



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

BJ (Singh explained) Sri Lanka [2016] UKUT 00184 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 22 January 2016

**Decision &
Promulgated**

Reasons

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE O'CONNOR**

Between

**BJ
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Mackenzie, instructed by A.J. Paterson Solicitor

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Singh (No immigration decision – jurisdiction) [2013] UKUT 00440 (IAC) is authority for proposition that the First-tier Tribunal has jurisdiction to hear an appeal only where there has been an immigration decision. It is not authority for the proposition that where an immigration decision has been made the First-tier Tribunal has no jurisdiction to hear an appeal against such decision unless the SSHD has first complied with her obligations under the Immigration (Notices) Regulations 2003.

DECISION AND REASONS

(Delivered orally on 22 January 2016)

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. At the core of the appeal before the Upper Tribunal is the issue of whether the First-tier Tribunal erred in concluding that it had no jurisdiction to entertain an appeal brought by the appellant against the respondent's 'decision' of 6 November 2014.
2. The relevant factual background is as follows. On 1 April 2011 the appellant's husband was granted leave to remain as a refugee until 12 February 2014. On the same date the appellant was granted leave to remain in the United Kingdom on a discretionary basis, also until 12 February 2014. The appellant's husband applied for settlement on 29 January 2014, using form 'SET (Protection Route) version 08/2013'. Within that form the appellant's husband named the appellant as his dependant and answered 'yes' when asked 'is settlement requested' for her (the appellant).
3. On 6 November 2014 the appellant's husband's application for settlement was refused but his leave was extended, it is said under paragraph 339Q of the Immigration Rules, for a further three years; such leave expiring on 5 November 2017. On the same date the respondent said this in relation to the appellant's application:

"You have applied for indefinite leave to remain in the United Kingdom as the spouse of a person granted asylum or humanitarian protection but your aspect of the application has been rejected.

You have applied for indefinite leave to remain in the UK as the dependant of [SJ], however, as you have not been granted asylum or humanitarian protection either in your own right or in line with [SJ] nor have you been granted a family reunion visa, your aspect of the application has been rejected as there are no provisions under the settlement protection route to be granted leave. Your last period of leave was granted on a discretionary basis.

If you wish to remain in the United Kingdom you should make the appropriate application and pay the correct fee. For further advice on which application is relevant to you, you should visit the Home Office website...

I should remind you that as the application was made in time you have 28 days to make a valid application, if you fail to regularise your stay you may be liable for removal action."

4. The appellant did not make any further application but instead sought to appeal this 'decision' to the First-tier Tribunal. The appeal was considered by First-tier Tribunal Judge Eames and in a decision headed "Notice: No Jurisdiction" the judge concluded that there was no valid appeal before him, giving the following reasons for so concluding:
 - "37. The letter of 6 November 2014, for all that it purports to deny the appellant (as I shall still call her for convenience) a status she had applied for, nevertheless is not a notice of decision as defined. The letter does not contain any notice of appeal rights, for one thing, much less any detail of how or where to lodge an appeal etc. The relaxation of the Rules on content effected by Regulation 5(6) does not appear to apply in the present case since the appeal rights concerned (if there were any) could not only be exercised on the various grounds referred to in that paragraph.
 38. But if I am wrong about the operation of Regulation 5(6) the effect of Judge Kopieczek's judgment [in Singh (No Immigration Decision – jurisdiction) [2013] UKUT 00440] is that a formal, compliant notice is required in order to generate the appeal rights the appellant seeks to exercise. Whether or not Regulation 5(3), (4) or (5) were observed, 5(1)(a) was not complied with.
 39. The facts in Singh were that no decision at all could be located in the materials before the First-tier Tribunal. But I do not think that affects the very simple principle in that case: that a valid decision is needed before any appeal rights arise."
5. At the hearing before us Mr Walker properly conceded that the appellant had made a valid application for leave to remain to the Secretary of State. He further accepted that the consequence of: (a) the fact that the appellant had leave to remain at the time of making the application and (b) that the decision of 6 November resulted in her no longer having leave, is that the decision of 6 November is an immigration decision as defined in section 82 of the Nationality, Immigration and Asylum Act 2002 and, consequently, that the appellant had been entitled to bring an appeal to the First-tier Tribunal against such decision..
6. For reasons which follow, we agree with Mr Walker in each aspect of his concession.
7. The application of 29 January 2014 was not required to be made on a specified form. In a letter of 19 February 2014 sent to the appellant, the respondent "*acknowledges receipt of your [the appellant's] application.*", and continues by confirming that the appellant's "*status and entitlements, including the right to work, continue whilst a decision is being made on your settlement application*". At the end of this letter the respondent further observes that "*If you fail to enrol within fifteen working days and do not contact us with a valid reason your application may be rejected as invalid.*" There is no suggestion in this letter that the application by the appellant was not being treated as valid, indeed it provides support for the contrary position.

8. We can find nothing else in the papers before us that supports the proposition either that the appellant did not make an application on 29 January 2014, or that any application she did make was not valid. Consequently, on the information before us we are inexorably drawn to conclude that the appellant's application of 20 January 2014 was a valid application.
9. Faced with a valid application, the Secretary of State could either treat it positively and grant the appellant leave or, alternatively, refuse the application. Mr Walker could not identify any alternative possible decision on the application lawfully open to the Secretary of State. Clearly, the Secretary of State did not grant the appellant leave in response to her valid application and, accordingly, we find that she must have refused it – as was conceded to be the case by Mr Walker.
10. Pursuant to s.82(2)(d) of the Immigration, Nationality and Asylum Act 2002 (as it was), an immigration decision includes a decision refusing to vary a person's leave to enter or remain if as a result of that refusal such person has no leave to enter or remain. Consequently, when a person applies for leave to remain during the currency of existing leave but receives a negative decision after such leave expires (excluding the effect of Section 3C of the Immigration Act 1971) that person has a right of appeal to the First-tier Tribunal (see SA [2007] UKAIT 00083). This is exactly the position that the appellant found herself in.
11. When the Secretary of State makes an 'immigration decision' she is required, pursuant to the Immigration (Notices) Regulations 2003 ("the Notices Regulations"), to provide specified information to the recipient of such decision – including, *inter alia*, notice of the existence of a right to appeal. It was the failure of the Secretary of State to comply with her obligations under the Notices Regulations that led Judge Eames, in part, to conclude that the First-tier Tribunal had no jurisdiction to entertain the appellant's appeal.
12. However, there is ample authority from this Tribunal in support of the proposition that an appellant may waive the requirements of the Notices Regulations (See: QI (Notice of decision: time calculations) Nigeria [2006] UKAIT 00042, a decision of the Vice President, Abiyat and others (rights of appeal) Iran [2011] UKUT 00314 (IAC), a further decision of the Vice President, and R (on the application of Khan) v Secretary of State for the Home Department (right of appeal – alternative remedy) IJR [2015] UKUT 00353 (IAC), a decision of Upper Tribunal Judge O'Connor).
13. On our reading, the decision in Singh (No immigration decision – jurisdiction) [2013] UKUT 00440 (IAC), relied upon by Judge Eames, provides no support for a contrary conclusion. That decision is properly distinguishable on the basis that there was no relevant immigration decision before the Tribunal, in contrast to the instant case in which we have found there was an immigration decision. If, however, we are not correct in so distinguishing the decision in Singh then we decline to follow it, preferring instead the line of established authority set out in paragraph 12 above, none of which cases were referred to by the Tribunal in Singh.

14. We have no hesitation in concluding that an applicant is entitled to waive the Secretary of State's compliance with the Notice Regulations, and that the instant appellant did so.
15. For these reasons the First-tier Tribunal was incorrect in its conclusion that it had no jurisdiction to entertain the appeal brought by the appellant and, accordingly, we set aside its decision to this effect.
16. The next issue for consideration is whether the matter should be remitted to the First-tier Tribunal for it to determine the appeal brought before it, or whether the Upper Tribunal should remain seized of the appeal. After discussion between the parties we have been greatly assisted in our consideration of this issue by Mr Walker identifying that the Secretary of State now accepts that the appellant is entitled to leave in line with that given to her husband.
17. On the basis of this concession we conclude that the appeal should be retained in the Upper Tribunal. We re-make the decision on appeal for ourselves, allowing it with a direction that the Secretary of State, grant the applicant leave until 5 November 2017.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law and is set aside.

We re-make the decision on appeal ourselves, allowing the appellant's appeal.

The Secretary of State is directed to grant the appellant leave until 5 November 2017.

Signed:

A handwritten signature in blue ink, appearing to read 'M. O'Connor', with a horizontal line extending to the right.

Upper Tribunal Judge O'Connor