Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30633/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision & Reasons Promulgated**
On 8 June 2017	**On 27 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR KHAIR MOHAMED ARAB
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Emma Rutherford (Counsel)
For the Respondent: Mr David Mills (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Gurung-Thapa, promulgated on 26th October 2016, following a hearing at Stoke-on-Trent on 12th October 2016. In the determination, the judge dismissed the appeal of the

Appellant on human rights grounds, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant's Claim

2. The Appellant is a male, a citizen of Afghanistan, who was born on 20th November 1986. He applied against the decision of the Respondent, Secretary of State dated 25th August 2015, revoking his grant of indefinite leave to remain (ILR) pursuant to Section 76(1)(a) and (b) of the NIAA 2002.

3. By a decision dated 5th April 2017, Designated Judge R C Campbell determined that the consequence of the revocation of the Appellant's indefinite leave to remain was that he would be required to now apply for extensions of limited leave. There was no sign in the papers before Designated Judge Campbell of a decision by the Secretary of State refusing a human rights claim made by the Appellant. The question before the Tribunal was whether the Appellant had a right of appeal by way of the transitional provisions relating to the Immigration Act 2014 against a particular decision made by the Secretary of State. Designated Judge Campbell noted how the Tribunal below had referred to the Supreme Court judgment in **George [2014] UKSC 28** in order to conclude that the deportation order made by the Secretary of State on 17th October 2012 invalidated the Appellant's leave. The Secretary of State's instructions and guidance to case owners is that a deportation order made under the UK Borders Act 2007, as in the present case, does not invalidate leave while an in-country appeal can be brought or is pending. Designated Judge Campbell determined that the outstanding question now left for determination by this Tribunal was whether the Appellant had a right of appeal against the August 2015 decision to revoke indefinite leave under Section 76 of the 2002 Act. Taking into account also the fact that the decision under appeal in **George** was not made in accordance with the UK Borders Act 2007, permission to appeal was granted by Designated Judge Campbell.

Submissions

4. At the hearing before me on 8th June 2017, Ms Rutherford, appearing on behalf of the Appellant, handed up three documents in support of her appeal. These included her skeleton argument, the Supreme Court judgment in **George [2014] UKSC 28**, and the relevant transitional provisions that applied.

5. For his part, Mr Mills handed up a statutory instrument in the form of the Immigration Act 2014 (Commencement Number 3, Transitional and Saving Provisions) Order 2014, SI Number 2771. Ms Rutherford argued that in this case the decision to revoke indefinite leave to remain was made on 25th August 2015. This postdated the appeal regime changes which were brought in by the Immigration Act 2014. In accordance with the transitional arrangements there was a right of appeal in this case. This is because Regulation 9 of the Immigration Act 2014 (Commencement Number 3, Transitional and Saving Provisions) Order 2104 states that,

"notwithstanding the commencement of the relevant provisions, the save provisions continue to have effect, and the relevant provisions do not have effect …".

6. Ms Rutherford submitted that the Appellant's offences in this case predated 20th October 2014 and thus he did not become a foreign criminal on or before 20th October 2014. And in regard to Regulation 11, which refers to a person who makes an application on or after 20th October 2014, Ms Rutherford submitted that whereas in the instant case the Appellant did not make an application in the normal manner and the Secretary of State did notify him of her intention to revoke indefinite leave to remain in July 2014, he responded by making representations on 31st July 2014. This meant that the Secretary of State's notification and his response are the equivalent of an application and thus as the process began before 20th October 2014, the Appellant in this case benefited from the transitional and saving provisions. She also added that the grant of permission was limited to whether or not the judge was entitled to conclude that the decision to deport the Appellant had invalidated his indefinite leave to remain.

7. In Reply, Mr Mills submitted that, if one has regard to the transitional provisions of 2014 (number 2771), he would have to accept that the reference there to the section of "transitional and saving provisions and appeals", at part 2 of the statutory instrument, deals with specific kinds of appeal, none of which apply in the Appellant's case, because they essentially refer to a situation on or after 20th October 2014, whereas the Appellant's appeal went back much earlier. His appeal went back to 31st July 2014. But this is not the end of the matter. The reason is that there was no human rights representation made on his behalf, so as to generate a right of appeal.

8. Moreover, one also has to look at the Immigration Act 2014 (Commencement Number 4, Transitional and Saving Provisions and Amendment) Order 2015, which is in the form of statutory instrument number 371. What this did was to amend paragraph 9 of the 2014 transitional provision (SI number 2771) which had stated that "the relevant provisions do not have effect".

9. Under the 2015 order various categories of workers, such as Tier 1 Migrant or Tier 2 Migrant or Tier 4 Migrant still benefit provided that they made their application before 6th April 2015, and the old regime still applies to them, where they complain about a refusal of variation of leave to enter or where they complain about a refusal of entry clearance.

10. But the Appellant is not covered by any of these exceptions. He cannot therefore, have been granted a right of appeal by mistake, where none existed as a matter of law. He had not made a human rights claim at any stage.

My Consideration of the Appeal

11. Following the decision of Designated Judge Campbell on 5th April 2017, the unresolved question in this appeal is regarding whether the Appellant has a right of appeal against the August 2015 decision to revoke the indefinite leave to remain under Section 76 of the 2002 Act. I find that he has no right of appeal.

12. This is a case where the Appellant has never raised a separate and distinct human rights appeal against the deportation decision. After his right to remain in the UK on the basis of the grant of indefinite leave to remain was revoked by the Secretary of State, the Appellant raised a human rights argument within the revocation of that right to remain, but did not do so as a separate human rights application. His human rights claim was considered by the judge below and dismissed.

13. He does not, however, have a right to an appeal if he had not raised a human rights claim which generated such a right of appeal.

14. If such a right was given to him mistakenly, then the normal rule that statute cannot be supplanted by a mistaken exercise of discretion, applies and a no right of appeal does not turn into a right of appeal.

15. In the circumstances, I dismiss the claim. There is no right of appeal.

Notice of Decision

16. The decision of the First-tier Tribunal involved the making of an error on a point of law and it fell to be set aside. I remake the decision as follows. This appeal is dismissed.

17. No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 26th June 2017