Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15666/2019

THE IMMIGRATION ACTS

Considered on the papers	**Decision & Reasons Promulgated**
On 25 November 2020	**On 3 December 2020**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MR FAIZANUL HASAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Hatton, promulgated on 7 April 2020. Permission to appeal was granted by First-tier Tribunal Judge Fisher on 10 August 2020.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. The appellant arrived in the United Kingdom on 13 February 2007 with entry clearance as a student. He switched to the Highly Skilled Migrant

Programme and thereafter to Tier 1 Highly Skilled General Migrant and was granted successive periods of leave, valid until 6 April 2013. The appellant's leave to remain was cancelled on 15 November 2011 and he was removed to India the following day. The appellant successfully appealed the cancellation of his leave and he was granted leave to remain under Tier 1 until 13 January 2017. The Secretary of State informed the appellant that there would be no break in his lawful residence from 15 November 2011 until 13 January 2014. On 13 January 2017, the appellant applied for settlement on the grounds of long residence and under the HSMP as well as leave to remain on human rights grounds. Those applications were rejected for failure to pay the application fee. On 14 August 2018, the appellant applied, in person, for settlement on the grounds of long residence. That application was "voided" as he did not provide the required documentation. On 7 September 2018, the appellant submitted an application for settlement on the grounds of long residence. It is the refusal of that application, by way of a decision dated 4 September 2019, that is the subject of this appeal.

4. According to the decision letter of 4 September 2019. The application under paragraph 276B of the Rules was refused because the appellant's lawful residence was from 13 February 2007 until 13 January 2017, one month short of 10 years, falling foul of 276B(i). It was noted that thereafter he remained without lawful status which meant that 276B(v) was not met. The appellant's human rights claim was considered in respect of private life alone, given that his spouse and child resided in India. The respondent did not accept that the appellant could meet any of the requirements of 276ADE (1) or that unjustifiably harsh consequences would result from the refusal of his human rights claim.

The decision of the First-tier Tribunal

5. The appellant's appeal was considered on the papers, at his request. In short, the First-tier Tribunal noted that the appellant had been granted an in-country right of appeal but that the appeal had been lodged from abroad. While the judge concluded that the Tribunal did not have jurisdiction to consider the matter, he dismissed the human rights appeal.

The grounds of appeal

6. Permission to appeal was granted on the basis that there was arguable unfairness in that despite stating that he had no jurisdiction, the First-tier Tribunal judge had purported to dismiss the appeal. Reference was made to an earlier decision to allow the appeal to proceed on the basis that there was an in-country right of appeal.

7. Directions were served on the parties by email on 28 August 2020, which communicated that a provisional view had been taken that the matter could be decided without a hearing and invited written submissions regarding whether the First-tier Tribunal made an error of law and whether

that decision should be set aside. The parties were further invited to submit reasons if it was considered that a hearing was necessary.

8. Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 states that the Upper Tribunal may make any decision with or without a hearing but must have regard to any view expressed by a party when deciding whether to do. The respondent gave no indication of her view as to the issue of whether there was a material error of law which could be justly determined without an oral hearing. The appellant did not respond.

9. I have considered the judgment in *JCWI v The President of the Upper Tribunal* [2020] EWHC 3103 (Admin) and conclude that the appellant has not been disadvantaged by the error of law issue being decided without a hearing in this instance for the following reasons. The appellant left the UK voluntarily on 17 September 2019 and requested that his appeal before the First-tier Tribunal be considered on the papers. He has not responded to the directions of 28 August 2020 despite them being forwarded to the email address he provided, and which was used to serve him with the First-tier Tribunal decision as well as the grant of permission to appeal to the Upper Tribunal. There is no reason to suppose that the appellant has not received the directions. The respondent's Rule 24 response, received on 9 September 2020, indicated that the appellant's appeal was not opposed but invited the Upper Tribunal to set aside the decision of the First-tier Tribunal and either to treat the appeal as invalid or as abandoned.

Decision on error of law and remaking

10. The preliminary issue before the First-tier Tribunal was whether the appellant was entitled to pursue his appeal against the Secretary of State's decision of 4 September 2019 despite having left the United Kingdom before lodging that appeal. The decision of 4 September 2019 informed the appellant that he did not have to leave the UK during the time period in which he might appeal or until that appeal had been decided, if he did appeal. The said decision was received by the appellant's former representatives on 6 September 2019. The appellant voluntarily left the UK on 17 September 2019. The appeal was lodged online with the First-tier Tribunal on 19 September 2019. The appellant gave an address for service in India.

11. Section 92(3) of the NIA 2002 stipulates that "*an appeal must be brought from within the United Kingdom,*" unless the claim has been certified under section 94(1), 94(B) or it involves the removal of an asylum seeker to a safe third country. The appellant's human rights claim was not certified and did not involve a protection or third-country issue. He brought his appeal shortly after his arrival in India. Accordingly, the judge was right to find at [34], that there was no jurisdiction to decide the appeal. That there had been an earlier decision to allow the appeal to proceed to listing is neither here nor there.

12. The judge erred only in proceeding to briefly consider and dismiss the human rights appeal at [39] and reflecting this in the notice of decision. In these circumstances, I consider that I can immediately proceed to remake the decision. Accordingly, I set aside the decision of the judge to dismiss the appeal on human rights grounds and substitute it with a decision that there is no jurisdiction to consider this appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The Upper Tribunal has no jurisdiction to consider this appeal.

Signed: Date 3 December 2020

Upper Tribunal Judge Kamara

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