IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000691

First-tier Tribunal No: HU/58087/2022
LH/02712/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 June 2024

Before

THE HON. MR JUSTICE PEPPERALL
UPPER TRIBUNAL JUDGE KAMARA

Between

MOSTAFA-AL GALIB
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Z Jafferji, counsel instructed by E1 Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 22 May 2024

DECISION AND REASONS

Introduction

1. By a decision promulgated on 21 December 2023, First-tier Tribunal Judge Jarvis decided that the First-tier Tribunal (the FTT) did not have jurisdiction to hear Mostafa-Al Galib's appeal against the refusal of indefinite leave to remain in the United Kingdom pursuant to s.82(1)(b) of the Nationality, Immigration and Asylum Act 2002. Mr Galib now appeals the decision of the FTT on the question of jurisdiction.

Background

2. Mr Galib is a Bangladeshi national. He lives in London with his wife, Musarrat Saberin Nipun, and their young son. By an application made on 24 March 2022, Mr Galib sought indefinite leave to remain on the basis of ten years' residence

pursuant to para. 276B of the Immigration Rules. The Secretary of State for the Home Department refused the application on 22 April 2022, but the decision was subsequently withdrawn and a fresh decision, also refusing indefinite leave to remain, was made on 22 October 2022. The October decision expressly recorded that Mr Galib had a statutory right of appeal to the FTT.

3. Meanwhile, on 13 May 2022, Mr Galib applied for limited leave to remain under Appendix Graduate to the Immigration Rules as his partner's dependant. Ms Nipun's own application for limited leave to remain for the purposes of post-graduate employment was granted from 20 June 2022 until 9 June 2024. On 15 October 2022, and notwithstanding the Secretary of State's usual policy of considering one application at a time, she granted Mr Galib's own application under Appendix Graduate as Ms Nipun's dependant until 9 June 2024.

4. The issue in this appeal is whether Judge Jarvis was right to conclude that, on the proper construction of the 2002 Act, no appeal lay to the FTT pursuant to s.82(1)(b) because the Secretary of State had not decided to refuse Mr Galib's human rights claim.

The law

5. Section 82(1)(b) provides that a person may appeal to the FTT where "the Secretary of State has decided to refuse a human rights claim". By s.84(2), the sole statutory ground of appeal is that such decision was unlawful under s.6 of the Human Rights Act 1998. Section 113 defines a human rights claim as "a claim made by a person … 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 s.6 of the Human Rights Act 1998".

6. Further, s.104(4A) provides:

> "An appeal under s.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."

7. These provisions were considered by the Court of Appeal in R (Mujahid) v. First-tier Tribunal (Immigration & Asylum Chamber) [2021] EWCA Civ 449, [2021] 1 W.L.R. 3404. Stuart-Smith LJ posed and answered the question at the heart of that appeal at [1]-[3]:

> "1. Where: (a) an individual who is in the United Kingdom makes an application for indefinite leave to remain which is to be treated as a human rights claim within the meaning of s.113 of the Nationality, Immigration and Asylum Act 2002 …; and (b) the Secretary of State decides not to grant indefinite leave to remain but grants the individual limited leave to remain, does the Secretary of State 'refuse a human rights claim' within the meaning of s.82(1)(b) of the Act, with the result that the individual has a right of appeal to … the FTT?
>
> 2. By a judgment …, the President of the Upper Tribunal (Immigration & Asylum Chamber) … (Lane J) concluded that the answer to this question is no. He therefore dismissed these proceedings, by which

> the appellant sought judicial review of the decision of the FTT that no right of appeal to the FTT existed in the specified circumstances.
>
> 3. For the reasons set out below, I would hold that the President was correct in his conclusion."

8. In Mujahid, the appellant sought indefinite leave to remain. The signed application form included the following statements:

> "I accept that where I do not qualify for indefinite leave to remain but fall for a grant of limited leave, my application will be treated as an application for limited leave and I may be asked to pay an immigration health surcharge …
>
> I accept that, in the event that I do not meet the requirements for indefinite leave, my application may also be considered as an application for limited leave to remain and understand that the Secretary of State will not grant a period of limited leave unless the requirement to pay an immigration health charge … has been met."

9. The Secretary of State rejected the application for indefinite leave to remain but indicated that Mr Mujahid would fall to be granted limited leave to remain for a period of 30 months were he to make a valid application for such leave. Limited leave would be granted on the basis of the exceptional circumstances of his child's residence in the United Kingdom for over seven years. The decision then indicated that the Secretary of State was treating the application as an application for limited leave which would be invalid if he did not pay the immigration health charge with ten days. Mr Mujahid duly paid the charge and a second formal decision was made a month later confirming the grant of limited leave to remain for a period of 30 months. The letter then asserted that there was no right of appeal since s.82 did not provide such a right where an applicant still has leave to enter or remain in the United Kingdom.

10. Reading s.82(1)(b) together with s.113, Stuart-Smith LJ held, at [19]:

> "In my judgment, and in agreement with the President, the natural meaning of this composite provision is that a right of appeal … arises where the Secretary of State's decision is that there is no lawful impediment to removing the applicant from or requiring them to leave the United Kingdom or refusing them entry. This most naturally refers to the current effect, either immediate or imminent, of the decision when made. There is nothing in the wording of the provisions to suggest that the right of appeal arises where the applicant continues to have a right to remain in the United Kingdom or to enter as the case may be. The effect of the Secretary of State's decision in the present case is quite the opposite: it is to accept that it would be unlawful to remove the appellant from or to require him to leave the United Kingdom or to refuse him entry. As was confirmed in both of the Secretary of State's responses, after receipt of the immigration health payment he would have and has had permission to stay for 30 months, which is not liable to be curtailed, and he was not required to leave the United Kingdom as a result of the decision."

11. Rejecting Mr Mujahid's argument to the contrary, Stuart-Smith LJ added, at [20]:

> "The appellant's interpretation seems to me to strain the words of the statute beyond what they can reasonably bear; and I can see no reason of legal policy to support it. Rather, it would raise the prospect of challenges that would prove to be premature, academic, or both. If an appeal to the FTT were made now it would run the obvious risk of being rendered academic if the appellant were to make an application for further permission to remain, which may be granted. If he makes another application and further permission to remain is not granted, the appellant will then be entitled to challenge that decision at a time when the need for a protective right of appeal to the FTT will be present and real rather than prospective and theoretical. As it is, the appellant was not prevented from challenging the present decision by judicial review, if so advised. It therefore cannot be said that he is denied appropriate access to the courts if the respondent's interpretation is upheld."

12. Stuart-Smith LJ observed at [21] that, so construed, the statute was a "comprehensible scheme for giving access to justice when it is needed, but not otherwise". Further, he considered that s.104(4A) supported his preferred construction, adding, at [25]:

> "It would be incoherent to hold that, on the one hand, the applicant has a right to appeal to the FTT if the Secretary of State grants limited leave in response to an application for indefinite leave to remain but that, on the other, an appeal … that is brought in any other circumstances involving refusal of a human rights claim is to be treated as abandoned if limited leave is subsequently granted."

13. Mujahid was followed by the then Vice President of the Upper Tribunal, Mark Ockelton, in Secretary of State for the Home Department v. Yerokun [2020] UKUT 00377 (IAC). Mr Yerokun's application for leave to remain in the United Kingdom on the basis of his family and private life was refused but he was granted six months' leave outside the rules on an exceptional basis pending the conclusion of court proceedings regarding access to his children.

14. In a concise judgment holding that there was no right of appeal, the Vice President pointed to s.104(4A) and observed, at [11]:

> "The effect of this is that if a person's human rights claim is refused, and he appeals, the grant of a period of leave, however short, brings his appeal to an end. It is inconceivable that there was intended to be a right of appeal where the same grant was made before the appeal could be launched. The reason why the grant of leave causes the appeal to be abandoned is that the grant removes for the moment the argument that the Secretary of State proposes to interfere with the claimant's rights by removing him, which is the sole basis upon which the appeal could have been pursued, given the words of s.113 and s.84."

The FTT decision and reasons

15. In his lucid judgment, Judge Jarvis found that the Secretary of State's view that Mr Galib could be removed from the United Kingdom as a consequence of the 22 October decision was plainly wrong in fact and law since, at the time that the

decision was made, Mr Galib already had limited leave to remain and was not therefore liable to removal pursuant to s.10 of the Immigration and Asylum Act 1999. That erroneous view of Mr Galib's status could not, the judge found, be determinative.

16. While accepting that the factual position in the instant case is different from that in Mujahid, Judge Jarvis found that there was no material distinction in respect of the core issue and that Mr Galib could not show an imminent liability to removal. Further, he rejected an argument that leave granted as a dependent partner under the graduate scheme was not a human rights route, adding that such leave "inherently recognises the article 8 family life" of Mr Galib and his wife.

The grounds of appeal

17. By this appeal, Mr Galib argues that the judge erred in law by finding that the FTT had no jurisdiction and by misdirecting himself as to the effect of Mujahid. He complains that such finding was reached notwithstanding that:

    17.1 the Secretary of State "issued" the right of appeal and the FTT admitted the appeal despite both being asked repeatedly to ensure whether a right of appeal existed; and

    17.2 both parties submitted that the FTT had jurisdiction and that this case could be distinguished from Mujahid.

18. Further, Mr Galib argues that the definition of a human rights claim should have been construed expansively and not restrictively. Mr Galib argues that Judge Jarvis wrongly considered his current leave under the graduate route to have elements of a human rights claim. He points to the fact such leave is one-off and cannot be extended. Finally, Mr Galib argues that he should have been awarded his costs because the appellate process had been the "making" of the Secretary of State and his decision-making.

19. In his oral submissions, Zainul Jafferji, who appears for Mr Galib as he did below, distinguished between the grant of limited leave upon Mr Galib's application made under the Immigration Rules and the grant of limited leave on Mr Mujahid's convention claim pursued outside the rules. He drew attention to Lane J's own decision in Mujahid [2020] UKUT 85 (IAC), and to the judicially prepared headnote, which read:

> "(1) A person (C) in the United Kingdom who makes a human rights claim is asserting that C (or someone connected with C) has, for whatever reason, a right recognised by the ECHR, which is of such a kind that removing C from, or requiring C to leave, would be a violation of that right.
>
> (2) The refusal of a human rights claim under s.82(1)(b) of the Nationality, Immigration and Asylum Act 2002 involves the Secretary of State taking the stance that she is not obliged by s.6 of the Human Rights Act 1998 to respond to the claim by granting C leave.
>
> (3) Accordingly, the Secretary of State does not decide to refuse a human rights claim when, in response to it, she grants C limited leave by reference to C's family life with a particular family

> member, even though C had sought indefinite leave by reference to long residence in the United Kingdom."

20. While in Mujahid the human rights claim succeeded, Mr Jafferji stresses that the Secretary of State considered whether Mr Galib had an article 8 claim outside the rules and found that he did not. The leave granted under Appendix Graduate was under the rules and not the convention. Relying on the decision in MY (Pakistan) v. Secretary of State for the Home Department [2021] EWCA Civ 1500, [2022] 1 W.L.R. 238, he argued that Mr Galib's application under Appendix Graduate did not necessarily involve a claim that removal would be a breach of his convention rights. Further, he submitted that the limited leave granted in this case was precarious in that it depended upon Ms Nipun's ability to extend her own leave and the stability of the couple's marriage.

21. The Secretary of State lodged written representations before the FTT maintaining that Mr Galib had a right of appeal. Late in the afternoon before this hearing, the Secretary of State lodged a pithy response resisting this appeal and asserting for the first time his view that Judge Jarvis did not err in law in declining jurisdiction. In his brief oral submissions for the Secretary of State, Tony Melvin argued that Mr Galib's claim as a dependant under Appendix Graduate was premised upon his genuine and subsisting relationship with Ms Nipun.

Decision on jurisdiction

22. The effect of the decision of 15 October 2022 to grant Mr Galib limited leave to remain as his partner's dependant was that he could not lawfully be removed from the United Kingdom pursuant to s.10 of the Immigration and Asylum Act 1999. Accordingly, the effect of the subsequent refusal of Mr Galib's application for indefinite leave to remain a week later did not render him liable to his imminent or immediate removal.

23. Upon the proper construction of ss.82 and 113 of the 2002 Act as explained in Mujahid, we therefore conclude that Mr Galib's appeal to the FTT is not in respect of a human rights claim, being a claim that to remove or require him to leave the United Kingdom would be unlawful under s.6 of the 1998 Act. Rather it would be, like the appeal in Mujahid, prospective and theoretical.

24. We are fortified in our conclusion by considering the coherency of the statutory scheme in light of the decisions in Mujahid and Yerokun, and the effect of s.104(4A).

25. If no appeal lies where limited leave to remain is granted when refusing indefinite leave (Mujahid and Yerokun), and any appeal that originally lay upon the refusal of indefinite leave to remain is treated as abandoned by the later grant of limited leave (s.104(4A)), it would be surprising if an appeal nevertheless lay where limited leave to remain was granted before the refusal of the application for indefinite leave.

26. There is, in our judgment, no merit in the argument that a different result should be achieved where the limited leave granted is as a dependant under the graduate scheme:

    26.1 First, no removal is possible in law whatever the route through which limited leave is granted: s.10 of the 1999 Act. That is the critical issue since the right of appeal only arises where there is an imminent risk that the applicant will be refused entry, required to leave or removed from the United Kingdom.

    26.2 Likewise, s.104(4A) does not discriminate and would treat an appeal as abandoned by the subsequent grant of limited leave whatever the route, and however short and precarious such leave (Yerokun).

    26.3 Thus, upon the proper construction of ss.82 and 113, no human rights claim arises.

27. On our analysis, we do not regard it to be necessary to determine whether the application under Appendix Graduate necessarily engaged article 8. That issue was important in MY because it was the refusal of the application under the rules for leave to remain under what was then the domestic violence route that was said to give rise to the right of appeal. Here, by contrast, there was a successful claim under the rules and leave to remain has been granted such that there is no imminent risk of removal. Nevertheless, having heard argument, we observe that while a graduate's own application under the points-based system does not necessarily engage article 8, the claim of his or her dependent partner not to be removed from the United Kingdom plainly engages article 8.

28. Although pleaded in the notice of appeal, Mr Jafferji rightly does not argue that the Secretary of State's erroneous assertion in the 22 October decision that Mr Galib had a right of appeal, or his argument before Judge Jarvis in support of that view, give rise to any waiver or estoppel. In our judgment, Judge Jarvis was obviously right to conclude that statutory jurisdiction cannot be conferred by waiver, agreement or the parties' failure to take the point. The contrary position is unarguable in view of the clear authority of Virk v. Secretary of State for the Home Department [2013] EWCA Civ 652, at [23].

29. We therefore dismiss the appeal against the decision declining jurisdiction.

Costs ground

30. The grounds referred to the FTT having made a decision on costs. This is not the case and indeed no application for costs was made before the FTT. Mr Jafferji clarified that the grounds were intended to refer to Judge Jarvis's decision not to make a fee award in favour of the appellant. In making that decision, Judge Jarvis took into consideration the argument put by Mr Jafferji before us, that is that the appeal was wrongly admitted by the FTT. In the absence of any error in the judge's approach, the ground amounts to mere disagreement with the FTT decision on the fee award.

Summary of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

The appellant's appeal is dismissed.

Signed: MR JUSTICE PEPPERALL Date: 19 June 2024

The Hon. Mr Justice Pepperall
Sitting as an Upper Tribunal Judge.

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed: MR JUSTICE PEPPERALL Date: 19 June 2024

The Hon. Mr Justice Pepperall
Sitting as an Upper Tribunal Judge