Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52360/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 13 January 2015	**On 21 January 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

IMMIGRATION OFFICER, HEATHROW

Appellant

And

JM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: No representative

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. This is an appeal against a decision of the First-tier Tribunal (Judge Doyle) allowing JM's appeal against the Immigration Officer's decision refusing to grant him leave to enter taken on 11 December 2013.

3. For convenience, I will refer to the parties hereafter as they appeared before the First-tier Tribunal.

4. The appellant, a citizen of Namibia, was born on 13 December 2003. His mother, TR lives in the UK and has indefinite leave to remain. The appellant entered the UK as a visitor in October 2007 and his subsequent application for leave to remain to settle with his mother was unsuccessful. As a result of that, he returned to Namibia where he lived with his grandmother. An application to settle in the UK made from Namibia was refused by the Secretary of State in February 2008. Finally, on 31 October 2008, the appellant was refused leave to enter the UK as a visitor.

5. The current appeal arises out of the appellant's arrival in the UK at Heathrow Airport on 11 December 2013. He sought leave to enter as a visitor. He did not have entry clearance. On that day, the Immigration Officer at Heathrow refused the appellant leave to enter as a visitor and proposed to remove him to Namibia. Relying, in part, upon the appellant's immigration history the Immigration Officer was not satisfied that the appellant would leave at the end of his visit.

6. In refusing the appellant leave to enter, the notice of decision points out that the appellant only had a limited right of appeal under sections 88 and/or 89 of the Nationality, Immigration and Asylum Act 2002 as the decision has been taken on the basis that the appellant:

> "Do[es] not have entry clearance valid for the purpose for which your application for leave to enter was made."

The Appeal

7. The appellant appealed to the First-tier Tribunal. In his grounds of appeal the appellant specifically relied upon the grounds in s.84(1)(b), (c) and (g) of the 2002 Act namely, race relations, human rights and Refugee Convention grounds. That, as will become clear shortly, is consistent with the limited right of appeal available to the appellant under s.89(2) of the 2002 Act. In particular, of course, the appellant was relying upon Article 8 and the right to respect for his private life based on the fact that his mother had ILR in the UK, his step-father was in the UK as her spouse and his sibling also lived in the UK.

8. Judge Doyle allowed the appellant's appeal. He did so on two bases. First, he was satisfied that, in fact, the appellant met the requirements of the visitor rule, namely para 41 of HC 395 (as amended). Secondly, Judge Doyle concluded that the Immigration Officer's decision was "not in accordance with the law" as the Immigration Officer had failed to have

regard to his duty under s.55 of the Borders, Citizenship and Immigration Act 2009 and the welfare of the appellant who was an 11 year old child. As regards the appellant's reliance upon his human rights, and in particular Article 8, Judge Doyle concluded that there was not a valid appeal before him.

9. The Immigration Officer sought permission to appeal on the basis that there was no valid appeal before the First-tier Tribunal. On 6 October 2014, the First-tier Tribunal (Judge Lever) granted the Immigration Officer permission to appeal on that basis. Thus, the appeal came before me.

10. At the hearing, the appellant was unrepresented but his step-father, SK spoke on his behalf.

11. Mr Richards submitted that the Judge was wrong to allow the appeal under the Immigration Rules and on the basis that the decision was "not in accordance with the law" as the only permitted grounds of appeal under s.89(2) of the 2002 Act were race relations, human rights and Refugee Convention grounds. Mr Richards accepted that the appellant had relied upon Article 8 in his notice of appeal to the First-tier Tribunal, however, he submitted that nevertheless the appellant had only an out of country appeal on that ground because of the effect of s.92 of the 2002 Act. Consequently, he invited me to allow the Immigration Officer's appeal and substitute a decision that there was no valid appeal on any basis before the First-tier Tribunal.

Discussion

12. The relevant statutory provision which creates a right of appeal against a decision to refuse an individual leave to enter is set out in s.82(1) and (2)(a) of the 2002 Act. That states as follows:

> "(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,…"

13. That was the relevant immigration decision made against the appellant on 11 December 2013.

14. However, by virtue of s.89 of the 2002 Act, in certain circumstances, the right of appeal against refusal of leave to enter is limited to "bringing" an appeal on one or more of the grounds set out in s.84(1)(b), (c) and (g) which in shorthand, amount to race relations, human rights and Refugee Convention grounds.

15. So, s.89(2) states that:

> "(1) A person may not appeal under section 82(1) against refusal of leave to enter the United Kingdom unless –

(a) On his arrival in the United Kingdom he had entry clearance, and

(b) The purpose of entry specified in the entry clearance is the same as that specified in his application for leave to enter."

16. The appellant did not have entry clearance when he arrived in the United Kingdom and so s.89(1) applied so that he "may not appeal under section 82(1)". However sub-section 2 provided for a limited right of appeal as I have already indicated above:

"(2) Sub-section (1) 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)."

17. Consequently, and Mr Richards accepted, in this appeal the appellant could in principle bring an appeal against the Immigration Officer's decision on 11 December 2013 but only on one or more of the specified grounds, namely race relations, human rights and Refugee Convention grounds.

18. In fact, the appellant relied upon all of these although, in particular, the substance of his appeal was under Article 8 of the ECHR.

19. It is clear to me that when an individual is permitted to "bring" an appeal because he has relied on one of the specified grounds, his appeal is limited to the grounds relied upon. He cannot rely upon other grounds set out in s.84 of the 2002 Act, for example that the decision was not in accordance with the Immigration Rules (s.84(1)(a)) or that the decision was "otherwise not in accordance with the law". (s.84(1)(e)). The effect of section 89 when s.89(2) allows for the bringing of an appeal is not to open up an appeal on any grounds but only those upon which the individual has the limited right of appeal specified in s.89(2). In my judgement the "bringing of an appeal" in s.89(2) is not limited to 'commencing' an appeal but also delimits the scope of any appeal properly brought on one or more of those grounds.

20. Even without more, therefore, it is clear that the Judge was not entitled to allow the appellant's appeal on the basis that he met the requirements of the Immigration Rules or that the Immigration Officer's decision was not in accordance with the law. That was not a ground upon which the appeal could be brought or subsequently maintained.

21. However, there is a further reason why the Judge erred in law in dealing with the appellant's appeal. That is because even though the appellant had a right of appeal under s.89(2) on the limited grounds specified in s.89(2) he could only bring that appeal out of country. He had no in-country right of appeal against the refusal to grant him leave. Whether an appeal, can be brought from within the United Kingdom is governed by s.92 of the 2002 Act. Section 92(1) states that:

> "(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies."

22. Section 92(2) set out a number of immigration decisions contained in s.82(2) to which s.92 "applies". Section 92(2) provides:

> "(2) This section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f), (ha) and (j)."

23. Omitted from that list is the immigration decision defined in s.82(2)(a), namely a refusal of leave to enter.

24. However, s.92 goes on to recognise a number of situations where an in-country right of appeal exists. Section 92(3) deals with leave to enter the United Kingdom. It provides as follows:

> "(3) This section also applies to an appeal against refusal of leave to enter the United Kingdom if –
>
> (a) at the time of the refusal the appellant is in the United Kingdom, and
>
> (b) on his arrival in the United Kingdom the appellant had entry clearance."

25. Sub-sections (3A)-(3D) create a number of exceptions to the in-country right of appeal conferred by s.92(3) but none are relevant to this appeal.

26. The effect of s.92(3) is that, subject to sub-sections (3A)-(3D), there is an in-country right of appeal against refusal of leave to enter where the appellant is in the UK and on his arrival in the UK the appellant had entry clearance. That, obviously, has no application to the appellant as he did not have entry clearance on arrival in the UK. That was the very basis upon which his right of appeal was limited by s.89. Consequently, s.92(3) did not confer an in-country right of appeal against the refusal of leave to enter made in respect of the appellant even on the limited grounds set out in s.89(2).

27. The remaining provision in s.92 potentially relevant to the appellant is in s.92(4) which states that:

> "(4) This section also applies to an appeal against an immigration decision if the appellant –
>
> (a) has made an asylum claim, or a human rights claim, while in the United Kingdom, …"

28. In this appeal, the appellant raised for the first time the issue of human rights in his notice of appeal to the First-tier Tribunal. In R (Nirula) and First-tier Tribunal (Asylum and Immigration Chamber) v SSHD [2012] EWCA Civ 1436, the Court of Appeal held that a person who raised human rights

for the first time in a notice of appeal to the First-tier Tribunal did not fall within s.92(4)(a). The Court of Appeal noted the definition of a "human rights claim" in s.113 of the 2002 Act as:

> "A claim made by a person to the Secretary of State…at a place designated by the Secretary of State".

29. The Court of Appeal concluded that the reliance by an individual on his human rights in a notice of appeal was not a claim "made … to the Secretary of State" but rather to the Tribunal. Further, the requirement that the individual "has made" a human rights claim requires that the claim must proceed any appeal which meant that it must have been made before the institution of an appeal.

30. It follows, therefore, that when the appellant raised Article 8for the first time in the notice of appeal it could not be said that he "has made … a human rights claim" whilst in the UK such that by virtue of s.92(4)(a) his limited right of appeal could be exercised whilst he was in the UK rather than out of country.

31. That was, in effect, the reasoning that led Judge Doyle at para 15(d) and (e) to conclude that there was "not a valid appeal in terms of the 1950 Convention before me". In fact, there was not a valid appeal on any basis before Judge Doyle as the appellant could only exercise that right of appeal out of country on the limited grounds set out in s.89(2).

Decision

32. For these reasons, the First-tier Tribunal had no jurisdiction to hear the appellant's appeal.

33. I set aside the First-tier Tribunal's decision to allow the appellant's appeal under the Immigration Rules and on the basis that the Immigration Officer's decision was not in accordance with the law.

34. I substitute a decision that there was no valid appeal before the First-tier Tribunal.

Signed

A Grubb
Judge of the Upper Tribunal
Date: **20 January 2015**

<u>To the Respondent</u>
<u>Fee Award</u>

As a result of my decision that there was no valid appeal before the First-tier Tribunal, no fee award can be made.

Signed

A Grubb
Judge of the Upper Tribunal
Date: **20 January 2015**