IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02701/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 9 February 2022	**On the 29 March 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

NASIR MAHMOOD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Mair, Counsel, instructed by ASR Advantage Law Solicitors
For the Respondent: Mr C Williams, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant appeals against the decision of the First-tier Tribunal (Judge Elliott), promulgated on 21 June 2021, by which he dismissed the Appellant's appeal against the Respondent's decision (I use that term advisedly – see below) to refuse his application for indefinite leave to remain in the United Kingdom as a victim of domestic violence.

2. The Appellant, a citizen of Pakistan, had married a British citizen in 2006 and had arrived in the United Kingdom the following year as her spouse. A number of subsequent applications of various types were either refused or withdrawn. In January 2019 the relationship broke down and the couple began living separately. In that same month the Appellant made an application under the domestic violence concession and limited leave to remain was granted from 15 January 2019 until 14 April 2019. On the day of expiry of that leave the Appellant made the indefinite leave to remain application with which we are concerned.

The Respondent's decision

3. It is important to set out certain parts of the refusal decision here as they have a direct bearing on the outcome of this case. On the front page of the decision letter dated 14 November 2019 it was stated that:

> "Your application for indefinite leave to remain has been refused. We have considered your application for indefinite leave to remain and have refused it. You can apply for administrative review of this decision."

4. Following a detailed consideration of the relevant legal framework and evidence provided by the Appellant, the decision letter concludes in the following terms:

> "Any submissions you may have made relating to your human rights have not been considered because an application for indefinite leave to remain as a victim of domestic violence is not considered to be a human rights based application. If you wish to apply for leave to remain based on your human rights or other compassionate factors it is open to you to apply using an appropriate application form. Please see our website for further details. Your application for indefinite leave to remain in the United Kingdom has been refused and is hereby recorded as having been determined on 14 November 2019."

Proceedings in the First-tier Tribunal

5. The Appellant then lodged an appeal with the First-tier Tribunal. The Respondent contended that there was no right of appeal attaching to the decision as it was not a refusal of a human rights claim and therefore fell outside the scope of section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act").

6. The matter went before a Duty Judge (Judge Fisher), who, by a decision dated 12 May 2020, determined that there was a "valid appeal" and that it should proceed. On 21 December of that year further directions were issued by the First-tier Tribunal following what appears to have been another decision made by Assistant Resident Judge Chohan to the effect that there was a valid appeal because the Respondent's decision was

appealable. On 8 March 2021, a case management review hearing was conducted. At this point the Respondent does not appear to have raised the issue of jurisdiction.

7. At the substantive hearing before Judge Elliott on 5 May 2021, the Presenting Officer did not raise any jurisdictional issue. The judge addressed the issue of jurisdiction at [74]–[78] of his decision. He noted the procedural history thus far, referring specifically to the decisions of Judges Fisher and Chohan. At [78] the judge said the following:

> "… However it is clear enough from the nature of his [the Appellant's] claim that he was asserting not only that he was a domestic abuse victim but that he also had established life with his brothers, sisters, his nephews and nieces in the UK and that he was reliant on them not only for financial support [but also] for essential emotional support. This is repeated in his appeal application and maintained in argument before me by Ms Mair. I find therefore that the Appellant's appeal raised a valid right of appeal within Sections 82(1)(b) and 84(2) of the Nationality, Immigration and Asylum Act 2002 as amended."

8. The judge then went on to conduct a thorough analysis of the evidence before him. For the purposes of our decision it is unnecessary to set out his findings in any detail. Suffice it to say that he accepted certain elements of the Appellant's claim, but rejected the central contention that he (the Appellant) had indeed been a victim of domestic violence. It was concluded that the Appellant could not satisfy the requirements of paragraph 289A of the Immigration Rules and, having conducted a wider proportionality exercise, there were no additional grounds on which he could succeed under Article 8 ECHR. The appeal was accordingly dismissed.

The Appellant's challenge

9. The Appellant submitted his application for permission to appeal. The accompanying grounds need not be rehearsed in full here. In essence, they challenged the judge's decision on procedural and substantive points.

10. Permission was granted by First-tier Tribunal Judge Neville on 20 August 2021. He deemed the grounds to be arguable. There was no mention of any jurisdictional issues in the case.

The jurisdictional issue

11. In our preparation for the hearing we detected what appeared to be a relatively obvious and fundamental jurisdictional difficulty. The Appellant had made an application for indefinite leave to remain as the victim of domestic violence. We accept that the covering letter accompanying the application did in fact raise human rights issues relating to Article 8 and it

might be said with a good deal of force that this constituted a human rights claim.

12. However, the decision letter, which was the only decision against which any potential right of appeal could flow, made it plain that there was no refusal of a human rights claim and that indeed the Respondent was not treating the application as a human rights claim at all. It would follow that there simply was no refusal of a human rights claim and that this would be the case whether or not a human rights claim had been made in the first place.

13. Prior to the hearing we put the parties on notice that we were raising the question of jurisdiction as a preliminary issue. We appreciated that it had not been canvassed at any stage since the early days of the appeal being initiated in the First-tier Tribunal. However, jurisdiction is fundamental and, in our judgment, we were fully entitled to take the point of our own volition.

14. We asked the parties to address us on the application of MY (Pakistan) [2021] EWCA Civ 1500, which had approved the decision of the Presidential panel in MY (refusal of human rights claim: Pakistan) [2020] UKUT 89 (IAC). The essence of these decisions was that it was open to the Respondent to require an individual to make a human rights claim on a specified form and that the refusal of an application for indefinite leave to remain as a victim of domestic violence did not necessarily constitute the refusal of a human rights claim. Paragraphs 46 and 48 of the Underhill LJ's judgment state:

> "46. Of course the fact that the application and the human rights claim are distinct does not mean that the Secretary of State could not in principle have made a decision simultaneously to refuse both, albeit that that would have involved a departure from her one-application-at-a-time policy. But the terms of decision make it quite clear that she did not do so: rather, consistently with that policy, she refused the domestic violence application and said that she would deal with any human rights claim if a separate application were made. Ms Naik did not suggest otherwise: her case, as we have seen, is that the purported splitting of the decisions in that way was ineffective.
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> ...
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> 48. As to that, I confess to some concern about a situation where someone who has (let it be assumed) pursued an application on a ground which is reasonable but ultimately unsuccessful can only pursue a second application on a (let it be assumed) valid second ground at the cost of being subjected to the various restrictions itemised above – though I am not to be taken to be expressing any view about its lawfulness. However, I do not see how that has any bearing on the issue before us. For the reasons given, I have no doubt that the Secretary of State has not decided to refuse the Appellant's human rights claim. If that produces unfair results of the kind relied on by Ms Naik that is a consequence of the application of her one-application-at-a-time policy: it cannot be deployed to justify treating her as having made a

> decision which she plainly has not made. For the reasons given at paras. 31-38 above, and subject to Ms Naik's invitation referred to at para. 35, it is not open to us in this Court to consider a challenge to the lawfulness of that policy, or its application in this case."

15. In the present case, whether or not a human rights claim had been made, it appeared clear to us that the Respondent did not in any way engage with that claim and it cannot rationally be said that she refused any claim that may have been made. Our provisional view was that there was never a right of appeal in this case, notwithstanding what we consider to be the erroneous view taken by the First-tier Tribunal throughout proceedings.

16. At the hearing Ms Mair, with her customary professionalism and realistic approach, acknowledged the potential difficulties in the Appellant's way as regards the jurisdictional issue. She sought to distinguish the present case from that arising in MY (Pakistan) by submitting that here there had been an effective concession by the Respondent or an agreement between the parties as to the existence of a valid appeal. This was in reality all that she could put forward, but, with respect, it does not stand up to scrutiny. An agreement between the parties, or indeed an apparent concession by the Respondent, cannot create jurisdiction where there is none (in respect of the "concession", we have doubts as to whether a concession was ever actually made by the Respondent. It seems to us as though she had quite rightly contested the existence of a right of appeal at the inception of the appeal process but, following the decision of Judge Fisher, had taken a view that there was no mileage in continuing to repeat the same arguments again and again during proceedings. In any event, this has no bearing on our overall conclusion).

17. Having considered matters as a whole, we conclude that our provisional view was correct and that, whatever the position was during proceedings in the First-tier Tribunal, the bottom line is that the Respondent's decision of 14 November 2019 did not attract a right of appeal under section 82(1)(b) of the 2002 Act. The First-tier Tribunal therefore proceeded without jurisdiction and the judge's decision must be set aside in full.

Notice of Decision

The decision of the First-tier Tribunal was made without jurisdiction and that decision is set aside.

The Appellant had no right of appeal to the First-tier Tribunal and neither that Tribunal nor the Upper Tribunal shall take any further action in respect of these proceedings.

No anonymity direction is made.

Signed H Norton-Taylor Date: 22 February 2022

Upper Tribunal Judge Norton-Taylor