Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/05399/2011
AA/05400/2011
AA/05405/2011
AA/05403/2011
AA/05826/2011

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 4th October 2013	**On 22nd October 2013**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR
UPPER TRIBUNAL JUDGE DAWSON

Between

ABDUSSALAM ELARBI ELZAWI
THURAYA ALI AHMED KENAN
ARAIBE ELZAWI
NOUR ELZAWI
YOUSER ELZAWI

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr McIndoe of Latitude Law Solicitors
For the Respondent: Mr McVeetie, Home Office Presenting Officer

DETERMINATION AND REASONS

Background

1. The Appellants challenge, with permission, the decision of First-tier Tribunal Judge Heynes made following a hearing at Manchester on 30th June 2011.

2. There is an unfortunate procedural history to this matter.

3. The family arrived in the UK on 10th September 2010. The first Appellant was accompanying his wife who came to study at the university here. He was granted limited leave to enter the UK until 31st January 2014 as a dependent partner, and the three children were similarly granted leave to enter as dependants of their mother.

4. On 21st March 2011 the first Appellant made an application under paragraph 327 of HC 395 for variation of his leave to enter or remain in the UK on the grounds that it would be contrary to the UK's obligations under the UN Convention and Protocol Relating to the Status of Refugees for him to be removed from or required to leave the UK.

5. His application was refused on 7th April 2011, and his wife and three children were similarly refused in line.

6. The case came before Judge Heynes on 30th June 2011 who dismissed the appeal on asylum grounds and on human rights grounds but found that they were entitled to humanitarian protection.

7. The Secretary of State sought permission to appeal against Judge Heynes' decision in relation to humanitarian protection which was granted by Senior Immigration Judge Eshun on 29th July 2011. The Appellant also submitted an application for permission to appeal to the Upper Tribunal in relation to the asylum and human rights decision but that application was overlooked.

8. The matter came before me on 13th December 2012 when it came to light that there was an outstanding permission application from the Appellant yet to be decided. I set aside the decision in relation to humanitarian protection and in remaking the decision, dismissed the appeal on that ground in a determination dated 13 December 2013.

9. Because there was an outstanding application for permission to appeal against the asylum and human rights decision by the Appellants I made a separate decision, without a hearing, as a First-tier Tribunal Judge, to refuse permission to appeal. Unfortunately that decision was never served.

10. The matter then came before Upper Tribunal Judge Deans who, unaware of the unserved decision, made a fresh decision on 2nd April 2013, again refusing permission to appeal.

11. The Appellants renewed their application to the Upper Tribunal and permission was granted by Upper Tribunal Judge Peter Lane on 24th April 2013. Upper Tribunal Judge Lane gave listing directions stating that I should not have been sitting on the panel, having expressed a view by refusing permission to appeal against the decision.

12. Nevertheless, on 3rd June 2013 the matter came before me for a Case Management Review hearing when I made further directions. The matter was then listed before us on 4th October 2013 for a rolled up hearing, first to decide whether there was an error of law and, if there was, to remake the decision.

Jurisdiction

13. At the commencement of the hearing we raised the issue of jurisdiction with the parties.

14. Under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 where an immigration decision is made in respect of a person, he may appeal to the Tribunal.

15. Under Section 82(2) an immigration decision means, inter alia,

(a) Refusal to vary a person's leave to enter or remain in the UK if the result if the refusals is that the person has no leave to enter or remain, or

(b) Variation of a person's leave to enter or remain in the UK if when the variation takes effect the person has no leave to enter or remain.

16. An appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 requires there to be an immigration decision as defined. Where no immigration decision has been made, the First-tier Tribunal has no jurisdiction to hear the appeal. (Singh (No immigration decision – jurisdiction) [2013] UKUT 0440).

17. With respect to the principal Appellant, the notice of immigration decision, variation of leave to enter or remain, reads as follows:

> "On 1st September 2010 you were granted limited leave to enter the UK until 31st January 2014 as a dependant partner.
>
> You applied on 21st March 2011 under paragraph 327 of HC 395 as amended (the Immigration Rules) for variation of your leave to enter or remain in the UK on the grounds that it would be contrary to the UK's obligations under the UN Convention and Protocol relating to the

Status of Refugees for you to be removed from or required to leave the UK, but I have refused our application under para 336. Your claim for asylum has been recorded as determined on 7th April 2011.

I have considered whether you should be granted asylum in the UK in accordance with paragraph 334 but I am not satisfied that you meet the criteria.

I have also considered whether you should be granted humanitarian protection in the UK in accordance with paragraph 339C but I am not satisfied you meet the criteria and have also refused your application under paragraph 339F. Your application has been recorded as determined on 7/04/11.

Full reasons for this decision are provided in the attached letter.

Furthermore I have decided that you no longer meet the requirements of the Immigration Rules under which you were granted leave to enter the UK and therefore I am giving you notice that your leave will be varied under Section 3(3)(a) of the Immigration Act 1971 such that there will be none remaining. The leave to enter or remain you had at the time you made this application is statutorily extended for the period when you can appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 or until an appeal brought under that Section is finally determined withdrawn or abandoned."

18. The decision in respect of the dependants reads as follows:

"On 1st September 2010 you were granted limited leave to enter the UK until 31st January 2014 as a dependant.

Abdussalam Elarbi Elzawi applied on your behalf on 21st March 2011 under paragraph 349 of HC 395 as annexed (the Immigration Rules) for variation of that leave because your are a dependant of Abdussalam Elarbi Elzawi.

Mr Abdussalam Elarbi Elzawi has applied for a variation of leave to enter or remain on the grounds that it would be contrary to the UK's obligations under the UN Convention and Protocol relating to the Status of Refuges for him to be removed from or required to leave the UK, but his application has been refused under paragraph 336. Consideration has also been given to whether he should be granted humanitarian protection in the UK in accordance with paragraph 339C but I am not satisfied he meets the criteria and his application has also been refused under paragraph 339F. Consequently your application is refused."

19. Mr McVeetie was initially of the view that there was no appealable decision in respect of any of the Appellants but, when given time to seek instructions, he advised us that his position was that the notice in relation to the first Appellant was an appealable decision. With respect to the dependents, Mr McVittie accepted that no appealable decision was made under Section 82(2) in respect of the dependants since there was no reference in the notice of decision to curtailing their leave.

20. Mr McKindoe was reluctant to accept the lack of jurisdiction but made no cogent argment against it.

21. We conclude that there is no appealable decision in respect of any Appellant, including the first Appellant, for the following reasons.

22. Mr Heynes recorded as follows:

> "The Respondent refused to grant asylum under paragraph 336 of HC 395 (as amended) for the reasons set out in the refusal letters dated 7th April 2011 and made a decision to curtail the leave of and remove the Appellants from the UK by way of directions to Libya."

23. It seems that Judge Heynes was relying on the statement at PF1 of the Respondent's bundle which states that:

> "On 7th April 2011 a decision was made to refuse to grant asylum under paragraph 336 of HC 395 (as amended) and on 15th April, 2011 a decision was made to vary leave to remain in the UK so that no leave remained."

24. We could see no decision in the file made on 15th April 2011. The only decision was dated 7th April 2011 and served on 15th April 2011.

25. We asked Mr McVeetie whether any further decision had been made on 15th April 2011 and he confirmed that there was none.

26. It is clear from the PF1 that the Secretary of State intended to make a further decision on 15th April 2011 to curtail the first Appellant's leave but never did so. The wording of the notice of 7th April 2011 is that the Respondent gives notice that the leave will be varied, i.e. curtailed, at a future date. Indeed the Secretary of State appears to believe that she had done so, by making reference in the PF1 to a non existent decision of 15th April.

27. Moreover the fact that no reference to curtailment was made in any of the notices relating to the dependants supports the contention that it was intended that a future appealable decision would be made both in respect of them and the principal Appellant.

28. It is very regrettable that the jurisdictional point was not taken at an earlier stage, but we are satisfied that there is no bar to the Upper

Tribunal raising the jurisdictional point of its own motion (Rashid Anwar and Prosper Adjo [2010] EWCA Civ 1275).

29. We conclude that Judge Heynes had no jurisdiction to consider the dependants' appeals because no appealable immigration decision had been made.

30. It follows that no appealable immigration decision was made in this case and the position is that the Appellants' claims remain pending before the Secretary of State.

31. Accordingly, since there was no appealable decision, Judge Heynes had no jurisdiction to determine the appeal and his decision is of no effect.

Decision

32. The decision of the First-tier Tribunal was erroneous in purporting to determine an appeal when there was no jurisdiction to do so. Accordingly the decision of the First-tier Tribunal must be set aside. It is remade by dismissing the appeal for want of jurisdiction.

Signed Date

Upper Tribunal Judge Taylor