



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

Appeal Number: PA/01019/2019

THE IMMIGRATION ACTS

**Heard at Bradford Combine Court
Centre
On 18 June 2019**

Decision & Reasons Promulgated

On 24 June 2019

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**SANGO [J]
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Greer, instructed by Parker Rhodes Hickmotts Solicitors.

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge AK Hussain promulgated on 26 March 2019 in which the Judge found there was no extant appeal before him.

Background

2. The Judge found the only issue before the First-Tier Tribunal was that relating to the question of entitlement to international protection. The Judge records at [3] drawing to the representative's attention at the outset of the hearing the content of [85] of the refusal letter. In that the decision maker writes:

“85. It is concluded that your further submissions have no realistic prospects of success because the supporting statements and documents you have submitted do not establish your claim that you personally are at risk of being persecuted or killed by the authorities in Angola on account of your membership of Apareco and your protests against the government of DRC for the reasons given above. It is considered that your submissions have failed to change the findings of the previous Immigration Judge and therefore are not considered to have a realistic prospect of success before another Immigration Judge.”

3. The Judge records that both advocates agreed that the above amounted to a conclusion by the Secretary of State that the appellant's further submissions did not amount to a fresh claim. The Judge therefore raised the question whether he had jurisdiction to hear the appeal stating the letter made it plain that the application was considered under paragraph 353 of the Immigration Rules and used the language applicable in that paragraph. The Judge at [5] states: “.. *I am satisfied that rather than being a new decision amenable to appeal, it was a decision rejecting the further submissions as a fresh claim*”.
4. The Judge therefore concluded that the respondent's decision does not amount to a decision that is appealable pursuant to section 82(1) of the 2002 Act.
5. The appellant sought permission to appeal which was granted by another judge of the First-Tier Tribunal. The operative parts of the grant being in the following terms:

“2. The relevant history is set out in the judge's decision. In summary, however, the appellant had made a previous protection claim which had been refused and appeal against that refusal had been dismissed by Judge Moxon. The appellant made further submissions, relying on various items of additional evidence, including a letter from the UNHCR.

3. The respondent was obliged, as a result of the chronology I have set out above, to perform the task set out by paragraph 353 of the Immigration Rules, as recently considered by the Supreme Court in Robinson [2019] UKSC 11; [2019] 2 WLR 897. He was obliged, in other words, to decide whether the appellant's further submissions amounted to a fresh claim. Sadly, despite the obvious importance of that decision, the respondent's letter of 8 January 2019 is wholly unclear as to the conclusion reached under paragraph 353. On the one

hand, as Judge Hussain noted, [85] of that letter use the language of paragraph 353 in concluding that the appellant's further submissions did not have 'a realistic prospect of success before another Immigration Judge [sic]'. On the other hand, the latter expressly stated that the appellant was entitled to appeal to the FtT and, potentially significantly, made no reference to the tests under paragraph 353 when it came to considering the appellant's human rights claim.

4. In light of the above, it is at least arguable that Judge Hussain erred in law in concluding that this was not a case like Sheidu [2016] UKUT 412 (IAC), in which the proper reading of the refusal letter was that there was a fresh claim, the refusal of which resulted in a further right of appeal. It is arguable that Judge Hussain erred in failing to turn his mind to the parts of the refusal letter which militated in favour of that conclusion, and focused entirely on those which supported the position belatedly adopted by the respondent at the hearing.
5. Permission to appeal is accordingly granted and the grounds may be argued in their entirety."
6. In relation to Paragraph 353 of the Immigration Rules; when a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
 - (i) had not already been considered; and
 - (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
7. It is not disputed that a previous application had been made and an appeal against the refusal dismissed by Judge Moxon. It is not disputed that the wording in [85] reflects that in (ii) of paragraph 353 set out above but the Judge was required to consider more than just the wording of that paragraph contained in the section of the decision headed 'Annex A Reasons for the Decision'. The actual asylum decision appears in the initial part of the letter of 8 January 2019 which is in the following terms:

"Asylum Decision

You have applied for asylum in the United Kingdom and asked to be recognised as a refugee. You claim to have a well-founded fear of persecution in Angola on the basis of your political opinion.

I have considered your claim on behalf of the Secretary of State.

I have also considered whether you qualify for a grant of Humanitarian Protection in line with paragraph 339C of the Immigration Rules.

In the light of all the evidence available, I have decided that you have not established a well-founded fear of persecution so you do not qualify for asylum. Your asylum claim is therefore refused under paragraph 336 and 339M of HC 395 (as amended).

I have also decided that you have not shown that there are substantial grounds for believing that you face a real risk of suffering serious harm on return from the UK so you do not qualify for Humanitarian protection.

Under paragraph 339F and 339M of the Immigration Rules.

I have also considered whether the circumstances of your case mean that your removal from the UK would breach your right to respect for family and private life under Article 8 of the European Convention on Human Rights. This consideration has been determined in accordance with Appendix FM to paragraph 276ADE(1) to 276 CE of the Immigration Rules, by virtue of paragraph 326B of the Immigration Rules.

I have decided that you do not qualify for leave on the basis of your family or private life in the UK. Your application is refused under D-LTRP.1.3/D-LTRPT.1.3 and 276CE.

I have also considered whether you may be eligible for a grant of limited or indefinite leave to enter or remain in the United Kingdom in accordance with the published Home Office Asylum Policy Instruction on Discretionary Leave and whether there would be a breach of your Human Rights under ECHR.

I have decided you do not qualify for Discretionary Leave.

Your claim has been recorded as determined on 8 January 2019.

Further details are contained in the attached Annex A.

Section 55

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Home Office to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. In dealing with your application, I have taken this into account.

Next Steps

Right of Appeal

You have 14 calendar days from the date of this decision was sent to appeal. Information on how to appeal, the appeal process and the fees payable (if applicable) are all available online at ...”

8. At no time in the decision under challenge does the respondent state that the further submissions are rejected as not amounting to a fresh claim pursuant to paragraph 353 of the Immigration Rules. Whilst the language used at [85] is similar to that set out in paragraph 353 the Judge arguably errs in law when findings [85] can be interpreted as a decision that the further submissions did not amount to a fresh claim. Not only is there no reference to the claim not being accepted as a fresh claim there is specific reference to various paragraphs of the Immigration Rules under which the appellant's application has been rejected. The claim will only be considered on its merits and a right of appeal granted, if rejected, if it is accepted as a fresh claim.
9. I therefore find the Judge has erred in law in a manner material to the decision under challenge when stating that the consequence of [85] are that the matter had not been accepted as a fresh claim and as such did not generate a right of appeal; meaning there was nothing extant before the First-Tier Tribunal.
10. In light of the fact the appellant has not had his appeal properly considered the only option is for the appeal to be remitted to the First-Tier Tribunal sitting at Bradford to be heard by a judge other than Judge Hussain nominated by the Resident Judge of that hearing centre. Further directions shall be given upon receipt of the file in accordance with operational requirements.

Decision

11. **The First-Tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the Bradford Hearing Centre to be heard by a judge other than Judge Hussain.**

Anonymity.

12. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 18 June 2019