means that the decision must be taken in accordance with domestic legal requirements [52]-[55]. Third, in certain cases, there is an implied procedural obligation under article 8 to give the affected person a fair opportunity to participate in the decision-making process [56]-[58].

Article 8 is the basis of the FTT's obligation to have regard to the child's best interest, not section 55. The duty in section 55(1) is imposed on the Secretary of State and the duty in section 55(3) is imposed on the persons exercising immigration functions specified in section 55(2). The FTT does not exercise these functions and the duty in section 55(3) therefore does not apply to it. Nor is it the function of the FTT to fulfil a disciplinary role in relation to compliance by the Secretary of State with section 55(3). This does not mean the Secretary of State may ignore the Guidance with impunity: if the Secretary of State's officials ignore it she may lose an appeal to the FTT, and in an appropriate case may be ordered to comply with the duty under section 55(3) in judicial review proceedings [54], [59]-[69].

Before assessing the FTT's compliance with article 8, the Court considered conflicting case law on what is required for the Secretary of State and her officials to comply with section 55(3) and the Guidance. The case law from Northern Ireland stated that express reference was required to the Guidance to show there had been compliance with section 55(3). The case law from Scotland and England & Wales stated that if a decision letter was substantively in compliance with what the Guidance required, even though it did not refer to the Guidance, this was sufficient to comply with section 55(3). The Supreme Court holds that the approach adopted in Northern Ireland is wrong, and the case law from Scotland and England & Wales should be followed. Whilst express reference to the Guidance was best practice and would help to show that a child's best interests had been considered, it was substantive compliance with the guidance that mattered as a matter of law [70]-[82].

As for the Secretary of State's compliance with the Guidance, the respondent submitted that there had been a failure to follow the procedure set out in the Guidance, because the respondent's daughter was not interviewed to determine her views about return to Nigeria and the prospect of her being subjected to FGM. The Court rejects this argument. The overarching imperative is that the immigration authorities should properly inform themselves about the

child's circumstances in order to understand the child's best interests. In some circumstances, an interview may be necessary to achieve this, but it may often be possible to do so without an interview. In the circumstances of this case, an interview was unnecessary [83]-[96].

The Court emphasises that even if there had been a breach by the Secretary of State of section 55(3), it would not have affected the ultimate outcome of this appeal. This is because the FTT's decision is a fresh determination which supersedes the decision of the Secretary of State. This means that so long as the FTT makes its own proper and lawful determination in relation to the child's rights under article 8, any breaches by the Secretary of State of section 55(3) will not provide grounds to challenge the FTT's decision [97]-[99].

Therefore, the critical issue is whether the FTT complied with article 8. The Court holds that it did. It correctly treated the best interests of the respondent's daughter as a primary consideration. By its own fair procedure, the FTT satisfied the procedural aspect of article 8. Its decision was "in accordance with the law" within the meaning of article 8(2). For these reasons, the Court restores the order of the Upper Tribunal, by which the respondent's appeal from the decision of the FTT was dismissed [100]-[105].

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)