Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/16764/2014
IA/16765/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 2 June 2015 **On 5 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

NAYANKUMAR MAGANBHAI PATEL
NRUPALBEN NAYANKUMAR PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: None
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

The History of the Appeal

1. The appellants, who are citizens of India and husband and wife, appealed against immigration decisions taken against each of them on 31 March 2014 together with respective forms IS151A providing for their removal from the United Kingdom.

2. Their appeals were heard on 21 January 2015 by Judge Hussain sitting at Richmond. Both parties were represented, the appellants by Counsel instructed by their present representatives. Judge Hussain heard submissions on the preliminary issue whether the appellants had a right of appeal exercisable within the United Kingdom. Contingently on finding

that they did, he heard the appeals substantively. In his determination of 9 February 2015, promulgated on the following day, he concluded that they did not have rights of appeal exercisable within the United Kingdom. He therefore dealt with the appeals on that basis and without considering them substantively.

3. The appellants sought permission to appeal, which was granted on 17 April 2015 by Judge Parkes in the following terms:

> "1. The appellants seek permission to appeal against a decision of First-tier Tribunal Judge Hussain promulgated on 10 February 2014 whereby the appellants' appeals against the Secretary of State's decision were found to be invalid. The application is in time and is admitted.
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> 2. The question of the appellant's right of appeal was raised at the hearing. The judge found that the appellants did not have an in-country right of appeal and that, whilst they remained in the UK there was no valid appeal. This was on the basis that the decision under appeal was a decision to remove them and not a decision to vary their leave, reliance was placed on **Nirula** [2012] EWCA Civ 1436.
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> 3. At the time of the removal the appellants had LTR. On the same day as the removal notice was served, 31/3/2014, the appellants were served with an IS151A which stated that his LTR was cancelled. It is arguable that the judge erred in relation to the variation of the appellant's leave. The judge was right in finding that no human rights application had been made pre-decision.
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> 4. The grounds are arguable and permission to appeal is granted."

4. The error of law hearing was listed before me for 10.00 a.m. on 2 June 2015. There was no appearance by the appellants nor their representatives, Malik Law Chambers. At my request the usher telephoned the representatives at 10.20 a.m. They reported that they had told the appellants of the date of the hearing and had requested fees in order to instruct Counsel, whenceforth they had heard nothing from them. They were therefore without instructions and would not be attending the hearing, for which they apologised for not having informed the Tribunal. Their letter to that effect arrived later in the day.

5. I conveyed this information to Mr Avery. In the exercise of my discretion I heard the appeal in the absence of the appellants and their representatives. Mr Avery made submissions, which I have taken into account, together with the grounds of appeal. I reserved my decision.

Determination

6. The appellants' submissions are set out in their grounds of appeal. They are essentially that the decisions were decisions to vary their leave to enter or remain in the United Kingdom, made under Section 82(2)(e) of the Nationality, Immigration and Asylum Act 2002. On that basis Section 92 of the 2002 Act conferred a right of appeal exercisable with the United Kingdom. However the judge found at paragraphs 8 and 9 of his determination that they were respective decisions for the husband that as an illegal entrant he be removed from the United Kingdom by way of directions under Section 82(2)(h) and for the wife that she be removed from the United Kingdom by way of directions as a person unlawfully there under Section 82(2)(g). These are categories of decisions which under Section 92 do not confer a right of appeal exercisable within the United Kingdom.

7. Construing both decisions and forms IS151A I find that they are not decisions to vary leave to enter or remain in the UK. Rather they are removal directions under the respective removal provisions of the 1971 and 1999 Acts. I find that the judge was correct to categorise them as he did.

8. Section 92 of the 2002 Act provides that, whereas there is an in-country right of appeal against decisions made under Section 82(2)(e), there is not such a right of appeal in relation to those made under Section 82(2)(g) or (h).

9. At first impression the language of section 92 is substantive, in the sense that the Tribunal does not have jurisdiction to entertain such an appeal, rather than procedural, in the sense that the issue, as for example a statue of limitation, depends upon its being pleaded by one of the parties. In the grounds of appeal the appellants submit that on the basis of case law it is procedural. These cases have not been placed before the Tribunal. Without sight of them, or submissions on the issues, I am not able to evaluate this submission. Construing the language of section 92, I find the bar on an in-country right of appeal to be substantive rather than procedural.

10. Should that on the basis of authority be wrong, section 92(4) provides that there is an in-country right of appeal where a person has made an asylum or a human rights claim while in the UK. Considering this provision in the light of authority, the judge found as a fact at paragraph 14 that the appellants had not made such a claim. On that alternative basis also I find that he was correct.

11. I conclude that the decision of Judge Hussain was correct in law, and accordingly uphold it.

Decision

12. The original determination contains no error of law and is upheld.

Signed

Deputy Upper Tribunal Judge J M Lewis Dated: 3 June 2015