Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11731/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd April 2019	**On 14th May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

[N I]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Burrett of Counsel, instructed by Wick & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sudan born on 1st January 1973. The issue upon which the Upper Tribunal is seized is an appeal against the decision of Immigration Judge Steer made at a Case Management Review at Hatton Cross on 24th January 2019. The issue that was before the judge was whether or not there was an appealable decision for the purpose of Section 82 of the Nationality, Immigration and Asylum Act 2002. Judge Steer found that there was no valid appeal and that the appeal must be dismissed.

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2. Grounds of Appeal were lodged to the Upper Tribunal on 15th February 2019. On 22nd March 2019 First-tier Tribunal Judge Grant-Hutchison granted permission to appeal. Judge Grant-Hutchison considered that the judge might have misdirected herself in connection with the following matters:

   (i) The Appellant had made an application in compliance with Rule 34 which was rejected by the Respondent. Even though the Respondent states that the Appellant did not qualify for ILR he is silent on the human rights submissions and that it was arguable that the Appellant was fully entitled to lodge an appeal in order to protect her immigration status and that of her dependants. In any event, Judge Grant-Hutchison noted that it was submitted that the judge did not serve on the Appellant's notice of invalidity as procedurally that had been served in accordance with Appendix SN of the Immigration Rules.

   (ii) That the decision to dismiss the appeal did not take into account the children's best interests in that the Appellant was already living outside her country of origin prior to arrival in the UK due to being at risk there as a result of her husband who was recognised as a refugee in the UK.

   (iii) That to refuse to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave to enter or remain is arguably an immigration decision under Section 82 of the Nationality, Immigration and Asylum Act 2002.

   (iv) That the Appellant's appeal was listed for a Case Management hearing. As recognised by the judge there was no agreement as to disposal and it was arguably unfair to dispose of the hearing in the manner set out in the decision without giving adequate notice to the parties particularly in terms of Rule 25(2) of the Procedural Rules.

   (v) It was arguable that the reliance on the 2012 Practice Note was erroneous and not in accordance with the current Tribunal's obligations under the Rules in coming to her decision.

3. On 16th April 2019 the Secretary of State responded to the Grounds of Appeal under Rule 24, submitting that the letter of 29th November 2018 set out clearly the position in relation to the Appellant's earlier rejected application not being an appealable decision and that the First-tier Tribunal was entitled to consider the written submissions by both parties before concluding that there was no appeal before the Tribunal.

4. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel, Mr Burrett. Mr Burrett is extremely familiar with this matter. He appeared before the Tribunal at the CMR and is also the author of the Grounds of

Appeal. The Secretary of State appears by her Home Office Presenting Officer, Mr Avery.

The Relevant Procedural Rule

5. The relevant Procedural Rule here is to be found in Rule 25(1) and (2) of the Tribunal Procedure Rules 2014.

   "Rule 25 states:

   (1) The Tribunal must hold a hearing before making a decision which disposes of proceedings except where –

   (a)–(f)

   (g) subject to paragraph (2), the Tribunal considers that it can justly determine the matter without a hearing.

   (2) Where paragraph (1)(g) applies, the Tribunal must not make the decision without a hearing without first giving the parties notice of its intention to do so, and an opportunity to make written representations as to whether there should be a hearing".

Submission/Discussion

6. Mr Burrett reminds me in his submissions of the background of this matter. The Appellant travelled to the UK on 17th September 2014 on the grounds of family reunion with her three children. Her husband, Mr Bakhiet Bargo, was a recognised refugee in the UK and the Appellant and their three children joined him in the UK and were granted five years' residence. The Appellant is now a widow as her husband died on 29th March 2016.

7. Prior to her leave expiring the Appellant had made an application for leave to remain on 13th October 2017 which was refused on 19th September 2018. The Secretary of State had submitted that the Appellant could no longer apply for indefinite leave to remain in the UK under the settlement route as she did not have refugee status. The Appellant in her application for settlement had maintained a risk of persecution and sought protection and also maintained a breach of Article 8. Mr Burrett submits that the Respondent failed to consider this and rejected the application, and that the Appellant maintains she had a right of appeal under Section 82(1)(c) of the Nationality, Immigration and Asylum Act 2002 (as amended by Section 15 of the Immigration Act 2014).

8. It is pointed out to me that a Duty Judge of the First-tier Tribunal in considering the Notice of Appeal considered there was a right of appeal and listed the appeal for full hearing on 6th November 2018 and this had been endorsed by First-tier Tribunal Judge Sweet at the appeal hearing. That hearing was, I am advised, due to proceed but did not because the Home Office Presenting Officer indicated that the matter would now be

reconsidered and a fully reasoned appealable decision referring to the protection aspects would be served on the Appellant in the absence of a grant of leave. However, on 29th November 2018 the Respondent wrote to the Tribunal stating that there is no right of appeal and that the matter should be struck out.

9. The matter was listed for a further CMR on 24th January 2019 where First-tier Tribunal Judge Steer on considering the opposing submissions accepted that there was a right of appeal and the matter would now proceed to a full hearing. However, in the determination served on 14th February 2019 Judge Steer made a conclusion that the Appellant in fact did not have a right of appeal and the application had not been submitted in the correct form, as required by Rule 34 of the Immigration Rules. Furthermore, she found that the decision was not a refusal of an asylum claim as the Appellant had not applied for asylum in person.

10. It is the submission of Mr Burrett that the First-tier Tribunal Judge had erred in law by determining the appeal, in failing to recognise the appeal was brought against a decision that left the Appellants with no leave to remain, and that the judge had erred in disposing of the appeal contrary to the First-tier Tribunal Rules. Mr Burrett further contends there was no legal basis properly set out by the First-tier Tribunal Judge as to how she was able to dispose of the appeal in accordance with the Rules. He goes on to further emphasise that had the Appellant's husband been alive, the Appellant would have been entitled to settlement but that the claim extant before me was a human rights claim. He points out that the First-tier Tribunal Judge had looked at the Appellant's Notice of Appeal and had set the matter down for hearing and that Judge Sweet had no concerns about it. The only reason, he points out, that it was adjourned was so the Secretary of State could give further consideration as to whether to grant the Appellant's application. It is his submission that the reviewed decision is erroneous and that there having already been found to be a valid appeal the judge's approach was wrong. Further, he submits it is wrong procedurally.

11. In response, Mr Avery submits that the question is whether or not the Appellant has an appeal and he submits that she does not and therefore the question to be considered is whether or not the Tribunal has jurisdiction to deal with it. He submits that this has been addressed in paragraphs 15 to 16 of Judge Steer's decision and that there is no valid application extant and that the decision is not appealable under Section 82. He submits there is no jurisdiction and that the judge has already come to a decision.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational

conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

14. This is a procedural appeal. No substantive hearing on the Appellant's application has ever been made and I accept that the Appellant is in an extremely difficult position for had her husband not sadly died then she would have been entitled to follow the settlement route. I further accept that any decision here affects not only her but her minor children.

15. There is an inherent responsibility on the Tribunal Service to impose a situation of fairness. Both parties argue procedurally and the question arises as to whether or not Judge Steer was right in her assessment in indicating that there is no right of appeal despite the fact that previous judges had indicated that there was. I am not required, nor asked, to make that decision today. What seems to me to be of the utmost importance is that the Procedural Rules are followed and that the matter is dealt with properly and fairly. The Procedural Rule in question is the one set out above, namely Rule 25 of the Tribunal Procedural Rules 2014. There has been no notice of intention given to the parties pursuant to Rule 25(2) as to whether or not there should be a hearing. The judge has merely made the decision at the CMC.

16. In such circumstances I am satisfied that the Procedural Rules have not been properly followed and that by doing so there is a procedural unfairness to the Appellant. I emphasise that that is not to say that ultimately the finding made by Immigration Judge Steer is not the right one. There seems to be a total inconsistency in the analysis made by First-tier Tribunal Judges on this point bearing in mind that Judge Steer's decision differs from that of Judge Sweet.

17. In such circumstances I consider that the correct approach is to set aside the decision of the First-tier Tribunal Judge and to remit the matter back to be dealt with at a further CMR by way of written and oral representations. The hearing of this matter will take place at Hatton Cross. Bearing in mind the seeming conflicting views of Judge Steer and Judge Sweet, it seems appropriate that the matter be best dealt with afresh by way of hearing before a full-time Immigration Judge other than those judges and I give directions accordingly.

Decision and Directions

The decision of the First-tier Tribunal Judge contains a material error of law insofar that Rule 25(2) of the Tribunal Procedural Rules 2014 has not been followed. I set aside the decision of the First-tier Tribunal Judge and give directions for the rehearing of this matter.

(1) That the matter is remitted to the First-tier Tribunal sitting at Hatton Cross for a further CMR with an ELH of one hour.

(2) The issue to be considered is whether or not the Appellant has or has not a valid appeal extant.

(3) That the CMR be listed before a full-time judge of the Immigration Tribunal other than Immigration Judge Steer or Immigration Judge Sweet.

(4) That there be leave to either party to submit and exchange written representations on the issue at least seven days prior to the restored CMR.

(5) That the parties' legal representatives also do attend the CMR to make oral representations.

No application was made for an anonymity direction and none is now made.

Signed Date 10 May 2019

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date 10 May 2019

Deputy Upper Tribunal Judge D N Harris