Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24294/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th September 2018	**On 25th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

F M H A B
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms K Pal (Senior HOPO)
For the Respondent: Mr J Rendle (Counsel)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Devittie, promulgated on 6th June 2018, following a hearing at Taylor House on 19th January 2018. In the determination, the judge allowed the appeal of the Appellant on humanitarian grounds, but dismissed it on asylum grounds. The Respondent, Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Egypt, and was born on 1st January 1997. He arrived in the UK on 30th January 2014 and claimed asylum as an unaccompanied minor, being aged 17. The Respondent refused the application on 6th May 2014, but on account of his age, granted him discretionary leave to remain until he had attained the age of 17½ years, which would have been until 1st July 2014. The Respondent came to the decision that she was not satisfied that there were adequate reception arrangements in place in Egypt.

3. Thereafter, the Appellant submitted an application for leave to remain on 16th June 2014, mentioning that his removal to Egypt would breach his rights under the European Convention of Human Rights. On 15th June 2015, the Respondent refused the Appellant's application for further leave to remain. This is the important decision in this appeal. The Respondent did so without considering the Appellant's asylum claim. The Appellant then brought an appeal against the refusal of leave on human rights grounds. The Respondent stated that the decision was only appealable on human rights grounds. On 15th September 2016 the First-tier Tribunal dismissed the Appellant's appeal. This was done on humanitarian protection grounds as well as on human rights grounds. On 16th June 2017, Upper Tribunal Judge Gleeson made a finding to the effect that "the Appellant had not made an international protection claim" and that he had been unrepresented, but that if he wished to proceed further, it would be advisable on receipt of this decision, for his new solicitors to do the following. First, to clarify the claim which the Appellant wished to make. Second, to make sure that the Grounds of Appeal to the First-tier Tribunal reflected this claim. Third, to ensure that the application is made in person. And finally, to ensure that further submissions are made under paragraph 353 of the Immigration Rules.

The Judge's Findings

4. When Judge Devittie sat to hear this case on 19th January 2018, it was an unfortunate aspect of this case, that the Respondent was unrepresented, although there were written objections to the appeal going forward on asylum grounds, until such time that the matter had been properly considered by the Secretary of State, so as to ensure that the Appellant was not deprived of a right of appeal pursuant to that decision. At the hearing also, the Appellant's representative, Mr T Aitken, was reluctant to proceed, on the basis of an amendment to the Grounds of Appeal, because as Judge Devittie recorded, the basis of the Rules was that "even an amendment to the Grounds of Appeal could not give life to an asylum appeal", because it was possible to raise an asylum claim, as an amended Ground of Appeal, only where the Respondent had first refused a protection claim, as defined by Section 82(2).

5. Notwithstanding objections both from the Appellant's representative, and the written objection from the Respondent Secretary of State, the judge proceeded to hear the appeal. This is not to say that the judge's consideration of the matter was anything other than meticulous in his consideration, and careful in his analysis.

What the judge said was that "Counsel's construction is too restrictive in a way that could not have been intended by the legislator" and that the statutory appeal scheme "is not designed to place undue procedural restrictions on the right of an applicant to broaden his appeal ground to include a claim under the Refugee Convention" (paragraph 17).

6. Indeed, if one looked at Section 82(1) it was clear that "the Tribunal can consider any matter raised in the statement which constitutes a Ground of Appeal". Judge Devittie went on to say that the way in which Section 84(2) is worded is such that it "is not intended to impose the restriction contended for" (paragraph 17(2)). The judge went on to say that "it cannot be the case that the Appellant is being deprived of a first instance decision" because in the Appellant's case, "he does not raise a basis for asylum different to that which has already been considered by the Respondent. He has submitted further documentary evidence in support of his appeal. It is not contended that this new evidence constitutes a fresh asylum claim" (see paragraph 17(3)).

7. Having heard the appeal, the judge then went on to make findings (see paragraphs 20 to 23) which were in favour of the Appellant.

8. The judge allowed the appeal.

Grounds of Application

9. The grounds of application, are prolix and elaborate. The point that they make under the heading "procedural irregularity" is that the Secretary of State was deprived of "fairness in the proceedings and objective treatment of the Secretary of State to properly make his case" (see paragraph 5).

10. On 8th August 2018, permission to appeal was granted on the basis that it was arguable that proceeding with the appeal, as Judge Devittie did, was to:

> "Deprive the Secretary of State from properly considering the matter and was procedurally unfair. It appears that the judge may not have given the Secretary of State sufficient time to address the issue or the evidence presented and so may have erred in doing so" (see paragraph 3).

Submissions

11. At the hearing before me, however, what has been submitted by Ms Pal, was that this was a case which required the Secretary of State's "consent" in that it was a "new matter" such that, without the consent being forthcoming, the judge could not proceed to deal with it. I have to say immediately that this is not the way in which the matter was argued, either before Judge Devittie, in the written objections of the Secretary of State, or in the rather elaborate and confusing Grounds of Appeal by the Secretary of State to that decision, nor indeed in the grant of permission by Judge Parkes on 8th August 2018, which simply states that "the judge may not have given the Secretary of State sufficient time to address the issue".

12. The way in which the matter has been conceived so far is in terms of "procedural unfairness". It is not in terms of the statutory requirement that if a "new matter" is introduced, that requires the "consent" of the Secretary of State. Indeed the decision in **Mahmud [2017]** is clear that the Secretary of State "must consent" to the consideration of any new matter. Be that as it may, both Ms Pal, who was appealing the decision of Judge Devittie before, and Mr Rendle, were in agreement that the decision should be set aside as a matter of law. In this respect, I find Mr Rendle's submissions to be far more compelling.

13. He placed reliance upon the "post-hearing submissions" dated 22nd January 2018, by Mr Aitken, who had appeared as Counsel on behalf of the Appellant at the hearing below before Judge Devittie. These post-hearing written submissions are detailed, comprehensive and clear. He makes the following salient points.

14. First, that the Appellant was concerned that by applying to amend his Grounds of Appeal, the Appellant would be deprived of an additional level of decision making, and be denied the opportunity to have his case fully considered by the Respondent in respect of his continued fear of returning to Egypt. This was important because he was now in possession of documentary evidence, which had not previously been available (see the Appellant's bundle at pages 15 to 32), which demonstrated that the Appellant had been sentenced to a period of ten years' imprisonment in his absence. Mr Aitken made it clear that if the evidence that the Appellant was seeking to rely upon was rejected by the Respondent then this should result in a new appealable decision being made, or the Respondent issuing a supplementary decision letter.

15. The second matter raised by Mr Aitken, and relied upon by Mr Rendle, was that the Appellant's representative raised the issue as to whether the current statutory regime even permits the Appellant to amend his Grounds of Appeal in the manner suggested by Upper Tribunal Judge Gleeson. The Respondent's decision was dated 15th June 2015. This decision refused the Appellant's human rights claim. It was a decision that fell within Section 82(1)(b) of the 2002 Act. Under Section 84(2) of the 2002 Act, an appeal under Section 82(1)(b) must be brought on the ground that the Respondent's decision is unlawful under Section 6 of the Human Rights Act 1998, as being incompatible with the Appellant's Convention rights.

16. It would appear from the wording of Section 84(1) of the 2002 Act (as amended) that it is possible only to raise an asylum ground as a Ground of Appeal where the Respondent has refused a "protection claim", as defined by Section 82(2) of the 2002 Act. Since the Respondent's decision of 15th June 2015 was not a refusal of a "protection claim" the Appellant was concerned that, without the Respondent's consent being issued under Section 85 of the 2002 Act (as amended) the Tribunal would not have jurisdiction to consider the Appellant's appeal on asylum grounds as proposed by UTJ Gleeson (see paragraph 30 of the written submissions).

17. It is in these circumstances, and for the reasons set out above, that, given the statutory injunction that, without the Secretary of State's consent to a "new matter"

an appeal simply cannot proceed, that I must conclude that the judge below fell into error, that was material to the determination, such that it must be set aside.

Notice of Decision

18. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to a judge other than Judge Devittie, to be considered again, pending a decision on the stated "new matter" by the Secretary of State.

19. This appeal is allowed.

20. An anonymity direction is made.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Juss 20th October 2018