Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13142/2018 (P)

THE IMMIGRATION ACTS

Determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Decision & Reasons Promulgated On 8th September 2020

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MUKTHAR ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: written submissions provided by Ms L E Daniels, the appellant's partner
For the Respondent: written submissions provided by Ms H Aboni, relying on a rule 24 response authored by Mr D Mills, both Home Office Presenting Officers

DECISION AND REASONS (P)

1. This is an 'error of law' decision determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, paragraph 4 of the Practice Direction made by the Senior President of Tribunals: *Pilot Practice Direction: Contingency*

arrangements in the First-tier Tribunal and the Upper Tribunal on 19 March 2020, and paragraphs 4 – 17 of the Presidential Guidance Note no 1 2020: Arrangements During the Covid-19 Pandemic, 23 March 2020.

2. The appellant appeals against the decision of Judge of the First-tier Tribunal Khawar (the judge) who, in a decision promulgated on 29 March 2019, dismissed his appeal in respect of a decision by the respondent dated 21 May 2018 on the basis that the First-tier Tribunal had no jurisdiction to hear the appeal.

3. Permission to appeal to the Upper Tribunal was granted by Judge of the First-tier Tribunal L Murry in a decision dated 16 June 2019 but sent on 20 June 2019. A hearing was listed for 12 July 2019 but this was vacated as it was anticipated that the appeal would be linked with another raising the same issue to be determined by a Presidential panel.

4. On 4 May 2020 Upper Tribunal Judge O'Connor issued directions to the parties expressing his provisional view that, in light of the pandemic, it was appropriate to determine the questions (i) whether the judge's decision involved the making of an error of law and, if so, (ii) whether the decision should be set aside, without a hearing. On 11 May 2020 the Upper Tribunal received further submissions from the appellant in respect of the two questions. No consideration was given to whether the two questions could be determined without a hearing or whether a hearing was acquired. Submissions from the respondent were received by the Upper Tribunal on 21 May 2020. The respondent did not consider that an oral hearing was necessary.

5. Further directions were issued by Upper Tribunal judge Reeds on 14 July 2020. Judge Reeds extended time to enable the appellant to provide any further legal submissions within 7 days of her directions being issued, and directed that the appellant should confirm in writing whether he sought an oral hearing or whether a face-to-face hearing was necessary, or in the alternative whether he was content for the decision to be made on the basis of the written material provided. In an email response received by the Upper Tribunal on 19 July 2020 Ms Daniels indicated that she and the appellant did not wish to prolong matters any longer. She contended that there had been no justification for the lengthy delay and that the appellant had been exploited by the Home Office, immigration solicitors and the First-tier Tribunal and Upper Tribunal, and sought for the appeal to be concluded based on all submissions made on the appellant's behalf, with particular reference to a stamp on the appellant's passport purporting to grant him Indefinite Leave to Remain in 2001. The respondent replied to Judge Reeds' direction by email dated 23 July 2020 stating that the additional documents were not relevant to the issue of jurisdiction and that they were in any event considered in the respondent's decision dated 21 March 2018.

6. Having regard to the overriding interest in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to deal with cases justly and fairly, and having considered the nature of the appellant's challenge to the judge's decision (which does not involve the need for further evidence to be considered), and having regard to the relatively narrow focus of the legal challenge (relating to an issue of jurisdiction) and the written submissions from both parties, and having satisfied itself that both parties have been given a fair opportunity of fully advancing their cases, the Upper Tribunal considers it appropriate, in light of the Covid-19 pandemic, to determine questions (i) and (ii) without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Background

7. The appellant is a male national of Bangladesh who is given date of birth is 10 August 1976. He maintains that he arrived in the UK on 1 March 1995, although the res has not been satisfied that the appellant has provided sufficient evidence to support his claimed length of residence. The appellant claims that he was issued with a letter by the Home Office dated 8 November 2001 referring to a grant of Indefinite Leave to Remain and that a stamp to this effect was placed in his passport. The respondent does not accept that the appellant was ever granted settlement in the UK. The appellant made several applications for a 'no time limit' stamp to be placed in his new passport but these were rejected. On 19 February 2015 the appellant made a human rights claim based on his family and private life. This was refused on 24 April 2015 and the decision certified pursuant to section 94 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). As a consequence of the certification the appellant had a right of appeal against the decision to refuse his human rights claim but he could only exercise that right of appeal once he left the UK. The certification was made on the basis that the application was 'clearly unfounded'. There does not appear to have been any challenge to the certification decision by way of judicial review.

8. the appellant made further representations pursuant to paragraph 353 of the immigration rules. The respondent declined to treat the further representations as a fresh human rights claim in a decision dated 21 March 2018. The appellant made further representations but these were refused pursuant to paragraph 353 in a decision dated 21 May 2018. Although this decision made clear that it was determined under paragraph 353 of the immigration rules, and it did not purport to give the appellant a right of appeal, the appellant nevertheless lodged an appeal with the First-tier Tribunal. A Duty Judge stated that it was arguable that the appellant's further sensations constituted a fresh claim that attracted a right of appeal and that the relationship between the appellant and Ms Daniels had not been properly considered. The matter was listed before judge Khawar on 8 January 2019.

The decision of the First-tier Tribunal

9. In a decision promulgated on 29 March 2019 the judge noted the preliminary issue raised by the Presenting Officer in respect of jurisdiction. At [9] the judge noted that decision refusing the appellant's human rights claim dated 7 May 2015 had been certified pursuant to section 94 of the 2002 Act. At [10] the judge stated that the respondent had incorporated the certificate in the decision under challenge dated 21 May 2018. At [11] the judge set out an extract from the decision dated 21 May 2018 in which the respondent was not satisfied that the appellant's further submissions created a realistic prospect of success before and Immigration Judge. At [12] the judge stated,

> "It is evident from the above that the Section 94 Certificate (clearly unfounded) is incorporated into the Respondent's present decision, the subject matter of this appeal. As such this Tribunal has no jurisdiction to consider this appeal unless and until the Section 94 certificate is withdrawn."

10. At [13] the judge indicated that, in light of the substantial evidence provided by the appellant, he attempted to persuade the Presenting Officer that the certificate should not be relied upon. After taking instructions the Presenting Officer said the certificate would be maintained and that the tribunal had no jurisdiction to determine the appeal. The judge dismissed the appeal due to lack of jurisdiction.

The challenge to the judge's decision

11. The appellant, with the assistance of his partner, has challenged the judge's decision on a number of disparate bases (he contends, amongst others, that there was unfairness in the way the hearing in the First-tier Tribunal proceeded, that the judge erred in law in his approach to the issue of certification under section 94 of the 2002 Act, and that the respondent conducted herself in an unlawful and dishonest manner). He also asserts that he was granted Indefinite Leave to Remain by way of a stamp on his passport and a letter sent by the Home Office dated 8 November 2001 (assertions supported by reference to documents obtained under a Subject Access Request). In granting permission to appeal Judge of the First-tier Tribunal L Murry stated,

> "It is arguable that the First-tier Tribunal in concluding that there was no jurisdiction to hear the Appellant's appeal failed to have regard to the decision of the Duty Judge (or TCW) dated 26 June 2018 stating that it was arguable that this was a fresh claim and attracted a right of appeal (**Sheidu (Further submissions; appealable decision)** [2016] UKUT 000412 (IAC)"

12. The single issue that I have to determine however, in the context of the Upper Tribunal's duties under section 12 of the Tribunals, Courts and Enforcement Act 2007, and in light of the grant of permission to appeal to the Upper Tribunal, is whether the judge's decision that he

had no jurisdiction to entertain the appeal involved the making of an error on the point of law that required the decision to be set aside. That, in turn, depends upon whether the respondent's decision dated 21 May 2018 was a refusal of a human rights claim as understood in section 82 of the Nationality, Immigration and Asylum Act 2002 (and by reference to section 113, which defines a 'human rights claim'), or whether it was a decision made pursuant to paragraph 353 of the immigration rules, in which case the appellant's further submissions would not be regarded as a fresh human rights claim.

13. Paragraph 353 of the immigration rules reads, so far as material,

> 'When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.'

14. In **Sheidu** the Upper Tribunal considered the appeal of a person who had an asylum appeal dismissed in 2005, and who had an appeal against a deportation decision dismissed in 2012. The person made further representations in May 2013 based on protection and article 8 grounds. The Secretary of State's decision in respect of these representations was headed,

> 'UK BORDERS ACT 2007
>
> CONSIDERATION OF FURTHER SUBMISSIONS
>
> DECISION TO REFUSE A PROTECTION CLAIM AND HUMAN RIGHTS CLAIM'

15. Under the heading "Consideration of protection claim" the Secretary of State considered the appellant's protection claim in substance and concluded, given the previous adverse credibility findings by Tribunal judges, that there was no reason to take a different view. The letter then passed to issues arising under article 8 and related immigration rules. Once again, the Secretary of State dealt in substance with the various arguments raised by the appellant before concluding, under a heading "Article 8 conclusion", that the appellant's deportation would not breach the U.K.'s obligations under the ECHR. A further short section dealt with "Other ECHR claims". The Secretary of State finally stated, under a heading "Paragraph 353 of the Immigration Rules", that consideration had been given to the appellant's submissions that had not previously been considered, but taken together with the previously considered material, they did not create a realistic prospect of success before immigration judge.

16. At paragraph 16 the Upper Tribunal observed that the references to paragraph 353 of the immigration rules only appeared at the end of the Secretary of State's decision, and that the heading of the letter indicated that it contained a decision to refuse a protection claim and a human rights claim. The Upper Tribunal concluded, in light of the particular decision before it, that there had indeed been a refusal of a human rights claim and that, as there was an appealable decision, paragraph 353 had no part to play. It is apparent from paragraph 17 that the Upper Tribunal placed great emphasis on the particular terms of the decision letter. The Tribunal noted that the decision letter started with what was described as a human rights claim, which was then substantively refused, and that the Secretary of State did so using wording in the heading and in the refusal itself that was clearly envisaged as a refusal of human rights claim by s.82 of the 2002 Act, and that the subsequent consideration under paragraph 353 could not have the effect of removing the right of appeal.

17. I have considered the decision dated 7 May 2015. It is clear that the respondent certified the appellants human rights claim pursuant to section 94 of the 2002 Act. I do not understand this to be in dispute. The appellant made further representations and these led to the decision dated 21 May 2018. I have considered this decision in detail. The structure and content of this decision are materially different from the decision in **Sheidu**. The decision of 27 May 2018 did not purport to be a decision to refuse a protection claim or a human rights claim, unlike the decision in **Sheidu**. At the very outset of the decision of May 2018 the respondent set out the provisions of paragraph 353 and made it clear that she was considering the application as a repeat claim. She referred to **ZT (Kosovo) v SSHD** [2009] UKHL 6 and indicated that she had to apply paragraph 353 in respect of further submissions made after a claim was certified under section 94 of the 2002 Act. The respondent referred to points raised by the appellant having previously being considered in earlier decisions, including the decision dated 21 March 2018 and noted that the remaining points which had not previously been considered, when taken together with the previously considered material, did not create a realistic prospect of success before an immigration judge. The respondent stated, "as your submissions do not create a realistic prospect of success before an immigration judge, they do not amount to a fresh claim." The respondent concluded again at the end of her decision that the further representations did not amount to a fresh claim. I am satisfied that the references to paragraph 353 of the immigration rules were an integral part of the May 2018 decision, and not simply 'tacked on' to the end, unlike the decision in **Sheidu**.

18. The continued relevance of paragraph 353 has been reinforced by the binding decision of the Supreme Court in **Robinson (formerly JR (Jamaica)) (Appellant) v Secretary of State for the Home Department (Respondent)** [2019] UKSC 11. At [64] Lord Lloyd-Jones held,

> "For these reasons I consider that the Court of Appeal was correct to conclude that "a human rights claim" in section 82(1)(b) of the 2002 Act as amended means an original human rights claim or a fresh human rights claim within rule 353. More generally, where a person has already had a protection claim or a human rights claim refused and there is no pending appeal, further submissions which rely on protection or human rights grounds must first be accepted by the Secretary of State as a fresh claim in accordance with rule 353 of the Immigration Rules if a decision in response to those representations is to attract a right of appeal under section 82 of the 2002 Act."

19. As the respondent did not accept the further representations as a fresh claim, the appellant did not have a right of appeal. As he had no right of appeal, there was no jurisdiction for the judge to entertain the appeal, despite the matter having been listed by the Duty Judge.

20. The reason the appellant had no right of appeal was because the respondent did not consider that his further representations amounted to a fresh claim. It was not because the earlier certification was incorporated within the decision. The certification only related to the 2015 decision. This mistake by the judge however does not require the decision to be set aside because the appellant did not, on any rational view, have a right of appeal. The appellant should have challenged the May 2018 decision, which was made in accordance with paragraph 353 of the immigration rules, by way of judicial review.

Notice of Decision

The decision of the First-tier Tribunal does not contain an error on a point of law requiring it to be set aside.

The appeal is dismissed.

D.Blum

Signed Date

Upper Tribunal Judge Blum 31 August 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email