IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002085
First-tier Tribunal No:
PA/01040/2021

THE IMMIGRATION ACTS

Heard at Birmingham
On 20 December 2022

Decision promulgated
On the 03 February 2023

Before

UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE MANDALIA

Between

HBK
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Fazli instructed by Sohaib Fatimi Solicitors.
For the Respondent: Mr Bates, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Thapar ('the Judge') who in a decision promulgated on 7

October 2021 dismissed the appellant's appeal against refusal of his claim for international protection and/or for leave to remain in the United Kingdom on any other basis.

2. Permission to appeal was refused by another judge of the First-tier Tribunal but granted by a judge of the Upper Tribunal on a renewed application on 15 August 2022.

3. At the conclusion of the hearing before us today we announced our decision that we find that the appeal was abandoned by statute when the appellant left United Kingdom for France for a holiday, which he claims was in early August 2021, and that when the matter came before the Judge on 1 September 2021 there was therefore no jurisdiction for the Judge to determine the appeal which no longer existed. We accordingly set the decision of the Judge aside but do not substitute a decision as we have no jurisdiction to do so following the statutory abandonment.

4. We informed the parties that we would give our reasons in writing for coming to that conclusion which we set out below.

The reasons

5. The Judge noted the appellant is a national of Afghanistan born on 24th March 1990. The appellant claimed he arrived in the United Kingdom on 17 March 2009. He claimed asylum on 24th March 2009 although that claim was treated as withdrawn on 12 October 2010 because the appellant had absconded. The appellant later stated that he had left the UK in 2009 and travelled to France where he remained until 2014. In 2014, he had travelled to Italy where he made a successful asylum claim. The appellant then visited Spain and Belgium looking for work and in 2017 he returned to France. The appellant was returned to the UK by the French authorities on 16 March 2018 at which point he made a further claim for asylum, by way of further submissions. The claim was refused by the Secretary of State on 7 January 2021. That decision attracted a right of appeal before the First-tier Tribunal. The appellant lodged an appeal and the appeal was listed for hearing before the First-tier Tribunal sitting in Birmingham on 1st September 2021. At paragraphs [7] and [8] of her decision, the judge said:

> "7. The Appellant failed to attend the hearing. On 28 April 2021, the Respondent raised the issue of whether the Appellant was still in the UK. On 13 May 2021, the representatives instructed by the Appellant stated that they could not verify whether the Appellant was still in the UK, they had received no instructions from the Appellant and requested they be removed from record as the instructed representatives. A letter was sent to the Appellant on 18 May requesting that he update the Tribunal of his position and there was no reply to this letter. A notice of hearing was sent to the Appellant on 13 August 2021 and the date of the hearing was again confirmed in writing on 28 August 2021. Several calls were made to the Appellant on the day of the hearing with each call going straight to the answer machine.

> 8. There was no application for an adjournment by the Appellant and no evidence from the Respondent as to why it was believed the Appellant was not in the UK. I was satisfied that notice of the hearing was sent to the address held on record for the Appellant and attempts were made to communicate with him on the day of the hearing. I found the Appellant was aware of the pending appeal since he did initially have the benefit of a solicitor when submitting his appeal form. I found the Appellant had ample opportunity to communicate with the Tribunal, and if the hearing was to be adjourned, I was not satisfied that he would engage in the proceedings on the next occasion. I had in mind the overriding objective and found it was proportionate to proceed with the appeal in the absence of the Appellant."

6. In support of the application for permission to appeal to the Upper Tribunal the appellant provided a witness statement dated 14 October 2021 in which he claims he had no knowledge of the hearing listed before the First-tier Tribunal on 1 September 2021. When granting permission to appeal, Upper Tribunal Judge Lindsay directed:

> "4. The appellant's representative should, within 21 days of receiving this grant of permission to appeal, file with the Upper Tribunal and serve on the respondent a more detailed witness statement from the appellant explaining why, if there is an explanation known to the appellant, the notice of hearing sent to the appellant's address was not received by him, and in any case why he was not contactable by his previous representative, causing them to go off the record, and by the First-tier Tribunal on the day of the hearing."

7. The appellant filed a supplementary statement dated 9 December 2022 in which he wrote:

> "3. … I would like to say that I left the UK with other Afghan friends who wanted to visit France in early August 2021. The reason for my travels was just to have fun and a break with friends. I have been here in the UK for many years and my asylum application remained unresolved. I was mentally stressed. I left the United Kingdom via Dover in a car….
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> …
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> 10. I wish to also confirm that when I left United Kingdom, I did so because I was given the impression by my friends that I was allowed to go to France and that it was as if I was travelling to Scotland, Wales or Northern Ireland. In addition, when travelling to France with my friends, I was not turned back by any immigration officials and nobody at the crossing between the United Kingdom to France this made me believe that at the time that I was allowed to enter France. I was not aware of the impact of me leaving the United Kingdom to France would have on my asylum application and I was never explained this by my previous solicitors, if I had known, I would never have left.
>
> 11. I only left United Kingdom because I was mentally exhausted and because I had waited so long for me to be granted asylum protection in the United Kingdom and my friend suggested that I should go with them on a short holiday to France. Furthermore, my previous solicitors

> did a terrible job in keeping me updated on the progress of my asylum application, they failed to inform me that I had an upcoming hearing and if I had known about the hearing that I would have obviously been more patient.

8. The Secretary of State in her Rule 24 reply raised the issue of the appeal being abandoned by statute. Section 92(8) of the Nationality, Immigration and Asylum Act 2002 provides:

> "(8) Where appellant brings an appeal from within the United Kingdom but leaves the United Kingdom before the appeal is finally determined, the appeal is to be treated as abandoned unless the claim to which the appeal relates has been certified under section 94 (1) or (7) or section 94 B."

9. It is not disputed that the appellant had brought an appeal from within the United Kingdom or that he left the UK before the appeal was finally determined. Whilst the Secretary of State takes issue with the appellant's claim to have only left the UK in early August 2021, that is not an issue that we need to resolve. The fact is that even on his own case, the appellant left the UK before his appeal was finally determined. It is also not disputed that this is not an appeal which has been certified under section 94 or 94B.

10. The appellant makes a number of points against the Secretary of State's that the appeal is to be treated as abandoned by operation of statute. Mr Fazli refers to the decision of the Tribunal in Niaz (NIAA 2002, s.104: pending appeal) Pakistan [2019] UKUT 399 in which the Tribunal found that where a person is removed by the Secretary of State against his or her will that does not result in the appeal becoming abandoned. Whilst that may be the case, the facts here are entirely different. Reliance upon the decision of the Upper Tribunal in Niaz does not assist the appellant. In Niaz the appellant had been forcibly removed from the United Kingdom. It was found that the forced removal of the appellant did not trigger the statutory abandonment provision, as the appellant's removal had not been a voluntary act. He did not leave the UK voluntarily. The difficulty with the appellant's claim is apparent from the clear and unambiguous wording of the s.92(8). The appeal is to be treated as abandoned, not that it may be, or that such abandonment provision may not apply if some subsequent event occurs (our emphasis). Here, the appellant was not removed by the appellant either unlawfully or otherwise by the Secretary of State. He left the UK voluntarily, in his words "just to have fun and a break with friends".

11. Mr Fazli submits the provisions of s92(8) apply to people who leave the United Kingdom but does not apply to those who then re-enter when the appeal is still pending, and before it is treated as abandoned. That is simply contrary to the clear and express words of the statute. Section 92(8) reflects the will of Parliament that where a person who has a pending appeal leaves the UK, before the appeal is finally determined, the appeal is to be treated as abandoned *(our emphasis)*. There is no provision in the section for what may happen after the act of leaving the UK has occurred. It is entirely

understandable that Parliament would treat an individual who asserts a right to remain in the UK, as having abandoned any appeal if that individual leaves the UK. Parliament clearly considered the circumstances in which leaving the United Kingdom would not cause an appeal to be abandoned, which are those relating to certification pursuant to section 94 and 94B. It was clearly not the will of Parliament that an individual who has a pending appeal, who chooses to leave the UK for a holiday or any other purpose during the course of that appeal, and subsequently returns to the UK, should be able to continue with the appeal. Leaving the country in which an individual is seeking international protection is contrary to the claims made in that respect. If Parliament had intended that an absence from UK whilst an appeal is being pursued would not operate such that the appeal is to be treated as abandoned provided the appellant returns to the UK before the hearing of the appeal, that would have been provided for by Parliament. Parliament could have added "or unless the appellant has returned to the UK before the appeal is finally determined". Parliament made no such provision, and we cannot incorporate words into the statutory provision that are simply not there.

12. When the appellant's attempts to re-enter the UK after his holiday were foiled by the French authorities he was able to secure the services of an agent and re-enter from France by crossing the English Channel. The appellant therefore re-entered the United Kingdom illegally. The suggestion that the clear provisions of s92(8) should somehow be read as suggested by Mr Fazli, is not supported by any authority. The suggestion that a person who returns to the UK unlawfully should be permitted to continue to pursue an appeal that is otherwise to be treated as abandoned, is inimical to good public administration and immigration control.

13. Mr Fazli also submits the appellant did not in fact leave the United Kingdom voluntarily, as he left on holiday with some friends as he was stressed due to his asylum claim being unresolved. This is, with respect, a highly unattractive submission. We begin by noting the appellant's account of events as set out in his two witness statements dealing with his absence from the UK, are very vague. He does not adequately address in those witness statements the chronology set out in paragraph [7] of the decision of the First-tier Tribunal, regarding the numerous attempts that were made by his representatives and the Tribunal to contact him. It was for the appellant throughout to ensure that he remained in contact with his representatives whilst his appeal was pending and if he was dissatisfied by the representation, he should have ensured that at the very least, the Tribunal was aware of an address at which he could be sent documents relevant to his appeal. In any event, the appellant could have gone on holiday anywhere within the UK without triggering the abandonment provision. The appellant had the benefit of legal advice at that time. The argument the appellant did not understand the consequences of leaving the UK has no merit. It is effectively an argument that ignorance of the law is a defence. It is a settled legal principle that it is

not. The fact of the matter is that the appellant chose to go on holiday and chose to go on holiday to France. On any view, that was a voluntary act. Attempting to distort the factual matrix to benefit from the decision in Niaz is entirely disingenuous. Trying to suggest that the scope of 'voluntariness' as found in Niaz should be extended to include consideration of whether the person making the decision to leave was fully informed of the consequences, is not a submission supported by any authority. As ignorance of the law is no defence it cannot be said that on the facts of this appeal, the appellant would not have been aware of the relevant legal provisions and their effect.

14. There is equally no merit in the claim made by Mr Fazli that the meaning of 'abandoned', in this context is in some way ambiguous. It is clear that the term abandoned, or specifically that the appeal "is abandoned", clearly conveys the will of Parliament that if a person who has lodged an appeal in-country leaves the UK, that appeal will end. It does not infer different meanings with different degrees. Niaz is no authority for the argument that an abandoned appeal could be revived on the facts of this appeal. As we have already identified, the facts of this appeal and that case are materially different. Once a person who has an appeal leaves the UK voluntarily that appeal ends. There is no additional procedural mechanism required to facilitate such an effect. The appeal is not withdrawn or dismissed, it is simply, in the words of s92(8), to be treated as abandoned.

15. The fifth argument advanced by Mr Fazli is that if the Upper Tribunal finds the appeal is abandoned without the possibility of revival, that would mean the First-tier Tribunal's adverse decisions would stand. That submissions is, with respect, entirely misconceived. The appellant voluntarily left the UK prior to the hearing before the First-tier Tribunal and thus before his appeal was finally determined. The Judge noted at paragraph [8] of her decision that there was no evidence before the Tribunal as to why the respondent may believe the appellant was not in the UK. If there had been evidence before the Tribunal that the appellant had left the UK before the appeal was finally determined, the judge would undoubtedly have treated the appeal as abandoned. In the event, having satisfied herself that there was no application for an adjournment and that the Notice of Hearing was sent to the address held on the record for the appellant, she proceeded to deal with the appeal in the absence of the appellant. For the reasons that are clear in her decision, she was undoubtedly entitled to do so.

16. It is however now clear that the appellant had left the UK before his appeal was finally determined and that the appeal is therefore to be treated as abandoned. In effect, if the judge had known of that position earlier, it would have been clear to her that she had no jurisdiction to determine the appeal. We are quite satisfied that the decision of the First-tier Tribunal is vitiated by a material error of law and must be set aside. The effect of our decision is that none of the adverse findings that were made by the Judge can stand. That answers the concerns raised by Mr Fazli that the decision of the First-

tier Tribunal may act as an obstacle to any further steps taken by the appellant.

17. Mr Fazli claims it will be unjust to consider the appeal as abandoned as this is not a case in which the appellant has been granted leave. It is submitted that appeals can more readily become abandoned where leave has been granted but the appellant is an asylum seeker whose claim needs to be determined. He submits it is not in the interests of justice to make further submissions and then pursue a future appeal based upon the same factual matrix as the current protection claim. We do not accept that. As we have said the wording of statute is clear. It was clearly the intention of Parliament that that provision should apply to those who have pending appeals and not only to those who have been granted leave. There is no basis for inferring the statutory provision does not apply to the appellant on the facts.

18. Mr Fazli submits that if the Upper Tribunal takes the view it has no jurisdiction to hear the appeal, we should entertain a claim for Judicial Review. He submits the Court of Appeal has in the past considered substantive points by sitting as a Divisional Court. Whilst the Administrative Court and Court of Appeal do so when that is the proper course to adopt, Mr Fazli does not draw our attention to the legal framework that establishes the Upper Tribunal has a similar power. In any event, we reject his claim that we should reconvene in some other form, even under the jurisdiction of the Upper Tribunal to determine a claim for Judicial review. No such claim has been pleaded or advanced. Mr Fazli's submissions amount to nothing more than an attempt by the appellant to circumvent the clear statutory provisions that apply to a statutory appeal.

19. The supplementary submissions made on the appellant's behalf seek to form the basis of an application to apply for judicial review. Whilst it is not disputed the Upper Tribunal has jurisdiction to determine judicial review applications in immigration and asylum matters, it is an abuse of the process to seek to commence a claim for Judicial Review in the course of a statutory appeal in the way sought by Mr Fazli. No proper application has been made in relation to which permission to bring judicial review could be granted. Hypothetically suggesting that if permission to bring judicial review was granted, the appellant would undertake to issue an application for permission for judicial review is procedurally improper on the facts. A grant of permission to bring judicial review usually follows a formal application with properly formulated grounds for review that are then served upon the Secretary of State, and, (unless the matter is urgent) an acknowledgement of service and summary grounds of defence have been filed. Only when the pleadings are before the Tribunal can the Tribunal reached an informed view as to whether the grounds are even arguable. The invitation by Mr Fazli that we should grant permission to claim judicial review and the appellant will then file the relevant pleadings, seeks to put the cart before the horse, without any opportunity for the respondent *(whether that is the First-tier Tribunal or the SSHD)* to have any fair opportunity to respond or participate.

20. This is a statutory appeal. The appellant had a right of appeal which he exercised but then acted in a manner that triggered the relevant statutory provision. The question is not the lawfulness of the Secretary of State's decision as it is not the Secretary of State's decision that the appeal should be abandoned but the operation of statute. If the appellant is suggesting that the Upper Tribunal should reconvene itself, even though there is no formal application for judicial review, the question must be what it is being asked to consider and the relief being sought. It could only be the lawfulness of the statutory provision by which the appeal becomes abandoned. The lawfulness of primary legislation does not fall within the remit of the Upper Tribunal and a challenge to the same should be issued in the High Court.

21. When Mr Fazli was asked at various points during the hearing to refer us to authorities in support of his written and oral submissions he was unable to draw our attention to anything in the authorities that support the broad submissions and propositions of law he relies upon.

22. Mr Fazli submits there will be no significant procedural burden or other burden upon the Tribunal to consider the evidence in order to deal with the case justly and fairly. That submission too, is misconceived. The Tribunals are creatures of statute and the purpose of the Tribunals is to consider cases in relation to which they have jurisdiction. If an appeal falls to be treated as abandoned by operation of statute, the Tribunal has no jurisdiction to simply disregard the statute and deal with an appeal that is to be treated as abandoned. The argument that somehow judicial resources should be expended by the Tribunal undertaking a hypothetical examination of the merits of the case, when it has no lawful basis for doing so, is entirely without merit.

23. As to fairness, this is not a case similar to that alluded to by the appellant involving the trade union Unison of unfairness arising because an individual does not have any other available legal remedy. In this appeal, as noted above, the appellant re-entered the United Kingdom illegally. The appeal that he lodged against the earlier refusal on 7 January 2021 has been abandoned. There is nothing to stop the appellant making a fresh claim for international protection in accordance with the procedure for doing so set out in the Immigration Rules and published guidance. It is not unreasonable or unlawful to expect the Secretary of State to consider whether such submissions amount to a fresh claim pursuant to paragraph 353 of the Immigration Rules. If as a result of such consideration the Secretary of State is of the view that the further submissions do not amount to a fresh claim, and rejects the claim accordingly, the appellant will have an effective remedy by way of an application for judicial review to the Upper Tribunal. If the claim is accepted as a fresh claim but refused, the appellant will have a right of statutory appeal. The reason the appellant can reasonably be expected to pursue such avenues by way of a fresh application is because his voluntary act in leaving the UK caused his existing appeal to be abandoned. It is his personal actions that are responsible for the position in which he finds himself now.

24. The argument that the reasons for leaving are relevant is noted, but whatever the reasons for a person leaving are, if that person leaves the UK voluntarily so far as that term is understood in law, their appeal will be abandoned. The statute does not provide for the exercise of some discretion.

25. Although Mr Fazli refers to 'proportionality', whether or not such a consideration applies, it is not disproportionate to expect an individual to abide by the terms of the statute. This is not a case in which it has been made out that the proper application of the wording of the statute to the facts, and resultant abandonment of the appeal, is unlawful or in any way disproportionate.

26. If one looks at a number of the submissions made on the appellant's behalf they are, in effect, an attempt to strike out the statutory provision and the impact of the same. For reasons that we have set out at some length in addressing the claims made by Mr Fazli, the appeal is to be treated as abandoned by operation of statute and the appellant was not denied access to justice. He exercised his right of appeal. It was his own conduct that results in his appeal being treated as abandoned.

27. Although Mr Fazli has clearly spent a considerable length of time and intellect to try and persuade us otherwise, the simple and straightforward outcome of the appellant voluntarily leaving the UK, to go on holiday in France when his appeal was pending, is that the appeal is to be treated as abandoned by virtue of the clear wording of s92(8). We do not accept that any of the attempts made by Mr Fazli to circumvent the statutory provision, however disguised, has any merit.

28. In closing we re-iterate that we have sympathy for the Judge who was plainly unaware of all the facts when she reached her decision. She was clearly alive to the possibility that the appellant may not have been in the UK, but was not aware that the appellant had previously left the UK and thus the appeal was abandoned by operation of statute. Although we find legal error in the determination it is through no fault of the Judge.

Decision

29. The Judge materially erred in law. We set the decision aside for want of jurisdiction.

30. As the appeal has been abandoned by operation of statute there is nothing extant before the Upper Tribunal upon which we are required to make any further decision.

Anonymity.

31. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No-one shall publish or reveal any information, including the name or address of the appellant, likely to

lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed……
Upper Tribunal Judge Hanson

Dated: 22 December 2022