Upper Tribunal
(Immigration and Asylum Chamber)

Yerokun (Refusal of claim; Mujahid) [2020] UKUT 00377 (IAC)

THE IMMIGRATION ACTS

Heard at Field House by remote means	**Decision & Reasons Promulgated**
On 25 August 2020	.....

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMUEL OLUDARE OLUYEMI YEROKUN

Respondent

Representation :

For the Appellant: Ms S. Cunha, Senior Home Office Presenting Officer.

For the Respondent: Mr S. Winter, instructed by Frew & Co Solicitors.

The reasons given by the President in R (Mujahid) v First-tier Tribunal and SSHD [2020] UKUT 00085 (IAC) are reinforced by two further factors: (1) Under s 104(4A) a human rights appeal is deemed to be abandoned if a period of leave, however short, is granted after the appeal is brought. It is inconceivable that it was intended that a refusal of an application accompanied by a grant of leave was intended to generate a right of appeal. (2) There is an inherent difference between an application and a claim and the refusal of the one does not imply or entail the refusal of the other, even where the application includes a claim.

DECISION AND REASONS

INTRODUCTION

1.
The principal issue in this case is whether the respondent, whom I shall call “the claimant” has a right of appeal. If he does not, neither this Tribunal nor the First-tier Tribunal has juris diction to deal with his challenge to the Secretary of State’s decision.

THE FACTS AND THE PROCEEDINGS

2.
The claimant is a national of Nigeria. He first came to the United Kingdom as a visitor in 2004. He has had a number of subsequent periods of leave. He has made a number of applications for leave to remain on a variety of human rights grounds connected with his family. His most recent application was in November 2017 and was an application for leave to remain on human rights grounds.

3.
The Secretary of State's decision is in the form of a notice dated 27 July 2018. It states as follows:

"You applied for leave to remain on the basis of your family and private life but your application has been refused. You have however been granted 6 months leave outside the immigration rules on an exceptional basis pending the conclusion of court proceedings regarding access rights to your children."

4.
A letter of the same date gave the Secretary of State's reasons for both elements of that decision. The notice indicated that there was no right of appeal against the decision. The claimant nevertheless put in a notice of appeal. In the First-tier Tribunal , Judge Buchanan decided at a hearing on 21 November 2018 that there was a right of appeal. Following a further hearing on 24 April, he issued on 11 June 2019 a decision allowing the claimant's appeal "in respect of the decision made by the respondent". The exact impact of Judge Buchanan's decision is not absolutely clear, but it does appea r , particularly from paragraphs [66]-[67] where he expresses his conclusions on proportionality, that he considered he was dealing with a refusal of leave to remain, amounting to a disproportionate interference with the claimant's private life.

5.
The Secretary of State now appeals, with permission, to this Tribunal on a number of grounds including that relating to jurisdiction.

THE LAW

6.
The rights of appeal against an immigration decision are found in s 82 of the Nationality, Immigration and Asylum Act 2002 (as amended):

"(1) A person ("P") may appeal to the Tribunal where—

(a) the Secretary of State has decided to refuse a protection claim made by P,

(b) the Secretary of State has decided to refuse a human rights claim made

by P, or

(c) the Secretary of State has decided to revoke P's protection status."

7.
The other subsections are not material to this case. By s 84(2), an appeal against the refusal of a human rights claim must be brought on the ground that the decision is unlawful under s 6 of the Human Rights Act 1998. Section 113(1) defi n es, for the purposes of these provisions, a "human rights claim". That phrase :

“(a) means a claim made by a person that to remove him from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c.42) (public authority not to act contrary to Convention) …. b ut

(b) does not include a claim which, having regard to a former claim, falls to be disregarded for the purposes of this Part in accordance with immigration rules, ‘humanitarian protection’ has the meaning given in section 82(2) ”

8.
Paragraph (b) is not in issue here. Nor is it in issue that by making his application for leave to remain in the way he did, the claimant made a “human rights claim” : so much is accepted by the Secretary of State.

9.
Clearly, in order to have a right of appeal under this head, the human rights claim must have been the subject of a decision to refuse it. Precisely what that means has been the subject of a number of decisions of this Tribunal and of the C ourts. In putting the claimant’s case Mr Winter knew that he was in some difficulties given the decision in MY [2020] UKUT 00089 (IAC), a decision of a Presidential panel, and R (Mujahid) v First-tier Tribunal and SSHD [2020] UKUT 00085 (IAC), a decision of the President. The latter, decided on facts very similar to those in the present case, points clearly to a decision against the existence of a right of appeal. The headnote reads as follows:

“(1) A person (C) in the United Kingdom who makes a human rights claim is asserting that C (or someone connected with C) has, for whatever reason, a right recognised by the ECHR, which is of such a kind that removing C from, or requiring C to leave [the United Kingdom], would be a violation of that right.

(2) The refusal of a human rights claim under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 involves the Secretary of State taking the stance that she is not obliged by section 6 of the Human Rights Act 1998 to respond to the claim by granting C leave.

(3) Accordingly, the Secretary of State does not decide to refuse a human rights claim when, in response to it, she grants C limited leave by reference to C’s family life with a particular family member, even though C had sought indefinite leave by reference to long residence in the United Kingdom. ”

DISCUSSION

10.
I see no good reason to depart from that decision. Indeed, there are two points not mentioned there which to my mind reinforce it. The first is the effect of s 104(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)) . ”

11.
Subsection (4B) does not apply to appeals on human rights grounds. The effect of this is that if a person’s human rights claim is refused, and he appeals, the grant of a period of leave, however short, brings his appeal to an end. It is inconceivable that there was intended to be a right of appeal where the same grant was made before the appeal could be launched. The reason why the grant of leave

causes the appeal to be abandoned is that the grant removes for the moment the argument that the Secretary of State proposes to interfere with the claimant's rights by removing him, which is the sole basis upon which the appeal could have been pursued, given the wor ds of s 113 and s 84.

12.
The second point is a little more tentative, but none the less in my judgment real. It seems to me that there is an inherent difference between an application and a claim. A claim's success depends on circumstances and their assessment; an application's success depends on the exercise of some executive power. Some applications may include claims, and the converse may also be true , but it does not follow even in such cases that the refusal of one implies or entails the refusal of the other. A person who makes an application by reference to a claim seeks some particular benefit arising from the circumstances of his case. The decision-maker may recognise the circumstances but be disinclined to grant the particular benefit sought. There is nothing contradictory, therefore, in refusing the application while recognising (and so not refusing) the claim. The statute provides a right of appeal against refusal s of claims – as it happens, claims based on the United Kingdom's international obligation s – but it says nothing about a right of appeal against the refusal of an application which by the nature of this area of law, is likely to be a matter governed by the Immigration Rules and other domestic law.

13.
It may have been the failure to recognise the distinction between a claim and an application that led Judge Buchanan into error. In his first decision, at [13], he wrote as follows:

" In my judgment, standing that the appellant was notified of a Decision made by the Secretary of State which states in terms "You have applied for leave to remain on the basis of your family and private life but your application has been refused": he is plainly a person whose claim has been refused."

14.
The judge gives no reason for his elision of the concepts of application and claim in this way. His bold statement at the end of that paragraph led him directly to the conclusion that the claimant who, as a result of his dealings with the Secretary of State, had had the threat of removal from the United Kingdom lifted by a grant of leave, was a person whose claim that to remove him would be unlawful under s 6 of the Human Rights Act 1998 had been refused. That in my judgment cannot be right.

DECISION

15.
For the reasons given above, the decision against which the claimant sought to appeal was not a decision within s 82(1) of the 2002 Act and ca rried no right of appeal. The First-tier Tribunal had no jurisdiction. For the avoidance of doubt, that also means that all the views, assessments and judgments expressed by Judge Buchanan about the evidence before him are of no effect and should not be the subject of any reference hereafter. So far as these proceedings are concerned, I find that Judge Buchanan erred in law in considering that he had jurisdiction. I set aside his decision. I substitute a decision dismissing the purported appeal for want of jurisdiction.

C.M.G. Ockelton

C. M. G. OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 2 December 2020