



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08887/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 7th May 2019

Decision & Reasons Promulgated
On: 4th June 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

DG
(anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: Ms Caseley, Counsel instructed by Advisa Solicitors
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Malaysia born in 1932. He appeals with permission the decision of the First-tier Tribunal (Judge Welsh) to dismiss his appeal for want of jurisdiction.
2. The background to the appeal before me can be shortly put. On the 26th August 2016 the Appellant Mrs G made an application to be permitted to remain in the United Kingdom with her daughter. The application stated, *inter alia*, that Mrs G is suffering

from dementia and wishes to remain in the care of her family in the United Kingdom. The application was refused on the 18th July 2017 on the grounds that Mrs G had sought leave for a purpose not covered by the Immigration Rules and that paragraph 322(1) thereof therefore applied. The Appellant appealed to the First-tier Tribunal on human rights grounds.

3. When the matter came before Judge Welsh at a 'Case Management Review' hearing the Respondent raised the matter of jurisdiction. It was submitted that since the decision of the Respondent had nowhere referred to Mrs G's human rights, this could not be said to be an appeal against a human rights decision. The First-tier Tribunal accepted that this must be so, and dismissed the appeal for want of jurisdiction.
4. The Appellant now appeals to this Tribunal on the grounds that the Tribunal erred in law in its interpretation of the statutory framework. Before me the Respondent agreed; I was invited to set the decision of the First-tier Tribunal aside and to remit the matter to the First-tier Tribunal with a direction that the case proceed as a human rights appeal. I agree but it is appropriate that I set out in a little more detail why that is the correct outcome.
5. The Appellant's right of appeal derives from s82 of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014):

"82 Right of appeal to the Tribunal

- (1) A person ("P") may appeal to the Tribunal where –
 - (a) the Secretary of State has decided to refuse a protection claim made by P,
 - (b) the Secretary of State has decided to refuse a human rights claim made by P, or
 - (c) the Secretary of State has decided to revoke P's protection status.
6. What might constitute a 'human rights claim' has been the subject of some litigation in this Tribunal and above (see for instance Robinson (formerly JR (Jamaica)) (Appellant) v Secretary of State for the Home Department (Respondent) [2019] UKSC 11, Waqar v Secretary of State for the Home Department [2015] UKUT 169 (IAC), Juliana Baihinga v Secretary of State for the Home Department [2018] UKUT 00090 (IAC)) but the whys and wherefores of that jurisprudence need not be explored here since it was expressly accepted by the First-tier Tribunal that the application made by Mrs G in August 2016 did indeed constitute a human rights claim, raising issues under both Articles 3 and 8: see paragraph 17 of the decision.
7. The First-tier Tribunal went on to find as follows:

"However, I am satisfied that the decision maker who considered the application did not consider it to be a human rights claim and did not decide it as a human rights claim. There is no specific mention of either Article 3 or Article 8, nor is

there any indirect reference to human rights. For instance, there is no reference to a balancing of interests or issues of proportionality”

8. As Mr Bramble accepts, it was here that the First-tier Tribunal erred. The fact that the decision-maker apparently failed to understand the nature of the application before him did not preclude a right of appeal to the First-tier Tribunal: there had been a human rights claim, and it had been refused. This was all that was required by s82(b).
9. It may be that the First-tier Tribunal had in mind the jurisprudence relating to ‘fresh claims’. Where an applicant has already had a human rights claim decided and makes further representations, it is a matter for the Secretary of State whether those submissions amount to a ‘fresh’ human rights claim. His decision must be made with reference to paragraph 353 of the Rules, and it may only be challenged by an application for judicial review, i.e. it cannot be appealed to the First-tier Tribunal. That was not the case here. This was not a ‘fresh claims’ case and in those circumstances the only questions for the First-tier Tribunal were whether Mrs G had made a human rights claim, and whether she had been refused. Since the First-tier Tribunal answered both of those questions in the affirmative, in my view rightly, it followed that Mrs G had a substantive right of appeal before it.

Anonymity Order

10. This case concerns sensitive personal information relating to Mrs G’s health. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decisions

11. The determination of the First-tier Tribunal contains an error of law and it is set aside.
12. The decision in this human rights appeal is to be re-made *de novo* in the First-tier Tribunal.
13. There is an order for anonymity.

Upper Tribunal Judge Bruce
7th May 2019