Neutral Citation Number: [2019] EWCA Civ 1310

Case No: C2/2017/3354

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Macleman
JR/3293/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2019

Before:

LORD JUSTICE IRWIN
LADY JUSTICE SIMLER

- -

Between:

THE QUEEN (on the application of MOHAMED ASHAD MOHAMED FIRDAWS)	**Appellant**
- and -	
(1) FIRST TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)	
(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondents**

- -
- -

Robert Parkin (instructed by **Ronald Fletcher & Co LLP**) for the **Appellant**
Zane Malik (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 16 July 2019

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Approved Judgment

Lord Justice Irwin:

Facts and background

1. This appeal has a tortuous procedural history. Moreover, the case turns on highly technical points of law. In order to approach the relevant points of law with clarity, it is regrettably necessary to summarise the factual and procedural background.

2. The appellant is a Sri Lankan national born on 30 March 1984. He entered the United Kingdom on 20 September 2008 as a student with leave to remain until 31 October 2010. On 11 December 2010 his leave to remain was extended to 28 February 2013. On that day he made an application for further leave to remain which was refused for non-payment of a fee. On the 27 March 2013 he made a further application for leave to remain as a student, and was granted extended leave to remain on the 22 November 2013, his leave expiring on 22 March 2014.

3. On the 21st March 2014 the appellant made a further application for an extension of leave to remain as a Tier 4 general student. Before any decision on that application, the appellant claims that he sent to the Secretary of State on 31 May 2014 a letter stating a change of address. If this was sent, it was either never received or a change of address was not recorded by error.

4. On 10 December 2014 the appellant's leave to remain was curtailed, his leave now expiring on the 13 February 2015. This was by reference to the appellant's sponsor.

5. On 27 February 2015 the appellant applied for leave to remain outside the Immigration Rules and on compassionate grounds. This application was based on Article 8 of the European Convention. The application was refused on 30 March 2015. Part of the decision reads:

> "whilst it is acknowledged that you currently enjoy living and studying in the United Kingdom this does not give you the right to do so on an exceptional basis. The Secretary of State is satisfied that you have provided no compelling or compassionate reasons why you should be granted leave to remain outside the rules and is therefore not prepared to exercise her discretion in your favour. Your application for leave to remain in the United Kingdom is therefore refused.
>
> You made an application on 27 February 2015. However, your leave to remain expired on 13 February 2015. You therefore did not have leave to enter or remain at the time of your application.
>
> Your application for leave to remain in the United Kingdom has been refused and you no longer have any known basis of stay here. There is no right of appeal against this refusal."

6. On 19 January 2016 the appellant was served with a Notice to Remove and a Statement of Additional Grounds. On 3 February 2016 the appellant made a further human rights application for leave to remain on the basis of his Article 8 private life

rights. This was refused on 29 February 2016, the letter of refusal indicating that the appellant had out of country appeal rights only. On 6 October 2016, the appellant applied for an appeal against the refusal by the second respondent to grant further leave to remain, that is to say the decision of 30 March 2015, some 18 months earlier.

7. This appeal came before First-tier Tribunal ["FtT"] on 14 December 2016. FTJ Herlihy ruled on a preliminary issue that the appellant had no valid appeal. The essential parts of his short decision reads as follows:

> "However the Appellant had no extant leave to enter or remain at the date of the decision and this has not been challenged by the Appellant in his grounds of appeal. It is argued by the Respondent that the Appellant does not have a right to appeal under s.82 Nationality, Immigration and Asylum Act 2002 (prior to the amendment by Sct 15 of the Immigration Act (2014) because his leave was curtailed on 13 February 2015 in a letter dated 10 December 2014. The Appellant's representative states at paragraph 4 of the grounds of appeal that the Appellant's former representative was notified by the Respondent that a notice of curtailment had been forwarded to the Appellant notifying him that his leave extant until 28 February 2015 had been curtailed to 13 February 2015.
>
> I am satisfied that the Appellant has no right of appeal as the decision is not one that fell within the definition of an immigration decision as set out in Section 82(2). This is because the Appellant had no leave to remain at the date of the decision and the refusal to vary leave to remain was only permitted under Section 82(d) of the Nationality, Immigration and Asylum Act 2002 if the result of the refusal is that the person has no leave to remain.
>
> In any event I note that the notice of appeal appears to be out of time; it is signed and dated the 6 October 2016 and the Respondent's decision is dated 30 March 2015. By virtue of Rule 19(2) of the Tribunal Procedure (First-Tribunal) (Immigration and Asylum Chamber) Rules 2014 the Appellants had a period of 14 days from the date after they were sent the notice of decision to lodge the appeal with the Tribunal. Calculating the period for lodging the appeal in accordance with Rule 19(2) the notice of appeal should have been filed with the Tribunal on or before 13 April 2015. The Tribunal file shows that the notices of appeal were received by the Arnhem Support Centre on 7 October 2016. I am satisfied that the appeal is substantially out of time by 18 months. I am not satisfied that the Appellant has provided a credible explanation for the delay of over 18 months in submitting the notice of appeal. I am unable to identify any special circumstances relating to the Appeal which would render it unjust not to exercise my discretion under Rule 4 by extending time.

> I conclude that there is no relevant decision and therefore no pending appeal. It follows that the Tribunal has no jurisdiction to consider the Appellant's notices of appeal."

8. On 14 March 2017 the appellant sought judicial review. This application was initially made to the High Court, but following the transfer of judicial review jurisdiction, was transferred to the Upper Tribunal. On 24 July 2017 UTJ King refused permission. The central part of that decision reads:

> "It is entirely clear that there is no right of appeal against a refusal if the applicant does not have leave to enter or remain at the time of the application. It was a contention of the applicant that the decision to curtail his leave dated 10th December 2014 was not effectively served and therefore that his leave had not in fact been curtailed. The second respondent relies upon paragraphs 8ZA and 8ZB of the Immigration Rules that took effect on 12th July 2013, which placed the burden upon the applicant to demonstrate that service had not been effective. It is the contention of the respondent that he has failed to do so.
>
> The grounds of application simply state that the burden rests upon the respondent to show due service of the curtailment notice, but that is incorrect in the light of the new Immigration Rules. No evidence is presented in the grounds to substantiate the contention that service was not effected.
>
> In all the circumstances it is not arguable otherwise than that the second respondent was entitled to treat the curtailment notice as validly served upon the applicant such as to justify the decision made on 30th March 2015. In the circumstances it is not arguable that the decision of the Secretary of State was otherwise than reasonable and lawful. Similarly, there is no argument otherwise that that the decision of the First-tier Tribunal in declining jurisdiction to challenge that decision was also both reasonable and lawful."

9. On 21 November 2017 the appellant sought review of the refusal of permission. UTJ Macleman noted that the grounds which had been before UTJ King were "confused on the law and not based on any clear statement of facts". Counsel who came before UTJ Macleman had been instructed "very late" and "put the case very differently". Counsel had directed that a fresh bundle of documents should be prepared and that bundle included a copy of a letter dated 31 May 2014 from the applicant to the second respondent advising a change of address. Counsel submitted that the curtailment letter of December 2014 had gone to the applicant's out of date address and the applicant was not aware of that development until he received the decision of 30 March 2015 refusing the application for leave to remain outside the rules. The remaining part of UTJ Macleman's decision reads as follows:

> "9. It was agreed in course of debate that the material part of the rules is at [8ZB]: "where a notice is sent in accordance with

> rule 8ZA, it shall be deemed to have been given to the person affected unless the contrary is proved."
>
> 10. Mr Hawkin submitted that the respondent retains an initial obligation to show that the notice was sent; that it is not discharged by mere production of a copy; and the narration of the immigration history in defence, accompanied by a declaration of truth, was insufficient.
>
> 11. My view is that the respondent does have to show that notice was sent, but that takes no more than production of a copy and confirmation that the records show it was issued. On the facts advanced here, however, that would not be the nub of the matter.
>
> 12. The applicant's case, if matters were to reach the stage of a trial of the facts, depends not on showing that the notice was never sent, but on showing that he never received it, because it went to the wrong address, and that fault was on the respondent's side, not on his.
>
> 13. The first hurdle is whether the decision of the FtT, based on the information before it, might arguable be an unlawful one.
>
> 14. The proposed grounds of appeal to the FtT said at [5], "the appellant is entitled to plead that the decision…of 10/12/14 was never formally served on him."
>
> 15. That may well be right as an abstract statement; but it was no more than that.
>
> 16. The FtT decision notes that [4] of the grounds stated that "the appellant's former representative was notified by the respondent that a notice of curtailment had been forwarded to the appellant notifying him that his leave… had been curtailed…"
>
> 17. Matters might have been different if there had been a specific offer to prove non-receipt, by way of the notification of a change of address, not acted upon by the respondent; but the grounds were silent.
>
> 18. There was nothing before the FtT by which any other outcome might sensibly have been expected.
>
> 19. Equally, there is nothing in the grounds or in the renewal grounds to suggest that on the information before the decision-maker on 30/3/15, the outcome should have been otherwise."

10. For those reasons UTJ Macleman concluded that production of the relevant letter and a correct basis of the application was far too late: the case was "fatally flawed" by

failure to put the matter before the FtT and so there was no arguable prospect of its decision being set aside.

This Appeal

11. The Appellant sought to appeal on two grounds. The first was essentially a repetition of the earlier arguments concerning the service of the curtailment letter. Permission was refused on this ground by Asplin LJ, who concluded that the law "in relation to the onus to prove service … changed as from 12 July 2013. This was prior to the date of the purported service, on the date upon which it purportedly took effect". The application on that ground has not been renewed.

12. However, a second ground is advanced, for which Asplin LJ gave permission. The ground reads:

> "The Human Rights Application refused in 2015, was not certified but refused without a right of appeal. This was yet another procedural error that the Learned Judge at the reconsideration hearing failed to take issue over. A Human Rights Claim that had not been certified ought to have been either (i) granted an in-country right of appeal by the R1; or (ii) returned to the R2 for determination on the basis that the decision had not been made."

13. In granting permission, Asplin LJ observed:

> "There is a real prospect of success in arguing that the FTT and the UT applied section 82(d) Nationality, Immigration and Asylum Act 2002 in the wrong form prior to its amendment and were wrong to decide that there was no right of appeal."

14. In support of this ground, Mr Parkin begins by stating what is now common ground: the Appellant (1) made a human rights claim, (2) after his leave to remain had expired, (3) which was refused. The sole question is "whether the Appellant had (or acquired) a right of appeal against that refusal". As will become evident, the Appellant does argue that, even if he had no right of appeal as at the date of the refusal, he subsequently acquired such a right. This argument forces an examination of the formidable, indeed Byzantine, commencement provisions promulgated by the Second Respondent.

15. The Appellant begins by making a concession, subject to his ensuing arguments. At the time when he made his human rights claim (27 February 2015) and at the time when it was refused (30 March 2015), the Appellant had no leave to remain. The refusal did not terminate his leave to remain, because that had already ceased by curtailment on 13 February 2015. The decision simply had the effect that his leave was not restored: see *SA (Section 82(2)(d): Interpretation and Effect) Pakistan* [2007] UKAIT 00083.

16. It is therefore also common ground that the decision was not an "immigration decision" sufficient to satisfy the "old" form of section 82(2)(d), the relevant definition of which read:

> "(2) In this Part "immigration decision" means –
>
> …
>
> (d) refusal to vary a person's leave to enter or remain … if the result of the refusal is that the person has no leave to enter or remain."

17. By section 15(2) Immigration Act 2014 ["the 2014 Act"], this statutory provision was altered. The subsection reads:

> "Section 15…
>
> (2) for section 82 substitute –
>
> "82 Right of appeal to the Tribunal
>
> (1) A person ("P") may appeal to the Tribunal where –
>
> …
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P, or
>
> …"

18. The Appellant therefore argues that, if that provision applies, he has a right of appeal, since he has made a human rights claim, which was refused.

Commencement of Section 15(2) of the 2014 Act

19. The Second Respondent was granted the power to promulgate implementation orders for (*inter alia*) the substitution of the "new" forms of section 82 by the bringing into force of the provisions of the 2014 Act. Four such orders were promulgated between July 2014 and 6 April 2015.

Commencement Order 3

20. The Immigration Act 2014 (Commencement No 3 Transitional and Saving Provisions) Order 2014 ["Commencement Order 3"] was made on 15 October 2014. Article 1(2) of the order distinguishes between "the relevant provisions" and "the saved provisions". One of the "relevant provisions" under Paragraph 1(2)(d) is "Section 15 [of the 2014 Act, concerning] (right of appeal to First-tier Tribunal)".

21. Article 2 of Commencement Order 3 provides:

> "2. The day appointed for the coming into force of the following provisions of the Act, subject to the saving provisions in articles 9, 10 and 11, is 20th October 2014 –
>
> …
>
> (b) Section 15

…"

22. Hence, apart from the effect of the "saving provisions in Articles 9, 10 and 11", the substitution of the "new" appeal provision for the "old" was 20 October 2014.

23. Article 9 provides:

> "**Transitional and saving provision**
>
> 9. Notwithstanding the commencement of the relevant provisions, **the saved provisions continue to have effect**, [emphasis added] and the relevant provisions do not have effect, **other than so far as they relate to the persons set out respectively in articles 10 and 11, unless article 11(2) or (3) applies** [emphasis added]."

24. The "saved provisions" in Article 9 are defined in Article 1(2)(e). They include "… Part 5 of the 2002 Act". Part 5 of the 2002 Act is entitled "Appeals in Respect of Protection and Human Rights Claims" and includes section 82 "Right of Appeal to the Tribunal". Hence, section 82(2)(d) – the "old appeal" – is one of the "saved provisions" within Article 1(2)(e), and by the terms of Article 9 (set out above), "… continues to have effect … other than so far as they relate to the persons set out respectively in Articles 10 and 11, unless Article 11(2) or (3) applies".

25. Article 10 relates to "foreign criminals" liable to deportation. That is not relevant to this Appellant.

26. Article 11 reads:

> "**Transitional and saving provision**
>
> 11. - (1) The persons referred to in article 9 are a person ("P2") who makes an application on or after 20th October 2014 for leave to remain—
>
> (a) as a Tier 4 Migrant;
>
> ...
>
> (2) The saved provisions have effect, and the relevant provisions do not have effect, where P2, having made an application of a kind mentioned in paragraph (1), at any time thereafter makes—
>
> (a) an application for leave to enter; or
>
> (b) any further application for leave to remain which is not of a kind that is mentioned in paragraph (1);
>
> provided the subsequent application is not a protection claim or human rights claim, made while P2 is in the United Kingdom, other than at a port.

(3) Where paragraph (2) applies, the saved provisions also have effect, and the relevant provisions do not have effect, where a decision is taken in relation to P2—

(a) which constitutes an immigration decision under section 82(2) of the 2002 Act as in force immediately prior to 20th October 2014; or

(b) to which section 83 or 83A of the 2002 Act as in force immediately prior to 20th October 2014 applies.

(4) Where the relevant provisions apply, and an appeal has already been brought against an immigration decision under section 82(1) of the 2002 Act but before the relevant provisions applied, the reference to a "decision" in section 96(1)(a) of the 2002 Act is to be read as a reference to an "immigration decision".

(5) In this article—

(a) "human rights claim" means—

(i) a claim made by a person to the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c.42) (public authority not to act contrary to Convention); or

(ii) an application for leave to remain made under paragraph 276ADE of, or Appendix FM to, the immigration rules;

(b) "immigration decision" has the same meaning as in section 82(2) of the 2002 Act as in force immediately prior to 20th October 2014;

(c) "immigration rules" means the rules for the time being laid down by the Secretary of State as mentioned in section 3(2) of the 1971 Act;

(d) "Leave to enter the United Kingdom" means leave to enter the United Kingdom given in accordance with the provisions of, or made under, the 1971 Act;

(e) "Leave to remain in the United Kingdom" means leave to remain in the United Kingdom given in accordance with the provisions of, or made under, the 1971 Act and any variation of leave to enter or remain by the Secretary of State;

(f) "port" has the meaning in section 33(1) of the 1971 Act(1);

> (g) "protection claim" has the meaning given in section 82(2) of the 2002 Act;
>
> (h) "protection status" has the meaning given in section 82(2) of the 2002 Act;
>
> (i) "Tier 4 Migrant" has the same meaning as provided in the immigration rules."

27. Article 11(2) applies (as the terms set out recite) to a person within Article 11(1), who:

> "at any time thereafter makes … any further application for leave to remain … which is not of a kind … mentioned in paragraph (1); provided the subsequent application is not a protection claim or human rights claim, made while [that person] is in the United Kingdom, other than at a port."

28. This formulation therefore embodies the following steps:

    i) Does the person fall within Article 11(1): here, did the Appellant make an application after 20 October 2014 for leave to remain as a Tier 4 migrant?

    ii) If yes, did the person thereafter make a further application for leave to remain, other than as a Tier 4 migrant?

    iii) If yes, was that further application

        a) a protection claim or human rights claim,

        b) made whilst the person is in the United Kingdom,

        c) other than at a port?

29. The Appellant's case in written submissions was that he is a person falling within Article 11(1); that he did make a further application for leave to remain other than as a Tier 4 migrant, and that his further application was a human rights claim, made in the United Kingdom, but not at a port. Hence, the Appellant argued that the "relevant provisions" (i.e. the "new appeal" test) applies to him. He is not caught by Article 11(2).

30. The Second Respondent argues that the Appellant did not fall within Article 11(1) at all. The Second Respondent says the Appellant did not make an application for further leave to remain as a Tier 4 migrant on or after 20 October 2014. His application for an extension of leave to remain as a Tier 4 general student was made on 21 March 2014. His application of 27 February 2015 was for leave to remain outside the Immigration Rules. Hence, says the Second Respondent, the provisions of Article 11 are irrelevant to the case. The Appellant is caught by the "old appeal" test. He would have had appeal rights under section 82 of the 2002 Act only in respect of an "immigration decision". There was no such decision.

31. In the course of argument, Mr Parkin sensibly conceded that his client could not satisfy the first part of Article 11(1) for the reason given by the Second Respondent: the Appellant simply did not make an application for further leave to remain as a Tier 4 migrant on or after 20 October 2014. Mr Parkin did submit that the Appellant might succeed under Article 11(2)(b), since he had made a "further application for leave to remain which is not of a kind that is mentioned in paragraph (1)". Mr Parkin did concede, however, that this was a difficult point for him. He went on to submit that the Appellant had appeal rights under Commencement Order No 4.

Commencement Order No 4

32. Commencement Order 3 was replaced on 6 April 2015 (Commencement No 4, Transitional and Saving Provisions and Amendment) Order 2015 ["Commencement Order 4"]. Article 8 of Commencement Order 4 repealed Article 10 and the relevant parts of Article 11 of Commencement Order 3. The relevant parts of Article 9(1) of Commencement Order 4 read:

> "9. – (1) Notwithstanding the commencement of the relevant provisions, the saved provisions continue to have effect and the relevant provisions do not have effect so far as they relate to the following decisions of the Secretary of State –
>
> (a) a decision made on or after 6th April 2015 to refuse an application to vary leave to enter or remain made before 20th October 2014 where the person was seeking leave to remain as a Tier 4 Migrant or as the family member of a Tier 4 Migrant and where the result of that decision is that the applicant has no leave to enter or remain;
>
> (b) a decision made on or after 6th April 2015 to refuse an application to vary leave to enter or remain made before 2nd March 2015 where the person was seeking leave to remain as a Tier 1 Migrant or (as the case may be), Tier 2 Migrant or Tier 5 Migrant or as the family member of a Tier 1 Migrant, a Tier 2 Migrant or a Tier 5 Migrant and where the result of that decision is that the applicant has no leave to enter or remain;
>
> (c) a decision made on or after 6th April 2015 (so far as that is not a decision mentioned in sub-paragraph (a) or (b)) to refuse an application made before 6th April 2015, where that decision is –
>
> (i) to refuse leave to enter;
>
> (ii) to refuse entry clearance;
>
> (iii) to refuse a certificate of entitlement under section 10 of the 2002 Act (1);

> (iv) to refuse to vary a person's leave to enter or remain and where the result of that decision is that the person has no leave to enter or remain; unless that decision is also a refusal of an asylum, protection or human rights claim.
>
> (d) a decision made before 6th April 2015 in relation to which, immediately before 6th April 2015, an appeal could have been brought or was pending under the saved provisions.
>
> …
>
> (4) In article 11, omit paragraphs (1), (1A), (2), (3) and (5)(a) and (c) to (i)."

33. The Appellant argues that those provisions confine the "old appeal test" to certain categories of decision taken after 6 April 2015. The relevant decision here was, it is said, taken before 6 April 2015.

34. Mr Parkin's argument is that Commencement Order 4 achieves an unexpected result. The order "omits" paragraph 11(1), and thus abolishes the requirement that the Appellant should have made an application for leave to remain as a Tier 4 migrant on or after 20 October 2014: the requirement the Appellant could not satisfy.

35. Mr Parkin then argues that the "saved provisions" are preserved by the substitute Article 9(1) for those in respect of whom the relevant decision (here, a decision "to refuse to vary [the Appellant's] leave to … remain … where the result of that decision is that the person has no leave … to remain", substitute Article 9(1)(c)(iv)) was made on or after 6 April 2015. Mr Parkin argues that the Appellant is outside this preservation of the "old rules" because his relevant decision was made before 6 April 2015. Moreover, the Appellant (on this construction) does not satisfy the substituted Article 9(1)(d) because, although his relevant decision was made before 6 April 2015, he could not on 5 April 2015 have brought an appeal under the "saved provisions". Mr Parkin acknowledges the perversity of the outcome from this literal reading of Commencement Order 4, but submits that is the correct construction of the language.

36. The Second Respondent argues:

> "The Appellant's contention that this version of section 82(1)(b) of the 2002 Act came into force on 20 October 2014 and was applicable to his case is simply misconceived. For the purpose of the Appellant's case, this version came into force on 6 April 2015. It was not in force when the Secretary of State took his decision, namely, on 30 March 2015."

37. The Second Respondent further argues that an appeal would in any event be bound to fail. There is no conceivable basis on which the Appellant could succeed on the merits. Therefore, he should in any event be refused any relief.

Conclusions

38. I begin by considering Commencement Order 3. In my view, the Appellant's case here is quite hopeless. He simply cannot satisfy the first necessary qualifying criterion under Article 11(1): his application for leave to remain as a Tier 4 migrant was not made on or after 20 October 2014. Further, the requirement in Article 11(2) that the relevant individual should have "made an application of a kind mentioned in paragraph (1)", clearly does not refer merely to an application for leave to remain as a Tier 4 migrant, but to such an application made on or after 20 October 2014.

39. It follows that the Appellant had no right of appeal before the general commencement of the Immigration Act 2014, and no right of appeal during the currency of any commencement order up to and including Commencement Order 3.

40. Turning to Commencement Order 4, in my judgment Mr Parkin is correct as to the literal meaning of the order. The substituted Article 9(4) "omits" Article 11 paragraph (1), that is to say the requirement for an application on or after October 2014 for leave to remain as a Tier 4 migrant, and the succeeding additional provisions. The substituted Article 9 preserves Article 11(4) of Commencement Order 3, which reads:

> "11(4)
>
> 1. Immigration (Treatment of Claimants, etc) Act 2004(a), section 47 of the Immigration, Asylum and Nationality Act 2006(b) and paragraph 19(10) of Schedule 1 to the Legal Aid, sentencing and Punishment of Offenders Act 2012(c), as in force immediately prior to 20th October 2014.
>
> **Provisions coming into force on 20th October 2014 subject to saving provision**
>
> 2. The day appointed for the coming into force of the following provisions of the Act, subject to the saving provision in articles 9, 10 and 11, is 20th October 2014 -"

41. Article 11(4) is another piece of drafting of formidable complexity. This paragraph cannot apply to this Appellant, since it is agreed that his appeal is not against an "immigration decision under Section 82(1) of the 2002 Act". However, it illustrates the policy behind the 2014 Act and the Commencement Orders taken generally, which is to confine rather than expand appeal rights in historic cases.

42. However, the "omission" in Commencement Order 4 of the successive tests in Article 11 of Commencement Order 3 is not confined to any particular category of case. I am unable to discern an obvious reason for the "omission", but it must throw the construction of the substituted Article 9 back to the plain language of the provision. The words bearing on this case are as follows:

> "9(1) Notwithstanding the commencement of the relevant provisions [the "new test"], the saved provisions [the "old test"]

> continue to have effect … so far as they relate to the following decisions of the Secretary of State –
>
> …
>
> (d) a decision made before 6th April 2015 in relation to which, immediately before 6th April 2015, an appeal could have been brought or was pending under the saved provisions."

43. The decision relevant to the Appellant was before 6 April 2015, but no appeal could have been brought or was pending under the saved provisions. Hence the Appellant is not affected by a decision in relation to which "the saved provisions continue to have effect" within the meaning of the substituted Article 9. A literal reading therefore leads to the conclusion that the "relevant provisions" have effect, and thus the "new rule" would afford the Appellant a right of appeal.

44. This conclusion, born of the rebarbative drafting of these commencement orders, produces an absurd result. If applied, it would mean that the Appellant, having had no right of appeal before the 2014 Act, and no right of appeal during the currency of Commencement Orders 1 to 3 inclusive, acquired a right of appeal when Commencement Order 4 came into force on 6 April 2015. It would also give rise to the absurd consequence that, had this Appellant attempted an appeal earlier, he would have failed, whereas because he delayed so very long, he has acquired a right of appeal he previously lacked.

45. This Court cannot re-write statutory instruments. However, this Court can withhold a remedy, where appropriate. While a technical reading of Commencement Order 4 appears to give a right of appeal to this Appellant, I would dismiss this appeal nevertheless. Aside from the absurd results already identified, there are other reasons for that outcome.

46. Firstly, this is an appeal against a refusal to grant permission for judicial review. The grant of permission (and relief) involves the exercise of the Court's discretion. No Court could properly contemplate a favourable exercise of discretion in this case. Not only does the literal reading of Commencement Order 4 produce an absurd result directly contrary to the clear policy behind these provisions, but there is absolutely no merit in the Appellant's case. Mr Parkin was frank with the Court that the only reason for the Appellant's delay in seeking an appeal was that he did not understand he might have an appeal for a long period, until he was advised of the argument said to arise from Commencement Order 3. As we have seen, that argument was misconceived. However, that late, erroneous advice brought about the delay which is now said to provide the platform for appeal, because Commencement Order 4 is in force.

47. In addition, for the reasons set down in the early part of this judgment, there is absolutely no merit in the Appellant's underlying case and no arguable basis for any extension of time for his substantially out-of-time appeal: see in particular, the excerpts from the judgment of the FtT set out in paragraph 7 above.

48. For those reasons, I would dismiss this appeal.

49. I cannot conclude without commenting, not for the first time, on the extreme complexity and obscurity of drafting in the field of immigration law, as exemplified by these Commencement Orders. Such drafting as this serves to conceal rather than reveal meaning. It confuses even the expert legally qualified reader, never mind those affected by the provisions. In this instance, the drafting has produced a perverse result. Such an approach is firmly to be deprecated.

Lady Justice Simler:

50. I agree.