IAC-CH-AP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01414/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 3rd October 2014	**On 27th October 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

T R K
(ANONYMITY DIRECTION MADE)

Claimant

Representation:

For the Claimant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr O Rhys James Counsel

DETERMINATION AND REASONS

1. It has previously been found appropriate, given this appeal involves asylum issues, that the Claimant be granted anonymity unless and until the Tribunal directs otherwise. As such, no report of these proceedings shall directly, or indirectly, identify the Claimant or any members of his family. Failure to comply with this direction could be a contempt of court.

2. The Appellant in these proceedings is the Secretary of State, who was the Respondent before the First-tier Tribunal. For ease of reference, we refer to the parties as the Secretary of State and the Claimant.

3. The Secretary of State appeals with permission of the Upper Tribunal a decision of First-tier Tribunal Judge Harries promulgated on 24th April 2014 in which she allowed the Claimant's appeal against the decision of the Secretary of State, made on 13th February 2014, to refuse him leave to enter.

4. This Sri Lankan Claimant's history, so far as it is relevant, is that he claimed to have arrived here illegally in August 2004. Of his own volition he left the UK on 25 October 2006, travelling to Italy, where he went to join a friend, on a forged Home Office Travel Document. After only two or three hours in Italy, he tried to leave on a false passport. He was discovered and arrested. He admitted the use of false documents. The Italian authorities put him on a flight to the UK. On arrival, and so at the port of entry, he claimed Asylum airside. He was granted temporary admission.

5. In November 2006 the Asylum claim was rejected; it was initially certified as wholly unfounded but, following representations, that decision was withdrawn in May 2013. The Secretary of State made a fresh decision in February 2014. The Secretary of State refused the Claimant leave to enter on the grounds that the Claimant was seeking to enter the United Kingdom for a purpose other than one for which entry is permitted by Immigration Rules (Section 88(2)(d) Nationality, Immigration and Asylum Act 2002), and when giving notice of that decision explained in a reasons for refusal letter why she found he had failed to make out his claim for international protection, and also gave notice of her intention to give directions for his removal to Sri Lanka. The claimant appealed to the First-tier Tribunal, raising international protection and human rights grounds. The appeal came before Judge Harries who, following a hearing on 07 April 2014, allowed his appeal on the grounds that the decision was "otherwise not in accordance with the law".

6. The pertinent parts of the judge's decision appear at paragraphs 26, 27, 28, 40 and 41.

> "26. Having considered all the submissions in relation to the removal decision appealed against I find that it was not made by the respondent in accordance with the law. I am satisfied that there is an immigration decision but I find that it was made on the wrong grounds as submitted by Miss Physsas for the Appellant. I find that at the relevant time the Appellant was not seeking to enter the United Kingdom for a purpose other than one for which entry is permitted by the Immigration Rules with reference to section 88(2)(d) of the Nationality, Immigration and Asylum Act 2002.
> 27. The circumstances are that the Appellant has not sought leave to enter the United Kingdom at any time; he entered illegally in 2004 and was returned involuntarily in 2006 after his arrest in Italy and removal back

to the United Kingdom. On one view of it his status on return to the United Kingdom, albeit he was granted temporary admission, must have been as it was when he departed, namely that he continued to be an illegal entrant. In these circumstances the removal decision should have been made on these grounds when his asylum claim was rejected.

28. If I am wrong in that regard and the Appellant was seeking leave to enter the United Kingdom I accept the submission from Miss Physsas that seeking asylum is a purpose permitted by the Immigration Rules so that in either event the respondent has made the removal decision on the wrong grounds and therefore not in accordance with the law. The Appellant therefore awaits a lawful decision from the respondent. In these circumstances I have not determined the appeal on any other grounds but have made the following findings in relation to the asylum claim for future reference.

...

40. In the light of my findings set out above and my rejection of the core aspects of the Appellant's claim I do not accept that he is an individual who is, or is perceived to be, a threat to the integrity of Sri Lanka as a single state because he is or would be perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka. Nor do I accept that the Appellant is a person whose name appears on a computerised 'stop' list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. I accordingly find that the Appellant is not an individual whose name appears on a 'stop' list or that he will be stopped at the airport and handed over to the appropriate Sri Lankan authorities in pursuance of such order or warrant.

41. In the light of my finding that the decision of the respondent is not in accordance with the law I do not determine the appeal to a conclusion in relation to the remaining grounds of appeal. If I were to do so I would not find under the terms of the United Nations Convention relating to the status of refugees that the Appellant has shown a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. I would not be satisfied that the Appellant has established a well-founded fear of persecution if returned to Sri Lanka for a reason within the 1951 Convention. I would find that the Appellant's removal would not cause the United Kingdom to be in breach of its obligations under the 1951 Convention."

7. The Secretary of State's grounds are that the judge's finding that the decision was "otherwise not in accordance with the law" is erroneous because, on his return to the UK, the Claimant sought to enter the UK by virtue of being a refugee. In those circumstances, in the face of a refusal of refugee status, the only decision available to the Secretary of State is a refusal of leave to enter. In a subsidiary point, the grounds argue that the judge's finding the Claimant is an illegal entrant is also erroneous in law because he left the United Kingdom voluntarily to travel to Italy. He had not been "forcibly removed" as the judge had found.

8. The Claimant attended the hearing before us. As no application to adduce additional evidence was made it was not necessary for us to hear from him, and the representatives proceeded on the basis of submissions only.

9. At the commencement of the hearing we indicated that we saw the merit in the grounds, and asked Mr James if there were arguments he could put forward to countermand the arguments. As the discussion unfolded, Mr James conceded that the judge's finding that the Claimant is an "illegal entrant" was unsustainable. Mr James recognised that the Claimant's earlier status as an illegal entrant was made irrelevant in the context of current appeal rights because of his having exited the country, and could not be determinative of his status when, on 25th October 2006, he was airside at the port, and seeking leave to enter as a refugee. He did not become an illegal entrant for a second time because he was permitted to pass through immigration control with the benefit of temporary admission. Whilst temporary admission does not operate as "leave to enter", his presence cannot be characterised as being illegal in the context of the 1971 Immigration Act.

10. Mr James sought to sustain the judge's decision on an alternative novel basis. In terms Mr James did not accept that the Immigration Rules made no provision for entry clearance for the purpose of claiming asylum. He argued that because the Claimant was making his claim for refugee status airside he was obviously seeking leave to enter to make or pursue an asylum claim. Asylum came within The Immigration Rules of HC 395, and so the Claimant was making an application for a purpose covered by them. Had the Claimant's claim been successful, he would have been granted leave to enter, so it followed that he was seeking entry for a purpose which was accommodated in the Rules.

11. Mr James took us to paragraph 331 of the Immigration Rules which states as follows:

> "331. If a person seeking leave to enter is refused asylum or their application for asylum is withdrawn or treated as withdrawn under paragraph 333C of these Rules, the Immigration Officer will consider whether or not he is in a position to decide to give or refuse leave to enter without interviewing the person further. If the Immigration Officer decides that a further interview is not required he may serve the notice giving or refusing leave to enter by post. If the Immigration Officer decides that a further interview is required, he will then resume his examination to determine whether or not to grant the person leave to enter under any other provision of these Rules. If the person fails at any time to comply with a requirement to report to an Immigration Officer for examination, the Immigration Officer may direct that the person's examination shall be treated as concluded at that time. The Immigration Officer will then consider any outstanding applications for entry on the basis of any evidence before him."

12. Mr James submitted that the Secretary of State's decision: that the Claimant was making an application for a purpose outwith the rules, was

not simply a "wrong" decision in the context of the applicable rules and amenable to an appeal on the ground that it was "not in accordance with the immigration rules", but an unlawful one, so as to be correctly identified by the judge as a decision which was "otherwise not in accordance with the law". Further, the decision gave rise to a defective notice which, as a result of being defective, was incapable of giving rise to a valid right of appeal. It followed the First-tier Tribunal had no jurisdiction and the Claimant awaited a correct lawful decision notice.

13. Mr Richards in response relied on the grounds of the application. He asserted that no disadvantage had been caused to the Claimant by the use of the particular form of decision. The Claimant had been given the opportunity to make out his claim for international protection to the Secretary of State and to the Tribunal. There was no suggestion that the judge's decision rejecting the Claimant's entitlement to refugee status contained any error. The judge had not dealt with Article 8 but there is no cross appeal on that basis.

14. Mr James clarified that the Claimant raised no issue in respect of the Judge's findings rejecting the Claimant's claims for international protection in respect of the Refugee Convention and Articles 2 and 3 of the ECHR. Mr James further clarified that in terms of Article 8 any disturbance was to Private rather than Family Life, and limited to that resulting from return to Sri Lanka in the context of his residence here on temporary admission from 24th October 2006 until the date of return. The evidence to the First Tier was limited to confirmation of the Claimant's having been provided with accommodation, and there was nothing going to the character and quality of Private Life enjoyed, or the severity of interference consequent upon removal.

Discussion

15. The crux of the appeal as it was before us was the challenge to the judge's finding at paragraph 28 that the Secretary of State's immigration decision refusing leave to enter was made unlawful by her finding that the Claimant had not made an application for a purpose for which entry is permitted by the Immigration Rules.

16. We reject Mr James's bold contention that the Rules permit entry for the purposes of either claiming or pursuing an asylum claim. Mr James' reference to paragraph 331 is misconceived. The Rules make provision for the grant of leave where a claim for asylum is established: they do not make any provision for leave to enter for that purpose. However, even if the Claimant had been seeking to enter the United Kingdom for a purpose for which entry is permitted by the Immigration Rules, so that the Secretary of State's decision was wrong in that regard, then that is a matter subject to resolution on appeal available to the Claimant out of country on the ground available under the Nationality, Immigration and Asylum Act 2002 Section 84 (1) (a) that the decision is "not in accordance with the Immigration Rules" rather than at Section 84 (1) (e) i.e.

"otherwise not in accordance with the law". As it happens, in this case the Claimant failed to put forward any basis within the Rules for seeking entry, and so there is no substantive point to avail him in that regard in any event.

17. The relevant statutory provisions of the Nationality, Immigration and Asylum Act 2002 : Section 82, Section 84, and Section 88 are as follows:

"82 Right of appeal: general

(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal**]** .

(2) In this Part 'immigration decision' means—

(a) refusal of leave to enter the United Kingdom,

(b) refusal of entry clearance,

(c) refusal of a certificate of entitlement under section 10 of this Act,

(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,

(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,

(f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,

(g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom),

(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal),

(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),

(ia) a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c. 77) (seamen and aircrews),

(ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),

(j) a decision to make a deportation order under section 5(1) of that Act, and

(k) refusal to revoke a deportation order under section 5(2) of that Act.

(3) N/A

(4) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part."

84 Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—

(a) that the decision is not in accordance with immigration rules;

(b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c. 74) (discrimination by public authorities) or Article 20A of the Race Relations (Northern Ireland) Order 1997;

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the Claimant's Convention rights;
(d) that the Claimant is an EEA national or a member of the family of an EEA national and the decision breaches the Claimant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;
(e) that the decision is otherwise not in accordance with the law;
(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;
(g) that removal of the Claimant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the Claimant's Convention rights**.**

88 Ineligibility
(1) This section applies to an immigration decision of a kind referred to in section 82(2)(a), (b), (d) or (e).
(2) A person may not appeal under section 82(1) against an immigration decision which is taken on the grounds that he or a person of whom he is a dependant—
(a) does not satisfy a requirement as to age, nationality or citizenship specified in immigration rules,
(b) does not have an immigration document of a particular kind (or any immigration document),
(ba) has failed to supply a medical report or a medical certificate in accordance with a requirement of immigration rules,
(c) is seeking to be in the United Kingdom for a period greater than that permitted in his case by immigration rules, or
(d) is seeking to enter or remain in the United Kingdom for a purpose other than one for which entry or remaining is permitted in accordance with immigration rules.
(3) N/A
(4) Subsection (2) does not prevent the bringing of an appeal on any or all of the grounds referred to in section 84(1)(b), (c) and (g)."

18. Now to apply those provisions to the position of the Claimant. We find the Claimant was seeking leave to enter. We are certain of that because he asked to be recognised by the UK as a refugee. He was then entitled to, and the Respondent was duty bound to make, an Immigration Decision, as to whether or not he would be granted entry. The decision is one that falls within Section 82 (2) (a) of the 2002 Act. The Claimant was given a right of appeal because the Statute, in the same provision, provides that it is it is an appealable decision. We pause to note that in the face of the Statutory provisions the submission that the decision gave rise to a defective notice and so no valid right of appeal lacks coherence.

19. The Claimant appealed.

20. An immigration decision within Section 82 (2) (a), which, as we have reasoned, this is, carries only limited grounds of appeal because of the

provision of Section 82 (4), which refers to the restrictions contained in the same part of the Act, restrictions which, at Section 88 (2)(d) of the eligibility provisions, limit the grounds available to those at Section 84 (1) (b), (c) and (g). In short, discrimination, refugee and ECHR grounds. Saving provisions are set out at Section 88(4), but none applies to the Ground of Appeal at Section 84(e), i.e. "that the decision is otherwise not in accordance with the law".

21. The Claimant raised asylum and human rights grounds and so he raised two grounds of appeal which require determination in country. That is how he came to have the benefit of an in-country right of appeal by virtue of Section 92(3C).

22. However it appears that neither representative drew the judge's mind to the relevant statutory provisions. Nevertheless whatever the merits of the reasons given by the Immigration Officer, there can be no argument that the decision was made on the grounds specified in s 88 (2) (d). The grounds of appeal are therefore limited to those in paragraphs (b), (c) and (g) of s 84(1).

23. To conclude: although the Refugee Convention and ECHR grounds raised in the notice of appeal were before the judge, the ground in the 2002 Act at s 84 (e) "otherwise not in accordance with the law", relied on by counsel at the First–tier Tribunal, and on which the judge allowed the appeal, was not available.

24. It follows that we find that the decision of First-tier Tribunal Judge Harries, to the extent that it purported to find that the decision was "otherwise not in accordance with the law", is in error, and must be set aside.

25. The judge's findings dismissing the merits of the grounds in respect of the Refugee Convention, Articles 2 and 3 ECHR, all of which stood together, are not challenged, and so stand as determinative of the dismissal of the grounds of appeal on those issues.

26. In terms of the merits of the Article 8 ground of appeal, no findings were made by Judge Harries, and so the ground is before us to determine. The ground of appeal is formulaic. Mr James clarified that reliance is on private life, as opposed to the existence of any family life. Unsurprisingly, in the context of the relevant jurisprudence and the scant evidence of the character and quality of the Private Life currently enjoyed by the Claimant, or of interference with it beyond the bald statement of relocation to Sri Lanka consequent to removal, Mr James did not seek to press upon us that this was an alternative ground upon which the Claimant could hope to succeed. In remaking the decision we also dismiss the Claimant's appeal on human rights grounds.

27. For all of the reasons set out above the Secretary of State's appeal succeeds; we set aside the decision of the First-tier Tribunal, and we remake the decision and dismiss the Claimant's appeal on all grounds.

Signed Date: 3rd October 2014
Deputy Upper Tribunal Judge Davidge