Upper Tribunal a
(Immigration and Asylum Chamber) Appeal Number: HU/23986/2018

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Monday 8 July 2019	**On Friday 12 July 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

JIBIN JOSEPH VAKANIL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Kannangara, Counsel instructed by Wise Legal
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Andrew promulgated on 11 February 2019 ("the Decision"). By the Decision, the Judge treated as abandoned the Appellant's appeal against the Respondent's decision dated 14 November 2018 refusing his human rights claim in the context of an application for indefinite leave to remain.

2. The Appellant is a national of India. He entered the UK as a student on 8 December 2008 with leave to remain from 5 November 2008 to 31 October 2010. He obtained further leave in that category to 30 April 2012. He then applied for and was granted leave to remain as a Tier 1 post-study migrant until 9 August 2014. On 8 August 2014 the Appellant made a further application for leave as a student. He applied to vary that application on 22 April 2015 to that of a Tier 2 migrant, but that application was rejected as invalid on 24 June 2015. He was however granted leave as a Tier 2 migrant from 2 July 2015 in response to an application made on that date. His leave granted to 31 May 2018 was later extended to 13 June 2020.

3. The Appellant's appeal focusses on the reasons for the Respondent's decision dated 24 June 2015 which he says is contrary to the Respondent's guidance in relation to the exercise of discretion. The other contentious issue is the legal effect of the gap in leave which was the basis for the Respondent's rejection of the application for indefinite leave to remain.

4. Judge Andrew in the Decision treated the appeal as abandoned on the basis that section 104(4A) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") applies because the Appellant had been granted leave to remain.

5. The Appellant's grounds rely on section 82 of the 2002 Act and the description of the decisions which attract a right of appeal, specifically the refusal of a human rights claim. The Appellant asserts that as there was a refusal of a human rights claim, the Respondent's decision generated a right of appeal notwithstanding the grant of leave to remain as a Tier 2 migrant (which grant preceded the decision letter under appeal here). That is consistent with the fact that the Respondent's decision confirmed there to be a right of appeal on that basis which is also consistent with the Respondent's guidance. Of course, however, the Respondent cannot confer a right of appeal where none exists as a matter of law.

6. Permission to appeal was granted by First-tier Tribunal Judge Cruthers on 30 May 2019 in the following terms so far as relevant:

> "..2. I take it to be common ground that the appellant has limited leave to remain in the UK until 13 June 2020 (as per paragraph 2 of the decision under consideration).
>
> 3. The exact date of the limited grant of leave referred to above is not immediately apparent to me. But from paragraphs 7 and 8 of the appellant's witness statement of 30 January 2019, I take it that the grant referred to was made before the appellant submitted his index application on 12 November 2018. The decision said to have been under appeal to Judge Andrew was a refusal of indefinite leave to remain – decision taken on 14 November 2018 (her paragraph 1). Judge Andrew treated the appeal as abandoned by reference to section 104(4A) of Nationality, Immigration and Asylum Act 2002.

> 4. As per the grounds on which the appellant seeks permission to appeal, I consider it arguable that the subsection of section 104 referred to above does not operate to create a "deemed abandonment" where the grant of leave referred to was made before the decision which the appellant is seeking to appeal against."

7. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier Tribunal for re-hearing.

DISCUSSION AND CONCLUSIONS

8. By letter dated 25 June 2019, the Respondent submitted a Rule 24 response in the following terms so far as relevant:

> "..2. The Respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant meets the requirements of paragraph 276B"

9. Whilst not withdrawing the concession, Mr Tufan submitted that section 113 of the 2002 Act might be relevant and questioned whether it could be said that there was a human rights claim in circumstances where the Appellant will not be removed, at least not prior to 2020 when his leave ends. He could of course make an application for further leave to remain at that time. Mr Kannangara submitted that this was not relevant. The issue still has to be determined based on a hypothetical removal as at the date of hearing.

10. I begin my consideration with that issue. Section 113 provides as follows:

> "human rights claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 …"

11. In some respects, it is irrelevant whether the claim made is a human rights claim. If the Respondent has considered it as such and refused it without certifying the claim as clearly unfounded (pursuant to sections 94 or 96 of the 2002 Act) or refused to treat it as a fresh claim applying paragraph 353 of the Immigration Rules then there is a refusal of a human rights claim which, pursuant to the current wording of section 82 of the 2002 Act generates a right of appeal.

12. In any event, though, Mr Kannangara's submission is consistent with case-law, specifically, the Court of Appeal's decision in JM v Secretary of State for the Home Department [2006] EWCA Civ 1402. That is not precisely on point since the appellant did not have leave to remain at the relevant time. Nor could she have appealed if she had leave to remain as, at that time, the decision generating a right of appeal – namely a

refusal to vary leave – did not give a right of appeal if appellant had leave remaining. However, the ratio (that the claim that removal would breach an appellant's human rights is to be assessed on a hypothetical basis, whether or not removal is imminent at the relevant time) is applicable to this case.

13. Turning then to section 104(4A) of the 2002 Act, that provides that "[a]n 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…". The intention behind that sub-section appears to be that the appeal no longer serves any purpose and is therefore deemed by statute to be abandoned. So much is evident from section 104(4B) to which section 104(4A) is subject which provides that where an appeal is on asylum or humanitarian protection grounds, there is no automatic statutory abandonment and an appellant may give notice that he wishes to continue the appeal in order to vindicate his entitlement to refugee or HP status.

14. Turning then to the situation here, the Appellant has been given leave to remain but only as a Tier 2 migrant for a limited period of time. In order to raise his entitlement to indefinite leave to remain, he is required to continue his challenge to the Respondent's negative decision in that regard. The only issue therefore is whether he can do that by way of an appeal or only by a judicial review challenge. In agreement with FtTJ Cruthers, I agree that the answer to this question is to be found in a temporal analysis of section 104(4A). In other words, the appeal is only statutorily treated as abandoned if the appellant "is" (and not "was") granted leave to remain.

15. I accept, as I have already indicated, that under the previous version of the appeal provisions in section 82 of the 2002 Act, a person in the Appellant's position would not be entitled to a right of appeal as he had extant leave to remain prior to the decision under appeal. However, I am fortified in my conclusion that this is not now the way in which the provisions are to operate by the Home Office policy guidance entitled "Rights of Appeal" (Version 7.0: July 2018) which analyses the position as follows:

> **"Human rights application where the person has immigration leave**
>
> This section provides guidance on human rights claims where the person has immigration leave and is seeking leave of a different duration (an upgrade application). It tells you about whether a human rights claim has been made where the applicant has extant immigration leave and is seeking leave of a different duration (an upgrade application). When considering an application for leave to remain you must first identify whether or not a human rights claim has been made. The section, "What is a human rights claim" sets out which applications made under the Immigration Rules are human rights claims. It gives guidance on how to identify human rights claims that have been made outside the

> Immigration Rules. Where an applicant has made a human rights claim which is refused, they have a right of appeal (subject to certification). However, where an applicant has extant immigration leave then whether they have made a human rights claim will depend on:
> • the basis of the grant of their extant immigration leave
> • the basis on which they are seeking leave of a different duration
> **Immigration leave: human rights or non human rights**
> It is important that you establish whether leave has been granted on a human rights or a non human rights basis as this may affect whether the current application is a human rights claim. Where a person has extant leave on a human rights basis and is seeking leave to remain of a different duration on the basis that the grant of limited leave is itself a breach of their human rights, that application is not a human rights claim. The rationale for this is that the second application (for example, for indefinite leave to remain) is in reality, an upgrade application rather than a human rights claim. The applicant is merely seeking a more generous form of leave than that which they have already been granted…..
> **New human rights claims**
> There will be applicants who have immigration leave on human rights grounds, who make a new and different human rights claim which if refused will have a right of appeal. For example, an applicant who has extant leave as a partner, which they no longer qualify for, seeks a variation of that leave on the basis that they are the parent of a child. That constitutes a new human rights claim. The refusal of such a claim will give rise to a right of appeal. Where the applicant has extant immigration leave on a non human rights basis and is seeking to vary that leave on a human rights basis that will normally be a human rights claim and they will have a right of appeal from any refusal of that claim. The section "What is a human rights claim?" gives guidance on this. An example of this would be where an applicant has extant immigration leave as a student and makes an application for leave to remain as a partner which is refused. The applicant would have a right of appeal against that refusal as it has not been accepted that they have a right to remain on human rights grounds. At the end of their student leave they will be required to leave the UK and be removable and their argument is that that removal will be unlawful under the Human Rights Act 1998."

16. For the foregoing reasons, I am satisfied that the Decision contains an error of law and I set it aside. Given the terms of the Decision, the Appellant has not had his appeal considered substantively on the merits at all. For that reason, Mr Tufan submitted that the appeal should probably be remitted to the First-tier Tribunal for re-determination.

17. Mr Kannangara initially submitted that I could go on to re-make the decision in this Tribunal as he appeared to think that the issues were only ones of law in relation to which few findings of fact needed to be made. However, I pointed out to him the recent Court of Appeal judgment in R (oao Masum Ahmed) v Secretary of State for the Home Department [2019] EWCA Civ 1070. That decision is binding on this Tribunal and appears to place the Appellant in some difficulty due to the analysis of paragraph 276B(a)(i) of the Immigration Rules concerning continuous lawful residence.

18. Due to the nature of and reasons for the gap in the Appellant's residence in 2014/2015, the facts of his case at that time may require more detailed consideration to ascertain the extent of the gap and the effect of that gap on the issue whether the Appellant has ten years' continuous lawful residence (see chronology set out at [2] above). I accept of course that the issue for the Tribunal is a wider one whether Article 8 ECHR is breached by the decision under appeal, but the starting point will be whether the Appellant can meet paragraph 276B given that this is the basis on which he claims to be entitled to leave to remain on human rights grounds. In any event, the facts at that time, may also be relevant to that wider issue. The extent of the fact finding which is required in this case may therefore be quite extensive, particularly since there has been no previous consideration of the merits of the Appellant's case.

19. Having taken instructions, Mr Kannangara agreed that the appeal should be remitted to the Tribunal. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that :-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

20. In light of what I say at [18] above, concerning the extent of the fact finding which is necessary in this case and the lack of any prior consideration of the merits of the Appellant's case, I am satisfied that it is appropriate to remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Andrew.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Andrew promulgated on 11 February 2019 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Andrew.

Signed Dated: 8 July 2019

Upper Tribunal Judge Smith