Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03273/2019

THE IMMIGRATION ACTS

Decided under Rule 34
Without a hearing on
28th September 2020

Decision & Reasons Promulgated
On 06th October 2020

Before

UPPER TRIBUNAL JUDGE KEITH

Between

SAMUEL SHEHU
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant, who was the appellant before the First-tier Tribunal ('FtT'). I will therefore refer to the parties as they were referred to by the FtT.

2. The appeal is against a decision of a Judge of the First-tier Tribunal, Judge G Mitchell, promulgated on 27th September 2019, by which he dismissed the appellant's appeal on the basis that the FtT lacked jurisdiction to hear an appeal. The gist of the background was that the appellant had applied for indefinite leave to remain as a Tier 1 General Migrant, using Form SET(O), which the respondent had rejected on 22nd September 2017, on the basis that there was a disparity between the earnings

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declared to HM Revenue and Customs and the information provided by the appellant on his earlier application for limited leave to remain in 2011. Under the points-based system of Tier 1, the respondent then disregarded any earnings and concluded that the appellant failed to satisfy paragraph 245CD(g) of the Immigration Rules. A subsequent application for administrative review was also rejected on 20th October 2017. The administrative review decision contained a "one-stop" notice under section 120 of the Nationality, Immigration and Asylum Act 2002.

3. In response, the appellant both appealed to the FtT and brought judicial review proceedings. The statutory appeal was brought on the basis that the respondent ought to have appreciated that by the time of the refusal of administrative review, the appellant had 10 years' continuous lawful residence and was therefore entitled to remain under Paragraph 276B of the Immigration Rules, as he had been granted leave to enter on 7 April 2007. The appellant also issued a judicial review claim, described by the FtT as protectively challenging the respondent's decisions. That application was apparently resolved by way of a consent order under which the applicant withdrew his application, upon the respondent agreeing to withdraw her decision of 22nd September 2017 and for the respondent to reconsider the appellant's application as a Tier 1 Highly Skilled Worker within three months of that date.

4. Following her reconsideration, on 2nd February 2019 the respondent confirmed its refusal in similar terms to the refusal in 2017, but added that the Immigration Rules now included provisions for applicants wishing to remain in the UK on the basis of their family and private life and that since the appellant had not made a valid application for article 8 consideration, consideration had not been given as to whether his removal from the UK would breach his rights under article 8 of the European Convention on Human Rights ('ECHR').

5. A hearing on 5th February 2019 before the FtT to consider his ongoing statutory appeal was adjourned with directions to the respondent "to consider the appellant's claim that he satisfied the long residence rules." Those directions were not complied with. Judge Mitchell, in the later hearing, questioned the basis on which the FtT had the power to make such a direction, which was without written reasons.

6. In the later hearing before Judge Mitchell, the respondent argued that the 21st June 2016 application was not a human rights claim; no decision had been taken to refuse a human rights claim; and that the respondent would not provide consent to any new matters being considered by the FtT.

<u>The FtT's decision</u>

7. The FTT concluded that the appellant had made a human rights application, not in the 21st June 2016 application, but in subsequent correspondence from his legal representative dated 17th December 2017, which referred to long residence and obstacles to the appellant's integration in his country of origin. However, the respondent had not made a decision to refuse any human rights claim. The lack of a refusal was acknowledged by the appellant both in the correspondence dated 17th December 2017 and later correspondence dated 20th February 2020.

8. Accordingly, the appellant did not have the right to bring a statutory appeal against the February 2019 decision and the FtT dismissed the appellant's appeal on the basis of lack of jurisdiction.

The grounds of appeal and grant of permission

9. The appellant lodged grounds of appeal which are essentially as follows:

   9.1. Ground (1) - the FtT had erred in concluding that the respondent had not made a decision refusing his human rights claim. At §[88] of their decision in Balajigari v SSHD [2019] EWCA Civ 673, the Court of Appeal confirmed that the making of the decision which deprived the applicant leave to remain was in itself an interference with an applicant's article 8 rights. The respondent's refusal letter of 2nd February 2019, which refused the appellant's 2016 application, encroached on the appellant's article 8 rights.

   9.2. Ground (2) - it was incumbent on the FtT to apply the authority of Baihinga (r. 22; human rights appeal: requirements) [2018] UKUT 00090 (IAC), which meant the respondent ought to have treated the appellant's 2016 application as including a human rights claim. The FtT also had before him a valid statutory appeal.

   9.3. Ground (3) – it was incumbent on the FtT to have allowed the appellant to adduce evidence of 10 years' continuous lawful residence – see: OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC).

10. First-tier Tribunal Judge Landes granted permission on 28th January 2020, regarding it as arguable that the FtT had erred in finding that the respondent had made no decision to refuse a human rights claim. While not part of the binding decision of the Court of Appeal in Balajigari, it was clearly its opinion at §[99] that refusal of an application where human rights had been raised could amount to refusal of a human rights application. While the ground relating to a failure to admit documents or issue directions appeared to be weak, the grant of permission was not limited in its scope.

Directions in the light of Covid-19

11. Upper Tribunal Judge Canavan issued directions on 11th May 2020, indicating that on her provisional view, the questions of whether the FtT had erred in law and whether his decision should be set aside could be resolved without a hearing. The parties were directed to provide further submissions and where, despite the provisional view expressed, they regarded a hearing as necessary, they were required to submit reasons for that view.

12. Both parties responded, agreeing that the issues of whether there was an error of law and whether the decision of the FtT should be set aside could be resolved on the papers.

13. I have considered the matter afresh and endorse Upper Tribunal Judge Canavan's view that the determination of the error of law and whether the FtT's decision should be set aside can be resolved without a hearing. The reason for this is that the scope of

the issues is clearly outlined, limited to narrow legal issues, and documented. There is no suggestion that there are further submissions which could only be made at a hearing, which had not been addressed in the appeal. I therefore conclude that it is in accordance with the overriding objective that I reach a decision on the error of law and whether the FtT's decision should be set aside, on the papers.

The parties' submissions

14. Both parties' submissions were very brief.

15. The appellant referred to the case of Birch (Precariousness and mistake; new matters) [2020] UKUT 00086 (IAC). The FtT had referred to the respondent ignoring directions to consider the appellant's application on the basis of his long residence and the Upper Tribunal was not limited in what it could consider as a new matter. The appellant met the 10-year long residence provisions, which would be determinative in any proportionality assessment of his human rights (see: TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109).

16. The respondent relied on MY (refusal of human rights claims claim) Pakistan [2020] UKUT 89 (IAC). The appellant had complained that the respondent had not reached a decision on his human rights application, which was inconsistent with his assertion that there had been a refusal of his human rights appeal, which generated a statutory right of appeal.

Discussion and conclusions

17. Neither party now disputes that the appellant has made what constitutes a human rights application. The FtT determined this not to be the 2016 application, but follow-up correspondence from the appellant's legal representative, Mr Jones of Garden Court Chambers, dated 17th December 2017, following a "one-stop" notice.

Ground 1

18. The first ground asserts that the FtT erred in concluding that the 2nd February 2019 decision did not amount to a refusal of the appellant's human rights application. The appellant essentially seeks to argue that because the respondent's refusal of his 2016 Tier 1 application has the effect of refusing his continuing leave to remain in the UK, that effectively amounts to a refusal of his human rights claim, which the FtT found separately to have been made in the 2017 correspondence. Ground (1) fails in two respects. First, while the appellant acknowledges, in submissions, MY, the appellant's submissions do not engage with that authority, in the sense of dealing with the principles outlined in that case. By way of reminder, these are as follows:

> *"56. Section 82(1)(b) requires there to have been a decision on the claim. That, in turn, at least strongly suggests there must have been engagement with the claim. The outcome of that engagement must have been to "refuse" the claim. In the light of paragraph 55 above, a decision to refuse a human rights claim requires the respondent to reach a decision that the person concerned does not have a case for*

remaining in the United Kingdom by reference to his or her, or anyone else's, human rights…

59. Even if the respondent's reason for not considering the human rights claim was legally erroneous, it would still be the case that the human rights claim had not been considered by her. Any such error would be judicially reviewable, on public law grounds; but that would need to be by application to the Upper Tribunal, not by way of appeal to the First-tier Tribunal…

62. Second, if one analyses the communication that the appellant received from the respondent in September 2018, it is in two entirely separate parts. The part that says "you applied for indefinite leave to remain ... your application is refused" is the decision. The reasons for that decision are, for present purposes, immaterial. That includes the paragraph which says any human rights submissions have not been considered. The decision to refuse has, therefore, to be treated as a decision to refuse the human rights claim, which the appellant had made, compatibly with section 113, along with his application under the Rules.

63. The implications for the respondent and the appellate process, if Ms Mair is right, are potentially serious. It is therefore necessary to examine the appellant's case by going back to first principles.

64. The respondent has been given the function by Parliament, through the Immigration Acts, of deciding applications from those who require leave to enter or remain in the United Kingdom. As a general matter, the respondent is the primary decision maker, with her decisions being subject to a right of appeal to the First-tier Tribunal under the 2002 Act or to judicial review, where a right of appeal does not exist.

65. In the appellate context, the position of the Secretary of State as primary decision- maker is necessarily subject to the requirements of the ECHR and the Refugee Convention, which focus attention on the present position, as it is at the date of an appeal hearing. Nevertheless, section 85(5) contains a mechanism for the respondent to consent to the consideration of "a new matter" by the First-tier Tribunal.

66. If the appellant is correct as to the proposition we have articulated in paragraph 61 above, the respondent would find herself in the following position. If she maintains her current stance of engaging with human rights claims only if made by way of particular forms and in particular circumstances, the respondent faces the prospect of the First-tier Tribunal becoming the primary decision-maker in what may be a significant number of human rights cases. The alternative is for the respondent to abandon her current practice.

67. We find the appellant's first proposition involves an impermissible "reading-down" of section 50 of the 2006 Act and the Rules made under it; and of the relevant case law. The respondent's ability, pursuant to section 50 of the 2006 Act, to require a specified procedure to be followed in making or pursuing an application or claim, and, in particular, in requiring the use of a specified form (along with the payment of a fee) has been endorsed by the Court of Appeal in Shrestha. Although that case was concerned with a section 120 Notice, paragraphs 29-33 of the judgment of Hickinbottom LJ acknowledged the power of

the respondent to regulate the way in which applications and claims fall for consideration under the Immigration Acts. The way in which the respondent does so may, of course, be subject to public law challenge. However, there is no suggestion in Shrestha that the Court had difficulties with the respondent's stance (which differed from that in Ahsan), whereby the respondent will, as a general matter, engage with an application or claim only if made in the specified manner, until the point at which the individual concerned is subject to removal directions, when no formality will be necessary. We reject Ms Mair's attempt to distinguish Shrestha; although concerned with section 120, it contains an endorsement of the respondent's practice that has relevance to the present case.

68. Importantly, at paragraph 102 of Balajigari, the Court of Appeal, in discussing the formal requirements, noted counsel for the Secretary of State as making it clear:

> *"…that the Secretary of State was not minded to waive the formal requirements generally so as to facilitate appeals (as opposed to applications for judicial review) in all cases. As the legislation now stands, that appears to be a stance that he is entitled to take".*

We are, accordingly, satisfied that the respondent is entitled, as a general matter and subject to her overriding public law duties, to adopt the position whereby, even if a communication is given to her which satisfies the definition of a "human rights claim" in section 113, she is not for that reason alone necessarily obliged to engage substantively with the claim in order to decide whether it should be granted or refused. The respondent can, therefore, as a general matter lawfully respond to a human rights claim by declining to consider it."

19. Applying these principles to the facts as considered by the FtT, the effect of the respondent's refusal of 2nd February 2019 could not have been clearer – it was to refuse a Tier 1 application; to then refer, at page [9] of the appellant's bundle, to the respondent's changes to the Immigration Rules which:

> *"set out the requirements for those seeking leave to enter or remain on the basis of respect for private or family life….If you wish the Home Office to consider an application on this basis you must make a separate charged application using the appropriate specified application form….Since you have not made a valid application for Article 8 consideration, consideration has not been given as to whether your removal from the UK would breach Article 8 of the ECHR."*

20. The appellant's citing of Birch is in fact a new ground, relating to the ability of the Upper Tribunal to consider new matters, even absent consent from the respondent. Even had I permitted an amendment to the ground, which I do not, it does not assist the appellant. In that case, the Upper Tribunal was remaking a decision on a valid statutory appeal. There is no such valid statutory appeal here.

21. In summary, the FtT was unarguably entitled to conclude that, whether in error or not, the respondent had expressly declined to make a decision on the appellant's article 8 claim. Ground (1) must therefore fail.

Ground 2

22. The first part of ground (2), namely whether the respondent ought to have considered the appellant's article 8 claim, is answered by the authority of MY above, a reported Presidential decision which expressly considered Baihinga. As §[59] of MY confirms, the appropriate route to challenge a failure to consider a human rights application, as opposed to a refusal of that application, is by way of judicial review. In relation to the second part of the ground, in the absence of an appealable decision, the FtT did not have before him a valid statutory appeal, which he had jurisdiction to consider. For these reasons, ground (2) must also fail.

Ground (3)

23. This ground asserts that the FtT ought to have admitted evidence relevant to the appellant's continuous lawful residence (not a basis of 2019 refusal). The flaw in this ground is that there was a human rights decision and valid statutory appeal before the FtT and Upper Tribunal, as well as consent by the respondent to consider the "new matter" in OA and Others. In contrast, in this appeal, for the reasons set out, there was no human rights decision by the respondent; and no valid statutory appeal before the FtT. While continuous lawful residence might well be relevant to whether a statutory appeal should succeed against the refusal of a human rights claim, there has been no such refusal and therefore the FtT cannot be criticised for refusing to admit evidence that was not relevant to the question of jurisdiction, or to seek compliance with directions on the point. This final ground must also therefore fail.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The First-tier Tribunal's decision is upheld and the appellant's appeal is dismissed.

Signed J Keith .... Date: 28th September 2020

Upper Tribunal Judge Keith