



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/23784/2016

THE IMMIGRATION ACTS

**Heard at: Field House
On: 24th January 2019**

**Decision & Reasons Promulgated
On: 4th February 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SAFIULLAH SAFI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms I Sriharan, instructed by SMA Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan born on 16 January 1994. He entered the United Kingdom on 24 October 2010 with entry clearance granted to accompany his mother. On 11 November 2013 he was refused indefinite leave to remain as the child of a settled person. He appealed against that decision and his appeal was heard in the First-tier Tribunal on 12 March 2015 and dismissed in a determination promulgated on 18 March 2015. He was refused permission to appeal against that decision by the First-tier Tribunal and the Upper Tribunal and became appeal rights exhausted on 17 September 2015.

2. On 15 October 2015 the appellant applied for leave to remain on human rights grounds. In a decision of 18 August 2016, the respondent refused to treat his submissions as a fresh human rights claim, pursuant to paragraph 353 of the immigration rules, as he had already had an appeal on human rights grounds in March 2015. The respondent stated in the refusal letter that there was no right of appeal against the decision.

3. However the appellant lodged an appeal against the decision on 7 October 2016 and, in the grounds of appeal, relied on the reported decision of the Upper Tribunal in Sheidu (Further submissions; appealable decision: Sudan) [2016] UKUT 412 in submitting that the respondent had made a decision refusing the appellant's human rights claim which gave rise to a right of appeal.

4. The following then occurred. On 18 January 2017 a First-tier Tribunal Duty Judge decided that the issue of whether there was a valid appeal was arguable and could be raised at a hearing. In a letter dated 19 July 2017 addressed to the First-tier Tribunal the removals casework department of the Home Office requested that the appeal be struck out as invalid on the basis that the refusal letter was not an immigration decision under section 82 of the Nationality, Immigration and Asylum Act 2002 which gave rise to a right of appeal. The appeal was, however, listed for hearing on 13 March 2018. On 24 January 2018 the Home Office referred to the lack of response to the previous letter of 19 July 2017 and again requested that the appeal be struck out. On 9 February 2018 the Tribunal wrote to the Presenting Officers Unit advising that representations into the validity of the appeal could be made at the hearing.

5. The appeal came before First-tier Tribunal Judge Hanbury on 13 March 2018. It does not appear that the validity issue was raised before the judge and neither was it raised by the judge. The judge proceeded with the appeal without considering the matter and heard evidence from the appellant and his father and heard submissions from both parties. He found that the appellant could not meet the requirements of paragraph 276ADE(1) of the immigration rules and that there were no exceptional circumstances outside the rules. In a decision dated 27 July 2018 and promulgated on 9 August 2018, he dismissed the appeal on human rights grounds.

6. The appellant sought permission to appeal against Judge Hanbury's decision on the grounds of delay in promulgating his decision, failing to give clear reasons and making irrational findings.

7. Permission to appeal was refused in the First-tier Tribunal but was subsequently granted in the Upper Tribunal on 5 December 2018 on all grounds.

8. At the hearing I indicated to the parties my concerns about the validity of the appeal and the jurisdiction of the Tribunal in the matter, in view of the nature of the decision giving rise to the appeal. Whilst no challenge had been

made to Judge Hanbury's decision by either party on such grounds, the Court of Appeal made clear in Virk & Ors v Secretary of State for the Home Department [2013] EWCA Civ 652 that jurisdiction could not be conferred by waiver or agreement when there simply was no statutory jurisdiction. Accordingly it was a matter that had to be addressed despite it not having been raised in the grounds or grant of permission. Since neither party had contemplated the issue being raised, I gave them an opportunity to consider the matter, to take any necessary instructions and to make any relevant applications. After a short break, both parties advised me that they were content to make submissions on the point without an adjournment and were content for me to make a decision on the Tribunal's jurisdiction.

9. Ms Sriharan accepted that the appropriate course at the time of the decision was for a challenge to be made by way of judicial review but the appellant's previous solicitors (not her instructing solicitors) chose instead to lodge an appeal. She submitted that the Home Office had considered paragraph 276ADE(1) and exceptional circumstances and had therefore accepted that there was a human rights claim, as in Sheidu, although she accepted that there were differences in Sheidu.

10. Mr Tarlow asked me to find that the Tribunal had no jurisdiction as there was no right of appeal.

11. As I advised the parties, my view is that there was clearly no valid appeal before the First-tier Tribunal. The decision of 18 August 2016 was nothing like the decision in Sheidu and contained nothing within it to suggest that it was an immigration decision made under section 82 refusing a human rights claim. The letter of 18 August 2016 made it very clear that the appellant's application was treated as further submissions under paragraph 353 of the immigration rules, that it did not meet the requirements of paragraph 353 so as to amount to a fresh claim and that there was no right of appeal. The nature of the decision was unambiguous. Accordingly there was no valid appeal before the First-tier Tribunal and the Tribunal had and has no jurisdiction in the matter.

12. It is clear, from the judgment of the Court of Appeal in the case of Virk, that jurisdiction cannot be taken to have been accepted by the fact that the respondent made no representations at the hearing and that the judge proceeded on the basis that there was a valid appeal. That is apparent from [23] of Virk:

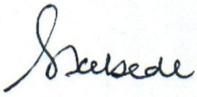
"This decision is consistent with the fact that the FTT is a creation of statute whose jurisdiction in this case is limited by the terms of s.82 of the 2002 Act. The same goes for the UT. Statutory jurisdiction cannot be conferred by waiver or agreement; or by the failure of the parties or the tribunal to be alive to the point. Although, as Longmore LJ pointed out, decisions taken without jurisdiction may in due course become irreversible, that point has not been reached in this case. It was, in my judgment, open to either the FTT or the UT to take the point about jurisdiction notwithstanding the failure of the Secretary of State to raise it herself. Judge Kebede was therefore entitled to rely on the FTT's lack of jurisdiction in order to decide the appeal

and the only objection to his duties lies in the way he proceeded to determine it.”

13. In the circumstances the decision of Judge Hanbury is set aside and I re-make the decision by dismissing the appeal on the basis of a lack of jurisdiction.

DECISION

14. The making of the decision of the First-tier Tribunal involved an error on a point of law. The decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing the appellant’s appeal for lack of jurisdiction.

Signed: 

Upper Tribunal Judge Kebede
2019

Dated: 24 January