Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19715/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 July 2019	**On 2 August 2019**

Before

THE HONOURABLE MRS JUSTICE CUTTS
(SITTING AS AN UPPER TRIBUNAL JUDGE),
UPPER TRIBUNAL JUDGE BLUM

Between

ZULFIQAR [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms P Young, Counsel, instructed by Birth Tree Law Chambers
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Shergill (the judge), promulgated on 10 April 2019, dismissing for want of jurisdiction the appeal of Mr Zulfiqar [K] (the appellant) against the decision of the Secretary of State for the Home Department (respondent) dated 8 August 2018 refusing his application for Indefinite Leave to Remain (ILR) as a victim of domestic

violence, upheld in an Administrative Review dated 6 September 2018.

Procedural history

2. It is necessary to set out in some detail the events leading to the appeal before us. The appellant, a national of Pakistan born in 1980, entered the UK with entry clearance as a spouse on 25 November 2016. On 29 January 2018 he applied for Indefinite Leave to Remain under the domestic violence provisions of Appendix FM of the immigration rules. His application was accompanied by a statement, dated 26 January 2018, in which he claimed to have become depressed and suicidal through the shame and embarrassment of being a male victim of domestic violence. He additionally claimed to fear ill treatment from his brother-in-law if removed to Pakistan. A covering letter accompanying the application briefly referred to the appellant having suicidal thoughts following the domestic violence and that there had been threats to his life if he returned to Pakistan.

3. In his decision of 5 August 2018 the respondent refused to grant the appellant ILR and curtailed his leave so that it expired on that date. The respondent was not satisfied that the spousal relationship broke down due to domestic violence and did not consider that the appellant provided sufficient evidence to establish the same. The respondent did not engage with the appellant's claim to be at risk of suicide or his claimed fear of ill-treatment from his brother-in-law in Pakistan. At the end of his decision the respondent stated,

> "Any submissions you may have made relating to your Human Rights have not been considered as an application for ILR as a victim of Domestic Violence. ILR is not considered to be a Human Rights-based application. If you wish to apply for leave to remain, based on your Human Rights or other compassionate factors it is open to you to apply using an appropriate application form. Please see our website for further details."

4. The appellant requested an Administrative Review of the respondent's decision. An Administrative Review decision dated 6 September 2018 upheld the earlier decision. Although the Administrative Review repeated the appellant's claim regarding threats from his estranged wife should he return to Pakistan there was no substantive engagement by the respondent with this assertion.

5. The appellant lodged an appeal with the First-tier Tribunal. In a decision issued on 31 October 2018 Judge of the First-tier Tribunal Shanahan held that the decision the appellant was seeking to appeal was not one against which there was an exercisable right of appeal. Judge Shanahan referred to the decision in **AT, R (On the Application Of) v Secretary of State for the Home Department**

[2017] EWHC 2589 (Admin), upon which the appellant relied in lodging his appeal, and noted that the decision provided by the appellant was the refusal of an Administrative Review rather than a decision to refuse a human rights claim. As such there was no right of appeal. The First-tier Tribunal issued a decision under rule 22(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Immigration & Asylum Chamber) Rules 2014 on the basis that the appeal lodged was invalid.

6. The appellant's representatives requested that the First-tier Tribunal reconsider its decision. On 22 November 2018 the First-tier Tribunal issued directions to the parties in an effort to clarify whether the appellant also made an application for Leave To Remain on human rights grounds. On 17 December 2018 Judge of the First-tier Tribunal Herlihy decided that the appellant's statement accompanying his application to the Home Office did include a human rights claim under Articles 2 and 3 based on his fear of harm from his brother-in-law in Pakistan. Judge Herlihy concluded that the respondent's decision was also a refusal of the human rights claim and that the appellant had a right of appeal.

7. The matter was listed for a substantive hearing and came before the judge on 19 February 2019. This hearing was adjourned because the Presenting Officer sought to rely on a letter purportedly written by the appellant's estranged wife and the appellant needed an opportunity to deal with this new evidence. In response to directions issued by the judge the appellant's representatives wrote to the First-tier Tribunal on 29 March 2019 indicating that the appellant was not pursuing any protection issues at the hearing and would only pursue the domestic violence matter and the related private and family life issues under Article 8.

8. At the start of the adjourned hearing on 1 April 2019 the Presenting Officer raised, for the first time since the appeal had been listed, the issue whether there was jurisdiction to hear the appeal. The judge explained, at [6],

> "… given the late reliance on this issue, and the mixed issues of fact and law that usually arise when looking at jurisdiction, I decided that the appeal would be heard. I noted that the appellant could not be in a worse position than for example a visit visa appeal where someone might be able to argue particular human rights infringements notwithstanding the curtailment of visit visa appeal rights."

9. The judge heard extensive evidence from the appellant and two supporting witnesses and both representatives made their submissions.

The decision of the First-tier Tribunal

10. For reasons that will become apparent it is not necessary for us to consider the judge's decision in detail. In brief summary, the judge referred to paragraph 56 of **AT**, which in turn considered the definition of a human rights claim in the Administrative Court decision of **Alighanbari, R (on the application of) v Secretary of State for the Home Department** [2013] EWHC 1818 (Admin). **AT** decided that, while some applications under the domestic violence provisions were also human rights claims, others were not. Given the content of the solicitor's letter dated 29 March 2019 the judge found that the appellant had not made a stand-alone Article 8 claim. The judge considered the evidence of the appellant's Article 8 claim to be "wafer thin" and that he failed to make out the minimum elements of a family or private life case. The judge concluded that the appellant's "obliquely pleaded Article 8 case" did not meet the minimum elements of a section 113 human rights claim. The judge also considered the appellant's Article 3 claim based on self-harm to be weak and that the minimum elements of such a claim were not established. The judge considered that if he was wrong in respect of his assessment under **AT** then his findings in respect of Article 3 and Article 8 would, in any event, lead to a negative result for the appellant.

11. At [26] the judge concluded,

> "There is no valid appeal before the tribunal because the appellant has not shown that his appeal was a human rights claim which could constitute either an existing or prospective Article 3 or 8 claim; or show any interference with those ECHR rights based on the pleadings and evidence before the tribunal. This matter is, therefore, dismissed for want of jurisdiction."

The challenge to the First-tier Tribunal's decision

12. The appellant sought permission to appeal on two grounds. The first ground contended that the judge acted in a procedurally unfair manner by hearing the appeal on the basis that he had jurisdiction without then giving the parties an opportunity of making submissions on the issue of jurisdiction.

13. The second ground of appeal contended that the judge erred in law in concluding that Article 8 was not engaged given that the appellant had lived in the UK for over 2 years at the date of the hearing and had an adult siblings and friends in the UK.

14. Both parties produced skeleton arguments in preparation for the 'error of law' hearing.

The 'error of law' hearing

15. At the outset of the 'error of law' hearing we raised with the parties our concern that there had never been a refusal of a human rights claim such as to give rise to a right of appeal. We drew the parties' attention to the decision of 5 August 2018 which expressly disavowed any consideration of human rights submissions made by the appellant, and we noted that the Administrative Review decision did not engage with any human rights claims made by the appellant. We gave the parties an opportunity to respond to our initial observations. Ms Young sought to persuade us that **AT** provided for a right of appeal and that the appeal before the First-tier Tribunal proceeded on the basis that the Tribunal had jurisdiction. Mr Avery submitted that our initial observations were correct and that there had been no decision capable of leading to a right of appeal.

16. Having heard from both representatives we concluded that there had never been a decision refusing a human rights claim and that neither the First-tier Tribunal nor the Upper Tribunal had jurisdiction to hear the appeal.

Discussion

17. The definition of a human rights claim is contained in section 113 (1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), as amended by paragraph 53 (2) (a) of Schedule 9 (4) to the Immigration Act 2014. A human rights claim is,

> '… a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the [ECHR]).'

18. Section 82 of the 2002 Act identifies the circumstances in which a person has a right of appeal to the First-tier Tribunal. Section 82(1)(b) reads,

> 'A person ('P') may appeal to the [First-tier] Tribunal where… the Secretary of State has decided to refuse a human rights claim made by P….'

19. The right of appeal therefore attaches to the "refusal" of "a human rights claim."

20. Appendix FM of the immigration rules is headed 'Family Members' and contains Section DVILR setting out the requirements for a grant of ILR for victims of domestic violence. Appendix AR covers the availability and application of the Administrative Review remedy. AR3.1 establishes that Administrative Review is only available where

an ‘eligible decision’ has been made. AR3.2(c) states that an ‘eligible decision’ is a decision made on or after 6 April 2015 on an application for leave to remain made under the immigration rules unless it is an application as a visitor, or where an application or human rights claim is made under…

> ‘(viii) Appendix FM (family members), but not where an application is made under section BPILR (bereavement) or section DVILR (domestic violence)’

21. We did not hear any oral argument on the issue whether the representations in the appellant’s statement and covering letter accompanying his ILR application were capable of amounting to a human rights claim as understood in **Alighanbari** or in the Presidential decision of **Baihinga (r. 22; human rights appeal: requirements)** [2018] UKUT 00090 (IAC). We therefore proceed on the basis that the combination of the statement and the covering letter were sufficient to establish the elements of a human rights claim based on Article 3.

22. In order to trigger a right of appeal the respondent must have refused the human rights claim. The difficulty for the appellant is that the decision of 5 August 2018 expressly stated that no consideration had been given to any of the submissions made by the appellant relying on his human rights and there was no attempted engagement with the human rights claim elements that he advanced. Nor could the Administrative Review decision constitute a refusal of a human rights claim. There was simply no engagement in the latter decision with the core elements of the appellant’s application that constituted an Article 3 human rights claim. Although the respondent refused to grant the appellant ILR as a victim of domestic violence we are satisfied, having regard both to that decision and the Administrative Review decision, that the respondent did not refuse a human rights claim.

23. We draw further support in our conclusion from the first part of headnote 3 of **Baihinga**, which reads,

> *“The issue of whether a human rights claim has been refused must be judged by reference to the decision said to constitute the refusal.”*

24. We can find nothing in either the decision of 5 August 2018 or 6 September 2018 capable of constituting a refusal of the appellant’s human rights claim, as opposed to a refusal of his application for ILR as a victim of domestic violence.

25. The appellant relies on the decision of Mr Justice Kerr in **AT**, a judicial review challenge to the removal of a right of appeal from those refused leave to remain as the victims of domestic violence and its replacement with a right to Administrative Review only. The issue in

AT was whether, on the facts, the claimant's domestic violence claim was a claim that removal would be unlawful under section 6 of the Human Rights Act 1988 [54]. Mr Justice Kerr rejected the submission made on behalf of the claimant that all domestic violence claims were necessarily also human rights claims. "Some are, others are not" [65]. He found that the defendant could not, without primary legislation, remove the right of appeal for domestic violence claims that were also human rights claims as this would be contrary to s.82(1)(b) of the 2002 Act [67]. He did not however consider it appropriate to quash AR3.2(c) as proper effect could be given to s.82 by adopting "a purposive and strained construction." At [69] he explained that the sub-paragraph should be read as if it included the following words which he added in brackets and italicised,

> '(viii) Appendix FM (family members) but not where an application (*not being a human rights claim*) is made under… Section DVILR (domestic violence).'

26. **AT** did not however deal with the issue of what constituted a refusal of a human rights claim in the context of an ILR application under the domestic violence provisions. The elements that constitute a human rights claim in the context of the appellant's application are separate or severable. We do not read the decision in **AT** as authority for the proposition that the refusal of an application under the domestic violence provisions that contains elements constituting a human rights claim must itself constitute a refusal of a human rights claim in circumstances where the respondent has both failed to substantively engage with those elements and has expressly indicated that he will not deal with those elements.

27. In our judgment the elements that make up the human rights claim can and should be distinguished from the domestic violence claim itself. This follows from the recognition that some domestic violence claims will not contain any human rights elements. On the facts of this case the respondent expressly refused to engage with the human rights elements contained in the domestic violence application. In circumstances where no consideration has been given to the human rights elements of the appellant's application we conclude that there has been no refusal of a human rights claim.

28. For the reasons we have given we disagree with the brief decision of Duty Judge Herlihy who concluded that, as the appellant's application under the domestic violence provisions included a claim under Articles 2 and 3 based on his fear of harm in Pakistan, the refusal of the domestic violence application also constituted a refusal of a human rights claim.

29. As there was no refusal of a human rights claim, the judge did not have jurisdiction to hear the appeal. Although we have reached our

decision by a different route to that taken by the judge, the consequence of our analysis is that neither the First-tier Tribunal nor the Upper Tribunal has jurisdiction to entertain the appeal.

30. The appellant would not be without a remedy in these circumstances as the respondent's failure to consider the human rights claim aspect of the domestic violence application could have been challenged by way of judicial review. Although the appellant is now out of time to challenge that decision an application to extend time may be sympathetically viewed by the Upper Tribunal given the procedural history.

31. Although not directly relevant to his decision Mr Justice Kerr observed that a requirement for domestic violence victims to make two separate applications in circumstances in which the victim considers their application to also constitute a human rights claim would be unlawful as this would discriminate indirectly against women and would impose a potentially onerous financial barrier. We additionally note that unrepresented applicants may not understand which form is most appropriate for their application. Mr Justice Kerr indicated that the victim of domestic violence application form should be revised to include an option enabling the applicant to assert that the claim is also a human rights claim (see [48] and [49]). We are disappointed and concerned that the respondent does not appear to have acted upon this recommendation. Had the form been amended in the manner suggested the present difficulties faced by the appellant may have been avoided.

Notice of Decision

The appeal is dismissed for want of jurisdiction

D.BLUM 24 July 2019

Signed Date
Upper Tribunal Judge Blum