



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-000285

First-Tier Tribunal No: HU/50743/2022  
IA/01181/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 22<sup>nd</sup> March 2024**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**MD. RAJIB HOSSAIN**  
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr. M. Biggs, Counsel instructed by Zyba Law  
For the Respondent: Mr. T. Lindsay, Senior Home Office Presenting Officer

**Heard at Field House on 12 March 2024**

**DECISION AND REASONS**

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge Ford, (the "Judge"), dated 5 June 2023, in which she dismissed the appellant's appeal for want of jurisdiction.
2. Permission to appeal was granted by Deputy Upper Tribunal Judge Hutchinson in a decision dated 8 February 2024 as follows:

"The application is in time. The grounds are arguable. The judge was required to determine whether the appellant had made a human rights claim for the purposes of Part 5 of the Nationality Immigration and Asylum Act 2002 and, if so, whether the respondent refused that claim. The judge focused on whether Article 8 was engaged whereas arguably the strength or otherwise of the human rights claim does not depend on the merits of the claim **(MY (refusal of human rights claim: Pakistan) [2020] UKUT 89 (IAC)."**

3. There was no Rule 24 response.

### **The hearing**

4. I heard oral submissions from both representatives. I reserved my decision.

### **Submissions**

5. The grounds are summarised at [2] of the Grounds of Appeal as follows:

“(1) (a) Had the judge correctly understood and applied the relevant legal framework they would or should have concluded that the appellant did have a right of appeal from the 21 January 2022 decision. (b) The judge’s analysis as to whether the decision of the respondent appealed against generated a right of appeal under Part 5 of the Nationality, Immigration and Asylum Act 2002 (“the NIAA”) is based on an erroneous understanding of the legal requirements as to whether a right of appeal has arisen and is accordingly unsustainable. The judge should have considered (a) whether the appellant had made a human right claim for the purposes of Part 5 of the NIAA; and (b) whether, if he had, the respondent had decided to refuse that claim by the decision appealed against. The judge did not consider and determine these questions, and therefore materially erred in law.”

6. In his oral submissions, Mr. Biggs relied on the Grounds of Appeal, and submitted that the judge had failed to ask the correct questions when determining jurisdiction. The failure to engage with either question was an error of law. Had these questions been considered, the judge would have found that there was a right of appeal. The appellant had made a human rights claim, as acknowledged in the decision. The respondent stated in the decision “I have considered your rights under Article 8 of ECHR”. The respondent then considered the claim and rejected it. It was a decision to refuse a human rights claim.
7. Mr. Lindsay submitted that the answers to the two questions must be in the negative. He submitted that there was a third issue, materiality. Article 8 was not capable of being engaged. He submitted that these questions overlapped, and made submissions on the “overarching” question of materiality first, with reference to the case of Abbas [2017] EWCA Civ 1393. At [27] this held that private life could not be engaged out of country. He therefore submitted that it was not legally possible for the respondent to consider Article 8, and not jurisdictionally possible for the Tribunal to consider Article 8.
8. He referred to headnote (1) and paragraph [32] of MY. He submitted that the respondent’s Rights of Appeal guidance had not changed materially since then. He submitted that MY had held that this guidance was lawful. In reliance on the guidance, he submitted that the decision maker needed only to look at the purported Article 8 claim to the extent of deciding whether it was capable of engaging Article 8 rights. If it were not so capable, then no human rights claim had been made. He submitted that MY had held that this was an appropriate process for the respondent to follow. The decision maker had looked at the purported raising of a human rights claim, had made a decision that Article 8 rights were not engaged, and refused it with no right of appeal. This application was unfounded, with reference to Abbas. He submitted that the decision maker had not refused a claim, but had stopped short of substantively engaging with it.
9. With reference to Abbas he submitted that the error could not be material in any event. Nothing that the appellant relied on could be an Article 8 matter. The

appeal could not succeed. With reference to Ahsan [2017] EWCA Civ 2009, cited in the Grounds of Appeal, he submitted that this had not been put before the court in Abbas.

10. In response Mr. Biggs submitted that, contrary to Mr. Lindsay's submissions, MY had not approved the respondent's Right of Appeal policy guidance. He referred to [50] to [52] of MY. The Upper Tribunal, with reference to Baihinga (R.22; Human Rights appeals; requirements) [2018] UKUT 00090, found that the guidance was wrong to inject a substantive element into the formal test of whether there was a right of appeal. The aspect of the policy guidance relied on was unlawful. In any event, the statutory provisions were relevant, not the respondent's guidance. There was no reference to any substantive element of the claim in the statutory provisions.
11. In relation to the case of Abbas, Mr. Biggs submitted that Mr. Lindsay had put forward an argument relating to the substance of the claim, not regarding the statutory provisions of sections 113 and 82(1)(b). The points raised in relation to Abbas had nothing to do with the statutory definition of a human rights claim set out in section 113.
12. Regarding materiality, Mr. Biggs submitted that, if the judge had erred in law, the appellant had been denied a right of appeal, which was material. The appellant had been wrongly deprived of a procedure to which he was entitled. In relation to whether or not he would be able to succeed in his appeal, while he accepted that it might be difficult, the courts had not looked at the issue of Article 8 being engaged from abroad in the context of Ahsan. The appellant was entitled to have a full argument of the issues, which he had been denied.

### **Error of law decision**

13. I find that the grounds are made out and that the decision involves the making of a material error of law.
14. The Grounds of Appeal set out the two stages which need to be addressed when considering whether a right of appeal exists, by reference to the statutory provisions. What constitutes a human rights claim is set out in section 113 NIAA. This provides that a "human rights claim" "means a claim made by a person to the Secretary of State [.....] that [.....] to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998".
15. The covering letter which accompanied the appellant's application states (D50):

"The policy of considering human rights claims in visit applications [Version 1.0], page 3 & 4, if the Extra information section is completed, considering human rights claims in visit applications.

Rights of appeal [Version 10], page 15 reads as:

"Where applicants cannot find an appropriate form or believe that they cannot meet the requirements of the Immigration Rules, they must complete the form for the route which most closely matches their circumstances and pay the relevant fee and charges."

Therefore, we would request you to consider this application as a Human Rights claim.”

16. Later, under the heading “Human Rights Claim Under ECHR” it sets out the reasons for the application. I find that the appellant intended to make a human rights claim, and was clear from the outset that this is what he was doing.
17. I further find that the respondent treated it as a human rights claim. In his decision the respondent stated (D4):

“Given your reference to making a human rights claim and the various case law quoted by your representatives, I have considered your rights under Article 8 of ECHR. Article 8 of the ECHR is a qualified right, proportionate with the need to maintain an effective immigration and border control and decisions under the Immigration Rules are deemed to be compliant with human rights legislation.

I note that you state that you departed the UK in 2016 and have not applied to return since. Your wife and children are resident in Bangladesh with you. I note that you state that you have a brother in law and sister in law in the UK. However, these relationships are not capable of engaging Article 8. For the reasons given above I am not satisfied that you are a genuine visitor and I am therefore satisfied the decision is proportionate under Article 8(2). I note that no satisfactory reason has been put forward as to why your sister in law and brother in law cannot maintain ties with you through telephone or other means or travel to Bangladesh to visit you. I am therefore not satisfied that Article 8 is engaged in these circumstances.

I have also considered whether the particular circumstances set out in the application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant a grant of entry clearance to the United Kingdom outside the requirements of the Immigration Rules. Following a thorough assessment of the application I am satisfied that there is no basis for such a claim. It has therefore been decided that there are no exceptional circumstances in this case. Consequently, you will not be issued entry clearance outside the Rules.”

18. I find that the respondent acknowledged that the appellant had made a human rights claim and treated it as such.
19. Section 82(1)(b) of the NIAA provides a right of appeal to the Tribunal where “the Secretary of State has decided to refuse a human rights claim”. I find that the respondent treated the appellant’s application as a human rights claim, and that he refused it. That he refused it because he was not satisfied that Article 8(1) was engaged does not mean that it was not a human rights claim.
20. I have carefully considered the case of MY. I find that it does not support Mr. Lindsay’s submissions in relation to the respondent’s policy guidance on Rights of Appeal, quite aside from the fact that the statutory provisions are relevant, not the respondent’s guidance. MY states at [50]:

“In Baihinga (R.22; Human Rights appeals; requirements) [2018] UKUT 00090, the Upper Tribunal considered, in general terms, the requirements for establishing that a human rights claim has been made. The Tribunal doubted the correctness of the proposition, still found in the Rights of Appeal Guidance, that an unsubstantiated claim is not a human rights claim within the meaning of section 113. The Tribunal considered that the appropriate course, in such a case, was to certify the claim, under section 94 of the 2002 Act, as clearly unfounded. The same view was

expressed by Kerr J in AT at paragraph 59, where he held that “section 94(1) is drafted on the premise that a clearly unfounded human rights claim is still a human rights claim, albeit one without foundation”.

21. Mr. Lindsay did not provide a copy of the guidance, but it was agreed that it is the guidance entitled “Rights of Appeal”, version 15, dated December 2023. This states at the top of page 13 under the heading “Determining if human rights are engaged”:

“If the claim raises human rights, consider whether the claim made is capable of engaging the human right relied on. This will involve examination of the merits of the claim.

You should refer to considering human rights claims guidance which sets out how to undertake a substantive examination of the merits of human rights claims.”

22. Contrary to Mr. Lindsay’s submissions, MY did not approve this guidance. MY expressly states “The Tribunal doubted the correctness of the proposition, still found in the Rights of Appeal Guidance, that an unsubstantiated claim is not a human rights claim within the meaning of section 113.” I find that MY makes clear that the substance of the claim is not relevant when deciding whether it is a “human rights claim”. There is no reference in the statutory provisions to any consideration of the substance of any claim. That the respondent’s policy guidance injects an element of substance does not mean it is right, as is made clear in MY. The statutory provisions do not contain any substantive element. They might be broader than the respondent would like, but that does not mean that the respondent can narrow them by guidance. The guidance cited above is unlawful.
23. I also find that it is clear from the decision that the decision maker considered that the appellant had made a human rights claim, which he considered and refused, before stating that the appellant had a right of appeal. Mr. Lindsay’s submissions that the decision maker had considered whether Article 8 was capable of being engaged, and had then stopped, are not borne out by the decision, in particular the consideration by the decision maker as to whether there were any exceptional circumstances in the appellant’s case. That he considered that there were no exceptional circumstances is not relevant to the issue of whether the appellant had a right of appeal. It is clear that the decision maker refused a human rights claim and, in acknowledgement of that, stated that there was a right of appeal.
24. I do not agree with the submission made by Mr. Lindsay that the materiality in this appeal goes to the substance of the appellant’s human rights claim. By dismissing his appeal through lack of jurisdiction the judge deprived him of a right of appeal. That makes the error of law material. Mr. Lindsay submitted that the appeal was not capable of succeeding, but that is to inject the element of substance into the consideration of whether or not there is a right of appeal. It is clear that the decision to dismiss for lack of jurisdiction is material in that it deprived the appellant of a hearing.
25. I have considered the case of Abbas. It states at [2]:

“The important point of principle which arises in this appeal is this:

“To what extent does the state have a positive obligation on grounds of private life (where no relevant family life exists) to grant entry clearance for an adult to visit an elderly relative located in the United Kingdom?””

26. The conclusion at [27] is broader than just adults visiting elderly relatives. It states:

“There is no obligation on an ECHR state to allow an alien to enter its territory to pursue a private life. Article 8 was not engaged in the respondent's application for entry clearance for his family to visit the United Kingdom. No question of proportionality arises for consideration. The F-tT should have dismissed his appeal.”

27. I find that Abbas has no relevance to the issue of jurisdiction of the Tribunal where a human rights claim has been made. The statutory provisions govern who has a right of appeal. As set out at [27] of Abbas “the Tribunal should have dismissed his appeal”. There is no suggestion in Abbas that the Tribunal erred by considering the appeal in the first place. He had a right of appeal, which is what the appellant has been denied.

28. The facts in the appellant’s case are very different to those in Abbas. The courts have not considered the issue of someone in the appellant’s situation applying to be restored to the position he would have been in had he not been accused of cheating. Mr. Biggs accepts that it might be difficult given Abbas, but that is a matter which the appellant has a right to put before the Tribunal given that he has a right of appeal governed by statute.

29. I find that the grounds are made out. Mr. Biggs accepted that the judge had not been helped by the representatives before her who did not point her to the statutory provisions. However, by dismissing the appeal for lack of jurisdiction, I find that the judge made a material error of law.

30. I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

*“(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.*

*(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.”*

31. Given that the appellant has been deprived of a hearing, it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

### **Notice of Decision**

32. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside. No findings are preserved.

33. The appellant has a right of appeal, and therefore the appeal is remitted to the First-tier Tribunal to be reheard.
34. The appeal is not to be listed before Judge Ford.

**Kate  
Chamberlain**

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber  
19 March 2024