Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01512/2015

THE IMMIGRATION ACTS

Heard at FIELD HOUSE	**Decision & Reasons Promulgated**
On 2 April 2019	**On 3 April 2019**

Before

HER HONOUR JUDGE EADY QC (sitting as a Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE RINTOUL

Between

SALIM [L]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: MR A BANDEGANI of Counsel, instructed by Duncan Lewis, Solicitors
For the Respondent: MS S JONES, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This appeal raises a discrete question of law relating to the validity of a decision to set aside an earlier determination. Although this is a pure point of law, it is necessary to first set out the history of this matter so the question can be seen in context.

The Appellant's Immigration History

2. The Appellant is a citizen of Mauritius. He was born on [~] 1980 and first came to the United Kingdom as a visitor on 27 November 2004. In 2005 he made applications for leave to remain as a student nurse but was unsuccessful. On 8 March 2010, the Appellant again applied for leave to remain, this time under para 395C **Immigration Rules**, section 55 **Borders Citizenship and Immigration Act 2009** and art 3 of the **UN Convention on the Rights of the Child**. On 12 January 2011, that application was also refused with no right of appeal (and an attempt to appeal was later struck out on 31 January 2011). Subsequently, the Appellant was arrested and, after twice absconding, on 9 October 2014, he was detained and directions were set for his removal on 14 November 2014.

3. Those directions were cancelled when, on 14 November 2014, the Appellant claimed asylum, based on what he said was his fear for his life if returned to Mauritius – it being the Appellant's case that he had been threatened by both his wife's family and his own family due to disapproval of their marriage. On 23 January 2015, the Respondent refused the Appellant's protection and human rights claims and it was decided that he should be removed from the United Kingdom ("the refusal decision").

4. On 28 January 2015, the Appellant lodged an appeal (Appeal AA/01512/2015) against that decision which was duly listed for hearing before the First-tier Tribunal (FtT Judge Wilson) on 4 February 2014 under the **Fast Track Rules 2014** ("the FTR 2014") then in place. By a reasoned decision promulgated on 12 February 2015, FtT Judge Wilson allowed the appeal on the basis that the refusal decision had not been made in accordance with the law and it was directed that the Respondent should now determine the Appellant's application for leave to remain on the basis of continuing relationship with his children in accordance with section 55 **Borders Citizenship and Immigration Act 2009**. At para 24 of FtT Judge Wilson's ruling, however, it was noted that "*The claim for international protection, namely the request for asylum and or Article 3 and or humanitarian protection is dismissed*".

5. On 11 March 2015, the Respondent issued a further decision to remove the Appellant from the United Kingdom, having refused him leave to remain on the basis of his Article 8 rights. Consideration was given to whether there were significant obstacles to the Appellant's reintegration in Mauritius but it was concluded that there were not.

6. On 16 March 2015, the Appellant then lodged an appeal against the further refusal decision of 11 March 2015 (Appeal AA/04471/2015), claiming that his life would be in danger in Mauritius. That appeal was also listed for hearing under the **FTR 2014** and came before the First-tier Tribunal on 23 March 2015, at which point the Appellant was representing himself. By its decision promulgated on 26 March 2015, the First-tier Tribunal allowed the appeal in AA/04471/2015 on human rights grounds.

7. On 13 April 2015, the Appellant was granted leave to remain until 25 September 2017.

8. On 25 September 2017, the Appellant's leave to remain expired.

The Decision to Set-Aside

9. By its Judgment handed down on 29 July 2015, the Court of Appeal upheld a challenge to the **FTR 2014** (see **The Lord Chancellor v Detention Action** [2015] EWCA Civ 840). Subsequently, in appeals under the **FTR 2014**, the First-tier Tribunal has exercised its jurisdiction to set aside earlier appeal decisions by means of its power of review and set aside, as provided by section 9 **Tribunals, Courts and Enforcement Act 2007** ("the TCEA") and rule 32 **The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014** ("the Procedure Rules").

10. On 10 January 2018, the Appellant's solicitors applied to the President of the First-tier Tribunal for the previous determination of his appeal in AA/01512/2015 to be set aside and listed for re-hearing. At that stage, no mention was made of the appeal in AA/04471/2015 and the subsequent grant of leave to remain.

11. On 20 February 2018, the President of the First-tier Tribunal duly gave Notice of his Decision, of his own motion, to set aside the earlier determination of FtT Judge Wilson in AA/01512/2015 and directed that the appeal would be re-determined by another Judge.

The Re-Hearing in AA/01512/2015 and the Decision Appealed

12. Thus, the Appellant's appeal in AA/01512/2015 came before FtT Judge Sullivan at a hearing on 17 August 2018. It was during the course of that hearing that mention was first made of the Appellant's second appeal in AA/04471/2015 and the subsequent grant of leave to remain and its expiry on 25 September 2017.

13. In dismissing the appeal, FtT Judge Sullivan noted that the parties had been under an obligation to notify the First-tier Tribunal of the grant of leave to remain made subsequent to the determination in appeal AA/04471/2015 but had failed to do so. The Judge took the view that the determination of the Appellant's appeal in AA/04471/2015, promulgated on 26 March 2015, still stood as there had been no appeal within the 28-day time limit provided by rule 16(3) of the **Procedure Rules**; that decision did not depart from the earlier dismissal of the asylum claim. Given that the Appellant had failed to comply the requirements of the **Procedure Rules**, his appeal was dismissed for want of jurisdiction.

The Appeal

14. Pursuant to permission granted by UT Judge Rintoul, the Appellant now appeals against FtT Judge Sullivan's decision. The grounds of appeal can be summarised as follows:

(1) The First-tier Tribunal had exceeded its statutory power; it could not go behind the decision to set-aside under rule 32.

(2) The First-tier Tribunal had further erred in law in finding that the Appellant's appeal was out of time. Only upon being set aside on 20 February 2018 was the appeal in AA/01512/2015 to be treated as "pending". At that point, he did not fall to be treated as an appellant who "is" granted leave to remain for the purposes of section 104(4A) **Nationality, Immigration and Asylum Act 2002**.

(3) Further or in the alternative, the First-tier Tribunal had erred in refusing to extend time under rule 16(3) of the **Procedure Rules**.

The Law

15. Section 104 of the **Nationality, Immigration and Asylum Act 2002** ("the 2002 Act") provides (relevantly) as follows:

'**Section 104 Pending appeal**

(1) An appeal under section 82(1) [an appeal to the First-Tier Tribunal against specified decisions of the Respondent] is pending during the period-

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned …

(2) An appeal under section 82(1) is not finally determined … while-

(a) An application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b) Permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or

(c) An appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.

(3) …

(4) …

(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom.

(4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on [a ground specified in section 84(1)(a) or (b)

or 84(3) (asylum or humanitarian protection) where the appellant –

(a) …

(b) **gives notice, in accordance with the Tribunal Procedure Rules, that he wishes to pursue the appeal in so far as it is brought on that ground.**

…'

16. By the **TCEA**, powers are given to the First-tier Tribunal, as follows:

'**9. Review of decision of the First-tier Tribunal**

(1) The First-tier Tribunal may review a decision made by it on a matter in as case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)),

(2) The First-tier Tribunal's power under subsection (1) in relation to a decision is exercisable-

(a) of its own initiative,

(b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision.

…

(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following-

(a) correct accidental errors in the decision or in a record of the decision.

…

(c) set the decision aside.

…

(9) This section has effect as if a decision under subsection 4(c) to set aside an earlier decision were not an excluded decision for the purposes of section 11(1), but the First-tier Tribunal's only power in the light of a review under subsection (1) of a decision under subsection (4)(c) is the power under subsection 4(a).

(10)A decision of the First-tier Tribunal may not be reviewed under subsection (1) more than once …'

17. By section 11, the **TCEA** provides for a right of appeal to the Upper Tribunal, as follows:

'**11. Right of appeal to Upper Tribunal**

(1) **For the purposes of subsection (2), the reference to a right of appeal to the Upper Tribunal is to a right of appeal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.**

…

(5) For the purposes of subsection (1), an "excluded decision" is-

…

(d) a decision of the First-tier Tribunal under section 9-

…

(iii) to set aside an earlier decision of the tribunal,

…

(e) a decision of the First-tier Tribunal that is set aside under section 9 (including a decision set aside after proceedings on an appeal under this section have begun).'

18. The relevant parts of the **Procedure Rules** then provide:

'**Appeal treated as abandoned or finally determined**

16.— (1) A party must notify the Tribunal if they are aware that—

…

(b) the appellant has been granted leave to enter or remain in the United Kingdom;

(2) Where an appeal is treated as abandoned pursuant to section 104(4A) of the 2002 Act or paragraph 4(2) of Schedule 2 to 2006 Regulations, the Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined, as the case may be.

(3) Where an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the 2002 Act, but the appellant wishes to pursue their appeal, the appellant must provide a notice, which must comply with any relevant practice direction, to the Tribunal and each other party so that it is received within 28 days of the date on which the appellant was sent notice of the grant of leave to enter or remain in the United Kingdom or was sent the document listed in paragraph 4(2) of Schedule 2 to the 2006 Regulations, as the case may be.

…

Setting aside a decision which disposes of proceedings

32.— (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are—

…

(d) there has been some other procedural irregularity in the proceedings.

…'

19. We further remind ourselves that an order of a court or tribunal remains effective unless and until challenged and set aside, even if the court or tribunal concerned had no jurisdiction to make the order in question, see **Patel v SSHD** [2015] EWCA Civ 1175 at paras 54 and 71; specifically, see the observation of Sir Richard Aikens at para 54, where he noted: "*Like all orders of a court or tribunal, it must remain effective until challenged and set aside, even if it was made without the court or tribunal having jurisdiction to do so.*".

Discussion and Conclusions

20. We note that the position of both parties before us is that the appeal should be allowed. Notwithstanding that agreement, if we took the view that the First-tier Tribunal did not have jurisdiction to determine the appeal, we would be bound to reject this challenge and uphold the decision below.

21. Before engaging with the detail of the arguments, we further note that the fact of the second appeal (AA/04471/2015) and the subsequent grant of leave to remain were matters only drawn to the attention of the First-tier Tribunal Judge during the course of the hearing on 17 August 2018; it does not appear that the Judge was greatly assisted at that stage as to the relevance of those matters given the subsequent decision to set-aside in appeal AA/01512/2015. It was in that context that the FtT Judge apparently considered that the earlier grant of leave to remain had been fatal as, under section 104(4A) of the **2002 Act**, any appeal against the determination of 12 February 2015 would then fall to be treated as abandoned unless the Appellant gave notice that he wished to pursue the appeal on asylum or humanitarian protection grounds, a notice that would have had to be given pursuant to rule 16 **Procedure Rules**. On that view, by the time of the decision to set aside (20 February 2018), there was no longer any live appeal and the First-tier Tribunal had no jurisdiction to set aside the earlier determination.

22. The problem with that approach, however, is that it meant that the First-tier Tribunal was effectively seeking to set aside the decision of 20 February 2018 when it had no power to do so. Whether or not the First-tier Tribunal had jurisdiction to make the decision to set-aside, the order that it thus made remained effective (see **Patel**). Although it might have been open to either party to apply for permission to judicially review the set-aside decision, neither did so. As the decision to set-aside was an "*excluded decision*", as defined by section 11(5) **TCEA**, it was not open to the First-tier Tribunal to then purport to review it, still less set it aside (see section 9 **TCEA**). For the same reasons, it is equally not open to the Upper Tribunal to seek to set aside that earlier decision. The set-aside decision remained – and remains – effective.

23. Having reached that view, it is strictly unnecessary for us to engage with the Appellant's further argument that section 104(4A) of the **2002 Act** did not, in any event, apply so as to cast doubt on the First-tier Tribunal's jurisdiction to make the set-aside decision. For completeness, however, we make clear that we also take the view that, at the time the set-aside decision was made, the Appellant's leave to remain had expired (it had expired on 25 September 2017, nearly five months earlier) and, as such, the Appellant was not at that stage someone who "*is granted leave … to remain*" for the purposes of section 104(4A) of the **2002 Act** (emphasis added). Moreover, at the time of the grant of leave to remain, the appeal in AA/01512/2015 had been "*finally determined*" for section 104(4A) purposes and, as such, there was nothing to be treated as "*abandoned*" when leave to remain was granted on 13 April 2015. It was only at the point when the earlier determination in AA/01512/2015 was set aside, on 20 February 2018, that the appeal was again to be treated as "*pending*". And, as we have already observed, at that stage, there was nothing that would engage section 104(4A) so as to mean the appeal was to be treated as "*abandoned*".

24. For those reasons, we agree with the parties that the appeal in AA/01512/2015 was revived by the set-aside decision (and thus became a "*pending appeal*") and that section 104(4A) of the **2002 Act** did not operate such that it was then to be treated as abandoned.

25. Given its view on jurisdiction, the First-tier Tribunal did not engage with the merits of the Appellant's appeal and the appropriate course is for this matter to be remitted for re-hearing before a different Judge of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and we set it aside

We remit the decision to the First-tier Tribunal for a fresh hearing.

Signed  Date 2 April 2019

HER HONOUR JUDGE EADY QC