Upper Tribunal
(Immigration and Asylum Chamber)

MSU (S.104(4b) notices) Bangladesh [2019] UKUT 00412 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decisions & Reasons sent out on**
On 23 October 2019	………………………………….

Before

THE HONOURABLE MR JUSTICE LANE, PRESIDENT

MR C. M. G. OCKELTON, VICE PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MSU

(ANONYMITY DIRECTION MADE)

Respondent

Representation :

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer.

For the Respondent: Mr A Bandegani, instructed by Duncan Lewis.

1. Where s.104(4A) applies to an appeal, neither the First-tier Tribunal nor the Upper Tribunal has any jurisdiction unless and until a notice is given in accordance with s.104(4B).

2. If such a notice is given, it has the effect of retrospectively causing the appeal to have been pending throughout, and validating any act by either Tribunal that was done without jurisdiction for the reason in (1) above.

3. As the matter stands at present, there are no ‘relevant practice directions’ governing the s. 104(4B) notice in either Tribunal.

4. The Upper Tribunal has power to extend time for a s.104(4B) notice. Despite the provisions of Upper Tribunal rule 17A(4), such a power can be derived from s.25 of the Tribunals, Courts and Enforcement Act 2007.

DECISION AND DIRECTIONS

INTRODUCTION

1.
We have to decide various matter in relation to "upgrade" appeals, including the scope for extending time for a person to pursue such an appeal, and the effect of the notice that has to be given.

2.
It sometimes happens that a person who makes a claim on refugee or humanitarian grounds is refused on those grounds but, either in response to the original claim, or as a result of an appeal decision, or for some other reason, is granted leave to remain on some other ground. Similarly, a person whose protection status is revoked may be granted leave on some other basis. The person affected may be satisfied with the grant of leave. If so, all is well. But it may be that the person affected wants to maintain the claim to the higher status of a refugee or a person entitled to humanitarian protection: to 'upgrade', in other words.

3.
If the grant of leave precedes the commencement of any appeal, no particular problem arises. That is because despite the grant of leave there has nevertheless been a refusal of a protection claim or a decision to revoke protection status, and the familiar provisions of s 82(1)(a) and (c), 84(1)(a) and (b) and 84(3) give precisely the right of appeal required. If, however, the grant of leave to remain is made after the commencement of an appeal, the matter is more difficult. The current provisions are a development of those introduced by the Nationality, Immigration and Asylum Act 2002 as originally enacted. We deal with those in force from 20 October 2014, with savings, as a result of the notoriously complex provisions of the Commencement Orders for the Immigration Act 2014, with which, fortunately, we are not concerned.

THE LAW

4.
Section 104 of the 2002 Act now reads as follows; there is no subsection (3) or (4); and there is no paragraph (4B)(a).

"104. Pending appeal

(1)
An appeal under section 82(1) is pending during the period –

(a)
beginning when it is instituted, and

(b)
ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

(2)
An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while –

(a)
an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b)

permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or

(c)
an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.

(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to subsection (4B)).

(4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on a ground specified in section 84(1)(a) or (b) or 84(3) (asylum or humanitarian protection) where the appellant –

(a)
gives notice, in accordance with Tribunal Procedure Rules, that he wishes to pursue the appeal in so far as it is brought on that ground."

5.
There were similar provisions in paragraph 2 of Schedule 2 to the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). Those provisions are in effect reversed by reg 36(11) of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) and, except in quotations, we shall not need to refer further to them.

6.
The phrase "Tribunal Procedure Rules" is not defined in the 2002 Act, but the Rules made by virtue of s 22 of the Tribunals, Courts and Enforcement Act 2007 are to be called "Tribunal Procedure Rules". It is to those Rules, therefore, that s 104(4B)(b) refers. There are separate Rules for the First-tier Tribunal (Immigration and Asylum Chamber) and for the Upper Tribunal: the latter are nominally the same for all chambers of the Upper Tribunal except the Lands Chamber, but contain numerous provisions specific to individual chambers or different kinds of proceedings.

7.
In the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604), rule 16, so far as relevant, is as follows.

" **Appeal treated as abandoned or finally determined**

16.- (1) A party must notify the Tribunal if they are aware that –

(a)
the appellant has left the United Kingdom;

(b)
the appellant has been granted leave to enter or remain in the United Kingdom;

(c)
a deportation order has been made against the appellant; or

(d)
a document listed in paragraph 4(2) of Schedule 2 to the 2006 Regulations has been issued to the appellant.

(2) Where an appeal is treated as abandoned pursuant to section 104(4A) of the 2002 Act or paragraph 4(2) of Schedule 2 to 2006 Regulations, the Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined, as the case may be.

(3) Where an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the 2002 Act, but the appellant wishes to pursue their appeal, the appellant must provide a notice, which must comply with any relevant practice direction, to the Tribunal and each other party so that it is received within 28 days of the date on which the appellant was sent notice of the grant of leave to enter or remain in the United Kingdom or was sent the document listed in paragraph 4(2) of Schedule 2 to the 2006 Regulations, as the case may be."

8.
This should be read with rules 4 and 6. Rule 4, "Case Management Powers" gives general powers and, by rule 4(3):

"'In particular, … the Tribunal may –

(a)
extend or shorten the time for complying with any rule, practice

direction or direction;

… .'

Finally, rule 6 is as follows:

" **Failure to comply with rules etc.**

6.- (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include –

(a)
waiving the requirement;

(b)
requiring the failure to be remedied; or

(c)
exercising its power under paragraph (3).

(3) The Tribunal may refer to the Upper Tribunal, and ask the Upper Tribunal to exercise its power under section 25 (supplementary powers of Upper Tribunal) of the 2007 Act in relation to, any failure by a person to comply with a requirement imposed by the Tribunal –

(a)
to attend at any place for the purpose of giving evidence;

(b)
otherwise to make themselves available to give evidence;

(c)
to swear an oath in connection with the giving of evidence;

(d)
to give evidence as a witness;

(e)
to produce a document; or

(f)
to facilitate the inspection of a document or any other thing (including

any premises)."

9.
In rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) there are for present purposes exactly the same case management powers, and rule 5(3)(a) is word for word the same as rule 4(3)(a) of the First-tier Tribunal Rules. Rule 7 has similar functions to those of First-tier Tribunal rule 6, but is a little different:

" **Failure to comply with rules etc.**

7.- (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include –

(a)
waiving the requirement;

(b)
requiring the failure to be remedied;

(c)
exercising its power under rule 8 (striking out a party's case); or

(d)
..."

Rules 7(3) and (4) prescribe the procedure if a matter is referred to the Upper Tribunal under First-tier tribunal rule 6(3).

10.
The specific rules envisaged by s 104(4B) are in Upper Tribunal rule 17A:

" **Appeal treated as abandoned or finally determined in an asylum case or an immigration case**

17A.(1) A party to an asylum case or an immigration case before the Upper Tribunal must notify the Upper Tribunal if they are aware that—

(a) the appellant has left the United Kingdom;

(b) the appellant has been granted leave to enter or remain in the United

Kingdom;

(c) a deportation order has been made against the appellant; or

(d) a document listed in paragraph 4(2) of Schedule 2 to the Immigration

(European Economic Area) Regulations 2006 has been issued to the

appellant.

(2) Where an appeal is treated as abandoned pursuant to section 104(4) or (4A) of the Nationality, Immigration and Asylum Act 2002 or paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006, or as finally determined pursuant to section 104(5) of the Nationality, Immigration and Asylum Act 2002, the Upper Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined.

(3) Where an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the Nationality, Immigration and Asylum Act 2002, but the appellant wishes to pursue their appeal, the appellant must send or deliver a notice, which must comply with any relevant practice directions, to the Upper Tribunal and the respondent so that it is received within thirty days of the date on which the notice of the grant of leave to enter or remain in the United Kingdom was sent to the appellant.

(4) Where a notice of grant of leave to enter or remain is sent electronically or

delivered personally, the time limit in paragraph (3) is twenty-eight days.

(5) Notwithstanding rule 5(3)(a) (case management powers) and rule 7(2) (failure

to comply with rules etc.), the Upper Tribunal must not extend the time limits

in paragraph (3) and (4).”

11.
Section 25 of the Tribunals, Courts and Enforcement Act 2007 is headed “Supplementary Powers of Upper Tribunal” and reads as follows.

“25. Supplementary powers of the Upper Tribunal

(1)
In relation to the matters mentioned in subsection (2), the Upper Tribunal -

(a)
has, in England and Wales or in Northern Ireland, the same powers rights, privileges and authority as the High Court, and

(b)
has, in Scotland, the same powers rights, privileges and authority as the Court of Session.

(2)
The matters are –

(a)
the attendance and examination of witnesses,

(b)
the production and inspection of documents, and

(c)
all other matters incidental to the Upper Tribunal's functions.

(3)
Subsection (1) shall not be taken –

(a)
to limit any power to make Tribunal Procedure Rules;

(b)
to be limited by anything in Tribunal Procedure Rules, other than an express limitation.

(4)
A power, right privilege or authority conferred in a territory by subsection (1) is available for purposes of proceedings in the Upper Tribunal that take place outside that territory (as well as for purposes of proceedings in the tribunal that take place within that territory)."

12.
Pausing there, the basic structure appears to be clear. An appeal is abandoned by the grant of leave, and the parties are concurrently obliged to tell the Tribunal if there has been a grant of leave. If the appellant wants to maintain the appeal on protection grounds, there is a requirement of notice. The notice has to be given to the relevant Tribunal within a time limited by the relevant rules, and different periods apply to the two Tribunals. In the First-tier Tribunal the time limit can apparently be extended under the Tribunal's general powers, but in the Upper Tribunal the Rules prohibit the use of those powers to extend time. It follows that if the Upper Tribunal is the relevant Tribunal, there is no power to extend time unless that power can be found elsewhere, perhaps in s 25 of the 2007 Act. In any event, the notice given by the appellant "must comply with any relevant practice directions".

PRACTICE DIRECTIONS AND OTHER MATERIAL

13.
It is at this point that matters become very difficult. As Mr Bandegani's research has shown, the documents available to a person wishing to comply with the requirements of the Act and the Rules are sadly deficient. There is no doubt about what is the "relevant" practice direction, at least so far as the Upper Tribunal is concerned, because it is defined. Direction 5 of the Practice Direction: Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal is as follows.

"5 Pursuing appeal after grant of leave

5.1 This Practice Direction applies where:

(a)
an appeal would otherwise fall to be treated as abandoned pursuant to section 104(4A) of the 2002 Act because the appellant is granted leave to remain in the United Kingdom; but

(b)
the appellant wishes, in pursuance of sections 104(4B) or (4C), to pursue the appeal, insofar as it is brought on asylum grounds or on grounds of unlawful discrimination.

5.2 Where this Practice Direction applies, the appellant must comply with the following requirements (which are the relevant practice directions for the purposes of UT rule 17A(3)).

5.3 Where section 104(4B) of the 2002 Act (asylum grounds) applies, the notice required by UT rule 17A(3) to be sent or delivered to the Upper Tribunal must state:

(a)
the appellant’s full name and date of birth;

(b)
the Tribunal’s reference number;

(c)
the Home Office reference number, if applicable;

(d)
the Foreign and Commonwealth Office reference number, if applicable;

(e)
the date on which the appellant was granted leave to enter or remain in the United Kingdom for a period exceeding 12 months, and

(f)
that the appellant wishes to pursue the appeal in so far as it is brought on the ground specified in section 84(1)(g) of the 2002 Act which relates to the Refugee Convention.

5.4 Where section 104(4C) of the 2002 Act (grounds of unlawful discrimination) applies, the notice required by UT rule 17A(3) to be sent or delivered to the Upper Tribunal must state:

(a)
the appellant’s full name and date of birth;

(b)
the Tribunal’s reference number;

(c)
the Home Office reference number, if applicable;

(d)
the Foreign and Commonwealth Office reference number, if applicable;

(e)
the date on which the appellant was granted leave to enter or remain in the United Kingdom; and

(f)
that the appellant wishes to pursue the appeal in so far as it is brought on the ground specified in section 84(1)(b) of the 2002 Act which relates to section 19B of the Race Relations Act 1976 (discrimination by public authorities).

5.5 Where an appellant has sent or delivered a notice under UT rule 17A(3), the Upper Tribunal will notify the appellant of the date on which it received the notice.

5.6 The Upper Tribunal will send a copy of the notice issued under paragraph 5.5 to the respondent.

5.7 In this Practice Direction:

'appellant' means the party who was the appellant before the First-tier Tribunal; and 'respondent' means the party who was the respondent before the First-tier Tribunal."

14.
Problems appear immediately. The Direction has not been amended to match the appeal provisions changed by the Immigration Act 2014. In particular, the references to s 104(4C), the unlawful discrimination ground in 5.1(b) and the whole of 5.4, are no longer apposite. Further, the Refugee Convention ground of appeal is now in s 84(1)(a), not s 84(1)(g), which means that it is in fact impossible now to comply with the provisions of the Direction. There is no provision for maintaining an appeal on the other permitted grounds (those now in s 84(1)(b) and 84(3)). And, on a matter of detail, for the 'upgrade' provisions to apply, it is not now necessary for the leave granted to be "for a period exceeding 12 months" (5.3(f)). We were also shown a copy of a form available on the Tribunal's website, which is in line with the Practice Direction and has the same defects, as well as another one: it appears to apply only when "you have applied for permission to appeal to the Upper Tribunal", although the event raising the possibility of a notice by the appellant might arise after permission has been granted or possibly even after the Upper Tribunal's decision if the appeal is still pending (see s 104(2)), and it is possible to envisage cases where it might arise where the application for permission to appeal to the Upper Tribunal is or was by the Secretary of State, not the individual.

15.
Direction 5 is within Part 3 of the Practice Direction, which applies only to the Upper Tribunal. Part 2 contains the exiguous provisions applying to the First-tier Tribunal, with no mention of s 104(4A). This is because from 2006 the provisions about a notice that the appellant wished to pursue the appeal were in rule 18(1A)-(1G) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230), as amended by SI 2006/2788. Those Rules were made applicable to the Immigration and Asylum Chamber of the First-tier Tribunal when that Chamber was created in 2010. But they were revoked by rule 45 of the First-Tier Tribunal's 2014 Rules on 20 October, the same day that the present appeals regime took effect. It follows that there has never been any "relevant practice direction" within the meaning of its rule 16(3) in the First-tier Tribunal. This contrasts with the position in the Upper Tribunal, where, because of Direction 5.2, the out-of-date requirements are still in the Practice Direction but here too it appears that they cannot be regarded as 'relevant'.

16.
Mr Bandegani took us also to the Notice of Decision issued by the Secretary of State in the present case in June 2019 and no doubt in standard form. It is headed "Your asylum decision. Important information and advice for claimants. Grant of limited leave". It has two pages. The second half of the second page is devoted to this "information and advice":

"Pending Appeals

If you have an appeal pending at the time you are granted limited leave it will be treated as abandoned. If your ground of appeal was that the decision was unlawful by virtue of section 19B of the Race Relations Act 1976 you may give notice that you wish to continue your appeal. If your ground of appeal is brought in relation to the Refugee Convention and you have been granted limited leave for a period exceeding 12 months you may also give notice that you wish to continue your appeal. You may not give notice that you wish to continue your appeal on any other ground, and you must have raised these grounds in your original appeal. To prevent such an appeal becoming abandoned you must give notice to the Asylum & Immigration Tribunal (AIT) or the appropriate court that you wish to

continue your appeal. If you wish to continue your appeal you must give notice within 28 days of receipt of notice of your grant of limited leave. The appeal will be abandoned after 28 days unless you send to the relevant court the notice of intention to pursue the appeal. If you notify the court within 28 days that you wish to continue with an appeal, any pending appeal hearing will be re-listed.

To give notice that you wish to continue an appeal in these circumstances your notice must be in a form which complies with the relevant procedure rules. If your appeal is currently pending with the Asylum and Immigration Tribunal (AIT), or is being reconsidered by the higher courts, you may complete a form for this purpose which is available on the AIT website:

http://www.ait.gov.uk/forms_and_guidance/forms_and_guidance.htm."

17.
This is worse even than the unamended Practice Direction. It has all the latter's defects in its references to the old law. It compounds them by specifically and wrongly stating that "you may not give notice that you wish to continue your appeal on any other ground", whereas two other grounds are available, and one of those specified is not. It requires notice within 28 days of receipt of the grant of leave, which is wrong: in the First-tier Tribunal the notice has to be received within 28 days of the date the grant of leave was sent and in the Upper Tribunal it has to be received within 30 days of the date the grant of leave was sent (unless it was delivered personally or sent electronically, in which case the period is again 28 days). That difference between the rules for the two Tribunals draws attention to the most blatant error in this "Information and Advice": it says that notice must be given to the Asylum and Immigration Tribunal, a body that has not existed since 2010, and refers to a website which has also presumably not existed for the best part of ten years.

18.
Because the decision communicated, the grant of leave, is not one that itself carries a right of appeal, the contents of the Notice of Decision are not covered by the Immigration (Notices) Regulations 2003 SI 2003/658 (which, we think, would render the notice ineffective if the rights of appeal were stated so misleadingly). It is, however, not easy to excuse "Information and Advice" that is so badly out of date and which specifically denies a number of rights that are in law available to the person to whom the Notice is addressed and mis-states the law applicable to those whose existence it concedes.

THE FACTS AND PROCEDURAL HISTORY

19.
Having set out the law as expressed in the various sources available, we turn to the facts of the present case.

20.
MSU (to whom, despite the doubts about whether he has a pending appeal, we shall refer as "the appellant") is a national of Bangladesh. He came to the United Kingdom as a student in 2006. His wife and two children joined him as his dependents in 2008. A further child was born in the United Kingdom in 2011. The last child has never had leave, but on application the appellant's leave was extended, and the rest of the family's in line, the last grant of leave being due to expire on 30 December 2012. That leave was, however, curtailed with effect from 4 June 2012, because the college at which the appellant was registered had its licence revoked. The family have therefore been overstayers since 4 June 2012. Notices of removal were served on 24 September 2013 but were never implemented.

21.

On 28 February 2014 the whole family applied for leave to remain on the basis of article 8 of the ECHR. The application was refused. The family appealed, and the appeal was dismissed. Their appeal rights were exhausted on 8 May 2015. The appellant asked for his human rights application to be reconsidered on 3 August 2015: that request was refused on 18 September 2015. On 9 October 2015 the appellant's two eldest children submitted human rights applications, which were refused with no right of appeal on 8 September 2016. They sought Judicial Review. One of the claims was not admitted; the other was refused permission on the papers and the application was not renewed. Costs orders totalling just over £1,000 were made against them. Those proceedings were complete by the summer of 2017. On 28 July 2017 the respondent's Family Returns Team discussed voluntary return with the appellant.

22.

On 23 August 2017 the appellant claimed asylum. The claim was refused on 6 March 2018. The appellant appealed to the First-tier Tribunal on refugee, humanitarian protection and human rights grounds. The hearing was before Judge Raynor on 9 April 2019. He refused the claim on protection grounds but allowed it on human rights grounds, finding that the appellant's removal would be a disproportionate interference with the article 8 rights of himself and his family.

23.

Then followed the events that raise the questions we set out at the beginning of this decision. Judge Raynor's decision was sent out on 7 June 2019. On 20 June the appellant, his wife and all three children were granted leave to remain for 30 months, apparently as a result of the decision. It is not clear when or by whom notice of that decision was given to the Tribunal. On 21 June the appellant applied to the First-tier Tribunal for permission to appeal, making no mention of the grant but simply saying, in grounds signed by Mr Bandegani, that he did not challenge the allowing of his appeal on human rights grounds but only the dismissal of his appeal on protection grounds. Permission to appeal was refused by the First-tier Tribunal on 17 July. The application for permission was renewed to the Upper Tribunal, in time, on 31 July. Again, there was no mention of the grant, the matter being dealt with in terms identical to those below, and again signed by Mr Bandegani. On 1 August the appellant gave notice of his intention to continue the appeal on protection grounds following the grant of leave. It is clear, and is accepted, that that was out of time; it was accompanied by a request for time to be extended.

24.

The application for permission was decided by Judge Grubb. He pointed out that there is an issue about which procedure rules apply in these circumstances, that question being of importance in the light of the prohibition on the extension of time contained in the Upper Tribunal's Rules. He granted permission in order for the question of whether time could be extended and if so whether it should be; if, following a decision extending time the appeal was before the Upper Tribunal, he considered the substantive grounds arguable.

25.

Judge Grubb wrote that "it is arguable that [the First-tier Tribunal Rules] were the applicable Rules because, at the time the appellant was granted leave, the appeal was pending in the First-tier Tribunal", but that "it may be argued that the UT Procedure Rules have in some way "taken over" once permission to appeal was refused in the FtT". He thought that the issue was 'a difficult one'. With the last sentiment we agree.

DISCUSSION

A. THE EFFECT OF THE NOTICE

26.

The statute makes it clear that the appeal is abandoned on the grant of leave, unless a notice is given. It implies, but does not specifically provide, that if notice is given, the appeal again becomes a pending appeal, that is to say it ceases to be an abandoned appeal. It makes no provision, expressly or by implication, in relation to the position between the grant of leave and the giving of the notice.

27.

Clearly, there are two possibilities if a notice is given. One is that it has retrospective effect on the abandonment, which is now to be deemed never to have happened. The other is that it reverses the abandonment, so that the appeal remains an appeal which was for a period abandoned, but then again became pending. Each of these possibilities has an attraction in terms of its consequences in the context of the appeals provisions as a whole.

28.

If the effect of the notice is retrospective, the consequence is that in a case where notice is given the appeal was (it turns out) never abandoned. It is not therefore necessary to consider the consequences of the period of time between the grant of leave and the notice separately from any other period of time during which the appellant had been in the United Kingdom. It might have the effect that any action taken in that period by or in respect of the Tribunal (at either level) was retrospectively validated. On the other hand, it would mean that the appeal could not be regarded as actually having been abandoned by the grant of leave. The grant would merely have presumptively caused abandonment, and there would be a period of "limbo" during which it would not be possible to say whether the appeal should be treated as abandoned or not. A major difficulty is that because of the possibility of extending time for the notice (certainly in the First-tier Tribunal) one could never say for certain that the abandonment had definitively taken place. A person might (for example) be satisfied with a grant of leave in a category that appeared to lead to settlement. At the expiry of that leave, extension might be refused – because there had been a change in policy or the law, or a change in the person's circumstances, or for any other reason. The Secretary of State gives notice of an intention to remove. The person then makes an application for an extension of time for the notice to continue the appeal, with an explanation that the notice was not necessary until the refusal of the extension of leave. If time was extended, the consequence would be that the protection appeal had been pending for the whole intervening period.

29.

If the effect of the notice is not retrospective, there would remain for ever a period during which the appeal fell to be regarded as abandoned (although later recovered). There could be no possibility that any act done during that period could be retrospectively validated: it would need to be renewed. This has a particular impact on the giving of notice to appeal: there is a mismatch between the time for appealing and the time for giving a notice of intention to continue, which is much longer. Although this interpretation avoids the difficulty of the alternative, it would mean that it would regularly be necessary to extend time for the appeal that was validated by the notice of intention to continue. There might be difficult questions of interaction between different time limits, given the variety of orders in which relevant events might happen.

30.

We consider that the only real reason for not adopting the former interpretation is that relating to the possibility of an appeal's being permanently in limbo. Looking at s 104 as a whole, we think that in fact that possibility is not envisaged by the legislator.

31.
Section 104(1) and (2), it will be seen, suffer from the same difficulty, because given the possibility of an extension of time for appealing, the normal position would be that an appeal could never be said to be finally determined. The predecessor provisions of s 104(2)(a), in s 104(2) as amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, specifically dealt with this by incorporating the phrase "other than an application out of time with permission" in the specification of the periods of time during which an appeal remained pending following its determination. Although nothing in the present legislation has that express provision, it must nevertheless be implied. Otherwise no ordinary appeal could safely be regarded as having ceased to be pending, and no unsuccessful appellant could be removed (see s 78). Once it is appreciated that the application of subsections (1) and (2) require the possibility of the extension of time to be ignored, there seems no reason not to apply the same device to subsections (4A) and (4B). The difficult consequence to which we referred in paragraph [28] above vanishes, and the neater solution there set out becomes viable. We prefer it and adopt it.

32.
That interpretation has, as we said, the consequence that an act that was legally impossible at the time it was done may become retrospectively valid by the giving of the notice.

B. CAN THE UPPER TRIBUNAL EXTEND TIME?

33.
We have set out Upper Tribunal rule 17A(4) above. It appears to impose an absolute prohibition, underlined by the indication that the use of case management powers or the power to condone an irregularity does not provide an escape from the prohibition.

34.
Section 25 of the Tribunals, Courts and Enforcement Act 2007 is also, so for as relevant, set out above. It gives the Upper Tribunal all the powers of the High Court in "all … matters incidental to the Tribunal's functions". There can be no doubt that the extension of the time limit for giving a notice of the sort under discussion is such a "matter", nor that the High Court has power to extend time. The question then is whether the wording of the Rules excludes the s 25 power. Section 25(3) provides that the power "shall not be taken to be limited by anything in Tribunal Procedure Rules other than an express limitation". It follows that unless there is an "express limitation" of the power to extend time conferred by s 25, the power may be exercised.

35.
The wording of rule 17A(4) is a clear limitation of any power conferred by the Upper Tribunal Rules themselves but it does not appear to us that it can be an "express limitation" because it does not refer to (or express any limitation of) the s 25 power. It follows that the apparent prohibition in rule 17A(4) is wholly ineffective. This conclusion, surprising as it is, is reinforced by the approach to s 25 taken in the Court of Appeal in R (Singh) v SSHD [2019] EWCA Civ 1014. There, Leggatt LJ, with whom the other members of the Court agreed, said this:

“[18] I see no reason to give section 25 a restrictive interpretation. I agree with the following observations of Mr Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber) in William Hill Organization Ltd v Crossrail Ltd [2016] UKUT 275 (LC) , para 59:

"Parliament was obviously aware of the powers of the High Court, both those which are inherent, and those specifically conferred by statute. Section 25 therefore seems to me to be intended to be read literally and applied generally, and to invest the Upper Tribunal with the powers of the High Court in relation to all matters incidental to its functions; the critical limitation in section 25(2)(c) is supplied by the reference to the functions of the Tribunal, and does not depend on the source of the power or the terms in which it has been conferred on the High Court. Parliament could obviously make explicit an intention that the Upper Tribunal was not to possess a particular power, but where it has not done so, and where no express limitation has been imposed by tribunal procedure rules as contemplated by section 25(3)(b), the Upper Tribunal must be taken to have the same powers as the High Court in relation to all matters incidental to its functions."

36.
Leggatt LJ also rejected a submission that the s 25 power had been excluded by a specific power in the rules covering the “whole field” under consideration, partly because the limitation found in the Rules “in particular, … does not impose any limitation on the exercise of powers conferred by section 25”. In these circumstances it seems to us that we may say for the same reasons that the s 25 power is not excluded. We remind ourselves, however, that insofar as there might be any difference, it is to be exercised as it would be exercised in the High Court, not as the exercise of a power conferred by the Upper Tribunal Rules.

C. WHICH TRIBUNAL?

37.
When abandonment under s 104(4A) takes place it will sometimes be perfectly clear which Tribunal has the task of dealing with the validity of a notice of intention to continue, including any question of the extension of time. For example, if the grant of leave takes place before the First-tier Tribunal’s decision on the appeal, the Upper Tribunal cannot be involved and any such issues must be for the First-tier Tribunal. On the other hand, if the grant of leave occurs at a time when the appellant’s appeal is clearly before the Upper Tribunal, following a decision on the appeal and either a grant of permission or a refusal renewed to the Upper Tribunal, the matter must be for the Upper Tribunal: the First-tier Tribunal is functus . As Judge Grubb pointed out, however, in the present case the matter is not so clear. Given that there was an application for permission made to the First-tier Tribunal, which was refused, and that there was then an application for permission made to the Upper Tribunal before the notice of intention to continue the appeal was given, it appears superficially that questions relating to the notice ought to be considered by the Upper Tribunal.

38.
That, however, in our judgment cannot be right. The grant of leave had the effect (provisionally, it may be said) of causing the appeal to be treated as abandoned; and unless and until a valid notice was given, any act by either Tribunal (other than acts connected with acknowledging the abandonment) was made without jurisdiction. In particular, an application for permission to appeal could not be received or determined. It follows from that at the time it received and determined the application for permission in the present case the First-tier Tribunal was acting without jurisdiction, because both events followed the grant of leave. The Upper Tribunal has not been involved. (The correctness of this analysis can be tested by considering the position if no application for permission to appeal to the

Upper Tribunal had been made: although the First-tier tribunal appeared to have become functus by incompetently determining an incompetent application, the Upper Tribunal could not be concerned at all. The answer cannot be different if a further incompetent application is made to the Upper Tribunal.)

39.
On the facts of this case it can only be for the First-tier Tribunal to determine the validity of the notice, including deciding whether to extend the time for it to be given. Once there has been a valid notice, however, for the reasons set out at paragraphs [28]-[32] above, it has the effect of retrospectively continuing the appeal as a pending appeal, so that events that took place during the period when it was provisionally abandoned acquire validity. If the First-tier Tribunal does not extend time, the appeal stands as abandoned on 20 June 2019, and the Tribunal has only to send out the requisite notice acknowledging that. If time is extended, that will retrospectively validate (i) the application for permission to appeal to the First-tier Tribunal; (ii) the First-tier Tribunal's decision refusing that application; (iii) the application for permission to appeal to the Upper Tribunal; (iv) Judge Grubb's decision granting permission, and (v) the substantive appeal to the Upper Tribunal against the First-tier Tribunal's dismissal of the refugee grounds of appeal, which will be an appeal pending before the Upper Tribunal.

D. SHOULD TIME BE EXTENDED?

40.
For the reasons given above, we sit as judges of the First-tier Tribunal to consider whether time should be extended. We apply the usual criteria, as set out in the decisions of the Court of Appeal in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, Denton v T H White Ltd [2014] EWCA Civ 906 and Hysaj v SSHD [2014] EWCA Civ 1633.

41.
1. The extent of the default. The grant of leave was made on 20 June 2019. The period of 28 days limited by First-tier Tribunal rule 16(3) expired on 18 July. The notice appears to have been received on 2 August, 15 days later. The default is clearly not trivial, and an extension to over 150% of the time allowed under the rules would be required.

42.
2. The reason for the default. Before us, Mr Bandegani clearly indicated that the fault was entirely attributable to his instructing Solicitors, Duncan Lewis and Co. No further explanation was offered and we do not therefore know whether it was the result of ignorance of the law, ignorance of fact, or something else. The surrounding circumstances point clearly to the second (whether or not accompanied by either or both of the others). Mr Bandegani, presumably on instructions, drafted grounds of appeal to both Tribunals in turn, and those grounds were submitted by Duncan Lewis attached to applications they made on the appellant's behalf. At no stage was it mentioned or indeed apparently appreciated that the appellant had been granted leave. It looks as though the solicitors were not as closely in touch with the appellant's circumstances as they might be expected to be when apparently acting on his instructions. We can make no further comment on this. In particular we cannot associate ourselves with the submission that the delay was not the fault of the appellant. There is no evidence substantiating that.

43.
3. All the circumstances of the case. The appellant has leave and so is not threatened with removal, but the grant is the starting-point in a case of this sort and cannot be a matter to be taken into

account. The grounds of appeal have been considered and although not obviously strong have merited a (provisional) grant of permission to appeal. The materials that were publicly available relating to the process for giving the notice were, as we have shown above, seriously defective: but it is not said that either the appellant or his solicitors were misled by them. The information given in the material accompanying the grant of leave was also seriously defective, but again it is not said that the appellant was misled.

44.
4. Decision. We have had the advantage of full consideration of the issues of jurisdiction by Mr Bandegani and Mr Kotas. Mr Bandegani's position on behalf of Duncan Lewis and Co was a frank admission of failure. Although the default was considerable it was in context perhaps not enormous, and there is a clear judicial decision that the grounds are arguable. In what has essentially been a test case a decision not to extend time might be seen as condoning the various failures to give accurate information on the notice process. In particular we cannot ignore the fact that the individual information given by the Secretary of State was misleading, even if there is in the present case no evidence that anyone was misled. Any decision in circumstances such as this has to be made on its own facts and none can create a precedent. We consider by quite a narrow margin, that the justice of this case requires time to be extended; and we therefore extend time for the notice for such period as will enable the notice received on 2 August 2019 to be regarded as in time.

CONCLUSION

45.
That decision by the First-tier Tribunal now has the effects set out in paragraph [39] above. Sitting as judges of the Upper Tribunal we give the following directions. The appeal will be listed to be heard, by any constitution of the Upper Tribunal, in accordance with Judge Grubb's grant of permission, that is to say on the basis of grounds 2-5 of the grounds supporting the application for permission to appeal to the Upper tribunal.

Direction Regarding Anonymity

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 his family. Failure to comply with this direction could lead to contempt of court proceedings

C. M. G. OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 12 December 2019