



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

Appeal Number: HU/10975/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 22 October 2019
Written submissions made on 5
December 2019 and 6 February
2020**

Decision & Reasons Promulgated

On 23 April 2020

Before

**THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

Between

**REDA TAHRAOUI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the appellant: Ms K Anifowoshe, Counsel, instructed by Elkettas & Associates Solicitors

For the respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the appellant against the decision of a panel of the First-tier Tribunal comprising Judges Wilding and Beach (“the panel”), promulgated on 23 April 2019,” by which it concluded that the appellant

did not have a right of appeal and, as a consequence, there was no jurisdiction to determine any appeal.

2. This case was heard by the Upper Tribunal, the same day as MY HU/19571/2018. The decision in that appeal has now been reported as MY (refusal of human rights claim) Pakistan [2020] UKUT 00089 (IAC) (published on 19 March 2020). MY and the present appeal both concern the issue of whether a valid appeal could be made against a decision of the respondent to refuse an application. MY is of direct relevance to the appellant's case and we shall consider its conclusions later in our decision.

Relevant background

3. On 26 March 2018 the appellant, a citizen of Algeria, made an application for entry clearance as a visitor. The basis of this application was the appellant's wish to come to the United Kingdom to visit his sister, a British citizen, who suffered from health conditions which, it was said, prevented her from travelling to Algeria. The appellant also expressed a desire to see his sister's two minor children. The entry clearance application was accompanied by a covering letter. Having set out the nature of the application and referred to supporting evidence, that letter went on to cite Appendix V to the Immigration Rules (which contains the requirements to be met by the proposed visitor) and then Article 8 ECHR. In respect of the latter, it was said that a refusal of entry clearance would breach the protected rights of the appellant, his sister, and her two children.
4. The application for entry clearance was refused on 13 April 2018. The decision letter acknowledged the appellant's claim that his sister was unwell. Having regard to the evidence, the Entry Clearance Officer concluded that it had not been shown that the appellant was employed as claimed and that his personal and/or financial circumstances had not been satisfactorily explained. In light of this, it was not accepted that the appellant was a genuine visitor, nor that he had sufficient funds to cover the costs of the proposed visit to the United Kingdom. The application was refused with reference to paragraph V4.2(a), (c), and (e) of Appendix V to the Rules. No mention was made of Article 8. The decision letter concluded by stating that:

"In relation to this decision there is no right of appeal or right to administrative review."
5. Notwithstanding the apparent denial of a right of appeal, the appellant lodged a notice of appeal with the First-tier Tribunal. This prompted a review by an Entry Clearance Manager. That review, dated 18 December 2018, concluded that the original refusal of the entry clearance application was to be maintained. It went on to devote a not insubstantial amount of space to explaining why, in the view of the author, no "human rights claim" had been made by the appellant, with the result that there had been no refusal of any such claim. Reference was made to the judgment of the Court of Appeal in Kopoi [2017] EWCA Civ 1511 and the decision of the Upper Tribunal in Baihinga r.22; human rights appeal: requirements)

[2018] UKUT 00090 (IAC). Having highlighted the difficulties faced by the applicant's seeking to rely on Article 8 in respect of relationships other than between spouses, other partners or minor children, the review goes on to state:

"I am satisfied that the ECO's decision to deny the appellant a right of appeal on human rights grounds is correct as a matter of law and it should be upheld. The appellant does not have a right of appeal against the ECO's decision dated 13 April 2018 to refuse him entry clearance as a family visitor. His application for entry clearance to come to the UK and visit his disabled sister and her children does not constitute a 'human rights claim' and as such does not engage the provisions of Section 82(2)(b) of the 2002 Act [the Nationality, Immigration and Asylum Act 2002, as amended]. He has not established a family life with his sister and her children. Further, the shortness of his visit (15 days) is another indicator that Article 8(1) of the European Convention is not engaged at all in this case. I do not see how this case can be distinguished from *Kopoi*. The relationship between the appellant, his sister and her children is not sufficient to constitute family life for the purposes of article 8 and he does not have a right of appeal against the ECO's decision to refuse his visitor visa application. It is rather unfortunate that the FtT Judge did not issue a Rule 22 decision in this case to strike out the appeal for want of jurisdiction."

6. Finally, and at first blush perhaps somewhat incongruously, the review considers paragraphs GEN.3.1 and 3.2 of Appendix FM to the Rules, which require decision-makers in certain scenarios to consider whether any exceptional circumstances exist such that leave to enter or remain should be granted in order to avoid "an justifiably harsh consequences" for an applicant or specified affected family members. It is said that there was "no basis for such a claim" in the present case.
7. The appellant's grounds of appeal to the First-tier Tribunal asserted that all requirements under Appendix V to the Rules had in fact been satisfied. In addition, Article 8 was relied on, with associated submissions based upon the best interests of the appellant's sister's children.

The decision of the First-tier Tribunal

8. Given the wording of the respondent's decision, the panel raised a of its own volition a preliminary issue as to the validity of the appellant's appeal. Adopting what in the circumstances of the case appears to have been a sensible and pragmatic "belt and braces" approach, the panel heard evidence and submissions on the substance of the purported Article 8 claim, together with submissions on the jurisdictional issue.
9. At [8] the panel concluded as follows:

"In his application for his visitor's visa, the appellant included a covering letter which explicitly raised human rights, and specifically Article 8 of the European Convention of (sic) Human Rights. However, in refusing the application the Entry Clearance Officer did not consider those representations at all; the ECO simply considered the case under Appendix V the immigration rules. It therefore is clearly the case that

the appellant had made a human rights claim, the question however is whether the ECO's decision amounted to a refusal of a human rights claim."

10. Having cited para 35 of Baihinga, the panel went on to conclude at [10] that:

"In considering the decision of the entry clearance officer we are not satisfied that it constituted a rejection of a human rights claim. Nowhere within the decision does the entry clearance officer consider the human rights representations and in fact the only material consideration undertaken is that of Appendix V and a rejection that the appellant meets the requirements of the visit visa rules. The entry clearance officer does not engage with the question of Article 8 in the slightest, be it through the rules or indeed outside of them. It is therefore clear that when taken as a whole the entry clearance officer's decision is not a refusal of a human rights claim."

11. The inevitable result of this conclusion by the panel was that there was no valid appeal before it.

The grounds of appeal and grant of permission

12. Having referred to the nature of the entry clearance application and the grounds of appeal lodged with the original notice of appeal, the grounds of appeal in support of the permission application assert that the appellant had in fact made a human rights claim. It is then erroneously stated that there had been no review by an Entry Clearance Manager in this case. In light of the guidance set out in Baihinga, it is contended that the respondent had engaged with Article 8, and that the panel were wrong to have concluded otherwise.
13. In granting permission on 11 July 2019, Resident Judge of the First-tier Tribunal Zucker confirmed that a Duty Judge in the First-tier Tribunal had initially deemed there to be a valid appeal by the appellant on the basis that Article 8 was raised at the time of the entry clearance application. It was, in the view of Judge Zucker, clearly arguable that the appellant had made a human rights claim and that the respondent's apparent failure to have engaged with it when refusing the application entitled the appellant to bring a valid appeal.

The hearing before the Upper Tribunal

14. Like the panel, we deemed it appropriate to deal with this appeal in a "belt and braces" manner. Thus, we received oral evidence from the appellant's sister ("the sponsor") and heard submissions both on the jurisdictional issue and the merits of the case.
15. The sponsor adopted her witness statement and provided further information about her own circumstances and her relationship with the appellant. She explained that she had not seen her brother since 2012 and that she was unable to travel to Algeria due to her ill-health. She has no

other relatives in the United Kingdom and that it was important for her two teenage children to see their uncle. She told us that she communicates with the appellant on a daily basis. Other members of her family residing in Algeria have visited the United Kingdom; all had complied with the conditions of their leave.

16. By way of submissions, Ms Anifowoshe relied first and foremost on her skeleton argument. She contended that the appellant had clearly made a human rights claim when making the entry clearance application. When refusing that application, the respondent had acknowledged the feature of it which engaged Article 8, namely the appellant's relationship with his sister. That, submitted Ms Anifowoshe, was sufficient to constitute a refusal of the human rights claim. On the alternative basis that there had been a total failure to consider the human rights claim, it was submitted that this too would constitute a refusal. The existence of judicial review as a potential remedy was acknowledged, but Ms Anifowoshe submitted that the costs and nature of relief available rendered such an avenue unfair.
17. Reliance was placed on the Entry Clearance Officer's review. Relying on para 36 of Baihinga, Ms Anifowoshe submitted that the fact that the review had considered GEN.3.1 and 3.2 of Appendix FM the Rules indicated that the refusal of the entry clearance application also constituted a refusal of the human rights claim. To that extent, the review "tied in" with the decision.
18. As to the merits of the Article 8 claim, it was submitted that there was family life as between the appellant and the sponsor. There was dependency in this case, particularly as the sponsor was unable to go and see the appellant in Algeria. The sponsor's two children were also affected by the inability of the appellant to come to this country. On the evidence, the appellant had strong ties to Algeria and was a genuine visitor.
19. Mr Avery relied on the respondent's rule 24 response. In essence, he submitted that even if a human rights claim had in fact been made by the appellant, the decision did not constitute a refusal of that claim. The wording of the decision was clear enough.
20. At the conclusion of the hearing, we reserved our decision on whether or not the panel had erred in law.

Post-hearing submissions from the parties

21. In the case of MY, it was deemed appropriate to issue directions to the respondent, seeking more detailed submissions. These directions were issued in respect of the appeal in MY only. The respondent filed and served further submissions on 5 December 2019, addressing the circumstances of both MY and the present appeal. These submissions were sent to the appellant's solicitors.
22. As regards the appellant's case, the respondent maintains her position that the decision of 13 April 2018 did not constitute a refusal of a human

rights claim and that the panel was correct so to have found. However, it is accepted that the respondent had failed to follow her own guidance when deciding whether or not a human rights claim had been made in the first place. Thus, the respondent accepts that she should now consider afresh the question of whether the appellant's application for entry clearance did in fact constitute a human rights claim. This does not, in her submission, have any material effect on the outcome of this appeal because there has clearly been no refusal of a human rights claim and thus no valid appeal.

23. By further directions issued on 24 January 2020, the appellant was invited to make any further reply to the respondent's submissions if he so wished. In the event, brief written submissions, dated 6 February 2020, were filed and served. These submissions broadly reflect what was put forward at the hearing on 22 October 2019: the respondent considered what is said to be the appellant's human rights claim and then, by refusing the application for entry clearance, she went on to refuse that claim.

MY (refusal of human rights claim) Pakistan [2020] UKUT 00089 (IAC)

24. Having reviewed the appellate regime under Part 5 of the 2002 Act and an array of relevant authorities, the Upper Tribunal summarised its conclusions at para 81:

"81. In summary:

- (a) a human rights claim is defined by section 113 of the 2002 Act;
- (b) the respondent's assessment of whether a claim satisfies that definition is not legally determinative;
- (c) the respondent's Guidance is, however, broadly compatible with what the High Court has found to be the minimum elements of a human rights claim;
- (d) the fact a human rights claim has been made does not mean that any reaction to it by the respondent, which is not an acceptance of the claim, acknowledged by the grant of leave, is to be treated as the refusal of a human rights claim, generating a right of appeal to the First-tier Tribunal;
- (e) the respondent is legally entitled to adopt the position that she may require human rights claims to be made in a particular way, if they are to be substantively considered by her so that, if refused, there will be a right of appeal;
- (f) in view of (d) and (e) above, there is no justification for construing section 82(1)(b) of the 2002 Act otherwise than according to its ordinary meaning, which is that the respondent decides to refuse a human rights claim if she:
 - (i) engages with the claim; and
 - (ii) reaches a decision that neither the claimant (C) nor anyone else who may be affected has a human right which is of such a kind as to entitle C to remain in the United Kingdom (or to be given entry to it) by reason of that right."

25. Paras 83-86 of MY go on to state:

“83. For the reasons we have given, the mere fact that leave to remain is refused, in circumstances where a person has submitted what satisfies the statutory definition of a human rights claim, is not sufficient to create a right of appeal. As a general matter, the respondent is entitled to operate a system whereby she can withhold substantive consideration of a human rights claim that has not been made in a particular manner. There is nothing inherently unlawful in such a system. In particular, one can understand the respondent’s need to maintain orderly decision making by requiring separate applications in the case of certain human rights claims.

84. In any event, any challenge to this system (or to any specific refusal to engage with a human rights claim) has to be by judicial review. There is no justification for the present practice in the First-tier Tribunal, which involves an impermissible reading of section 82(1)(b). We respectfully endorse what First-tier Tribunal Judge Kelly said at paragraph 12 of his decision in the present case. The practice should cease.

85. In most cases, it should not be difficult for a caseworker or duty judge to see whether a human rights claim has been refused by the respondent. The starting point will be whether the decision says it is the refusal of a human rights claim and what, if anything, the decision and reasons say about a right of appeal. The reasons for a refusal of a human rights claim will necessarily involve a consideration of the human rights of the applicant or other relevant person. Even if the decision is made by reference to a provision of the Immigration Rules which of its nature involves human rights matters, there should be a consideration of the position outside the Rules, compatibly with Hesham Ali (see paragraph 75 above).

86. If the reasons for the decision reveal no such consideration by the respondent, the caseworker or duty judge will need to look to see what the explanation might be. If, as in the present case, the reasons state in terms that “any submissions you may have made relating to your human rights have not been considered”, then, barring something extremely unusual, that statement should be accepted at face value. No purpose will be served by asking to see the application and covering letter since, even if these disclose the making of a human rights claim, the respondent has not decided to refuse it.”

Error of law decision: discussion and conclusions

26. The first question is whether or not a human rights claim was made by the appellant. Although this had been controversial, the panel expressly found at [8] that such a claim had been made. The respondent’s submissions of 5 December 2019 do not acknowledge that finding, focusing instead on her failure to have considered relevant guidance on human rights claims in the context of visit visa applications.
27. We approach this appeal on the basis that a human rights claim was in fact made by the appellant.

28. As MY explains, the fact that a human rights claim has been made does not inexorably lead to a conclusion that there has been a refusal of that claim such as to give rise to a right of appeal, whenever the respondent reacts to the claim, otherwise than by responding to it by the grant of leave to remain or (as here) entry clearance.
29. The respondent's decision of 13 April 2018 could hardly be clearer as to its content and effect. There is no reference at all to Article 8, a human rights claim, or the refusal thereof. There is no substantive consideration of any Article 8-related matters and certainly no conclusion that either the appellant or his sister had any protected rights that were justifiably interfered with by the refusal of entry clearance. Further, the last sentence of the refusal notice states in terms that there was "no right of appeal" against the decision. Given that there would have been a right of appeal if a human rights claim had been refused, the statement that no such right existed was a clear indicator that such a refusal had not taken place. None of this bodes well for the appellant's assertion that the decision was indeed a refusal of a human rights claim.
30. In our judgment, the passing reference in the decision to the sister's ill-health does not add any material weight to the appellant's assertion that the respondent had in fact engaged with the human rights claim such as to constitute a refusal of the same. It amounts to no more than an acknowledgement of the evidential picture.
31. The appellant has relied on the content of the Entry Clearance Manager's review. As we have seen, that review purported to consider GEN.3.1 and 3.2 of Appendix FM to the Rules, provisions which deal with the existence of exceptional circumstances in an Article 8 context. On the appellant's case, this aspect of the review indicated that the refusal of entry clearance itself had also been a decision to refuse a human rights claim. We reject the submission for the following three reasons. First, the Upper Tribunal made it clear at para 35 of Baihinga that the question of whether a human rights claim has been refused must be judged by reference to the decision said to constitute that refusal. In the present case, this is the refusal of entry clearance. As we have alluded to in paragraph 28, above, the decision is clear on its face. Secondly, and with reference to the same passage in Baihinga, an Entry Clearance Manager's review "cannot re-categorise a decision which was not, in its own terms, the refusal of a human rights claim." Thus, the reference in the review to GEN.3.1 and 3.2 offers the appellant no assistance. Thirdly, whilst para 36 of Baihinga indicates that the terms of a review may in certain circumstances cast light on what the original decision-maker had been doing when refusing an application for entry clearance, again this offers no sustenance to the appellant's case. There was no ambiguity in the decision to refuse the application; there were no aspects of that decision which required illumination. Further, the review itself was concerned almost entirely with a rejection of the appellant's assertion that there had been a refusal of a human rights claim giving rise to a right of appeal. The reference to GEN.3.1 and 3.2 of Appendix FM at the end of the document was at best a

superfluous attempt to perhaps cover all bases, as it were. In any event, it cannot possibly show that the decision was, notwithstanding all indications to the contrary, in fact a refusal of a human rights claim.

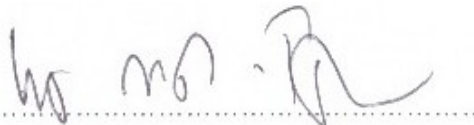
32. In light of the foregoing, the only conclusion to be drawn is that the respondent's decision of 13 April 2018 refusing the appellant entry clearance as a visitor was not a refusal of a human rights claim.
33. It follows from this that the panel were correct in reaching the same conclusion and that there is no error of law in its decision. The appellant had no valid appeal.
34. In these circumstances it is of course unnecessary for us to consider the merits of the appellant's Article 8 case.

Notice of Decision

35. **The decision of the First-tier Tribunal did not involve the making of an error on a point of law.**
36. **The decision of the First-tier Tribunal stands. The appeal to the Upper Tribunal is dismissed.**

Anonymity

37. The First-tier Tribunal did not make an anonymity direction and we see no reason to do so.



Signed

Date: 22 April 2020

Upper Tribunal Judge Norton-Taylor

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).**

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email