Upper Tribunal
(Immigration and Asylum Chamber)

Aziz (NIAA 2002 s 104(4A): abandonment) [2020] UKUT 00084 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 January 2020	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

MR C M G OCKELTON, VICE PRESIDENT

Between

RASHID AZIZ

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr. E. Nicholson, Counsel (Direct Access)

For the Respondent: Mr. T. Melvin, Senior Home Office Presenting Officer

Where a person brings an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and is then given leave to remain in the United Kingdom, the effect of section 104(4A) is to cause the appeal to be treated as abandoned (subject to section 104(4B)), whether or not the appeal was pending on the date of the grant of leave.

DECISION AND REASONS

1. The appellant, a citizen of Pakistan, arrived in the United Kingdom in 2008, with leave to enter. Leave to remain was given to the appellant on various occasions; but on 5 May 2016, the appellant's application for indefinite leave to remain was refused by the respondent. On 14 February 2018, the appellant applied for indefinite leave to remain on the basis of long residence. That application was also refused and generated an appeal to the First-tier Tribunal on human rights grounds.

2. In a previous application for leave, the appellant had declared self-employed income of over £12,600 from 1 October 2010 to 28 February 2011. Records from Her Majesty' s Revenue & Customs, however, showed that on 21 February 2017 no self-employed earnings had been declared to them. The respondent did not accept the appellant's explanation that he had been under the misapprehension that his tax from self-employment had been paid under the PAYE system. As a result, t he appellant's application for indefinite leave to remain on the grounds of long residence was refused under paragraph 322(5) of the Immigration Rules. The respondent also did not consider that the appellant met the terms of paragraph 276B of the Rules, or any other provision thereof, and tha t the appellant was not assisted by Article 8 of the ECHR.

3. First-tier Tribunal Judge Parkes dismissed the appellant's appeal, following a hearing in Birmingham on 5 December 2018. The judge considered it to be:-

" a bizarre coincidence that the one year that he inadvertently understated his self-employed earnings to HMRC, and the only time he had self-employed earnings, is the year that without the higher figure being provided in his Tier 1 application he would not have met the threshold to achieve the points necessary for his application to succeed " (paragraph 14).

4. The judge went on to explain why he did not accept the appellant's explanation that the appellant considered the tax had been paid from PAYE. The judge noted that the appellant had used a friend to complete his tax return. The friend had "no formal accountancy experience. Apparently he is no longer contactable and so unable to provide an explanation for his error" (paragraph 16).

5. At paragraph 18, the judge stated that he was satisfied on the evidence presented that the respondent had discharged the burden of proof of showing the appellant was dishonest in the figures provided to HMRC. The judge then turned to the issue of the appellant's family life.

6. The judge noted that the appellant was now married and had two children. The elder child had health issues, for which he was receiving therapy. The judge was unpersuaded that the appellant would need the support of family in Pakistan, in order to re- establish himself there, given that he had "established himself in the UK without the benefit of cultural familiarity or such support" (paragraph 21). Neither the appellant nor his wife had leave to remain in the United Kingdom. Ordinarily , both children would be expected to return to Pakistan, with their parents. The judge found that , although health provision for the appellant's son m ight not be to the same standard or as readily available as in the United Kingdom, the evidence did not show that support did not exist. The judge said he was aware from a previous case that there was a centre in Pakistan devoted to the condition from which the son suffer ed (paragraph 23). Whilst there would be difficulties in the appellant and his family returning to Pakistan, the evidence was not such as to show that it would be contrary to the best interests of the child concerned for the family to return, to such an extent as to outweigh the public interest in the enforcement of immigration control (paragraph 24).

7. At paragraph 25, the judge concluded by noting that children move at the behest of their parents between countries and continents on a daily basis, with children being expected to make the necessary adaptations. He found that the appellant's children could, by the same token, adapt, notwithstanding the health issue relating to one of the children.

8. Permission to appeal to the First-tier Tribunal was sought on three grounds . In a decision of 17 January 2019, the First-tier Tribunal refused permission on those grounds. Although the First-tier Tribunal Judge had not recorded in his decision that the appellant's current accountant had attended and given evidence, the First-tier Tribunal did not consider that to be material. The accountant was

reliant on the account provided to him by the appellant and his evidence merely demonstrated what was common ground; namely, that the appellant was now up-to- date with his tax affairs. The judge had found that the appellant failed to provide evidence of the absence of provision in Pakistan for the medical condition of the elder child. It was on that basis, rather than of any specialist knowledge of the judge, that this point was resolved against the appellant. Finally, it was not arguable that the First-tier Tribunal Judge had ignored relevant case law in finding that the children, including one who had lived in the United Kingdom for more than seven years, could be expected to return to Pakistan with their parents.

9. The appellant renewed his application for permission to appeal before the Upper Tribunal. The Upper Tribunal refused permission to appeal in a decision dated 3 April 2019. The Upper Tribunal did not consider there was an arguable error in relation to the First-tier Tribunal Judge's handling of the issue relating to paragraph 322(5) and the problem regarding the appellant's tax return. A l t h ough the First-tier Tribunal Judge had noted, in reaching his decision, that there was to his knowledge a centre in Pakistan that dealt with the medical problem of the appellant's son, the Upper Tribunal considered that it was permissible for a judge to use judi cial knowledge, given that what the judge said was correct and that this was an issue concerning information in the public sphere, which would have been open to the appellant to find and produce. Dealing with the ground raised before the Upper Tribunal to the effect that the First-tier Tribunal Judge had not properly considered section 117B(6) of the Nationality, Immigration and Asylum Act 2002, the Upper Tribunal considered it was plain that the First-tier Tribunal Judge had reached the conclusion that it would be reasonable for the elder son, as a "qualifying child" for the purposes of Part 5A of the 2002 Act, to leave the United Kingdom.

10. On 12 April 2019, the appellant's solicitors applied on his behalf for permission to bring judicial review under CPR 54.7 A to quash the refusal by the Upper Tribunal of permission to appeal against the First-tier Tribunal Judge's decision. The grounds of application were drafted by Mr Nicholson. The y critiqued the way in which the Upper Tribunal Judge, who refused permission to appeal, had dealt with the three grounds of challenge against the First-tier Tribunal Judge's decision. The application also contended that the Upper Tribunal Judge had erred in finding that the First-tier Tribunal Judge had not strayed "outside the range" of findings concerning Article 8 that were "reasonably available … on the evidence".

11. So far as concern ed CPR 54.7A(7) (b) , which requires there to be an important point of principle or practic e or some other compelling reason to hear the judicial review , Mr Nicholson's grounds submitted that the Upper Tribunal's errors constituted "important points of principle and practice relevant to the correct approach to be taken in consideration of applications for permission to appeal". There was also said to be a compelling reason to grant permission, which related to the prospects of the appellant's son being removed from the United Kingdom in circumstances which the Court of Appeal, in a case said to be directly analogous in respect of the son's medical condition , had considered to be "little short of catastrophic".

12. On 7 May 2019, the respondent granted the appellant and his family leave to remain in the United Kingdom until 7 November 2021. We are not aware it is contended on behalf of the appellant that he was not promptly informed by the respondent of the grant of leave. The Upper Tribunal became aware of th e grant only upon receipt of a letter from the respondent dated 2 October 2019 .

13. On 19 July 2019, Sir Ross Cranston, sitting as a Judge of the High Court, granted permission to apply for judicial review under CPR 54.11, 54.12. He considered that there were " reviewable errors"

in the Upper Tribunal's reasons for refusing permission to appeal and that errors marred the decision of the First-tier Tribunal Judge.

14. Consequent upon the grant of permission, Master Gidden, on 3 September 2019, made an order quashing the Upper Tribunal's decision to refuse permission to appeal.

15. On 13 September 2019, the Vice-President, unaware of the grant of leave to the appellant and his family, issued a notice stating that permission to appeal against the First-tier Tribunal Judge's decision was granted by the Upper Tribunal. A notice of hearing before the Upper Tribunal was sent on 23 September, for a hearing on 24 October 2019.

16. Following receipt of the respondent's communication of 7 October 2019, that leave had been granted , a L awyer of the Upper Tribunal, acting pursuant to delegated authority, issued a notice on 8 October 2019, stating that the appellant's appeal was treated as abandoned, pursuant to section 104 (4A) of the 2002 Act , and that section 104(4B) did not apply . Section 104(4A) and (4B) read as follows:-

" …

(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) …

(b) 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.

… ".

17. The Upper Tribunal L awyer noted that the appellant's appeal was not based on asylum or humanitarian protection grounds and that, in any case, the appellant had not provided any such notice.

18. On 14 October 2019, the appellant's solicitors (the same ones as had acted hitherto in the appeal and in the judicial review) wrote to the Upper Tribunal. The solicitors submitted that the appellant's appeal:-

" should not be treated as abandoned. By the operation of subsection 104A(1)(b) our client's appeal ceased to be pending on 4 April 2019, when the Upper Tribunal refused his application for permission to appeal.

The respondent's grant of leave to remain to our client on 7 May 2019 therefore di d not have any effect on our client's appeal, since he did not have any appeal at the time of the grant of leave. The appellant's appeal only came into existence following the High Court's decision of 3 September 2019 ".

19. The letter made reference to the Upper Tribunal decision in Saimon (Cart Review: "pending") [2017] UKUT 00371, in which the Upper Tribunal said:-

“ We should say that nothing decided here should be taken as a decision as to whether an appeal is pending after a decision of the Upper Tribunal refusing permission to appeal has been given but before it has been quashed in any judicial review proceedings brought in respect of it. During that time we agree with Mr Saini that it may be rather difficult to say that the appeal is pending: but we make no decision on that ” (paragraph 7) .

20. The letter of 14 October 2019 ended by s ubmitting that , applying this dictu m , “the appellant achieves access to justice and the opportunity via a fair hearing to challenge the respondent’s decision that he practiced deception.”.

21. At this point, it is convenient to refer to the earlier provisions of section 104:-

“ 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 ”.

22. In the light of the appellant’s solicitors’ letter of 14 October 2019, the Upper Tribunal arranged a hearing on 29 January 2020. Mr Nicholson appeared on behalf of the appellant, directly instructed by the latter . The solicitors who had previously acted for the appellant apparently ceased to do so on 4 December 2019, the day after they had sent an e-mail to the Upper Tribunal, seeking dates to avoid, for the convenience of Counsel.

23. Before us, speaking to his skeleton argument, Mr Nicholson submitted that none of the situations described in paragraphs (a), (b) or (c) of section 104(2) applied in the present case. At the point when permission to appeal to the Upper Tribunal had been refused by that Tribunal (5 April 2019) , the appellant’s appeal was no longer pending. As a result , subsection (4A) could not apply when the leave was gran ted . F ollowing the quashing by the High Court of the refusal of permission to appeal , the appeal again became pending .

24. Mr Nicholson sought to rely upon the Upper Tribunal’s decision in Niaz (NIAA 2002 s. 104: pending appeal) [2019] UKUT 399. In Niaz , the appellant had been removed from the United Kingdom by the respondent, following the refusal by the Upper Tribunal of permission to appeal against the First-tier Tribunal’s decision . After his removal, however, the Court of Appeal granted permission to appeal against the decision of the High Court not to grant permission for a judicial review under CPR 54. 7A, with the result that the Upper Tribunal’s refusal of permission was quashed.

25. At paragraph 29 of its decision, the Upper Tribunal in Niaz made reference to the passage from the decision in Saimon , to which the appellant's solicitors in the present case referred in their letter to the Upper Tribunal of 14 October 2019:-

" 29. The second and third sentences of paragraph 7 of Saimon foreshadow the conclusion we have reached in the present case; namely, that an appeal which has been finally determined ceases to be pending. In the case of an application for permission to appeal to the Upper Tribunal under section 11 of the 2007 Act, the appeal is finally d etermined when it is no longer 'awaiting determination' , which will, of course, be the position once the application is, in fact, determined. That, in our view, is the inexorable result of section 104(2)(a). Although section 104(2) is describing situations in which an appeal is not to be regarded as finally determined, the corollary is that, where none of the situations described in sub-paragraphs (a) to (c) apply (and the appeal has not lapsed or been withdrawn or abandoned), the appeal in question must be treated as having been finally determined. Any other result would mean the respondent could never safely assume that the removal of an individual would not violate section 78 of the 2002 Act.

30. The fact that the refusal of permission to appeal was quashed, as a result of the proceedings in the Court of Appeal after the appellant had been removed, means the appellant's appeal must, from that point, be treated as again pending. There is nothing inherently problematic with the fact that an appeal may, under the statutory scheme, become pending after a period during which, compatibly with that scheme, the appeal has been treated as finally determined. "

26. Mr Nicholson's attempt to pray in aid Saimon and Niaz is, with respect, fundamentally misconceived . The crucial difference is, of course, that in the present case the respondent has granted the appellant two years' leave to remain in the United Kingdom. That is an event which section 104(4A) says, in terms, will cause the appeal to be tr e ated as abandoned. The fact that the appellant's appeal had ceased to be pending at the point when leave was granted does not mean that, at the moment when the appeal again fell to be treated as pending, following the High Court's quashing decision, section 104(4A) had to be disregarded. On the contrary, at the very moment when the appeal again became pending, it fell to be treated as abandoned.

27. Not only is that construction of section 104, in our view, mandated by the statutory language; any other result would be incoherent. Section 84(1)(c) requires a human rights appeal to be brought on the ground that the removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention). The effect, however, of granting the appellant leave to remain, on the facts of the present case, is that the respondent has, in effect, agreed (by reference to the appellant's family's circumstances) that his removal would violate Article 8 of the ECHR. There is, a ccordingly, no statutory basis upon which the appeal could proceed.

28. Mr Nicholson submit ted it cannot be right that the appellant is left without judicial redress in respect of his contention that he did not employ dishonesty in respect of his financial affairs, contrary to the decision of the respondent and the finding of the First-tier Tribunal Judge. As, however, the Court of Appeal has observed (A h s an v Secretary of State for the Home Department [2017] EWCA Civ 2009; Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673) t here are limits to the way s in which a human rights appeal may be used to achieve judicial adjudication on matters of this kind.

29. Accordingly, we find that the Upper Tribunal L awyer was correct to issue the notice recording that the appellant's appeal had been abandoned under section 104(4A).

30. Mr Nicholson told us he did not feel “ashamed” that an order had been obtained from the High Court, quashing the Upper Tribunal’s refusal of permission. Whilst that may be so, it is of concern that the solicitors who were acting for the appellant in the judicial review proceedings (Mr Nicholson having, he indicated, stepped back from those proceedings after he had drafted the grounds) did not inform the High Court, as soon as they became aware of the gr ant of leave. The appellant owed a duty of candour in those judicial review proceedings. Even if the appellant might have been (wrongly) advised that the grant of leave did not have the effect of causing his appeal to be abandoned, the grant was clearly a matter of prof ound significance in those proceedings , since there was no longer any prospect of the appellant and his family (in particular, his son with medical issues) being removed by the respondent to Pakistan. Had the High Court been made aware of that matter, it is hard to see how it could have concluded that the requirements of CPR 54.7A (7) (b) were satisfied.

31. We consider it necessary to make the High Court aware of this matter. It will be for that Court to decide whether it wishes to hear from the appellant’s solicitors.

Decision

The appeal is abandoned.

Signed Date

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber