Upper Tribunal
(Immigration and Asylum Chamber)

Vigneswaran (abandonment: s 104(4B)) [2016] UKUT 00054 (IAC)

THE IMMIGRATION ACTS

Heard at Glasgow
10 December 2015

Promulgated on

……

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

NAGAMUTHTHU VIGNESWARAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Devlin, instructed by McGlashan Mackay Solicitors
For the Respondent: Mr Matthews, Senior Home Office Presenting Officer

Inaction is not giving notice for the purposes of s 104(4B).

DECISION AND REASONS

1. The appellant, a national of Sri Lanka, came to the United Kingdom in 2010 and was detained. He then applied for asylum. He was refused, and an appeal was unsuccessful. He did not leave the United Kingdom, and failed to observe reporting conditions in the period from 14 February 2012 to 24 January 2013 when he was encountered by officials and detained again. He made further submissions in support of his asylum claim which were refused in a new appealable decision on 11 February 2014. He appealed on asylum and human rights grounds and also on the

basis that the decision was not in accordance with the law. His appeal was heard on 27 March 2014 by Judge Kempton, who dismissed it. He applied for permission to appeal to the Upper Tribunal.

2. Permission was refused by the First-tier Tribunal but on renewal was granted by Upper Tribunal Judge Freeman. That decision, and the events subsequent to it, are encompassed in a decision by the Vice President, made without a hearing, on 14 October 2014:

"DECISION AND REMITTAL

1. On 10 September 2014 I wrote to the parties as follows:-

"On 17 June 2014 Judge Freeman granted permission to appeal in the following terms:

"Permission to appeal is granted.

REASONS

(a) The First-tier application seems to have been in time, contrary to the view of the permission judge, who might helpfully have dealt in more detail with the merits in the alternative. However, as he pointed out, the hearing judge had allowed the appellant's appeal under article 3 of the Human Rights Convention, on the basis of his mental health needs in Sri Lanka: so it is hard to see, and there is no explanation in the renewed grounds as to what humanitarian protection under article 15(b) of the Qualifications Directive would have added, in terms of his status in this country: as even the grounds concede, this had not been argued before. It follows that the only real issue is on asylum.

(b) Turning to the asylum grounds,

(3) and (4) The hearing judge recorded at paragraph 58 the appellant's claim about his wife's continuing to receive visits from the CID asking after him, which might have brought him within category 7(d) of GJ (post civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC); but, in her very long and otherwise careful decision, she did not deal with it on the facts.

(5) While corroboration is certainly not required as a matter of law in such cases, the judge found on the facts of this one, at paragraph 49, that there was no evidence at all that the Sri Lankan authorities knew of any link between this appellant and his brother, who, according to what he said, was a bodyguard of the son of the Tamil Tiger leader. The answer given to that in the renewed grounds is that the judge should have found [sic. taken judicial notice of the fact] that the authorities would be able to check various types of record "with little or no effort on their part". No authority is cited for this proposition: if it were to have been put forward on the facts, evidence needed to have been put before the judge as to the likelihood of their doing so in this case.

(6) The grounds however make no arguable link between the appellant's activities in this country, such as the judge found them to be, and the continuing visits to his house in Sri Lanka.

(c) It follows that permission to appeal is given on the point in paragraph (4) – (5) of the grounds only. Unless there is an objection within

the time set out in the attached letter, the appeal will be allowed, with a direction to Judge Kempton to continue and conclude the hearing on that point."

I do not know what the judge envisaged by his reference to the "time set out in the attached letter"; but the covering letter sent with the decision mentioned no time limit. Nevertheless, both parties have replied. The Secretary of State agrees with the proposal in the decision. The appellant's representative's letter makes no mention of that proposal and refers to "the forthcoming Hearing" before the Upper Tribunal.

It appears that the appellant's representatives have not understood the terms of the grant of permission. If Judge Freeman's proposal takes effect, the proceedings before the Upper Tribunal will be concluded by the allowing of the appeal and its remittal: the presence or absence of any additional grounds of appeal can make no difference. It will be for Judge Kempton to re-determine the appeal, and if she makes an error of law, the appellant can, if so advised, appeal against her decision to the Upper Tribunal. If, on the other hand, Judge Freeman's proposal does not take effect, the appeal will be determined by the Upper Tribunal on the basis of the extant grant of permission. In such circumstances there can be no further appeal to the Upper Tribunal: further recourse would be to the Inner House.

If no proposal to the contrary is received **within 21 days** of the date of this letter I will allow the appeal to the Upper Tribunal and remit the appeal to Judge Kempton for her to determine it according to law."

2. No response has been received from either party. The appeal to this Tribunal is allowed. I remit the appeal to the First-tier Tribunal and direct that it be determined by Judge Kempton according to law."

3. What the Tribunal did not know was that, presumably acting on the positive parts of Judge Kempton's decision, the Secretary of State granted 30 months leave to the appellant on 4 September 2014. When the matter came back to Judge Kempton the Secretary of State argued that the appeal had been abandoned by operation of s 104 of the Nationality, Immigration and Asylum Act 2002. After hearing submissions from the parties Judge Kempton accepted that argument. The appellant now appeals on the basis that in doing so she erred in law.

4. Section 104 of the 2002 Act was, at the relevant date, as relevant, as follows:-

"104(1) An appeal under section 82(1) is pending during the period –
(a) beginning when it is instituted, and
(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).
(4)…
(4A) An 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 (subject to subsection (4B)).

(4B) Subsection (4A) is shall not apply to an appeal in so far as it is brought on a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection) where the appellant –
(a) …
(b) gives notice, in accordance with Tribunal Procedure Rules, that he wishes to pursue the appeal in so far as it is brought on that ground."

5. The relevant Procedure Rules are those in s 17A of the Upper Tribunal Rules:-

"17A. (1) A party to an asylum case or an immigration case before the Upper Tribunal must notify the Upper Tribunal if they are aware that –
(a) the appellant has left the United Kingdom;
(b) the appellant has been granted leave to enter or remain in the United Kingdom;
(c) a deportation order has been made against the appellant; or
(d) a document listed in paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006 has been issued to the appellant.
(2) Where an appeal is treated as abandoned pursuant to section 104(4) or (4A) of the Nationality, Immigration and Asylum Act 2002 or paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006, or as finally determined pursuant to section 104(5) of the Nationality, Immigration and Asylum Act 2002, the Upper Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined.
(3) Where an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the Nationality, Immigration and Asylum Act 2002, but the appellant wishes to pursue their appeal, the appellant must send or deliver a notice, which must comply with any relevant practice directions, to the Upper Tribunal and the respondent so that it is received within thirty days of the date on which the notice of the grant of leave to enter or remain in the United Kingdom was sent to the appellant.
(4) Where a notice of grant of leave to enter to remain is sent electronically or delivered personally, the time limit n paragraph (3) is twenty eight days.
(5) Notwithstanding rule 5(3)(a) (case management powers) and rule 7(2) (failure to comply with rules etc.), the Upper Tribunal must not extend the time limits in paragraph (3) and (4)."

6. The practice direction sets out a form of notice. Although Judge Kempton was led by the parties to consider the First-tier Tribunal Rules as well, the position is that insofar as there was a pending appeal, it was before the Upper Tribunal for the whole of the period from 17 June to 14 October 2014, and the Upper Tribunal Rules applied to it during that period. Neither party informed the Tribunal about the grant of leave; and the appellant (who is not said to have been ignorant of the grant of leave) gave no notice that he wished to pursue his appeal on asylum grounds.

7. It might be thought that in those circumstances the absence of such notice had the automatic effect that the appeal fell to be treated as abandoned, at latest on the expiring of the time for giving notice, probably some time in the first week of October 2014. Any proceedings thereafter, in either Tribunal, were made without jurisdiction. But the appellant's position before the First-tier Tribunal was that it was unfair to apply the provisions of s 104 to him as he otherwise had no opportunity to argue his

Refugee Convention claim before a judge and he had come to the Tribunal prepared to do so. Before us Mr Devlin argued that "in the special circumstances of this case" the failure to give the notice envisaged by s 104(4B) should be regarded as giving the notice.

8. The circumstances to which Mr Devlin referred amount to the procedural history of the case and, in particular, the fact that after the letter of 10 September 2014 the appellant had not raised any objection to the matter continuing. But, with respect, that is only a special case of a general category of cases where the appellant does not raise any objection to the matter continuing. It is, in our view, impossible to regard the failure to give a notice as giving a notice in these or (probably) any other circumstances.

9. Besides, the procedure envisaged by s 104(4B) and the rules does not, as it has sometimes been put, impose any obligation on the appellant. On the contrary, it gives the appellant a choice. The default position, if we may so express it, is that the grant of leave is regarded as settling all outstanding matters between the appellant and the government. But if the appellant wishes to continue to attempt to establish his status as a refugee, he can do so by following the procedure in the rules.

10. Mr Devlin's submission, and the submission made on the appellant's behalf to Judge Kempton, appears to ignore wholly this question of choice. Before us Mr Devlin suggested that the failure to inform the Tribunal about the grant of leave, and to give any notice, should be treated as equivalent to the exercise of the choice. But the position is that it is perfectly clear from Judge Kempton's determination that the consequences of the grant, the terms of the statute, and the requirements of the rules, took the appellant and his solicitors entirely by surprise when they were drawn to their attention. It is quite impossible to regard the appellant as having made the relevant choice within 30 days after the grant of leave. Not only did he actually give no notice: it is clear that nothing that he did or could do at the relevant time could be interpreted as making the choice in question.

11. It follows that Judge Kempton was correct to find that the appeal had been abandoned by the grant of leave. The remittal to her was ineffective because on 14 October 2014 s 104(4A) had already taken effect in the absence of a notice under sub-s (4B). There was and is nothing else for the Tribunal at either level to determine.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 22 December 2015