IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002312
First-tier Tribunal No:
HU/04641/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 December 2023

Before

THE HONOURABLE MR JUSTICE DOVE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE SHERIDAN

Between

Ismeal Toure
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr M Karnik, Counsel instructed by Turpin Miller LLP
For the Respondent: Ms K Elliot, Counsel instructed by the Government Legal Department

Heard at Field House on 4 December 2023

DECISION AND REASONS

1. The appellant is appealing against a decision of Judge of the First-tier Tribunal Ficklin ("the judge") promulgated on 12 April 2023.

2. For the reasons set out below, we do not have jurisdiction to hear this appeal.

Background

3. On 17 July 2020 the appellant, who is a citizen of Belgium, was granted leave under the European Union Settlement Scheme.

4. On 14 May 2021 the appellant was sentenced to 22 months' imprisonment for a crime committed in January 2021.

5. On 25 August 2021 a decision was made by the respondent to deport the appellant ("the deportation decision"). The deportation decision states that because the appellant has EUSS leave he has a right of appeal under regulation 6 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations") which must be exercised within 14 days. The deportation decision also states that the grounds of appeal available to the appellant under the 2020 Regulations are that the decision breaches any of his rights under the Withdrawal Agreement or that the decision is not in accordance with sections 3(5) or (6) of the Immigration Act 1971. In addition, the deportation decision includes a "One-Stop Notice" inviting the appellant to provide reasons why he should not be deported.

6. On 8 September 2021, the appellant wrote to the respondent. The letter is headed "response to one-stop notice". In the letter, the appellant gives reasons why, in his view, it would be contrary to article 8 ECHR for him to be deported.

7. On 29 September 2021, the respondent made a decision refusing the appellant's human rights claim ("the human rights decision"). The human rights decision states that the appellant has a right of appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), which must be exercised within 14 days.

8. On 7 October 2021 the appellant (through his representatives) lodged an appeal (using form IAT-5) against both the deportation decision and the human rights decision. The appellant acknowledged that the appeal under the 2020 Regulations was late and applied for an extension of time so that it could be heard alongside the appeal under the 2002 Act. The reasons given by the appellant for the 2020 Regulations appeal being late were: (a) the appellant was initially served with a decision that did not make clear he had a right of appeal under the 2020 Regulations; (b) the appellant was in prison and unrepresented when served with the deportation decision; (c) he responded promptly to the respondent explaining why he did not want to be deported; and (d) his representatives acted promptly once instructed.

9. On 12 October 2021 the appellant lodged another appeal (without, it appears, his representative's knowledge), where he stated that he faces a risk of being killed if returned to Belgium. Neither Mr Karnik nor Ms Elliott were aware of this appeal application, which we drew to their attention as it was on the Upper Tribunal's file. Mr Karnik and Ms Elliott agreed that protection issues were not raised by either party in the First-tier Tribunal and neither sought to disturb the judge's decision on the basis that this issue had not been considered.

10. On 12 October 2021 the First-tier Tribunal sent an "acknowledgement of notice of appeal" to the appellant's representatives.

11. The appellant's appeal was considered at a hearing in the First-tier Tribunal on 23 March 2023 and the decision was promulgated on 12 April 2023. Permission to appeal was granted on 13 September 2023.

12. Following the grant of permission to appeal, the appellant's representatives notified the Upper Tribunal that the appellant had left the UK.

Decision of the First-tier Tribunal

13. The judge decided the appellant's appeal under section 82 of 2002 Act but not the appellant's appeal under regulation 6 of the 2020 Regulations. This is clear from (i) the notice of decision at the end of the decision, which only refers to dismissing the appeal on article 8 ECHR grounds; (ii) the judge only considering arguments about the EU Withdrawal Agreement in the context of evaluating proportionality under article 8 ECHR; and (iii) the absence of any reference to, or consideration of, an appeal under regulation 6 of the 2020 Regulations.

14. It is unsurprising that the judge treated the appeal as being only against the human rights decision given that this is how the case was advanced before him. There were two written submissions by the appellant's representatives before the First-tier Tribunal: the appellant's skeleton argument and the appellant's further submissions. Both framed the case as being about article 8 ECHR and neither referred to an appeal under regulation 6 of the 2020 Regulations.

Appeal against the human rights decision under section 82 of the 2002 Act

15. It was common ground that, in accordance with section 92(8) of the 2002 Act, we are required to treat the appellant's appeal under section 82 as abandoned because he has left the UK.

Appeal against the deprivation decision under regulation 6 of the 2020 Regulations

16. In contrast to an appeal under section 82 of the 2002 Act, an appeal brought under regulation 6 of the 2020 Regulations is not abandoned by leaving the UK: regulation 13(5) of the 2020 Regulations. However, for the reasons given below, we do not have jurisdiction to consider an appeal under the 2020 Regulations.

17. As the appellant recognised when he lodged his appeal on 7 October 2021, the appeal against the deportation decision under regulation 6 of the 2020 Regulations was made outside of the (14 day) time limit specified in rule 19 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the Procedure Rules").

18. Where, as in this case, a notice of appeal to the First-tier Tribunal is not made in-time, rule 20(4) of the Procedure Rules requires the First-tier Tribunal to decide whether or not to extend time as a preliminary issue; and rule 20(5) requires the First-tier Tribunal to provide the parties with reasons for the decision made under rule 20(4).

19. Mr Karnik was unable to identify a preliminary decision by the First-tier Tribunal extending time. Nor could he point to any part of the judge's decision where consideration was given as to whether or not to extend time. He maintained, however, that it could be inferred from the First-tier Tribunal's acknowledgement of notice of appeal, as well as from the appeal under the 2020 Regulations proceeding (and not being abandoned by the appellant), that time had in fact been extended.

20. We are not persuaded by these submissions for the reasons given by Ms Elliot, which we would summarise as follows:

a. First, the acknowledgment of notice of appeal is no more than a notification by the First-tier Tribunal that the appeal has been received; it does not purport to be, and is not, a decision on whether to extend time.

b. Second, rule 20(4) of the Procedure Rules requires a decision to be made on whether or not to extend time; it does not state that in the absence of a decision it can be inferred that time has been extended. That a decision to extend time under rule 20(4) cannot be inferred from an absence of a decision is reinforced by the fact that rule 20(5) requires reasons to be given.

c. Third, the appeal did not proceed before the First-tier Tribunal on the assumption that time had been extended for the appeal under the 2020 Regulations. As is clear from the First-tier Tribunal decision, as well as the appellant's written submissions before the First-tier Tribunal (as summarised above in paragraphs 13 – 14), the position before (and as understood by) the judge in the First-tier Tribunal was that the appeal before him was under section 82 of the 2002 Act, not regulation 6 of the 2020 Regulations.

21. As the First-tier Tribunal has not made a decision under rule 20(4) of the Procedure Rules, the appellant's application for an extension of time, made on 7 October 2021, remains outstanding before the First-tier Tribunal.

22. Mr Karnik submitted that the absence of a decision under rule 20(4) could be remedied by application of the "slip rule" or by this panel reconstituting itself as a First-tier Tribunal panel and in that capacity making a decision to extend time.

23. Ms Elliott's response to these submissions was that whether or not to extend time is an important judicial decision where a wide range of factors need to be balanced, and therefore the absence of such a decision cannot be characterised as a mere slip. She also argued that, whilst the Upper Tribunal has the power to reconstitute itself as a First-tier Tribunal, it would not be appropriate to do so in this case given that the First-tier Tribunal has failed to make a highly significant decision.

24. We agree with Ms Elliott. First, the question of whether or not to extend time requires a considered judicial decision. The absence of such a decision is not a mere accidental slip. Second, if we were to reconstitute ourselves as a panel of the First-tier Tribunal the appellant would lose the benefit of a two-tier decision-making process in circumstances where a decision has not yet been made in the First-tier Tribunal. We therefore are in agreement with Ms Elliott that the decision under rule 20(4) of the Procedure Rules (and, if an extension of time is granted, in the ensuing appeal under regulation 6 of the 2020 Regulations) should be made in the First-tier Tribunal.

The AIRE Centre's application to intervene

25. Shortly before the hearing the AIRE Centre applied to intervene. In the light of our decision on jurisdiction, their application has not been considered.

Notice of Decision

26. The appellant's appeal under section 82 of the 2002 Act has been abandoned.

27. We do not have jurisdiction to consider the appellant's appeal under regulation 6 of the 2020 Regulations. An appropriate judge in the First-tier Tribunal will now need to make a decision under rule 20(4) of the Procedure Rules in respect of the appellant's application of 7 October 2021 for an extension of time.

Judge Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 December 2023