IAC-FH-LW-V1

IN THE UPPER TRIBUNAL

JR/8109/2018

Field House
Breams Buildings
London
EC4A 1WR

13 August 2019

Judgment handed down on 6 September 2019

THE QUEEN
(ON THE APPLICATION OF)
MOHAMMAD KAMRUL ISLAM

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE KOPIECZEK
UPPER TRIBUNAL JUDGE SHERIDAN

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Mr M Biggs, Counsel, instructed by Universal Solicitors appeared on behalf of the Applicant.

Mr B Seifert, Counsel, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

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JUDGE KOPIECZEK: This application for judicial review concerns a decision of the respondent dated 12 September 2018. According to the applicant it is a decision to refuse a human rights claim (based on 10 years' continuous lawful residence). On behalf of the respondent it is argued that it is a fresh claim decision pursuant to paragraph 353 of the Immigration Rules.

However, the claim involves more than an argument as to how the respondent's decision should be characterised. Amongst other things, it is argued that if it is a fresh claim decision, it is unlawful. Central to that argument is a dispute about the service of a decision dated 23 November 2017, being a decision to refuse a human rights claim and certifying the claim as clearly unfounded, within the context of an application for indefinite leave to remain outside the Immigration Rules. The applicant contends that he never received that decision. If the decision was validly served, it would mean that the applicant's leave expired in November 2017. If that is right, he had not acquired 10 years' lawful residence as at the date of the respondent's 12 September 2018 decision and thus could not meet the requirements of paragraph 276B of the Rules (the long residence Rule).

Immigration history

1. It is not necessary for us to refer to anything other than the main features of the applicant's immigration history. He arrived in the UK on 27 May 2008 with leave as a student. Various applications were thereafter made for further leave to remain; some granted and some refused.

2. On 8 May 2014 he was granted leave to remain as a Tier 2 (General) Migrant until 14 April 2017. On 28 October 2016 he was informed that his leave to remain was curtailed to expire

on 1 January 2017. On 31 December 2016 he made an application for leave to remain on Article 8 grounds, that application subsequently being varied on 15 May 2017 to an application for indefinite leave to remain outside the Rules.

3. On 23 November 2017 the respondent purported to refuse that application, certifying it as clearly unfounded pursuant to s. 94(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). This afforded the applicant an out of country appeal only. It is this decision which the applicant contends he never received.

4. On 15 December 2017 he made an application for leave to remain on the grounds of long residence. That application was varied on 1 May 2018 to an application for indefinite leave to remain. That led to the challenged decision dated 12 September 2018.

Submissions

5. At the outset of the hearing, having identified with the parties the areas of challenge advanced on behalf of the applicant, we invited the parties to address us firstly on what we shall call the *Sheidu* point (*Sheidu (Further submissions; appealable decision)* [2016] UKUT 000412 (IAC)). That involves the contention that the respondent's decision of 12 September 2018, rather than being a refusal to accept further submissions as amounting to a fresh claim pursuant to paragraph 353 of the Immigration Rules, is in fact a refusal of a human rights claim. The parties agreed that if we found in favour of the applicant on that point it would not be necessary to go on to consider the other aspects of the claim.

6. A central feature of the claim otherwise, involves the contention that the applicant did not receive the decision of 23 November 2017 and did not sign for it. To that end the

applicant seeks to rely on evidence from himself, and from his landlady at the premises at which he resided at the relevant time. The respondent asserts that the decision having been sent to the applicant's address, and having been signed for, it was properly 'given'.

7. Although Mr Biggs indicated that oral evidence may not in fact be needed, that post-decision evidence would involve consideration of whether the issue of service of the 23 November decision was a question of precedent fact. That in turn relates to the presumption of notice having been given pursuant to article 8ZB(1) of the Immigration (Leave to Enter and Remain) Order 2000. The applicant's grounds raise an issue in terms of the Immigration (Notices) Regulations 2003, in particular regulation 7(4), but the grounds rely on an outdated version of those regulations which are inaccurately quoted in the grounds of claim.

8. The parties agreed that so far as they were aware, the Tribunal's decision in *Sheidu* has not been considered in any reported decision of the Upper Tribunal or, more importantly, any higher authority.

9. In his submissions on the *Sheidu* point, Mr Biggs referred to the detail of the decision dated 12 September 2018 in support of the contention that the respondent had in fact made a decision to refuse a human rights claim. Amongst other things, it was pointed out that the respondent had made express reference to the long residence Rule and considered it in detail before refusing the application pursuant to paragraph 276D of the Rules.

10. We were referred also to paragraphs 34-34G of the Immigration Rules in terms of the validity of applications for leave to remain, in support of the contention that in this case the

respondent had considered that the application made was a human rights application.

11. With reference to *Baihinga (r. 22; human rights appeal: requirements)* [2018] UKUT 00090 (IAC), and the respondent's Guidance on Rights of Appeal Version 6.0 published on 9 October 2017 appended to the decision in *Baihinga*, it was submitted that regardless of paragraph 353, an application for leave to remain on the grounds of long residence pursuant to paragraph 276B is a human rights claim. As we understood the argument, it was submitted that paragraph 276B applications (amongst others) are not subject to the paragraph 353 fresh claim regime because they are human rights claims in any event which require a decision from the respondent pursuant to paragraph 276D.

12. In response to our enquiry as to whether that meant that an applicant could make endless repeat applications of the same type, Mr Biggs submitted that the respondent has tools at his disposal in the form of ss. 94 and 96 of the 2002 Act. (certification provisions) which would mitigate the abuse of such repeat applications.

13. Returning to the *Sheidu* point, it was submitted that albeit that the respondent referred to paragraph 353 and fresh claim considerations at the end of the decision, by that point it was too late because the decision to refuse the human rights claim had already been made.

14. In his submissions Mr Seifert argued that there was a distinction made in the challenged decision between a human rights claim and an "application". Thus, there was repeated reference in the decision to the "application" for leave to remain, meaning that the respondent did not consider the application as a "claim".

15. We were also referred to that part of the decision under the sub-heading “Repeat claim” where paragraph 353 is considered. Relying on *Robinson v Secretary of State for the Home Department* [2019] UKSC 11, in particular at [62-64], it was submitted that the decision in this case is clearly a paragraph 353 decision.

16. It was further submitted that the facts in *Sheidu* were very different from those in this case, for example in that in *Sheidu* there had been several appeals to the First-tier Tribunal. Furthermore, the decision in this case is phrased differently from that in *Sheidu*.

17. In summary, it was submitted that not only were the facts in *Sheidu* different, but *Robinson* was now the authority on the point.

18. In his reply, Mr Biggs took issue with the contention that there was any distinction made in the respondent’s decision between an application and a claim. Furthermore, any such distinction was inconsistent with the Home Office policy appended to *Baihinga* which itself says that a 276B application is a human rights claim.

19. It was further submitted that *Sheidu* was not inconsistent with *Robinson*. The latter required the respondent to apply paragraph 353 and that was not done in this case.

Assessment and Conclusions

20. After submissions we announced to the parties that we would grant the application for judicial review on the basis that we were persuaded as to the merit of the applicant’s argument that the decision is in fact a refusal of a human rights claim rather than a fresh claim decision. We also indicated however, that we were not satisfied that there was any merit in Mr Biggs’ submissions to the effect that a paragraph 276B

refusal was, in effect, automatically to be characterised as a refusal of a human rights claim regardless of paragraph 353. All we need say about that argument is that we consider that similar arguments, or arguments with the same underlying thesis, were rejected in *Robinson* and other cases.

21. In *Sheidu* the guidance offered is encapsulated within the italicised words, namely that "If the SSHD makes a decision that is one of those specified in s 82(1), it carries a right of appeal even if the intention was not to treat the submissions as a fresh claim."

22. In *Sheidu* the appellant made an asylum application which was refused and his appeal dismissed. He made a number of subsequent applications all of which were rejected or refused. He was subject to a deportation decision and his appeal against that decision was dismissed. He made further submissions to the effect that he feared persecution in Sudan which he claimed was his country of nationality. There were Article 8 submissions in terms of family and private life.

23. The Tribunal summarised the challenged decision between [9] and [14] including, significantly, quoting at [9] the heading of the decision letter as follows:

"UK BORDERS ACT 2007
CONSIDERATION OF FURTHER SUBMISSIONS
DECISION TO REFUSE A PROTECTION CLAIM AND HUMAN RIGHTS CLAIM"

24. At [16] the Tribunal said as follows:

> "The terms of the decision letter in the present case show, we think, why we expressed the sentiments we did in paragraph 7 above. It is true that the part of the decision beginning at paragraph 66 purports to deal with the submissions made on the basis that they are not a "fresh claim". But it appears to us that the previous 65 paragraphs do something rather different. The heading of the letter, which we have set out, indicates that it contains a decision to refuse a protection claim and a human rights claim; so far as the latter is concerned, paragraph 58 appears to be, in terms, the refusal of a human rights claim. As it seems to us, this is ZT

> (Kosovo) and ZA (Nigeria) territory: there has been an appealable decision, and once there has been an appealable decision, paragraph 353 has no part to play."

25. Further, at [17] there is the following:

> "…Mr Deller's second submission is that, because of the way paragraph 353 is considered in the decision letter, and following Waqar, the decision was that the submissions did not amount to a "fresh claim", and so their rejection carried no right of appeal. If those terms were applicable to the decision letter, that submission would certainly be consistent with Waqar; but it does not appear to us that those submissions are open to the Secretary of State in view of the terms of the decision letter. Whatever may have been the terms of the decision letters in the other cases, it appears to us that this decision letter starts with a human rights claim, substantively refuses it, and does so using wording in the heading and in the refusal itself which is so clearly that envisaged by s. 82 that the subsequent consideration under paragraph 353 cannot have the effect of removing the right of appeal engendered by the decision."

26. It is apparent that the Tribunal in that case considered not only the structure and form of the challenged decision but its substance. It was not simply a question of the structure or form of the decision which was objectionable in terms of the respondent's contention that it was a fresh claim decision. It was that in substance the respondent had refused a human rights claim.

27. We have considered whether the decision in *Sheidu* survives that of the Supreme Court in *Robinson*. Mr Seifert relied in particular on [64] of *Robinson* where it states as follows:

> "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."

28. We do not see that passage, or indeed any other aspect of *Robinson*, as casting doubt on the correctness of the decision in *Sheidu*. It is true that *Sheidu* is a decision which was made with reference to the particular facts of that case. It is nevertheless a decision which is not that far removed from the facts of the case before us. Furthermore, the Tribunal obviously considered that the point in issue was of sufficient importance to offer guidance. We agree with the reasoning in *Sheidu* and apply it to the facts of the case before us.

29. Turning to the challenged decision in this case, it is instructive to summarise it and quote aspects of it verbatim. It is to be noted that unlike in *Sheidu* there is no heading stating that the decision is one to refuse a human rights claim. There is no heading at all. Page 1 states that "Your application has been unsuccessful. You should now leave the United Kingdom." The substantive part of the decision starts on page 2. There it states as follows:

> "On 01/05/18 you made a human rights claim in an application for Indefinite Leave to Remain in the UK on the basis of 10 years continuous and lawful residence and on the basis of your family and private life.
>
> Your application has been considered under those Rules, and with reference to Article 8 of the European Convention on Human

> Rights (ECHR). The relevant Immigration Rules can be viewed on [website given]".

30. Next, under a sub-heading "Consideration" it states that:

> "Your human rights application for Indefinite Leave to Remain has been considered under the Immigration Rules, including the family and private life Rules, and outside the Immigration Rules."

31. There then follows a description of the applicant's immigration history and on the following page the requirements of paragraph 276B are set out. The decision notes that the applicant entered the UK on 27 May 2008 as a student and that he made a number of in-time applications and resided lawfully until the 'outside the Rules' application dated 31 December 2016 was refused on 23 November 2017, with an out of country appeal. It refers to the applicant's leave having been extended under s.3C (of the Immigration Act 1971) but stating that that 3C leave ended on 23 November 2017 when the (31 December 2016) application was decided. That 23 November 2017 decision is the one which the applicant contends he never received.

32. There follows within the 12 September 2018 decision a consideration of the extent to which the applicant met the 10 year rule. We then find this:

> "Your application for Indefinite Leave to Remain in the UK is ***hereby refused*** under paragraph 276D with reference to 276B(i)(a) and (v) of the Immigration Rules" (our emphasis).

33. Consideration is then given to the extent to which the applicant was able to meet the family and private life requirements of the Rules, including in terms of suitability and eligibility. On page 5 there is detailed consideration of

the issue of "Exceptional Circumstances". On page 6 there is the following:

> **"Refusal Paragraph under the 10-year Private Life Route**
>
> In light of the above, your application is ***refused*** under paragraph 276ADE(1), (iii), (iv), (v), and (vi) of the Immigration Rules. Accordingly, you do not qualify for leave to remain under the 10-year private life route of Part 7 of the Immigration Rules, or for leave to remain outside the Rules on exceptional circumstances." (our emphasis).

34. After a paragraph referring to "Compassionate Factors" there is the sub-heading "Repeat claim".

35. Under this sub-heading it states as follows:

> "You have previously had an asylum or human rights claim refused with a right of appeal. On 31/12/16 you applied for Indefinite Leave to Remain outside the immigration rules. This was refused on 23/11/17 with an out of country right of appeal, which you chose not to take. Therefore your current claim has been considered to determine whether it is either a repeat claim or a fresh claim. We have done this consideration under paragraph 353 of the Immigration Rules (HC 395 as amended).
>
> Paragraph 353 of the Immigration Rules states:
>
> 'When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas.'

Your application has been considered on all the evidence available, including evidence previously considered. You have provided new information in the form of stating you have a partner in the UK, and providing further reasons which prevent you from returning to Bangladesh.

Having looked through your previous application dated 15/12/17, I can see no mention of a partner. Therefore, your partner does not meet the definition of 'partner' for the purpose of the immigration rules, as you have not been in a relationship for 2 years akin to marriage. You have also provided no evidence to demonstrate you are in a relationship. Furthermore, being in a relationship in the UK does not warrant a grant of leave outside the immigration rules.

I have considered the new information relating to your private life in the UK, and the reasons you state you cannot return to Bangladesh. I have not found you have demonstrated any exceptional circumstances, which would prevent you from being able to return to your home country.

Therefore, I have considered that your current application does not amount to a fresh claim, as there would be no realistic prospect of success at an appeal hearing as a Judge of the first tier could not reasonably take an alternative view.

Therefore it is considered that paragraph 353 should apply in your case, and my decision does not provide a right of appeal."

36. We accept that the foregoing passage of the decision letter involves a consideration of paragraph 353. However, the earlier four-and-a-half pages involve an assessment of the extent to which the applicant is able to meet the requirements

of the long residence rule, paragraph 276B, or otherwise meets the requirements of the Article 8 Rules. Within that consideration at the very outset there is the statement in the first sentence that on 1 May 2018 the applicant "made a human rights claim" in the application for indefinite leave to remain. It refers to his application having been considered under the Immigration Rules. The Immigration Rules applicable are set out. On page 4, after the assessment of paragraph 276B there is an express statement that the application for indefinite leave to remain is "hereby refused" under paragraph 276D with reference to 276B. Then, on page 6 it repeats that the application is "refused" with reference to the private life rules, paragraph 276ADE.

37. We consider it to be incontrovertible that the decision considered the extent to which the applicant was able to meet the requirements of the long residence and Article 8 Rules and unequivocally refused the application. We do not need to refer in any detail to the appeals regime. It is not in dispute but that if a human rights claim is refused, such a refusal (usually) generates a right of appeal under s. 82 of the 2002 Act.

38. We accept that it is appropriate within a paragraph 353 decision to consider the extent to which the application meets any applicable Immigration Rules. However, we do not consider that the paragraph 353 consideration that is to be found at the end of this decision has the effect of converting what is a refusal of a human rights claim to a refusal to accept further submissions as amounting to a fresh claim. The decision by that time had already been made.

39. Likewise, we do not consider that there is any merit in the argument that the decision distinguishes between an 'application' and a 'claim'. A plain reading of the decision

does not support that view even if such a distinction could properly be made in any given case.

40. In these circumstances, we declare that the decision dated 12 September 2018 is a refusal of the human rights claim which generates a right of appeal. The effect of that is that the applicant ought to have been served with the relevant notification of rights of appeal under the Immigration (Notices) Regulations 2003.

41. In the light of those conclusions, it is not necessary for us to decide whether, as a fresh claim decision, the decision is an unlawful one for the other reasons advanced on behalf of the applicant in the grounds.

42. Similarly, it is not necessary, and indeed would be inappropriate, for us to make findings on the question of whether the decision dated 23 November 2017 was lawfully "given" pursuant to the Immigration (Leave to Enter and Remain) Order 2000. That is a matter that is more appropriately resolved within the context of any appeal under the 2002 Act.

43. Accordingly this application for judicial review is granted.

44. At the handing down of this judgment neither party attended, their attendance having been excused.

Costs

45. In the embargoed judgment we indicated that our provisional view in relation to costs, subject to submissions, was that the respondent pay the applicant's reasonable costs, to be assessed if not agreed. Neither party has dissented from that view and on behalf of the applicant that view is endorsed. We make an order for costs in those terms therefore.

46. The respondent has made an application for permission to appeal to the Court of Appeal which, for the reasons explained in the embargoed judgment, we consider to have been made at the handing down hearing. Having considered the grounds dated 5 September 2019, we refuse permission to appeal to the Court of Appeal, there being no arguable error of law in our decision. ~~~~*0*~~~~

UTIJR6

JR/8109/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of
MOHAMMAD KAMRUL ISLAM

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Kopieczek &
Upper Tribunal Judge Sheridan

Application for judicial review: decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr M. Biggs on behalf of the Applicant and Mr B. Seifert on behalf of the Respondent, at a hearing at Field House, London on 13 August 2019 (judgment handed down on 6 September 2019)

Decision: the application for judicial review is granted

For the reasons given in the judgment attached, this application for judicial review is granted (the judgment also dealing with the issues of costs and permission to appeal to the Court of Appeal).

Order

We order therefore, that the judicial review application be granted.

Permission to appeal to the Court of Appeal

We refuse permission to appeal to the Court of Appeal, there being no arguable error of law in the decision.

Costs

The respondent is to pay the applicant's (reasonable) costs, to be subject to detailed assessment on the standard basis if not agreed.

Signed:

Upper Tribunal Judge Kopieczek

On: 6 September 2019

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).