Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20519/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 January 2022	**On 18 March 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HUSNU BEKTAS
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr A Bennie, Counsel instructed by Descartes Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State by an Entry Clearance Officer dated 21 November 2019 refusing him leave to enter as a Returning Resident.
2. The Secretary of State contends that the First-tier Tribunal had no jurisdiction to entertain the appeal.
3. This appeal first came before me very soon after the Court of Appeal gave its judgment in the case of **MY (Pakistan) v SSHD [2021] EWCA Civ 1500** and Mr D Clarke, Senior Presenting Officer, who represented the Secretary of State on that occasion, sought to rely on the Court of Appeal's decision in **MY**, which,

he contended, bolstered his argument that there was no right of appeal in this case. Counsel on that occasion, understandably, had not read **MY** and I decided to give time for considered submissions. In response to Directions, the Secretary of State, by Mr Clarke, served a skeleton argument dated 26 October 2021 and the claimant, by Ms Gwawr Thomas, Counsel, responded in a skeleton argument dated 9 November 2021.

4. I have considered these in addition to the oral submissions made before me.

5. The decision complained of is described as "Refusal of Entry Clearance" and is dated 21 November 2019.

6. This notes that the appellant applied for entry clearance as a Returning Resident to the United Kingdom. The decision said that the Secretary of State had considered paragraphs 18 and 19 of the Immigration Rules. It stated:

> "I am aware of your previous refusal as a Returning Resident but have taken a fresh look at the information and documents that you have provided along with the email from your solicitors. I also note that you have a wife and five children living in the UK."

7. The Secretary of State noted that the claimant last left the United Kingdom in September 2005 and concluded, uncontroversially, that he had been away from the United Kingdom for more than two years. The decision noted that the claimant had family in the United Kingdom and concluded that there was "limited social contact" in the time the claimant had been away although close relatives had visited him in Turkey.

8. The Secretary of State was not satisfied that the claimant had lived for more than half his life in the United Kingdom and had not demonstrated sufficiently strong ties to the United Kingdom or exceptional circumstances for being allowed to return. The decision letter also indicated that the claimant had the right to an administrative review. Administrative review was sought and the decision upheld. The review noted that the decision "was not a refusal of a human rights claim" and was therefore not an appealable decision under section 82 of the Nationality, Immigration and Asylum Act 2002.

9. The grounds of appeal to the First-tier Tribunal asserted that the claimant was married to a British national who had lived in the United Kingdom for more than 30 years and they had five children, all of whom were British citizens, and the youngest was still a minor. He is a son, M, born in September 2005. The claimant also has grandchildren.

10. The claimant was arrested in Turkey in February 2006 and was sent to prison for thirteen years and eleven months' imprisonment. The grounds of appeal make plain that following his release from prison he was keen to see his family and he applied for entry clearance as a visitor in 2018 but the application was refused. He made an application as a Returning Resident in June 2018 and that was refused in July 2018. He then made a further application as a Returning Resident in April 2019, leading to the decision complained of. The most recent application, unlike the others, was made with the benefit of legal advice. The grounds of appeal to the First-tier Tribunal against the Secretary of State's decision, particularly at paragraph 10.4, show the claimant's intention to rely on Article 8 of the European Convention on Human Rights.

11. One of the reasons for refusing the application for entry clearance was that the claimant had been convicted of an offence for which he had been sentenced to a period of imprisonment of at least four years and the application was refused with reference to paragraph 320(2)(b) of HC 395.

12. The First-tier Tribunal asked itself if there was a right of appeal and answered in the affirmative. The judge said:

> "Does the appellant have a right of appeal?
>
> 24. The first issue I need to decide is whether or not the [claimant] has a right of appeal. In closing submissions, [the Presenting Officer] stated it was a matter for the Tribunal but drew my attention to page 5 of the guidance 'considering Human Rights Claims in Visit Applications'. The guidance sets out the questions a decision-maker should consider when deciding whether a human rights claim has been made. The first question is whether the application says that it is a human rights claim.
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> 25. In her skeleton argument, Ms Thomas referred to the representations which accompanied the appellant's application which explicitly make reference to Article 8 [A62 – 70]. I am satisfied that those representations dated 2 April 2019 made abundant reference to Article 8 and explicitly argue the denial of the appellant's right to re-enter the UK and be reunited with his family would breach his private and family life under Article 8. In these circumstances, I am satisfied that the [claimant] made a human rights claim and he thus has a right of appeal to the Tribunal."

13. The First-tier Tribunal's decision was promulgated on 16 April 2021. It is regrettable that the judge's attention does not seem to have been drawn to the decision of this Tribunal, promulgated in February 2020, in **MY (refusal of human rights claim) Pakistan [2020] UKUT 00089 (IAC)**, which is a reported decision of the President, The Honourable Mr Justice Lane, sitting with Upper Tribunal Judge Norton-Taylor.

14. Before the First-tier Tribunal, it was Counsel's argument, set out in her skeleton argument dated 5 October 2020, that the claimant had clearly made a "human rights claim" and therefore had a right of appeal against the decision.

15. Whilst I follow the reasons for Counsel contending that a human rights claim had been made, namely reference to close family relationships including a relationship with a wife and a minor child, and I accept that Article 8 was referred to expressly in correspondence from solicitors that was appended to the application, I disagree with Counsel's contention that any decision following human rights submissions was necessarily an appealable human rights decision.

16. This was explained by the Upper Tribunal in **MY.** I appreciate that this decision has been appealed to the Court of Appeal and it is the Court of Appeal's decision, dismissing the appeal against the Upper Tribunal's decision, that must be considered because it is plainly binding authority but I find it easier to understand the decision of **MY** in the Court of Appeal by looking first at the decision in **MY** in the Upper Tribunal.

17. The judicially drawn headnote in **MY** in the Upper Tribunal makes three points which I paraphrase. First is that the Secretary of State's assessment of whether a claim is a human rights claim is not determinative. Second is the

fact that a claimant has made a human rights claim does not mean that any reaction to it by the Secretary of State which is not an acceptance of the claim, acknowledged by the grant of leave, is to be treated as a *refusal* of a human rights claim under Section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (the Act) and so attracting a right of appeal. Third is that section 82(1)(b) should be construed in accordance with its ordinary meaning, which is that the Secretary of State decides to refuse a "human rights claim" if she engaged with the claim and reaches a decision that neither the claimant nor anyone affected has suffered a violation of their human rights. It is important to appreciate that the Upper Tribunal's conclusion is based on a close study of the terms of the Act. It is trite law that the Tribunal has no jurisdiction to determine appeals except that given to it by Parliament.

18. Section 82(1)(b) of the Act provides that a person may appeal where the Secretary of State has decided to refuse a human rights claim (note "*decided to refuse*", not simply "*received"*) and section 113(1) of the Act defines a human rights claim as, inter alia, a claim made by a person that "to … refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act."

19. The point of contention in **MY**, and in the case that I have to decide, is whether a claim that was framed as a human rights claim, with or without reference to any other basis for the claim, and refused but without reference to human rights or apparent consideration of human rights, is in fact a decision to refuse a human rights claim within the meaning of section 82(1)(b) and therefore appealable to the Tribunal.

20. It is, I find, clear beyond argument from the decision of the Tribunal in **MY** that in order for there to be a human rights decision, and therefore a decision that is appealable to the Tribunal, the Secretary of State needs to have received a human rights application, or an application on human rights grounds, which application the Secretary of State has considered with some reference to the human rights of the applicant or others who are involved. If the Secretary of State is said to have irrationally refused to engage with a human rights claim or irrationally refused to categorise a claim as a human rights claim she would be very vulnerable to judicial review. Any application for judicial review in such circumstances might be defended on the basis that the applicant has an alternative remedy, that is to make unequivocally in the prescribed form a human rights application, but that is not something for me to determine now.

21. However, it is plain following **MY** in the Tribunal, that merely asserting human rights as part of the claim process will not necessarily result in an appealable "human rights decision".

22. I have looked again at the Refusal of Entry Clearance in this case. There was acknowledgement of the family's connections and circumstances. There was no express consideration of human rights. The decision was given in a form appropriate for a claim under the Rules only and the Entry Clearance Manager Review was quite clear that the decision to refuse entry clearance was not a refusal of a human rights claim.

23. There *may* have been scope for the claimant to have challenged this decision on public law grounds by asserting that there should have been an appealable

human rights decision but that is not what happened. Any human rights points raised have not been decided in a human rights context and, on the face of it, there is no human rights decision and therefore no appeal.

24. However, for whatever reason, **MY** in the Upper Tribunal does not seem to have been considered in this case and the appeal came before me, by which time there was a decision by the Court of Appeal in **MY**.

25. I consider in outline Mr Clarke's skeleton argument, which was adopted before me by Ms Everett.

26. This notes that the decision was made with clear reference to the Immigration Rules for a Returning Resident and provided for a challenge by way of administrative review, not appeal.

27. Mr Clarke's skeleton argument addressed directly the contention that where there is a human rights claim a decision to refuse the application for reasons not concerning human rights, is still a decision on the human rights claim and so appealable. This argument was rejected by the Upper Tribunal, (particularly at paragraphs 56, 57 and 58) which emphasised the need for a *decision on a claim* before there can be a right of appeal and a claim is not decided by reason of not being considered. The Upper Tribunal also makes the point that I have outlined above that an applicant who maintains that a human rights claim has been wrongly ignored is not without a remedy but that remedy is judicial review.

28. Analysis of the decision of the Court of Appeal in **MY** makes plain that the Secretary of State recognises that some applications under the Rules necessarily (or are so likely to raise the point that they are assumed for these purposes to "necessarily") raise human rights grounds and a right of appeal is recognised. Such cases are identified by the Secretary of State who has policies that provide for an appealable human rights decision. This is not such a case

29. Mr Clarke's skeleton argument also contended that the claimant did not make a human rights claim in the required form but claimed as a Returning Resident. He noted that a Returning Resident had to pay a fee in October of 2021 of £516 but a human rights claim to settlement application costs £1,523.

30. Perhaps more importantly, his skeleton argument emphasised, correctly, that the Secretary of State did not at any point consider the claimant or his family's Article 8 rights.

31. I consider the decision of the Court of Appeal in **MY**. The only reasoned judgment is by Underhill LJ, Vice President of the Court of Appeal, with whom Baker and Carr LJJs agreed. This began by noting that a human rights decision is one of three appealable decisions and that a human rights claim has to be made in a particular way. The court noted at paragraph 1(7):

> "In short, therefore, the issue is whether the Secretary of State is to be regarded for the purposes of section 82(1)(b) as having made a decision to refuse the appellant's human rights claim notwithstanding that she has purported to decide only his application for leave to remain as a victim of domestic violence."

32. Mr Bennie contended that human rights claims are inherent in a Returning Resident claim. His basis for this is that the assertion made by a Returning

Resident is necessarily that the person wishing to return has “close ties” which is highly indicative of an Article 8 claim.

33. I doubt that it would help the claimant if he could show that “human rights” are inherent in a Returning Resident Claim. The Secretary of State has not categorised returning resident applications as a human rights claim and, for the purposes of deciding if there is a right of appeal, it is the Secretary of State’s categorisation that is important, subject to judicial review as explained above.

34. However, without deciding the point, I understand the argument that the hypothetical applicant for entry clearance as a returning resident may well be seeking to re-establish “close ties” but the difficulty with that argument is that the close ties relied upon could easily be solely at the “private life” end of a private and family life continuum. I remind myself of the judgement of Burnett LJ (with whom Sir Ernest Ryder, Senior President and Gloster LJ agreed) in **Abbas v SSHD [2017] EWCA Civ 1393** at paragraph 27 that **[2017] EWCA Civ 1393:**

> “There is no obligation on an ECHR state to allow an alien to enter its territory to pursue a private life.”

35. I reject the contention that there is necessarily an inherent human rights element in a Returning Resident claim even if there was a human rights dimension to the application leading to the instant appeal.

36. In his judgment, with which the other Lords Justices agreed, Underhill LJ looked at the legislative background and the basis for leave to remain. He then moved on to look at the procedure for application. At paragraph 30 Underhill LJ considered ground 1 of the appeal to the Court of Appeal. It did not persuade the court but he summarised the ground as follows:

> “A refusal of an application which *is* or which *includes* a human rights claim *is* a refusal of a human rights claim for the purposes of section 82 NIAA 2002 [emphases in original]. There is no prerequisite for the respondent to ‘engage’ with human rights submissions.”

37. This was then paraphrased in the following way.

> “The appellant’s case is that where an applicant applies for leave to remain on a specified ground and, in connection with that application, advances a human rights claim, then if the Secretary of State refuses the application she is necessarily also refusing the associated human rights claim.”

38. This is precisely the argument that the Upper Tribunal had rejected and the Court of Appeal rejected it too. It is, at best, a judicial review point.

39. When dismissing the appeal to the Court of Appeal against the Upper Tribunal’s decision Underhill LJ said at paragraph 52:

> “Subject (perhaps) to the point made in the previous paragraph, I believe that my reasoning is to substantially the same effect as that of the UT, although its thorough decision covered some issues (such as what constitutes a valid human rights claim) which I have not found it necessary to address.”

40. In “the previous paragraph” Underhill LJ said:

> “I should say that the question, raised by the second sentence of ground 1, whether it was necessary for the Secretary of State to "engage with" the

> Appellant's human rights claim is for these purposes a red herring. If his case were otherwise well-founded, the decision to refuse the application would necessarily be a decision to refuse the human rights claim even if she had purported not to have considered it as a separate claim."

41. Read quickly this could be seen as the Court of Appeal agreeing that a decision following receipt of an application in human rights terms is a decision on a human rights claim, even it shows no signs of considering human rights but if that was intended the decision of the Upper Tribunal would not have been upheld.

42. There are certain categories of application which the Respondent recognises as inherently raising human rights issues. These categories are recognised. It was explained at paragraph 16 that:

> "However, the essential point underlying the Appellant's claim is that the Secretary of State does not regard applications by victims of domestic violence (or bereaved partners) as "human rights applications" in the sense explained in the previous paragraph: that is, she does not regard them as inherently involving a human rights claim in the same way as an application on the other bases covered by Appendix FM. That is apparent from the Appeals Guidance, but it is also explicitly reflected in Appendix FM itself. The relevant provision is paragraph GEN.3.2. Sub-paragraphs (1)-(3) provide (in summary) that in the case of applications under most of the sections of Appendix FM leave will be granted even if the applicant does not satisfy the prescribed requirements if refusal would give rise to a breach of article 8: that is because the Secretary of State recognises that there will be exceptional cases where an applicant who should be granted leave to remain under article 8 (as it relates to family life) will slip through the net of the specific provisions of Appendix FM. However sub-paragraph (4) provides that those sub-paragraphs should not apply to applications from bereaved partners and victims of domestic violence.[3] (The same approach is reflected in the administrative review provisions: see para. 18 below.)"

43. It is those cases, identified by the Secretary of State in published guidance as cases where human rights issues are inherent, that a right of appeal to the Tribunal exists even if, bizarrely, the Secretary of State fails to deal with human rights. This is because the Secretary of State has already recognised them as a "human rights application" and has committed to respond to that application, as such.

44. The Secretary of State has already decided that any other category of application, such as an application for entry clearance as a returning resident, does not automatically attract a right of appeal even if human rights issues are raised by the facts of a particular application. Rather, a dissatisfied applicant can seek judicial review of the Secretary of State's failure to treat such an application as a human rights application.

45. I have reflected on the submission before me.

46. In my judgement, the reasoning of the Upper Tribunal in **MY** stands. It is for the Secretary of State to decide if there is a human rights claim and not something for the Tribunal to infer except in a limited category of cases already recognised by the Secretary of State where there is an inherent human rights element.

47. Accordingly in this case there is no jurisdiction to entertain the appeal.

48. I do appreciate that the claimant, by his representatives, have gone to great lengths to establish his alleged right to return. There is much to consider but there is no point considering it in an appeal brought without jurisdiction and the findings of the First-tier Tribunal in the purported appeal have no value.

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

50. It follows that I set aside the decision of the First-tier Tribunal and substitute a decision ruling that there is no valid appeal.

Notice of Decision

51. The Secretary of State's appeal is allowed. There is no jurisdiction to entertain an appeal against the decision complained of.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 24 February 2022