



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00164/2018

THE IMMIGRATION ACTS

Determined at Field House
On 4th March 2019

Decision & Reasons Promulgated
On 14th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

BABER HASAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel, Law Lane Solicitors

For the Respondent: Ms J Isherwood, Senior Presenting Officer

DECISION BY CONSENT AND DIRECTIONS

1. Pursuant to Rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and by the consent of the parties the following order is made:
 - (i) Upon the parties' agreement that the decision of the First-tier Tribunal promulgated on 19th November 2018 discloses a material error of law, it is hereby ordered by consent as follows.

- (ii) The First-tier Tribunal Judge made errors of law in relation to the complaints made in the Grounds of Appeal in the following respects as agreed by the parties:
- (a) As stated by Upper Tribunal Judge McWilliam in granting permission to appeal, when the Appellant's judicial review claim came before Lady Justice Arden by way of a renewed permission hearing seeking permission to appeal to that Court, her Ladyship was of the view in her judgment dated 30 November 2017 that the Secretary of State's decision of 8 July 2015 represented a "substantive" consideration of the Appellant's human rights claim and was not a decision under paragraph 353 (thus explicitly accepting the fresh claim and reaching an adverse conclusion). As such permission to appeal against the refusal to move for judicial review was refused by Lady Justice Arden because there was in her view an alternative remedy, namely a statutory appeal before the First-tier Tribunal. This is a course of action that her Ladyship appears to have been encouraged to take by Mr Turner, whom represented the appellant on that occasion also and appeared as counsel before the Court.
 - (b) In my view, and as agreed by the parties, it is unclear from §9 of First-tier Tribunal Judge Beg's decision why it has been concluded that there was no valid right of appeal, particularly in the light of the binding judgment of Lady Justice Arden of 30 November 2017 that there may well be.
 - (c) Notwithstanding the decision of *Secretary of State for the Home Department v VM (Jamaica)* [2017] EWCA Civ 255 at [27] to [29] wherein the Court of Appeal (in a panel composed of Lady Justice Arden and Lord Justice Sales) made findings in a matter which appeared to be similar on its face to that in the instant appeal, given the judgment of Lady Justice Arden of 30 November 2017 and the pronouncement by her that there was an alternative remedy to judicial review in the form of a right of appeal, the First-tier Tribunal needs to give consideration as to whether a valid right of appeal arises as a consequence of the refusal of 9th July 2015 further to the decision of Lady Justice Arden.
 - (d) I was asked to note by the parties that the refusal of 9th July 2015 noted at paragraphs 21 and 32 internally that there was "no realistic prospect of success". I also note that there was no "certification" of the decision either.
 - (e) For my part, I am unclear as to whether the substantive consideration of 8th July 2015 puts this matter beyond the remit of paragraph 353 and *implicitly* creates a fresh claim having a realistic prospect of success. I say this particularly in light of the decision from the Supreme Court in *Robinson (formerly JR (Jamaica)) v Secretary of State for the Home Department* [2019] UKSC 11, promulgated only today.
 - (f) However, happily that is not a matter for me to decide but is a matter for the First-tier Tribunal to consider upon remittal of these proceedings.

2. As a consequence of the above agreed errors arising from the lack of reasons given in the decision of the First-tier Tribunal, the decision is set aside in its entirety and is remitted to be heard by a differently constituted bench.
3. The Appellant's appeal to the Upper Tribunal is therefore allowed.
4. The decision of the First-tier Tribunal is set aside for legal error by consent.

Directions

5. I make the following directions for the continuation of these proceedings upon remittal to the First-tier Tribunal for determination of the preliminary issue as to whether there is a valid right of appeal or not:
 - (1) The appeal is to be remitted to be heard by the Resident Judge of IAC Taylor House (or a judge of similar seniority), in order that the First-tier Tribunal can determine whether there is a valid right of appeal or not, as a consequence of the judgment of Lady Justice Arden of 30 November 2017.
 - (2) The time estimate given for the preliminary matter is at least one hour (given that the validity of the appeal may be a matter of some complexity and require more time than a Case Management Review hearing might, for example).
 - (3) It is a matter for the First-tier Tribunal as to whether it lists this matter merely for consideration of the preliminary point as to the validity of the appeal or whether it also lists this matter for substantive hearing thereafter (i.e. a *de facto* rolled up hearing if you will).
 - (4) In relation to any substantive hearing that may follow, I am told that no interpreter is required.
 - (5) There is no indication at present as to the number of witnesses that may be called.
 - (6) No further directions have been requested.

Anonymity

6. No anonymity direction has been requested and I do not see any reason why one should be given.

Deputy Upper Tribunal Judge Saini

Signed

Date 14 March 2019