



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/01095/2016 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On the 13th October 2021

On the 01st November 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SF

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION ON JURISDICTION AND DIRECTIONS (V)

For the appellant: In person. Not legally represented.

For the Respondent: Mr A Tan, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

Appeal Chronology

1. The appellant, who is a Pakistani national with date of birth given as 25.6.80, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 4.9.17 (Judge Morris), dismissing on all grounds his appeal against the decision of the Secretary of State, dated 6.1.16, to refuse his application made on 21.12.15 for indefinite leave to remain (ILR) on the basis of long residence under the Immigration Rules.
2. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 2.3.18. When the application was renewed to the Upper Tribunal, on 25.9.18 Upper Tribunal Judge Frances also refused permission.
3. The history is complicated by the fact of intervening applications, appeals, and judicial review applications. In a decision promulgated on 24.4.19 (HU/24573/2018), the First-tier Tribunal (Judge Davies) found that the appellant did not have a right to appeal against a decision he claimed to have been made by the respondent on 14.7.16, or alternately 14.7.14, to refuse LTR on grounds of long residence. As the Home Office skeleton argument of 7.2.19 explained, there was no such decision of 14.7.16. Furthermore, the decision of 14.7.14 was made in response to an application made on 4.3.14 but at both the date of application and decision, the appellant had extant leave to remain as a Tier 1 Highly Skilled Migrant, valid until 13.6.16. In consequence of s82(2)(d) he could only appeal the refusal decision where the result of the refusal would be that he has no leave to enter or remain. It follows, as Judge Davies found, there was no right of appeal. Permission to appeal Judge Davies' decision was refused by the First-tier Tribunal on 14.5.19 and on renewal of the application to the Upper Tribunal, also refused by Upper Tribunal Judge Lane on 10.6.19.
4. In the meantime, the appellant's Cart judicial review application (C4/2019/0187) was successful before the Court of Appeal in that on 7.7.20, Hickinbottom LJ granted permission to proceed with the judicial review application on the single ground that Judge Morris' approach to the burden of proof was wrong and that both the Upper Tribunal and the Administrative Court erred in not concluding that the ground was at least arguable. I do not have access to the grounds put before either the Administrative Court or the Court of Appeal but it appears that the issue of the burden of proof was one identified by Hickinbottom LJ himself.
5. In a decision of 5.11.20 (CO/4228/2018), the Administrative Court quashed the decision of the Upper Tribunal to refuse permission to appeal, and did so pursuant to CPR Part 54.7A(9), on the basis that there was no request for a substantive hearing. In consequence, on 10.2.20, the Vice President granted permission to appeal to the Upper Tribunal, limited to the sole issue of whether

the judge erred in identifying and/or applying the burden of proof where the respondent asserted that he had understated his income to HMRC.

6. A difficulty arises in that the Vice President purported to grant permission in relation to both cases, HU/01095/2016 and HU/24573/2018. However, the latter case is not in play in that there has been no judicial review of the Upper Tribunal's refusal to grant permission to appeal Judge Davies decision finding there to be no valid appeal. In the circumstances, the Upper Tribunal can only address HU/01095/2016, which is the decision in respect of which the Upper Tribunal's previous refusal to grant permission to appeal was quashed.
7. The respondent's Rule 24 Reply, dated 3.3.21, did not oppose the appeal, and the Tribunal was invited to "determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant was dishonest in the submission of his finances." This clearly relates only to HU/01095/2016. Before me in July 2021, Mr SF confirmed that the only relevant appeal is HU/01095/2016, which was also the view of Mr McVeety, representing the Home Office.
8. In my error of law decision promulgated 6.8.21, I carefully considered the decision of the First-tier Tribunal on the single issue of Judge Morris' treatment of the burden of proof. Since the promulgation of Judge Morris' decision, Balajigari [2019] EWCA Civ 673, promulgated on 16.4.19, has clarified that where the Home Secretary was minded to refuse indefinite leave to remain under the Immigration Rules para.322(5) on the basis of the applicant's dishonesty, or other reprehensible conduct, he was required as a matter of procedural fairness to indicate clearly to the applicant that he had that suspicion, so as to give the applicant an opportunity to respond. The Home Secretary was required to take that response into account before concluding that there had been such conduct. Furthermore, "Undesirability" required reliable evidence of sufficiently reprehensible conduct, and an assessment, taking proper account of all relevant circumstances, of whether the applicant's presence was undesirable. An earnings discrepancy only constituted sufficiently reprehensible conduct if it was a result of the applicant's dishonesty, *R. (on the application of Khan) v Secretary of State for the Home Department* [2018] UKUT 384 (IAC), considered.
9. The legal burden of proving an allegation of dishonesty was on the respondent on the balance of probabilities. It was evident from the First-tier Tribunal decision that Judge Morris failed to adequately address the burden of proof, stating at [16] that the burden was on the appellant on the balance of probabilities. The judge added at [17] that it was for the respondent to produce a "at least" prima facie case that the appellant had made false representations or failed to disclose material facts for the purpose of obtaining leave. This formulation, repeated at [31] of the decision was inaccurate and in clear error of law. The judge did not make clear that the legal burden of proving dishonesty lay on the respondent, not the appellant. In the premises, I was satisfied that the

decision of the First-tier Tribunal was made in error of law and could not stand but had to be set aside to be remade, which I did, reserving the remaking of the decision to the Upper Tribunal.

10. At the hearing before me in July 2021, the appellant advised me that a separate appeal before the First-tier Tribunal had adjourned on 16.7.21 to await the outcome of this matter, as it too turned on the same 322(5) character/suitability issues and at least to some extent the same HMRC and accounts information.
11. In my error of law decision, I set out directions requiring the respondent within 28 days of the issue of my decision to lodge and serve her “written position in respect of the issues in this appeal and on the appellant’s current immigration status and entitlement generally”.
12. The resumed hearing was listed before me remotely on 13.10.21. I was not aware until the hearing commenced, that the Secretary of State had in fact responded, somewhat belatedly, to my directions by the letter of 23.9.21, to which the appellant replied on 26.9.21.
13. As stated above, on 21.12.15 the appellant sought indefinite leave to remain (ILR) on the basis of 10 years’ long residence, which application the respondent refused on 6.1.16. The respondent’s refusal decision asserted that he had been absent from the UK between 4.6.09 and 5.2.10, a total of 245 days, exceeding the maximum permitted of 180 days provided for in the definition of ‘continuous residence’ within paragraph 276A of the Immigration Rules. The respondent also relied on paragraph 322(5) to refuse the application on the basis of the undesirability of permitting the appellant to remain in the UK in light of his conduct. In particular, it was alleged that he had declared income to HMRC in the tax years between 2011/2012 and 2013/2014 which was significantly less than the income he had stated in his immigration applications in April 2011 and May 2013. Almost all of his £120,000 self-employed income had not been declared to HMRC. The respondent’s case was and remains that he had used deception either to HMRC or in his Tier 1 applications. If correct, this adversely reflected on his character and conduct, relevant to paragraph 322(5) of the Immigration Rules.
14. In the letter of 23.9.21, the respondent takes a preliminary point that this appeal has to be considered as abandoned. It transpires that following an application made on 22.10.18, initially refused but allowed on appeal to the First-tier Tribunal (HU/06527/2019), the appellant had been granted Discretionary Leave to Remain in the UK. Reliance is made on Aziz (NIAA 2002 s 104(4A): abandonment) [2020] UKUT 00084 to the effect that “Where a person brings an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and is then given leave to remain in the United Kingdom, the effect of section 104(4A) is to cause the appeal to be treated as abandoned (subject to section 104(4B)), whether or not the appeal was pending on the date of the grant of leave”.

15. S104 as currently in force provides as follows:

“104 Pending appeal

(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).

(2) An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while –

- (a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,
- (b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or
- (c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.

(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) 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–

(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.

16. The Tribunal Procedure (Upper Tribunal) Rules 2008 provide:

“Appeal treated as abandoned or finally determined in an asylum case or an immigration case

17A. – (1) A party to an asylum case or an immigration case before the Upper Tribunal must notify the [F2Upper] 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 or remain is sent electronically or delivered personally, the time limit in 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).]”

17. The effect of Aziz and these provisions is that once Mr SF was granted discretionary LTR on 14.10.19, his appeal must be treated as abandoned, unless he can bring himself within s104(4B) and also gave notice within the 28-day time limit.
18. Mr SF sought to argue that under Procedure Rule 5(3)(a), the Upper Tribunal had the power to extend any time limit to enable him to continue with the appeal. However, as I pointed out to him, there are two difficulties with his submission. The first is that under s104(4B), it is only on protection grounds that he could pursue the appeal. Secondly, Rule 17(5) prohibits the Upper Tribunal from extending the time limit for the appellant to give notice that he wishes to pursue an appeal that would otherwise be treated as abandoned pursuant to s104(4A).
19. It follows that once Mr SF was granted discretionary LTR on 14.10.19, that matter should have been drawn to the attention of the Upper Tribunal, and a notice would have been issued to the effect that the appeal is to be treated as abandoned. It is unfortunate that this issue was not raised at the earlier hearing before me. However, whilst I made a decision setting aside the decision of the First-tier Tribunal promulgated 4.9.17, the appeal was not finalised and effectively remained open until the remaking of the decision in the appeal. The reality is that the Upper Tribunal had no jurisdiction to entertain the error of law issue, the effect of which is that the decision of the First-tier Tribunal (Judge Morris) stands as made.
20. Mr SF complained that he had been pursuing this matter for some years and that the enforced abandonment of the appeal left him in ‘limbo’ with a flawed decision of the First-tier Tribunal finding that he was dishonest. He also pointed

out that his wife had a pending matter the outcome of which turns on his own immigration status. As mentioned above, he also has a pending appeal which has been adjourned to await the outcome of this matter. I agree that it may appear unfair. However, I am satisfied that no reliance can be made by the respondent on the 2017 First-tier Tribunal decision, as all the adverse credibility findings were flawed by the failure to properly self-direct on the burden and standard of proof. For the same reasons, neither, in my view, should any Tribunal properly seek to rely under the Devaseelan principle on the flawed findings of Judge Morris in relation to the appellant's credibility and dishonesty, although the findings as to whether the appellant exceeded the maximum period allowed outside the UK would not be subject to the same consequence.

21. In summary, the Upper Tribunal has no jurisdiction to entertain this appeal.

Decision & Directions

The appellant's appeal to the Upper Tribunal is dismissed on the basis that there is no jurisdiction as the appeal must be treated as abandoned pursuant to s104(4A) of the 2002.

For clarity, the decision of the First-tier Tribunal in HU/24573/2018 must stand as made.

I make no order for costs.

I direct the Upper Tribunal to issue a notice pursuant to Rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to the effect that this appeal is treated as abandoned.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 13 October 2021

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

“Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 13 October 2021