Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07620/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 6 August 2019	**On 20 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SALEEM AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr. D. Mills, Home Office Presenting Officer
For the Respondent: Mr. W. Khan, Fountain Solicitors (Walsall)

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Smith, promulgated on 26 March 2019, in which he allowed Mr. Ahmed's appeal against the Secretary of State's decision to refuse to grant leave to remain on human rights grounds.

2. For the purposes of the decision I refer to the Secretary of State as the Respondent, and to Mr. Ahmed as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

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3. Permission to appeal was granted as follows

> "It is arguable that in going ahead to hear this appeal the judge failed to notice that the decision dated 11 March 2018 was not an appealable decision under section 82 of the Nationality and Immigration Act 2002. The only remedy available to the appellant was by way of Judicial Review. In proceeding to decide the appeal the judge has made an arguable error of law."

4. The Appellant attended the hearing. I heard submissions from both representatives following which I announced that the decision involved the making of a material error of law. There was no jurisdiction to hear the appeal, and the appeal was struck out.

Error of Law

5. The Respondent sets out the basis of the Appellant's application on page 2 of the decision. On page 3 the Respondent considers whether this is a repeat application. She quotes paragraph 353 of the immigration rules. She then considers the elements of the claim which had not been previously considered. On page 5 the Respondent states as follows:

> "Careful consideration has been given to whether your submissions amount to a fresh claim. Although your submissions have been subjected to anxious scrutiny, it is not accepted that they would have a realistic prospect of success before an Immigration Judge in light of the reasons set out above, in particular.
>
> All of your submissions have therefore been considered previously in the decision of 6 July 2015 and reconsideration on 5 August 2015, which was upheld by an Immigration Judge on 19 April 2016. Your submissions are not significantly different from the evidence that has previously been considered. Therefore they do not amount to a fresh claim. It was previously determined that the exceptional grounds you raised in connection to your previous claim were insufficiently compelling to indicate that leave to remain outside of the Immigration Rules was appropriate. In the absence of any additional evidence or claim it is not accepted that the exceptional grounds raised in your previous claim are sufficient to indicate that refusing you leave to remain would lead to unjustifiably harsh consequences as outlined in paragraph GEN.3.2 of Appendix FM.
>
> As your submissions do not create a realistic prospect of success before an Immigration Judge, they do not amount to a fresh claim."

6. I find that the Respondent gave proper consideration to whether or not this was a fresh claim. With reference to paragraph 353 the Respondent considered that it was not a fresh claim and therefore there was no right of appeal.

7. I was referred to the case of Robinson [2019] UKSC 11. At [64] it states:

> "For these reasons I consider that the Court of Appeal was correct to conclude that "a human rights claim" in section 82(1)(b) of the 2002

> Act as amended means an original human rights claim or a fresh human rights claim within rule 353. More generally, where a person has already had a protection claim or a human rights claim refused and there is no pending appeal, further submissions which rely on protection or human rights grounds must first be accepted by the Secretary of State as a fresh claim in accordance with rule 353 of the Immigration Rules if a decision in response to those representations is to attract a right of appeal under section 82 of the 2002 Act."

8. I find that this case makes it clear that, where the Respondent has not accepted further submissions as a fresh claim in accordance with paragraph 353, the decision does not attract a right of appeal. The Respondent did not accept the Appellant's further submissions a fresh claim.

9. Mr. Khan submitted that the Respondent had failed to take into account all of the evidence which was before her, and that the decision was unclear as to whether it was treating the submissions as a fresh claim or not. I do not find that this is made out. The Respondent was clear that this was not being treated as a fresh claim. The Respondent quoted paragraph 353. The Respondent then correctly went on to consider the elements of the Appellant's claim in order to make her decision as to whether or not there would be a realistic prospect of success before an Immigration Judge. That is what the Respondent was bound to do. The fact that the Respondent has considered the elements of the claim does not mean that the Respondent was treating it as a fresh claim. Without doing this, the Respondent cannot properly make a decision under paragraph 353.

10. The file shows that the issue of jurisdiction was one which fell to be considered as a preliminary issue. However, it was not dealt with. It was accepted by Mr. Mills that it did not appear that Mr. Hussain, representing the Respondent in the First-tier Tribunal, had raised this issue on the day of the hearing. However, he submitted that this was not a bar to it being considered now with reference to [37] of the case of Kousar [2018] EWCA Civ 2462, paragraph 37. I accept that this is the case, and Mr. Khan did not challenge this.

11. The file shows that a decision was made by a Duty Judge that jurisdiction was a preliminary issue which fell to be considered. While I accept, as submitted by Mr. Mills, that the Duty Judge was wrong in not deciding himself that there was no jurisdiction to hear the appeal, nevertheless it was clear from the Duty Judge's decision that whether or not the Tribunal had jurisdiction was a preliminary issue to be considered.

12. I find that the Judge did not appreciate that there was a jurisdiction issue to be considered as a preliminary issue. The Respondent's decision was clear that her decision did not attract a right of appeal. Any submissions made by Mr. Khan before me in relation to the Respondent's alleged failure to take into account all of the evidence which was put before her should have been raised as a matter for judicial review. The complaint by

the Appellant that new evidence was not considered properly by the Respondent does not lead to a statutory right of appeal.

13. It is very clear from the Respondent's decision that the Respondent did not consider this to be a fresh claim. I find that the Respondent treated the decision exactly in the way that she should have done. She did not consider it to be a fresh claim and so there was no statutory right of appeal.

Decision

14. The decision involves the making of a material error of law and I set it aside.

15. There was no jurisdiction to hear the appeal and the appeal is struck out.

16. No anonymity direction is made.

Signed Date 12 August 2019

Deputy Upper Tribunal Judge Chamberlain