



**Upper Tribunal
(Immigration and Asylum Chamber)**

Singh (fee award: ancillary decision) [2013] UKUT 00179 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Determination Promulgated

On 28 February 2013

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Before

UPPER TRIBUNAL JUDGE ALLEN

UPPER TRIBUNAL JUDGE MARTIN

Between

SANDIP SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Z Malik, instructed by Mayfair Solicitors

For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION

The Upper Tribunal does not have jurisdiction to consider a challenge to a decision of a First-tier Tribunal Judge to make, or not to make, a fee award. A decision on a fee award is an ancillary decision within the meaning of the Appeals (Excluded decisions) Order 2009 and is therefore not appealable.

1. The appellant is a national of India, born on 30 January 1979. He appealed to a Judge of the First-tier Tribunal against the respondent's decision of 27 September 2012 refusing to vary leave to remain in the United Kingdom and deciding to remove him from the United Kingdom by way of directions. The judge allowed the appeal in respect of the purported decision under section 47 of the Immigration, Asylum and Nationality Act 2006, basing his decision on what was said by the Upper Tribunal in Adamally and Jaferi [2012] UKUT 00414 (IAC). Otherwise the judge dismissed the appeal. He also stated that having dismissed the appeal there could be no fee award.
2. The appellant sought permission to appeal against this decision, arguing that having allowed the appeal under section 47 the judge had failed to give reasons as to why it was deemed appropriate not to make a fee award and that it was clearly arguable that the appellant would have been entitled to

some if not an entire fee award. Permission to appeal was granted by a Judge of the First-tier Tribunal on the appellant's grounds. In a response dated 21 January 2013 the Secretary of State opposed the appeal, arguing that the judge had directed himself appropriately.

3. At the hearing before us we asked the representatives at least initially to address us on the question of jurisdiction. Mr Malik had put in a skeleton argument and a number of authorities. He argued that paragraphs 2 and 3 of the Joint Presidential Guidance "Fee Awards in Immigration Appeals" were, with great respect, wrong in law and not binding. He invited us to depart from the guidance in this respect. If we were against him then we were asked nevertheless to determine the substantive issue given the number of cases where it arose and the absence of any provision in the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) or in the Immigration Rules restricting our ability to determine substantive issues even though there had been a finding of lack of jurisdiction.

4. With regard to the Presidential Guidance, Mr Malik noted that it was said there that the decision on fees was not part of the determination and was an excluded matter for the purposes of sections 11 and 13 of the 2007 Act. He argued that it was proper to give guidance on questions of discretion but inappropriate to give guidance on questions of law. The question as to whether a decision on a fee award was appealable was a pure question of statutory interpretation.

5. Mr Malik then took us to the relevant statutory and other provisions, including section 11 of the 2007 Act which sets out rights of appeal to the Upper Tribunal and the specific definition of "excluded decisions" at section 11(5) several of which, as he noted, referred to different statutory provisions. Mr Malik made the point that the power to award fees was set out at section 29 of the 2007 Act, and argued that if Parliament had intended to exclude a section 29 fee award it would have said so in section 11(5) where excluded decisions were defined, as the power to make fee awards came from the statute itself so it could not be an incidental matter. It would be unattractive to say that it would be left to the Lord Chancellor, who had power under section 11(5)(f) to specify decisions of the First-tier Tribunal in an order.

6. It was the case that the Lord Chancellor had made the Appeals (Excluded Decisions) Order 2009 which at Article 3 set out a list of express decisions at sub-paragraphs (a) to (l) and there was no reference to fee awards. Again it was argued that if the Lord Chancellor had intended to exclude fee orders then he would have said so expressly as he had done in respect of the other types of decisions. As regards sub-paragraph (m), it could not be said that a decision as to whether to award fees was procedural or preliminary, and although it was arguable that it was an ancillary decision, that argument could not be sustained as it was part of the overall decision that a Tribunal made.

7. Mr Malik went on to refer us to what had been said by Sedley LJ in *AS and RA* [2009] EWCA Civ 1495, at paragraph 15, and argued that by analogy there was an unattractive argument in this case involving the obligation to seek judicial review to challenge a decision of the kind involved in this case. He argued that it was a presumption that Parliament would not have intended appellants to go to the Administrative Court to rectify errors in Immigration Judges' decisions.

8. Mr Malik also referred to the decision of the Supreme Court in *Cart* [2011] UKSC 28, in particular at paragraphs 22 to 29 of Lady Hale's judgment concerning the scheme of the 2007 Act which had been to set up a specialist Tribunal to deal with all the matters falling within its specialist area. He argued that to conclude that one could not appeal a fee award to the Upper Tribunal was inconsistent with the scheme of the 2007 Act and frustrated its purpose. It required an appellant to go to the Administrative Court rather than going to the Upper Tribunal which was precisely what the 2007 Act,

properly construed, discouraged. It was therefore inconceivable that either Parliament in section 11 or the Lord Chancellor in the Excluded Decisions Order could have intended an outcome that would frustrate the scheme of the statute as a whole. It was argued that therefore the Presidential Guidance was wrong in law and that the Upper Tribunal had the power to decide the appeal.

9. In her submissions Ms Holmes argued, with respect to paragraph 11 of Mr Malik's skeleton, that it was an attempt to drag in wider issues which were not really relevant. She argued that in any event the appellant should not have had to pay a fee, noting what was said by Mr Malik at paragraph 7 of his skeleton concerning the proper interpretation of Article 5 of the Fees Order in relation to a section 47 case. She also took issue with the criticism of the Secretary of State set out at paragraph 11 of the skeleton, arguing that many of the decisions referred to had been made before the case law set out in that paragraph had been decided. Ms Holmes argued that what was said by Sedley LJ at AS was not germane to the issue in the case and was no more than an aside. The same could be said with respect to the remarks by Lady Hale concerning the structure of the 2007 Act. If there were cases where nevertheless matters were left to go on judicial review rather than on appeal to the Upper Tribunal then that was the way it was.

10. By way of reply Mr Malik argued that contrary to what had been asserted, what was said in AS and Cart was relevant and the point was that there was a presumption that where Parliament set up a specialist body it intended it to deal with its errors internally, and that was the basis on which the statute should be construed. There was a clear definition of excluded decisions. The Upper Tribunal had jurisdiction in this case.

11. After a brief adjournment we communicated to the representatives our conclusion that we did not have jurisdiction to deal with the issue in this case and that we would provide our reasons in full subsequently which we now do, after setting out the relevant statutory and other regulatory provisions and guidance, which are as follows:

" Tribunals, Courts and Enforcement Act 2007

11. Right to appeal to Upper Tribunal

E+W+S+N.I.

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (8).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by—

(a) the First-tier Tribunal, or

(b) the Upper Tribunal, on an application by the party.

(5) For the purposes of subsection (1), an "excluded decision" is—

- (a) any decision of the First-tier Tribunal on an appeal made in exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1)(a) of the Criminal Injuries Compensation Act 1995 (c. 53) (appeals against decisions on reviews),
- (b) any decision of the First-tier Tribunal on an appeal under section 28(4) or (6) of the Data Protection Act 1998 (c. 29) (appeals against national security certificate),
- (c) any decision of the First-tier Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c. 36) (appeals against national security certificate),
- (d) a decision of the First-tier Tribunal under section 9—
 - (i) to review, or not to review, an earlier decision of the tribunal,
 - (ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,
 - (iii) to set aside an earlier decision of the tribunal, or
 - (iv) to refer, or not to refer, a matter to the Upper Tribunal,
- (e) a decision of the First-tier Tribunal that is set aside under section 9 (including a decision set aside after proceedings on an appeal under this section have been begun), or
- (f) any decision of the First-tier Tribunal that is of a description specified in an order made by the Lord Chancellor.

(6) A description may be specified under subsection (5)(f) only if—

- (a) in the case of a decision of that description, there is a right to appeal to a court, the Upper Tribunal or any other tribunal from the decision and that right is, or includes, something other than a right (however expressed) to appeal on any point of law arising from the decision, or
- (b) decisions of that description are made in carrying out a function transferred under section 30 and prior to the transfer of the function under section 30(1) there was no right to appeal from decisions of that description.

(7) Where—

- (a) an order under subsection (5)(f) specifies a description of decisions, and
- (b) decisions of that description are made in carrying out a function transferred under section 30, the order must be framed so as to come into force no later than the time when the transfer under section 30 of the function takes effect (but power to revoke the order continues to be exercisable after that time, and power to amend the order continues to be exercisable after that time for the purpose of narrowing the description for the time being specified).

(8) The Lord Chancellor may by order make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of subsection (2).

29. Costs or expenses

(1) The costs of and incidental to—

- (a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal, shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) “wasted costs” means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

(7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.

The Appeals (Excluded Decisions) Order 2009

Citation and commencement

1. This Order may be cited as the Appeals (Excluded Decisions) Order 2009 and comes into force on 1st April 2009.

Excluded decisions

2. For the purposes of section 11(1) of the Tribunals, Courts and Enforcement Act 2007, the following decisions of the First-tier Tribunal are excluded decisions—

(a) a decision of the First-tier Tribunal under section 103 of the Immigration and Asylum Act 1999 (appeals); and

(b) a decision under paragraphs 22, 23, 24, 29, 30, 31, 32 and 33 of Schedule 2 to the Immigration Act 1971.

3. For the purposes of sections 11(1) and 13(1) of the Tribunals, Courts and Enforcement Act 2007, the following decisions of the First-tier Tribunal or the Upper Tribunal are excluded decisions—

(a) any decision under section 20(7), (8B) or (8G)(b) (power to call for documents of taxpayer and others), 20B(1B) or (6) (restrictions on powers under sections 20 and 20A) or 20BB(2)(a) (falsification etc. of documents) of the Taxes Management Act 1970;

- (b) any decision under section 35A(2) (variation of undertakings), 79A(2) (variation of undertakings) or 219(1A) (power to require information) of the Inheritance Tax Act 1984;
- (c) any decision under section 152(5) (notification of taxable amount of certain benefits) or 215(7) (advance clearance by Board of distributions and payments) of the Income and Corporation Taxes Act 1988;
- (d) any decision under section 138(4) of the Taxation of Chargeable Gains Act 1992 (procedure for clearance in advance);
- (e) any decision under section 187(5) or (6) (returns and information) of, or paragraph 3(2) or 6(2) of Schedule 21 (restrictions on powers under section 187) to, the Finance Act 1993;
- (f) any decision under paragraph 91(5) of Schedule 15 to the Finance Act 2000 (corporate venturing scheme: advance clearance);
- (g) any decision under paragraph 88(5) of Schedule 29 to the Finance Act 2002 (gains and losses from intangible fixed assets: transfer of business or trade);
- (h) any decision under paragraph 2, 4, 7, 9, 10, 11 or 24 of Schedule 13 to the Finance Act 2003 (stamp duty land tax: information powers);
- (i) any decision under section 306A (doubt as to notifiability), 308A (supplemental information), 313B (reasons for non-disclosure: supporting information) or 314A (order to disclose) of the Finance Act 2004;
- (j) any decision under section 697(4) of the Income Tax Act 2007 (opposed notifications: determinations by tribunal);
- (k) any decision under regulation 10(3) of the Venture Capital Trust (Winding up and Mergers) (Tax) Regulations 2004 (procedure for Board's approval);
- (l) any decision under regulation 5A (doubt as to notifiability), 7A (supplemental information), 12B (reasons for non-disclosure: supporting information) or 12C (order to disclose) of the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007.
- (m) any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British nationality Act 1981, section 82, 83 or 83A of the Nationality, Immigration and Asylum Act 2002, or regulation 26 of the Immigration (European Economic Area) Regulations 2006.

Revocations

4. The Appeals (Excluded Decisions) Order 2008 and the Appeals (Excluded Decisions) (Amendment) Order 2008 are revoked.

JOINT PRESIDENTIAL GUIDANCE

FEE AWARDS IN IMMIGRATION APPEALS

Preamble

On 19 December the First-tier Tribunal (Immigration and Asylum Chamber) Fees order comes into force requiring those who appeal to the First-tier Tribunal to pay a fee¹.

By rule 23A(2) of the Asylum and Immigration Tribunal (Procedure) Rules 2005(as amended by SI 2011 No. 2840) there is a power in the judge to direct the repayment of a fee in the case of an appellant whose appeal succeeds.

This guidance is issued to assist judges who have to decide on fee awards.

Introduction

1. In the courts, where there is power to award costs, it is usual for the unsuccessful party to pay the costs of the successful party which would include any fees paid to a court to bring an action.

2. Provision for a “fee award” is a new element for appeals to the FtTIAC. The making of an award is to be decided by the judge on the evidence before him or her and dealt with in the determination following the decision on outcome. The decision on fees is not part of the determination and is an excluded matter for the purposes of ss.11 and 13 of Tribunals, Courts and Enforcement Act 2007.

...

4. Although each case will turn on the exercise of a judicial discretion in the light of the issues, the following guidelines should be considered by judges making these decisions.”

12. The right to appeal to the Upper Tribunal is set out, as Mr Malik reminded us, at section 11 of the 2007 Act. As can be seen, there is a right of appeal to the Upper Tribunal on any point of law arising from a decision of the First-tier Tribunal other than an excluded decision, and section 11(5) provides a detailed definition of “excluded decision”. Paragraphs (a) to (c) concern specific matters arising under particular pieces of legislation, and thereafter paragraphs (d) to (f) are more general.

13. It is also relevant to note section 29(1) and (2) of the 2007 Act which makes it clear that the costs of and incidental to all proceedings in the First-tier Tribunal and the Upper Tribunal shall be in the discretion of the Tribunal in which the proceedings take place and that the relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

14. We do not agree with Mr Malik’s argument that if Parliament had intended to exclude a fee award made under section 29 it would have said so in section 11(5). As can be seen, by no means all the categories of excluded decisions relate to specific statutory provisions but extend to such matters as decisions of the First-tier Tribunal under section 9 of the Act to review or not to review an earlier decision of the Tribunal and a decision to refer or not to refer a matter to the Upper Tribunal. Clearly Parliament intended, in section 11(5)(f) to give the Lord Chancellor the power to specify decisions of the First-tier Tribunal which would also be excluded decisions. That provision is expressed in broad terms, and it can in no sense be said to take its colour from the specific nature of the matters set out at section 11(5)(a) to (c).

15. The same argument applies, *mutatis mutandis*, to the Appeals (Excluded Decisions) Order 2009, which is the order made by the Lord Chancellor in exercise of the power he has under section 11(5)(f) and also in respect of rights of appeal to the Court of Appeal, under section 13(viii)(f) of the 2007 Act. The fact that the Lord Chancellor has since chosen to specify a number of specific categories of decision as being excluded decisions in no sense inhibits the potential breadth of Article 3(m) which we have set out above. We agree with Mr Malik that a decision on fees cannot properly be described as a procedural or preliminary decision, and that if it is to fall within paragraph (m) then it must be an ancillary decision.

16. As regards the case law referred to by Mr Malik, paragraphs 22 to 29 of Cart provide a helpful overview of the changes brought in by the Tribunals, Courts and Enforcement Act 2007 and Sedley LJ at paragraph 15 of AS and RA commented, clearly obiter, on the unattractiveness of an error of the kind, if it were an error, being processed by way of judicial review which was a circuitous and arguably inappropriate route. Neither of these has in our view any direct relevance to the issue before us. In our view there is no context either in section 11 of the 2007 Act or in the Excluded Decisions Order which can detract from the clear wording of those provisions. The Presidential Guidance is, as it is headed, guidance, issued to assist judges who have to decide on fee awards. It does not purport to be prescriptive. The simple question we have to decide with regard to jurisdiction in this case is whether a decision on fees is an ancillary decision made in accordance with the terms of Article 3(m) of the Excluded Decisions Order. In our view it is entirely clear that it is an ancillary decision. No doubt wisely the Lord Chancellor preferred to make provision as he did in paragraph (m) for categories of decision rather than specifying particular types of decision, and it is difficult to see how a decision as to fees can be said to be other than ancillary to the main decision in the appeal.

17. Accordingly we conclude that we do not have jurisdiction to entertain a challenge to the First-tier Judge's decision not to make a fee award in this case, and that must be true of the Upper Tribunal generally in relation to challenges to decisions by First-tier Judges not to make (or to make) fee awards. We therefore decline jurisdiction in this case.

Signed Date

Upper Tribunal Judge Allen