



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00075/2017

THE IMMIGRATION ACTS

Heard at Field House
On 12 June 2018

Decision and Reasons Promulgated
On 13 June 2018

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR GANESAN CHIDAMBARAM
(NO ANONYMITY DIRECTION MADE)
Respondent

Representation:

For the Appellant: Mr A Slatter, counsel
(instructed by KTS Legal Ltd)

For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. For convenience and clarity the tribunal will refer to the parties by their designations as used in the tribunal below. Permission to appeal was granted to the Secretary of State for the Home

Department by First-tier Tribunal Judge Lambert on 7 March 2018 against the grant of the Appellant's Tier 2 appeal by First-tier Tribunal Judge R L Walker in a decision and reasons promulgated on 28 November 2017. The judge found, contrary to the Respondent's contentions, that the Appellant enjoyed a full right of appeal to the First-tier Tribunal, under the Immigration Rules by virtue of the transitional provisions.

2. Permission to appeal was granted because it was considered arguable that the Appellant had misunderstood the sequence of the Appellant's applications. The Appellant had arguably lost the right of appeal several years before the decision under appeal, dated 17 January 2017, which itself stated that there was no right of appeal.
3. Mr Wilding for the Secretary of State submitted that the chronology set out in the permission to appeal application was supported by the documents included in the Appellant's First-tier Tribunal trial bundle. On 18 August 2014 the Appellant applied to extend his Tier 2 leave to remain, but omitted to send his Certificate of Sponsorship and biometric enrolment. The Home Office wrote on 3 and 16 September 2014 requesting that information, which was not sent. The Tier 2 application was rejected as invalid and the application fee was refunded. On 16 October 2014 the Appellant made a valid application, but this was more than 28 days after his last leave to remain had expired. When, as happened, the application was refused on 2 December 2014, there was thus no right of appeal. The Appellant's 3C leave had expired before he made a valid application. The evidence showed that the Appellant's application on 18 August 2014 was not wrongly rejected, and the Appellant had not proved otherwise.
4. The Appellant attempted to appeal the decision that there was no right of appeal on his 16 October 2014 application, but he subsequently withdrew his appeal to the First-tier Tribunal. A subsequent Tier 2 application was also refused with no right of appeal to the First-tier Tribunal and the adverse Administrative Review of that was the subject of an unsuccessful judicial review. The judge had erred in finding that there was nevertheless a right of appeal because the Secretary of State for the Home Department had wrongly rejected the first application. The judge's decision should be set aside, and the decision remade and dismissed.

5. Mr Slatter for the Appellant sought valiantly to uphold the judge's decision. He submitted that the judge had been entitled to determine the First-tier Tribunal's jurisdiction for himself, and that the Upper Tribunal should not interfere with his findings. The Home Office had not discharged the burden of proof. The first, in time application for further leave to remain should never have been rejected.
6. The tribunal is bound to say that it had some difficulty in following Mr Slatter's submissions, and that in the tribunal's view the First-tier Tribunal judge's decision was plainly wrong. In the first place, the Secretary of State for the Home Department's decision dated 17 January 2017 should never have been the subject of Notice of Appeal to the First-tier Tribunal. The appeal should have been weeded out by the tribunal at the listing stage, because the refusal letter stated in express terms that there was no right of appeal to the First-tier Tribunal. The First-tier Tribunal's jurisdiction has been limited to international protection and human rights since 6 April 2014, and a Tier 2 application is not deemed to be a human rights decision. All that is available is Administrative Review under Appendix AR of the Immigration Rules. That did not depend on whether an application was in time or out of time. If that were to be contested, it was for the Appellant to make a judicial review application, which was fairly obviously likely to fail because of the adequate alternative remedy available if not the difficulty of establishing "Wednesbury" unreasonableness.
7. The chronology provided by Mr Wilding is unanswerable, and is supported by the evidence which was before the First-tier Tribunal judge. The Appellant failed to provide the biometric details or his Certificate of Sponsorship with his in time application, and was given two further opportunities to do so by the Home Office before his application was rejected as invalid. That rejection stated in terms that a valid out of time application would have no right of appeal. The judge's findings to the contrary, as to the validity of the rejected application are set out mainly at [23] of his determination, are contrary to the evidence in the Appellant's own bundle and are based on a misunderstanding of not only that evidence, but of the sequence of events which followed, as set out in Mr Wilding's submissions. The fact that the Appellant was subsequently permitted to make two further out of time applications for further leave to remain in Tier 2 was beside the point, as by then his 3C leave had expired, not to mention the change in appeal rights. The Appellant's submission of the further application on

16 October 2014 is itself strong evidence that his rejected application was invalid as he was informed in clear terms with reasons on 1 October 2014. That was the time to contest the issue if he had evidence showing that the Home Office were wrong, such as proof that he had indeed supplied a Certificate of Sponsorship and/or his biometric information with the application rejected as invalid. He took neither step, yet the burden of proof of validity was on him. It was inevitable that refusal on 2 December 2014 would leave him with no right of appeal as well as the need to leave the United Kingdom before enforcement action was commenced. Later he was further caught by the restriction in appeal rights generally.

8. Alarm bells should have been ringing loudly when the text of the Home Office's decision dated 17 January 2017 was considered, warning in familiar terms that there was no right of appeal to the First-tier Tribunal. In the tribunal's view, the submissions made to the judge on the Appellant's behalf were completely unsound and misleading, and should not have been made.
9. In conclusion, the Upper Tribunal finds that the purported appeal lodged against the Respondent's decision dated 17 January 2017 was invalid. There was no right of appeal. The Appellant's 3C leave had long ago expired and in any event there was no longer a right of appeal under the Immigration Rules. The First-tier Tribunal judge's decision is accordingly set aside. The appeal is remade and dismissed for want of jurisdiction.

DECISION

There was a material error of law in the First-tier Tribunal's decision and reasons, which is set aside.

The decision is remade. The appeal is dismissed because the First-tier Tribunal had no jurisdiction.

Signed

Dated 12 June 2018

Deputy Upper Tribunal Judge Manuell