Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of MG) v First-tier Tribunal (Immigration and Asylum Chamber) ('fresh claim'; para 353: no appeal) IJR [2016] UKUT 00283 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Cardiff Civil Justice Centre

On 13 April 2016

Determination Promulgated

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Before

THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE GRUBB

Between

R (ON THE APPLICATION OF MG)

Applicant

and

FIRST TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

Representation:

For the Applicant: Mr A Mackenzie instructed by Duncan Lewis, Solicitors
For the Interested Party: Ms Lisa Busch QC and Mr A Byass instructed by Government Legal Department

1. A decision that further submissions do not amount to a 'fresh claim' under para 353 of the Immigration Rules is not a decision to refuse a protection or human rights claim and so does not give rise to a right of appeal to the First-

tier Tribunal under s.82 of the Nationality, Immigration and Asylum Act 2002 (as amended by s.15 of the Immigration Act 2014).

2. Whilst the First-tier Tribunal must determine whether it has jurisdiction to entertain an appeal, it cannot decide whether a decision that further submissions do not amount to a fresh claim under para 353 was lawful or correct. Such a decision can only be challenged on public law principles in judicial review proceedings.

JUDGMENT

1. We make an anonymity order in this case under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended), given the subject matter. The order requires that (i) any report of this decision shall refer to the applicant by initials; (ii) the parties to these proceedings shall not disclose the applicant's identity to any person unconnected with the proceedings. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or Court.

2. The applicant is a citizen of Iran. In June 2012 he made a claim for asylum on the basis of his activities as a practising Christian. The claim was rejected and an appeal dismissed in August 2012 on the basis that his interest in Christianity was not sincere.

3. On 31 March 2015 his solicitors submitted further representations indicating that he had now been baptised into the Christian faith and he should now be granted asylum. It was contended that by reason of the fresh information this was a fresh claim for asylum within the meaning of rule 353 of the Immigration Rules.

4. Those representations were considered and rejected by the Secretary of State on 1 May 2015. It was concluded:

    i. The applicant did not qualify for leave to remain on any basis;
    ii. The previous decision should not be reversed and accordingly the applicant did not qualify for asylum;
    iii. There was no well-founded fear of persecution or serious harm;
    iv. The further representations were not a fresh claim as they would not lead to any different outcome.

5. The applicant lodged a notice of an appeal with the FtT IAC. He contended that he had made a protection claim that had been refused by the Secretary of State and as such he had a right of appeal to the Tribunal against such a decision by virtue of s.82(1)(a) of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014.

6. The FtT judge considered this contention in a preliminary ruling and rejected it because no notice of an appealable decision had been

issued. It is common ground before us that the reasons for this decision were insufficient to inquire into whether there had been an appealable decision made. The interested party nevertheless contended that the FtT judge came to the right conclusion because no appealable decision had been made.

7. Permission to challenge the decision by way of judicial review was granted by Dove J on 28 January 2016. This is the hearing of the substantive application.

8. Mr Mackenzie is conscious that the same subject matter was considered by the Upper Tribunal in the case of R (Waqar) v SSHD [2016] UKUT 133 (IAC). In that case it was contended that the changes made to s.82 of the 2002 Act meant that there was a right of appeal from any refusal of a protection claim, and the distinction made in para 353 of the Immigration Rules between a claim and a fresh claim no longer had any effect. The UT disagreed applying the judgment of Lord Neuberger MR in ZA (Nigeria) [2011] QB 722 notwithstanding the judgment of Lord Hope in BA (Nigeria) [2010] 1 AC 444 which on one reading might be said to have decided that rule 353 was no longer determinative of what amounts to an asylum or human rights claim in statute.

9. Permission to appeal the judgment of the UT was refused by the Court of appeal successively by Underhill LJ (on the papers) and Beatson LJ (following an oral hearing). We have had the benefit of the reasons for both decisions. Although refusal of permission to appeal is not a judicial decision that is binding on lower courts and tribunals, where it is a reasoned decision after argument, we are entitled to give it considerable weight.

10. In fact Mr Mackenzie was at pains to submit that his client took no issue with the decision of the UT in Waqar and therefore accepted that for present purposes s.82(1)(a) of the 2002 should be read as meaning ‘a person may appeal to the tribunal where (a) the Secretary of State has decided to refuse a protection claim (that is a fresh claim within the meaning of para 353) made by P’. He submits that the issue in the present application is who decides whether the claim is a fresh claim.

11. Whereas the previous case law is clear that this is a question for the Secretary of State subject to the supervision of judicial review (see R v SSHD, ex parte Onibiyo [1996] QB 768; Cakabay v SSHD (No 2) [1998] Imm AR 623; and ZA Nigeria itself), Mr Mackenzie contends that as a result of Parliament’s decision to grant a right of appeal from a refusal of a protection claim, then the FtT judge has jurisdiction to decide whether there has been a decision to refuse a protection claim.

12. His argument proceeds as follows:-

i. If there has been a refusal of a protection claim, there is an appealable decision. If there has not, a preliminary ruling will conclude that there is no such decision and the FtT has no jurisdiction.
ii. As the issue of whether the further representations are a fresh claim is an integral part of the question whether there has been a protection claim made and refused, it is necessary for the FtT judge to reach a view on that issue.
iii. Whether or not the claim for protection is a fresh claim is a matter of fact for determination by the FtT judge in the same way as is a dispute as to whether a fee had been paid and accordingly whether a proper application had been made is a matter for the FtT judge to decide: see Basnet [2012] UKUT 113 (IAC) and R (Khan) v SSHD [2015] UKUT 353 (IAC).

13. Attractively as Mr Mackenzie has presented his submissions to us, we are unable to agree with them.

14. In our view, notwithstanding the significant change in s.82 from a right of appeal against an immigration decision on a protection ground to a right of appeal against a protection decision itself, Parliament can be presumed to have legislated against the background of satisfaction with the previous law as declared in ZA Nigeria. There is no indication in the amendments made, that it was intended to transfer responsibility for the categorisation decision of whether a claim is a fresh claim to the FtT. Indeed the general purpose of the 2014 amendments was to reduce the appellate jurisdiction of the FtT.

15. Second, we do not agree that an assessment of whether a protection claim is a fresh claim is a question of jurisdictional fact to be determined by the FtT judge. In our judgment it remains a matter of assessment and evaluation by the SSHD subject to supervision in judicial review. Both the High Court and the Court of Appeal decisions in Cakabay are to this effect and nothing in the legislative changes suggests that a new approach must now be taken. We do not accept that these decisions are explained merely because the judicial review court does not apply the approach of jurisdictional fact rather than public law review on rationality grounds.

16. Third, we do not accept that the Secretary of State refused a protection claim when she rationally concludes that the claim before her is not a fresh claim. Mr Mackenzie's reliance on the decisions in Basnet and Khan does not avail him. The UT subsequently decided in the case of Ved [2014] UKUT 150 (IAC) that a decision that no valid application has been made and no immigration decision is required to respond to it is not itself an appealable decision, and there is no jurisdiction in the FtT judge to examine the facts for himself and conclude that as a valid application had in fact been made there ought to have been an immigration decision in response to it.

17. Here, the rationality of the Secretary of State's decision is not in issue. Mr Mackenzie does not in addition to the challenge to the FtT decision contend that the SSHD's assessment was flawed; the application rests on the proposition that a new decision can be made by the FtT judge on this issue. We consider that this case falls on the Ved side as opposed to the Basnet side of the line as regards the limits of the FtT's ability to determine whether it has jurisdiction to determine an appeal. In our view there can be no decision to refuse a protection claim where the representations are not recognised (rationally) to be a protection claim.

18. For these three reasons we are satisfied that the FtT judge reached the right conclusion that there was no right of appeal to the FtT, although for different reasons than he gave. Accordingly this application is refused.

Hon Mr Justice Blake
Sitting as a Judge of the Upper Tribunal