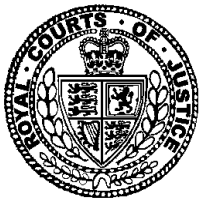

Neutral Citation Number: [2021] EWCA Civ 449

Case No: C2/2020/1021

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
MR JUSTICE LANE
JR/3420/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2021

Before:

LORD JUSTICE UNDERHILL
LORD JUSTICE GREEN
and
LORD JUSTICE STUART-SMITH

- -

Between:

THE QUEEN **on the application of** **MUHAMMAD ALEEM MUJAHID**	**Appellant**
- **-and -**	
FIRST TIER TRIBUNAL **(IMMIGRATION AND ASYLUM CHAMBER)**	**Respondent**
SECRETARY OF STATE **FOR THE HOME DEPARTMENT**	**Interested Party**

- -

Zane Malik QC (instructed by **Irvine Thanvi Natas Solicitors**) for the **Appellant**
Lisa Giovannetti QC and Simon Murray (instructed by **the Treasury Solicitor**) for the **Interested Party**

- -

Hearing date: 17 March 2021

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down will be deemed to be 10.30 am on Wednesday 31 March 2021.

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Approved Judgment

Stuart-Smith LJ :

Introduction

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 ["the Act"]; 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 First-tier Tribunal ["the FTT"]?

2. By a judgment promulgated on 28 February 2020, the President of the Upper Tribunal ["the UT"] (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.

The legislative background

4. The following provisions of the Act are of primary relevance to the issue:

i) S. 82 provides:

> "(1) A person ("P") may appeal to the Tribunal where—
>
> (a) the Secretary of State has decided to refuse a protection claim made by P,
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P, or
>
> (c) the Secretary of State has decided to revoke P's protection status.
>
> (2) For the purposes of this Part—
>
> (a) a "protection claim" is a claim made by a person ("P") that removal of P from the United Kingdom—
>
> (i) would breach the United Kingdom's obligations under the Refugee Convention, or
>
> (ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
>
> (b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions—

> (i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;
>
> (ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection; …"

ii) S. 113 provides that, unless a contrary intention applies:

> "human rights claim" means 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 Convention)."

The factual background

5. The Appellant, who is a citizen of Pakistan, arrived in the United Kingdom in October 2006 as a student. He was granted further leave to remain successively as a student, a Tier 1 (Post-Study) Work Migrant and a Tier 1 (General) Migrant until 30 August 2016. On 8 August 2016 he submitted a Tier 1 (General) application for indefinite leave to remain in the United Kingdom, which was subsequently varied to become an application for indefinite leave to remain based on ten years' long residence.

6. The letter accompanying his application said that the Appellant had a wife, adult son and minor daughter resident with him in the United Kingdom. They are also citizens of Pakistan. His children had been in the United Kingdom since December 2010 and it was submitted that he had developed a very strong private and family life during the course of his residence in the UK.

7. The application form, which the Appellant signed, required the Appellant to state all his reasons for wishing to stay in the United Kingdom. It included two statements as follows:

> "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 … . "
>
> and
>
> "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."

8. On 28 February 2018 the Secretary of State responded to the Appellant's application. The response said that the Appellant did not qualify for indefinite leave to remain but that he would fall to be granted limited leave to remain of 30 months on the basis of exceptional circumstances "were [he] to make a valid application for such leave". The exceptional circumstances justifying the grant of limited leave were stated to be "on the basis that your daughter … has resided in the UK for over 7 years." The response said that the Secretary of State was now treating his application as an application for limited leave which would be treated as invalid if he did not pay the immigration health surcharge of £500 within 10 days of the date of the letter of response. Once he had paid it, his application would be treated as a valid application for limited leave to remain and he would be granted 30 months limited leave to remain in the United Kingdom.

9. The Appellant duly paid the immigration health surcharge and was accordingly issued with a formal decision on 21 March 2019 confirming that he had been granted permission to remain until 21 September 2021 and that he was not required to leave the United Kingdom as a result of the decision. It also stated:

> "You are not entitled to appeal this decision. Section 82 of [the Act] does not provide a right of appeal where an applicant still has leave to enter or remain in the United Kingdom and so is entitled to stay here."

10. The appellant did not accept this last stricture and applied to the FTT to challenge the decision not to grant him indefinite leave to remain. As I have indicated, the FTT decided that the Appellant had no right to appeal to it. Hence, by a rather circuitous route, the application to the UT and the appeal to this Court.

The judgment of the UT

11. After a detailed review of the decision of this court in *Balajigari v Secretary of State for the Home Department and Ors* [2019] EWCA Civ 673 the President drew a distinction between two categories of case, namely (a) a refusal of an application made on Article 8 grounds that has the effect that the applicant has, either immediately or imminently, no legal right to be in the United Kingdom and is liable to removal; and (b) a refusal after which the applicant has a continuing right to be in the United Kingdom because they have leave to remain which is not liable to be curtailed. The latter category would include the present case. He accepted that a right of appeal to the FTT would arise in the first of these categories; but he rejected the proposition that such a right would arise in the second. He then addressed and rejected the Appellant's submission that the present case involved two separate and discrete decisions, the first being a decision to refuse the application for indefinite leave to remain and the second being to grant a separate application for limited leave.

12. The heart of the judgment is at [31]-[32] where the President said:

> "31. … It is clear from the definition of "human rights claim" in section 113(1) of the 2002 Act that the presumed removal of an individual from, or the presumed requirement on that individual to leave, the United Kingdom is an essential element in order for there to be an appeal. A person who makes a

> human rights claim is asserting that they (or someone connected with them) have, for whatever reason, a right recognised by the ECHR, which is of such a kind that removing that person or requiring them to leave would be a violation of that right. In the case of a qualified right, such as Article 8, a violation may result from the fact that it would be disproportionate to remove or to require the person to leave.
>
> 32. Accordingly, the refusal of a human rights claim made by a person who is in the United Kingdom can occur only where the Secretary of State's case, in response to the claim, is that she does not consider her obligations under section 6 of the 1998 Act require her to respond to the claim by recognising the human right to remain in the United Kingdom and so granting the individual leave to remain."

The appeal

13. There is one ground of appeal, namely that the UT erred in law in holding that the appellant has no right to appeal to the FTT under s. 82(1)(b) of the Act.

14. The Appellant is now represented by Mr Zane Malik QC. The Defendant FTT adopts a neutral stance and has not taken an active part in the appeal. The Interested Party is now represented by Ms Lisa Giovannetti QC and Mr Simon Murray. Neither Mr Malik nor Ms Giovannetti appeared below, though Mr Murray did. I am grateful to all counsel for the clarity and quality of their submissions, both written and oral.

15. The Appellant advances six strands of argument. They fall to be considered both singly and cumulatively but, for convenience, I follow the sequential order adopted by the Appellant. It is, I think, fair to describe the Appellant's submissions as concentrating on the fact that the Secretary of State did not accede to his application for indefinite leave to remain and the Respondent's as concentrating on the fact that she gave limited leave to remain as a result of which there is no requirement on the Appellant to leave the United Kingdom. The same approach can be detected in the parties' approach to the position on or after 21 September 2021. The Appellant concentrates on the fact that his present leave will have run out; the Respondent says that she has not made any decision about what happens then. It will of course be open to the Appellant to make a further application for permission to remain after that date, on whatever grounds he chooses to advance.

First strand: constitutional right of access to justice

16. The Appellant submits, relying on *Saleem v Secretary of State for Home Department* [2000] EWCA Civ 186 and *UNISON v Lord Chancellor* [2017] UKSC 51 at [80], that the UT gave no consideration to the constitutional right of access to justice; and that, if it had done so, if should have concluded that a right of appeal to the FTT is a fundamental right, akin to access to the Courts, which should not be restricted or abolished in the absence of clear statutory language.

17. The first thing to note is that this point was not taken before the UT. That said, I do not accept that there is substance in the point. Each of the authorities upon which the

Appellant relies was a case where a rule making power had been exercised in such a way as to impede the exercise of a statutory right of appeal or (in the case of *UNISON*) in such a way as to prevent the effective implementation of the rule of law. In the present case, we are concerned with the proper interpretation of the primary legislation of the Act.

18. The starting point should be the legislative intention of the provisions, as revealed by a proper understanding of the words of the provisions themselves. Reading s. 82(1)(b) with the definition of "human rights claim" interposed leads to the following composite provision: a person may appeal to the [FTT] where the Secretary of State has decided to refuse a claim made by that person to 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 s. 6 of the Human Rights Act 1998 ["the HRA"].

19. In my judgment, and in agreement with the President, the natural meaning of this composite provision is that a right of appeal to the FTT 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.

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.

21. For these reasons, my initial and provisional view would be that the interpretation adopted by the UT does not amount to a restriction of a right of access the justice that would otherwise have existed. Rather, it is to be characterised as a comprehensible scheme for giving access to justice when it is needed, but not otherwise.

22. The Appellant advances two main arguments to defeat this interpretation.

Second strand: inconsistency with the general structure and scheme of Part 5 of the Act

Third strand: failure to recognise distinctions between s. 84(1) and (2) of the Act

23. The Appellant submits that, where the legislature has wished to limit or remove rights of appeal that would otherwise have existed, it does so in clear language. In support, reference is made to ss. 92, 94 and 96 of the Act which use peremptory language such as "A person *may not bring* an appeal … ." The use of these terms is not in doubt; but, equally, they are applied where a right of appeal that would otherwise be given by the terms of the Act is being restricted or curtailed. If anything, the use of those different terms in that context serves to emphasise that s. 82(1)(b) is a provision of a different type – one that creates a right of appeal rather than one that curtails a right that would otherwise exist.

24. Nor do I consider that the Appellant is assisted by comparing the terms of s. 84(1) and (2) of the Act. S. 84(1) specifies the three grounds on which an appeal against the refusal of a protection claim may be brought. Each ground focuses on the removal of the applicant from the United Kingdom being in breach of the United Kingdom's obligations or unlawful under s. 6 of the HRA. By contrast, s. 84(2) specifies the single ground on which an appeal against the refusal of a human rights claim may be brought, namely that "the decision is unlawful" under s. 6 of the HRA. The Appellant submits that there must be a reason for referring to "the removal of the appellant" in s. 84(1) of the Act but not in s. 84(2). I agree and think that the reason is plain: unlike an appeal under s. 84(1) against the refusal of a protection claim, appeals under s. 84(2) are not solely concerned with removal of the appellant because refusal of a human rights claim may also involve refusal of entry. The different language is therefore required to cover all appeals that may arise under s. 84(2).

25. In my judgment, the interpretation adopted by the UT is consistent with the general structure and scheme of Part 5 of the Act. This emerges most clearly once s. 104(4A) is brought into play. It provides that an appeal under s. 82(1)(b) brought by a person while they are in the United Kingdom shall be treated as abandoned if they are granted leave to enter or remain in the United Kingdom. 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 to the FTT 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.

Strand four: the refusal of the Appellant's application

26. The Appellant draws a distinction between the refusal of his claim for indefinite leave to remain on 28 February 2019 and the decision to grant him limited leave on 21 March 2019. He is enabled to do so because of the reference in the 28 February 2019 response to the Appellant falling to be granted limited leave "were [he] to make a valid application for such leave." He submits that the refusal of indefinite leave should be seen in isolation and that, as his application for indefinite leave was a human rights claim, as defined, there has been a refusal of a human rights claim within the meaning of s. 82(1)(b) of the Act.

27. I would reject this strand of reasoning for two reasons. First, it seems to me to be entirely artificial to try to split the Secretary of State's decision-making process in this way. The context is important. By his application the Appellant accepted and agreed

that, if he did not qualify for indefinite leave to remain his application should be treated as an application for limited leave and that he might be asked to pay the immigration health contribution. That is exactly what happened; and by the letter of 28 February 2019 the Secretary of State gave an unambiguous indication that the applicant would be granted limited leave, subject only to payment of the immigration health charge. While the reference to the Appellant making a valid application for limited leave makes the Appellant's submission possible, it was immediately followed by the statement that the Secretary of State was now treating his application as an application for limited leave to remain. The wording may have been sub-optimal but, in my judgment, its meaning is clear. I would therefore see the response of 28 February and the decision notice of 21 March 2019 as part of one decision-making process. This approach is also consistent with the form of the decision notice dated 21 March 2019, which dealt with the reasons for refusing indefinite leave to remain, the fact that the application had been considered as an application for limited leave to remain, and the decision to grant permission to stay until 21 September 2021.

28. In this regard, Mr Malik accepts (correctly in my view) that on receipt of the Secretary of State's response of 28 February 2019 the Appellant was possessed of an application for limited leave that was valid, though it would have been treated as invalid if he had failed to pay the immigration health charge. He also accepts (equally correctly) that on the facts of this case there has never been a moment since submission of his application, when the Secretary of State was saying or could properly have said that it would be lawful to remove the Appellant, or to require him to leave or refuse him entry into the United Kingdom. This is not a promising foundation for Mr Malik's submission that the Secretary of State has rejected a claim that it would be unlawful to remove him, require him to leave or to refuse him entry.

29. Second, the submission concentrates upon the contents of the application rather than what the Secretary of State has refused, and they are different. As is clear from the composite version of s. 82(1)(b) set out at [18] above, the test to be applied is not what the applicant has applied for but what the Secretary of State has refused. Even when read in isolation and put at its highest for the Appellant, the response of 28 February 2019 left open whether the Secretary of State would decide that it was or was not unlawful to remove the Appellant from or require him to leave the United Kingdom or to refuse him entry. Therefore, the 28 February response was not a decision to refuse a human rights claim as defined; and, for the reasons given above, the 21 March 2019 decision was to the opposite effect.

Fifth strand: a refusal of an application is refusal of human rights claim even if removal is not contemplated

30. The Appellant seeks comfort from the statement and reasoning of Lord Carnwath in *Patel v Secretary of State for the Home Department* [2013] UKSC 72 at [29] that "the law has moved beyond the proposition that human rights only arise on removal decisions." The statement is uncontroversial, but was made in a different context. In the present context, it is common ground that the availability of an appeal to the FTT is dependent upon whether the Secretary of State has refused a human rights claim and not on whether a decision has been taken to enforce removal (or refuse entry, as the case may be). That does not assist in resolving the present issue, namely what constitutes refusal of a human rights claim.

Sixth strand: the Secretary of State's decision will be amenable to judicial review

31. The Appellant submits that, on a Judicial Review, the UT will make its own findings of fact and a fresh decision; and that it is "wrong in principle and deeply unattractive that justice has to be separately secured by a circuitous and arguably inappropriate route". The reasoning underlying this submission appears to be that (a) a refusal of indefinite leave to remain will give rise to Judicial Review proceedings based upon Article 8 ECHR, and (b) the FTT is better placed to conduct a fact finding hearing than the UT.

32. I accept that Judicial Review proceedings based upon Article 8 ECHR may require a fact finding hearing: see *Balajigari* at [104]. However, I do not accept that a refusal of indefinite leave to remain will engage an applicant's Article 8 rights where the refusal does not render the applicant liable to be removed, or require them to leave the United Kingdom (or be refused entry, as the case may be). I respectfully adopt what was said by Underhill LJ (with whom Gloster and Simon LJJ agreed) in *R (MS (India)) v SSHD* [2017] EWCA Civ 1190 at [138]: "it is important to bear in mind that the withholding of ILR is not in itself an interference with Article 8 rights."

33. To my mind, there is nothing that is either wrong in principle or unattractive in practice in adopting the interpretation for which the Respondent contends. There is a right of appeal to the FTT when there is a present and real need after refusal of a human rights claim (as defined). Otherwise, a decision to refuse indefinite leave to remain is only challengeable on normal public law grounds. In my judgment the legislative purpose is clear, as are the words used to implement it: Parliament has determined that the additional protection of an appeal to the FTT shall be available in the case of the most extreme outcome, namely where the effect of the Secretary of State's decision is to render the applicant liable to removal or a requirement to leave or refusal of entry, but not otherwise.

34. Mr Malik submitted that this led to the odd result that, the stronger an applicant's Article 8 grounds, the less likely it would be that there could be an appeal to the FTT against the refusal to grant indefinite leave to remain. Even accepting, for the purposes of argument, that this could be so, it does not subvert the clear meaning of the words of the Act.

35. In considering the Appellant's submissions sequentially, I have borne in mind the need to consider them cumulatively as well. Despite the clarity with which the submissions were advanced, I am unable to find more substance when considering them cumulatively than when considering them individually.

Conclusion

36. I would uphold the reasoning and decision of the President. If my Lords agree, I would dismiss this appeal.

Green LJ

37. I agree.

Underhill LJ

38. I also agree.