Upper Tribunal and First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06801/2016

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 12th September 2019	**On 21st October 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

K N
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Caseley, Counsel instructed by Migrant Legal Project
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Order Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

1. Anonymity having previously been ordered in the First-tier Tribunal (F-tT) and there being no application to remove the order, we see no reason to do so and the order remains in place. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly

identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The Proceedings

2. The appellant is a 36-year-old Sri Lankan citizen of Tamil ethnicity. He appeals against the decision of F-tT Judge Boyes promulgated on 16th October 2018 whereby he dismissed the appellant's appeal against a decision dated 13th May 2016 refusing to regularise his immigration status as an overstayer following the curtailment of his student leave on 1st March 2013 through a grant of leave on the basis of his international protection claim. An appeal was brought on international protection and Article 8 ECHR grounds.

3. The case has a complex history. A previous decision of F-tT Judge Woolley has already been set aside in earlier proceedings before the Upper Tribunal (UT) so that the case was dealt with by Judge Boyes as a remitted case. Judge Boyes dismissed the international protection grounds of appeal, concluding he did not accept the appellant's account of historical persecution and found the appellant did not have a profile which would place him at any real risk on return. However, based on medical evidence pertinent to the appellant's suffering PTSD and concern about treatment in Sri Lanka, Judge Boyes allowed the appeal on Article 8 grounds.

4. On 15th October 2018, the F-tT decision was promulgated.

5. On 20th October 2018, the respondent granted the appellant leave to remain pursuant to the judge's finding in respect of Art 8.

6. Rule 16 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604 as amended) (the "F-tT Rules") requires that the parties notify the F-tT when an appellant has been granted leave to enter of remain. The principal reason for this is that, by virtue of s.104(4A) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002"), the grant of leave results in any appeal being "treated as abandoned". Notice may, however, be served by an appellant in accordance with the F-tT or, if appropriate, UT Rules within 28 days (or 30 days in the case of the UT Rules) of the grant of leave if the appellant wishes to continue an appeal (which would otherwise be treated as abandoned) on asylum or humanitarian protection grounds.

7. On 30th October 2018, the appellant filed an application with the F-tT for permission to appeal, drafted by counsel, challenging the dismissal of the appeal on asylum grounds. The application made no mention of the fact that the appellant had been granted leave to remain. There is no suggestion that counsel had been made aware of the grant of leave. No notice to continue the appeal was served under the F-tT Rules.

8. On 8th November 2018, the F-tT (DJ Manuell) refused permission to appeal to the UT.

9. On 4th December 2018, the application for permission was renewed to the UT, again drafted by counsel, and again no mention of the grant of leave was made and again it was not suggested before us that counsel was aware of the grant of leave when preparing the renewed permission grounds.

10. On 23rd January 2019, without knowing that the appellant had been granted leave to remain, the UT (UTJ Storey) granted permission to appeal. Permission was granted on the grounds that Judge Boyes did not apply the Presidential Guidance about vulnerable witnesses, and incorrectly disregarded the medical expert evidence as to credibility of the account of causation when reaching his own conclusions as to the matter.

11. The respondent, when served with Judge Storey's decision, did not file a rule 24 response and again did not notify the UT that the appellant had been granted leave.

12. The case was set down for an initial oral hearing on 16th May 2019.

13. On 9th May 2019, the appellant notified the UT of the grant of leave and applied for:

    (i) An extension of time to file the notice under rule 17A of The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended), to the point that, although the Appellant had been granted leave to remain, his appeal should not be treated as abandoned pursuant to s.104(4A) of the Act and

    (ii) Permission to amend his grounds to rely on the recent case of KV (Scarring) v SSHD [2019] UKSC 10.

14. On 10th May 2019, UTJ Rimington determined both matters were to be decided by the judge at the forthcoming hearing set for 16th May.

15. On 16th May 2019, at the initial hearing before UTJ Grubb, permission to amend the grounds was granted. Further, the respondent conceded that the F-tT had erred for the reasons identified by Judge Storey but argued that, as the appeal had been abandoned, the UT had no jurisdiction. The appeal was adjourned and skeleton arguments were directed on the abandonment issue. The case was set down (a transfer order having been made) for a panel hearing on 12th September 2019 when the appeal was listed before us.

16. Given the respondent concession on the merits, the principal issue is whether the appellant's appeal is abandoned by operation of s.104(4A) of the NIA Act 2002.

The Relevant Legal Provisions

17. The principal legislation is as follows (we have highlighted the most relevant parts in bold type):

> **"Nationality, Immigration and Asylum Act 2002**
>
> *Pending appeal*
>
> s.104 **(1) An appeal under section 82(1) is pending during the period—**

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

(2) An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while—

(a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or

(c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.

(3) …

(4) …

(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to subsection (4B)).

(4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection) where the appellant—

(a) …

(b) gives notice, in accordance with Tribunal Procedure Rules, that he wishes to pursue the appeal in so far as it is brought on that ground.

(c) …

(4C) [repealed]

(5) [repealed]"

Schedule 9 of the Immigration Act 2014 made various substitutions and deletions from 20 October 2014.

18. The reference in s.104(4B)(b) to the "Tribunal Procedure Rules" is a reference to the F-tT Rules and, where applicable, the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) (the "UT Rules").

19. The relevant FtT rule, with our emphasis in bold, provides as follows:

"The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Appeal treated as abandoned or finally determined

16.- (1) A party must notify the Tribunal if they are aware that—

(a) the appellant has left the United Kingdom;

(b) the appellant has been granted leave to enter or remain in the United Kingdom;

(c) a deportation order has been made against the appellant; or

(d) a document listed in paragraph 4(2) of Schedule 2 to the 2006 Regulations has been issued to the appellant.

(2) Where an appeal is treated as abandoned pursuant to section 104(4A) of the 2002 Act or paragraph 4(2) of Schedule 2 to 2006 Regulations, the Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined, as the case may be.

(3) Where an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the 2002 Act, but the appellant wishes to pursue their appeal, the appellant must provide a notice, which must comply with any relevant practice direction, to the Tribunal and each other party so that it is received within 28 days of the date on which the appellant was sent notice of the grant of leave to enter or remain in the United Kingdom or was sent the document listed in paragraph 4(2) of Schedule 2 to the 2006 Regulations, as the case may be."

20. Rule 1(2) states that the F-tT Rules:

> "apply to proceedings before the Immigration and Asylum Chamber of the First-tier Tribunal."

21. The UT rule, with the most relevant parts in bold, is as follows:

"The Tribunal Procedure (Upper Tribunal) Rules 2008

Appeal treated as abandoned or finally determined in an asylum case or an immigration case

17A.- **(1) A party to an asylum case or an immigration case before the Upper Tribunal must notify the Upper Tribunal if they are aware that—**

(a) the appellant has left the United Kingdom;

(b) the appellant has been granted leave to enter or remain in the United Kingdom;

(c) a deportation order has been made against the appellant; or

(d) a document listed in paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006 has been issued to the appellant.

(2) Where an appeal is treated as abandoned pursuant to section 104(4) or (4A) of the Nationality, Immigration and Asylum Act 2002 or paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006, or as finally determined pursuant to section 104(5) of the Nationality, Immigration and Asylum Act 2002, the Upper Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined.

(3) Where an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the Nationality, Immigration and Asylum Act 2002, but the appellant wishes to pursue their appeal, the appellant

> **must send or deliver a notice, which must comply with any relevant practice directions, to the Upper Tribunal and the respondent so that it is received within thirty days of the date on which the notice of the grant of leave to enter or remain in the United Kingdom was sent to the appellant.**
>
> (4) Where a notice of grant of leave to enter or remain is sent electronically or delivered personally, the time limit in paragraph (3) is twenty eight days.
>
> (5) Notwithstanding rule 5(3)(a) (case management powers) and rule 7(2) (failure to comply with rules etc.), the Upper Tribunal must not extend the time limits in paragraph (3) and (4)."

22. Rule 1(2), so far as relevant, states that the UT Rules:

> "apply to proceedings before the Upper Tribunal…."

23. The "practice direction(s)" referred to in both sets of Rules are references to the Senior President's *Practice Direction: Immigration Asylum Chambers of the First-tier and Upper Tribunal* (Feb 2010 as amended). Although dating back to November 2010 when the current tribunal structure came into existence, it was amended on 13th November 2014.

24. The relevant provisions are at Part 3 Paragraph 5 headed: "Pursuing appeal after grant of leave". We do not need to set them out. Its terms are not directly relevant to the issues we have to decide. As an aside we note, however, that ss.104(3), 104(4C) and 104(5) of the NIA Act 2002 were deleted on 20th October 2014 by Schedule 9 to the Immigration Act 2014. When referring to the abandonment provisions in the 2002 Act, the *Practice Direction* does not take into account the amendments made in 2014 to the 2002 Act. In particular the 'rights of appeal' in s.82 and the 'grounds of appeal' in s.84, reflect the now repealed provisions of the 2002 Act.

25. It will be readily apparent from reading the F-tT and UT Rules that there is a significant difference between them. The UT Rules (rule 17A(5)) exclude the UT's case management powers under rule 5(3)(a) to extend time and the power in rule 7(2) to condone a failure to comply with a provision in the Rules. It is specifically stated that the UT "must not extend the time limits" in rule 17A(3) and (4) within which an appellant may serve a notice to continue an appeal on asylum or humanitarian protection grounds. No such exclusion of the F-tT's equivalent powers is made in rule 16 of the F-tT's Rules. In this appeal, boiled down, the issue is whether the out if time notice which the appellant filed on 9 May 2019 was governed by the UT Rules or F-tT's Rules – only if it was the latter would there be power to extend time. Subject that is, to the appellant's argument that if the UT Rules apply they are ultra vires by excluding the case management powers to extend time.

Discussion

Introductory points

26. It is common ground between the parties that, under s.104(4A) of the NIA Act 2002, this appeal is to be "treated as abandoned" unless the appellant has given notice in

accordance with the applicable rule, which would be rule 17A(3) in the UT and rule 16(3) in the F-tT.

27. The rules in both tribunals require an appellant to give notice that, despite the grant of leave, s/he wants to pursue the appeal on asylum or humanitarian protection grounds. The rule in each tribunal gives different time limits as to when the notice must be "received" by the tribunal. That date is calculated from when the notice of the grant of leave was "sent": 28 days later in the F-tT Rules but 30 days in the UT Rules (rules 16(3) and 17A(3) of the F-tT and UT Rules respectively). In relation to the UT, the 30-day period is reduced to 28 days in the event of electronic or personal service (rule 17A(4), UT Rules). The rules applicable in each tribunal require that any notice to continue the appeal on asylum grounds must comply with the practice direction.

28. It is accepted that the appellant did not give notice within the time limits set irrespective of which Rule applies.

29. It is also accepted that the F-tT Rules, through the case management power in rule 4(3)(a), can extend or shorten time for compliance with the procedure rules, which would include the time within which notice must be given by an appellant under rule 16.

30. Further, it is also common ground that the UT, despite having the same case management provisions at rule 5(3)(a) as the First-tier Tribunal and having further power in rule 7(2) to condone a failure to comply with rules, does not have any power under these provisions to extend the 30 day time limit for giving a notice specified under s.104 (4A) of the NIA Act 20002 and in rule 17A(3) (or rule 17A(4)). The power to extend time is explicitly excluded by rule 17A(5). There is no equivalent exclusion in the F-tT Rules. We were shown no material to explain why the two rules differ and we can see no apparent reason why they should, but they obviously do.

The submissions

31. The principal question we have to decide is: which rule applies in this appeal?

32. Ms Caseley submits it is the FtT's Rules. She submitted that the relevant date to ascertain which Rules apply is the date of abandonment by operation of s.104(4A) of the NIA Act 2002, i.e. the date of the grant of leave which was 20th October 2018 (or 22nd October if "granted leave" is understood to mean given by notice in writing) , and the appeal was at that time undoubtedly still pending before the F-tT because on any basis the UT had not yet become involved. The application for permission to appeal was not made to the FtT until 30th October 2018 and was not refused until 8 November 2018. That application was governed by the F-tT's Rules. The renewed application to the UT was made on 4th December 2018. Whilst that application was, on the face of it, governed by the UT's Rules, Ms Caseley's submission was essentially that by this time, the appeal had been abandoned by virtue of s.104(4A).

33. Accordingly, it is the F-tT Rules which governed any notice seeking to continue the appeal on asylum grounds. Ms Caseley submitted that we should reconstitute ourselves as the F-tT and she invited us to treat the notice served in the UT as having been served in the F-tT. In applying rule 16 of the F-tT Rules, the panel (sitting as the F-tT) has discretion to extend time, for example, under rule 4(4)(a).

34. In the event that we disagreed and found that the appeal was pending in the UT, Ms Caseley, in her skeleton argument and orally at the hearing, raised in the alternative that the UT Rules are unlawful by excluding any discretion to extend time for the giving a notice under s.104(4A).

35. As we pointed out at the oral hearing, we have considerable difficulty with this latter argument as it contemplates the UT having power to conclude a statutory instrument applicable to its own functions is ultra vires and then disapplying it. That is quite a different matter from an appellate tribunal concluding a lower tribunal erred in law in applying a statutory instrument which is, as a matter of law, ultra vires (see Chief Adjudication Officer v Foster [1993] AC 754). Unlike that situation, Ms Caseley proposal entails us performing a function which forms no part of the UT's appellate jurisdiction which "any point of law *arising from* a decision made by the First-tier Tribunal" (see s.11(1), Tribunals, Courts and Enforcement Act 2007). A jurisdiction to challenge the *vires* of statutory instrument is one that the UT does not have even in transferred judicial review proceedings under s.15 of the TCE Act 2007 (see Lord Chief Justice's *Consolidated Direction* (21 August 2013 as amended 17 October 2014), para 3(i)). In the result, given the view we take that the FtT rules apply, it is unnecessary to reach a concluded view on the ultra vires argument.

36. Ms Caseley argued that the effect of notice given in accordance with s.104(4B) of the NIA Act 2002 which was served albeit on the UT, if we extend time as the F-tT, is that the abandoning effect of s.104(4A) when leave was granted on 20th October 2018 is that s.104(4A) now does not apply, and the appeal is treated as if it had never been abandoned. Consequently, the subsequent acts of the F-tT refusing permission, as well as the renewal to and grant of permission by the UT, can now be seen as having occurred when the appeal is not, in fact, now treated as abandoned. The end result of which is that the appeal is now (but only now) pending in the UT.

37. Mr Howells took a slightly different position. He contended that the correct rule was determined by the time the notice was served. Because, following the grant of permission to appeal the appeal was pending in the UT at the time the notice was served on 9 May 2019, it is the UT Rules which apply. Under those Rules, he submitted, we do not have discretion to extend time for the service of a notice continuing the appellant's appeal. The appeal is abandoned by the operation of law under s.104(4A) and we have no jurisdiction.

38. We pause to note that, on this reasoning, it might be thought that the appeal would have moved into the UT when the application for permission was renewed to the UT, which would be when the UT Rules began to apply.

Our conclusions

39. We have not found this issue easy. We have, however, concluded that in large measure Ms Caseley's submissions are to be preferred.

40. The application of each set of procedural Rules is defined in the respective Rules as applying to "proceedings before" the relevant tribunal whether F-tT or UT (see rule 1(2) of the F-tT Rules and rule 1(2) of the UT Rules).

41. We agree with Ms Caseley that the applicable procedural rule is to be determined at the date of the abandoning event, i.e. the date of grant of leave. It is at that point that the notice provisions become of potential importance to an appellant who wishes to continue an appeal on asylum of humanitarian protection grounds. Certainty of which set of Rules apply is best achieved by taking this fixed date derived from the effect of s.104(4A). If the matter has not reached the UT, then the only applicable rule must be that in the F-tT's Rules, namely rule 16. By contrast, if the grant of leave to enter or remain occurs after the appeal has reached the UT because a permission application has been made under the UT Rules (rule 21) or the appeal has moved beyond that point in the UT, then the applicable rule will be found in rule 17A of the UT's Rules.

42. That leads us to consider the effect of s.104(4A) and (4B) of the NIA Act 2002. Section 104(4A) is, in our judgment, clear and unambiguous. Section 104(4A) states that the grant of leave *is* an abandoning event. Once leave is granted, the appeal is "treated as abandoned" by operation of law. The abandoning effect of s.104(4A) does not operate if, and only if, notice is *not* served in accordance with s.104(4B).

43. Mr Howells submitted that the 28-day period for the appellant to serve a notice leading to the appeal continuing should be allowed to expire, which would take the date of abandonment in this case, depending on service, to 17th/19th November. His submissions fail to take account of the clear wording of s.104(4A). We see nothing in s.104(4A) or (4B) which defers the statutory abandonment until the expiry of the time for service of a notice has expired. Presumably, if he were correct, the same logic should be applied to a notice accepted out of time under rule 16(3) but that would create a delay of uncertain, and potentially lengthy, duration before s.104(4A) took effect. That cannot be right and s.104(4A) is unambiguous in its terms: an appeal "shall be treated as abandoned" if leave is granted.

44. In any event, Mr Howells' contention is not material here because, as no notice was served in time, the abandonment happened, and it does not make any material difference whether it was 20th/22nd October 2018 or 17th/19th November 2018.

45. In our judgment, the appeal's "pending" status is not, in some way, suspended or in abeyance awaiting a notice being served or not, and potentially with the need for time to be extended, in accordance with the Rules. Until a notice is served, the appeal is treated as abandoned from that date leave is granted. The effect of s.104(4B) is that once a notice is served the abandonment, which took effect under s.104(4A) on the grant of leave, is retrospectively treated as if it had never occurred.

46. How does that analysis apply in this appeal?

47. Section 104(4A) applied so that as at 20th October 2018, the date of the grant of leave (or 2 days later on deemed service), the appeal was treated as abandoned. At that point, were the "proceedings" before the F-tT or UT? The answer is, in our judgment, self-evident – on 20 October 2018 the "proceedings" were before the F-tT so the F-tT Rules applied.

48. Even if the application for permission and decision in the F-tT occurred within the 28 days, by the time of renewal to the UT on 4th December 2018 and the grant of permission in the UT in January 2019, there was no extant appeal upon which the renewed application, or the subsequent grant of permission, could bite. By that date, the effect of s.104(4A), as no notice had been served, was that the appeal was abandoned and no longer "pending" before the FtT and, of course, there was nothing which could be described as an appealable decision to the UT. As there was no appeal, there could be no effective application to the UT to challenge it.

49. Whilst that might seem to 'fly in the face' of what actually happened, given that permission was granted and the appeal was listed in the UT, that is the effect of the statutory provisions. We can see no basis upon which an appeal which has been abandoned through the operation of law in the F-tT can be considered to have emerged in the jurisdiction of the UT through a renewed application for permission to appeal which had been processed unwittingly by the UT because the parties failed to advise the UT of the earlier statutory abandonment of the appeal in the F-tT.

50. In other words, at all times this appeal was only ever pending in the F-tT. It never reached the UT. It was abandoned by operation of law on 20th October 2018. However, as the appeal was governed by the F-tT Rules, rule 16(3) must apply in principle to the appeal for the purposes of giving effect to s.104(4B).

51. It is common ground that, in the event the panel concluded the appeal was governed by the F-tT's Rules, the notice of the intention to continue the appeal made to the UT should be treated as a notice made to the F-tT. We agreed, in the context of how the case was argued before us, that we would so treat it. We reconstituted ourselves as the F-tT to decide whether or not time should be extended to admit the notice applying the F-tT's case management powers in rule 4(3)(a).

52. There has been no adequate explanation of either party's failure to inform either tribunal of the grant of leave and, in the case of the appellant's solicitor representative, of the late service of the notice. The suggestion that the notice has been served late because "the case worker was on leave abroad" is not supported by any statement from the case worker as to leave dates etc, and so is, as Mr Howells rightly pointed out, unevidenced. The position is, in any event, belied by the lodging of the application for leave on 30th October 2018 i.e. within the 28-day period. A notice could have been served at the same time. Indeed, that would arguably have been the obvious and convenient time to do so. Further, there was continuing

failure to remedy the position on the return to work by the case worker, no remedial action being taken until the matter was listed in the UT in May 2019.

53. Mr Howells nonetheless conceded that we should exercise discretion and extend time because:

    (a) The appellant was not at fault, albeit his representatives were.

    (b) The respondent was also at fault for failing to notify the tribunal of the grant of leave.

    (c) There was a conceded error of law. The judge did not apply the Presidential Guidance about vulnerable witnesses, and incorrectly disregarded the medical expert evidence as to credibility of the account of causation when reaching his own conclusions as to the matter.

54. In the circumstances, sitting as the F-tT we have decided to exercise discretion and to extend time for the provision of the notice under rule 16(3).

55. The representatives were in agreement that, if time was extended, we should immediately reconstitute ourselves as a UT panel to decide the error of law. Ms Caseley relied on her previous argument that once the abandonment of the appeal occurred the renewal of permission to, and the subsequent grant of permission in, the UT operated so that the appeal was now in the UT.

56. Albeit that we have some hesitation, we accept this submission which has a logical basis in the effect of s.104(4B). It is, in our judgment, the inevitable effect of s.104(4B) when it applies if a notice is served in time or out of time but with an extension granted to the 28-day period. Section 104(4B) clearly states that s.104(4A) "shall not apply". Consequently, the appeal is not now treated as abandoned.

57. We consider that, in effect, as a result the processes followed after the expunged "abandonment" should be treated as effective – in other words, as if the abandonment ever occurred. The appellant has permission to appeal from the UT granted in January 2019. We are satisfied that, in light of the obvious error of law arising from the judge's assessment of credibility, we should reconstitute ourselves as a panel of the UT.

58. If this were wrong, and a vehicle is needed to bring the matter to the UT, Judge Davidge, sitting as a F-tT judge is authorised to deal with permission to appeal applications, and grants the appellant's application for permission to appeal.

59. The outcome of this appeal in the UT is as was conceded by Mr Howells.

60. The parties were agreed that we should set aside Judge Boyes' decision and remit the matter to the F-tT.

Decisions

61. On 20th October 2018 the respondent's decision granting the appellant leave to remain in the UK, by operation of law under s.104(4A) of the NIA Act 2002, resulted in the appeal being treated as abandoned on that date (or 2 days later to take account of deemed service).

62. The notice and application served on the UT on 10th May 2019 is properly treated as a notice and application for an extension of time to the F-tT pursuant to rule 16 of F-tT Rules.

63. Sitting in the F-tT exercising our case management powers under rule 4(3)(a) of the F-tT Rules, we extend time for the provision of notice under rule 16(3) of those Rules.

64. By virtue of s.104(4B), s.104(4A) shall not apply and the appeal is now treated as if it were never abandoned.

65. The appeal is now pending in the UT either a result of the grant of permission by Judge Storey in January 2019, or alternatively as a result of the grant of permission to appeal by Judge Davidge sitting in the F-tT.

66. Sitting as the UT, we find a material error of law in the F-tT decision of Judge Boyes dismissing the appellant's appeal and set the decision aside. We remit the appeal to the F-tT to be reheard de novo by a judge other than Judge Boyes.

Signed  Date 16 October 2019

Deputy Upper Tribunal Judge Davidge