Upper Tribunal
(Immigration and Asylum Chamber)

MH (effect of certification under s.94(2)) Bangladesh [2013] UKUT 00379 (IAC)

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 24 April 2013	
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Before

UPPER TRIBUNAL JUDGE DAWSON
DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M H

Respondent

Representation:

For the Appellant: Mr J Parkinson, Senior Home Office Presenting Officer
For the Respondent: Mr P Simon instructed by Monk & Turner Solicitors LLP

A person may appeal whilst in the United Kingdom where an asylum or human rights claim has been made but not where there has been certification of that claim or claims as clearly unfounded. Certification under s.94 (2) operates even where a claimant seeks to rely on grounds available to a party under s. 84 of the 2002 Act. It is the claim (which may comprise

asylum and human rights elements) that is certified, not the decision made on the claim, regardless of any grounds which might otherwise be raised against that decision.

DETERMINATION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Blackford who allowed the appeal by the respondent before the First-tier Tribunal (we shall refer to him as the claimant) on humanitarian protection grounds against the decision of 3 October 2012 to give directions for his removal. The claimant is a national of Bangladesh where he was born on 20 May 1967. He had arrived in the United Kingdom in 2003 and claimed asylum on 21 April 2012. In a Reasons for Refusal Letter dated 3 October 2012 the Secretary of State certified both the asylum and human rights claims that the claimant had made under s.94(2) of the Nationality, Immigration and Asylum Act 2002 on the basis that they were clearly unfounded. The claimant was informed as a consequence that he may not appeal from in the United Kingdom.

2. The judge heard argument from Miss Whittington on behalf of the Secretary of State and Mr Rana for the appellant. Miss Whittington argued that there was no right of appeal since the claim had been certified as unfounded. She referred the judge to *TM (s94 certificate: jurisdiction) Zimbabwe* [2006] UKAIT 00005 although the judge observed this was not a case in which the validity of the certification was an issue.

3. For the claimant, Mr Rana had accepted there was certification and that as a result there was no in-country right of appeal in respect of the asylum claim but nevertheless argued that the appeal was within the jurisdiction of the First-tier Tribunal because, although the human rights claim had been certified, Article 8 had to be considered in accordance with the Immigration Rules as well as in accordance with Article 8 in the way it would have been considered before 9 July 2012 with reference to the decision in *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC).

4. It was also argued that only the asylum and human rights claims had been certified. Paragraphs 27 to 29 of the refusal letter considered humanitarian protection and Mr Rana argued that in respect of that ground, there was a right of appeal under s.82. By way of response Miss Whittington had argued that the facts behind the claim to humanitarian protection were the same as the human rights points.

5. The judge did not express a concluded view on the matter of his jurisdiction at the hearing but expressed the preliminary view that he thought it likely the claimant had a remaining right of appeal in relation to humanitarian protection and proceeded to hear the appeal on that basis, preserving a ruling in relation to the preliminary issue as part of his determination. He explains in that determination that he had come to the conclusion that his preliminary view was correct; the certificate did not apply to

humanitarian protection. He concluded however that certification did apply to the Article 8 grounds. He considered the Secretary of State was correct not to have considered the new Rules in relation to the claimant's claim. Although his reasoning for this conclusion is not entirely clear, it was not an aspect pursued by the claimant subsequently.

6. The application for permission to appeal by the Secretary of State argued that the judge had misdirected himself in law in failing to distinguish between a ground of appeal under s.84 of the Nationality, Immigration and Asylum Act 2002 and the right of appeal under s.92(4) of the same Act. The claimant was subject to a decision to remove him, being a decision under s.82(2)(h) as an illegal entrant which is appealable by virtue of s.82(1). Had the claimant's asylum and human rights claims not been certified as clearly unfounded he would have been entitled to exercise an in-country right of appeal to the Tribunal pursuant to s.92(4)(a). This was however prevented by the operation of s.94(2). The grounds refer to the decision of the Tribunal in *SA (in-country appeal: human rights; other grounds) Bangladesh* [2005] UKAIT 00178 distinguishing the right of appeal from the grounds on which an appeal can be brought.

7. In granting permission to appeal, First-tier Tribunal Judge Saffer explained that he was satisfied that although the application was out of time, four days were not excessive and that despite no explanation having been given for the delay he extended time as there appeared to be merits in the grounds.

8. By way of a response pursuant to r.24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant gave reasons for opposing the appeal by the Secretary of State on the basis that:

   (i) First-tier Tribunal Judge Saffer had erred in law and acted unreasonably in extending time because the Secretary of State had given no reasons in the application. It is argued that in such circumstances First-tier Tribunal Judge Saffer should have refused to admit the application; and

   (ii) the decision to extend time without a request and supporting evidence from the Secretary of State was not in accordance with the requirements of the Rules with reference to *Samir (FtT permission to appeal: time) Afghanistan* [2013] UKUT 3 (IAC).

Is there a right of appeal against a decision extending time for permission to appeal and the grant of permission to appeal by the First-tier Tribunal?

9. We gave Mr Simon our preliminary view that *Samir* did not support the proposition argued in the rule 24 response. In that case the Tribunal was concerned with the situation where the First-tier Tribunal, when considering an application for permission to appeal, failed to notice that the application was out of time and so made no decision on whether to extend time but nevertheless granted permission to appeal.

10. The guidance given by the Tribunal is in these terms:

> "In a case where, following *Boktor and Wanis (late application for permission) Egypt* [2011] UKUT 00442 (IAC), a grant of permission has to be regarded as conditional upon a decision whether time should be extended, the latter decision is part of the original decision on the application. If the application was to the First-tier Tribunal, the decision as to time is therefore made by the First-tier Tribunal, and if the application is not admitted there is the possibility of renewal to the Upper Tribunal."

11. What had happened in *Samir* was that the Secretary of State applied for permission to appeal the decision of the First-tier Tribunal, three days after the time provided for in the Asylum and Immigration Tribunal (Procedure) Rules had expired. A judge of the Upper Tribunal sitting as a judge of the First-tier Tribunal granted permission to appeal without dealing with the lateness of the application. The appeal was duly listed before a Deputy Judge of the Upper Tribunal who concluded that time should not be extended. He did not admit the Secretary of State's application for the grant of permission to appeal and accordingly upheld the decision of the First-tier Tribunal.

12. As we observed to Mr Simon, the situation in the appeal before us is quite different. Although Judge Saffer indicated no explanation had been given for the delay, the application does in fact acknowledge that it was late and that the Secretary of State submitted there were special circumstances in the case which would result in it being unjust if time were not extended. This was because the decision of the First-tier Tribunal raised an important point of law in respect of the power to certify a claim under s.94 of the 2002 Act.

13. As observed by the Tribunal in *Samir*, s.11 of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal from a determination of the First-tier Tribunal to the Upper Tribunal on a point of law. The right may be exercised only with permission, which may be given by the First-tier Tribunal or the Upper Tribunal.

14. Section 11 of the Tribunals, Courts and Enforcement Act provides:

> (1) For the purpose of subsection (2), the reference to a right of appeal is to a right of 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 to appeal(or leave) may be given by –
>
> (a) the First-tier Tribunal, or
>
> (b) the Upper Tribunal, or on an application by the party.

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

…

(f) any decision of the First-tier Tribunal that is of a description specified in an order made by the Lord Chancellor."

17. Regulation 3 of the Appeals (Excluded Decisions) Order 2009 (SI 2009/275) (as amended) provides:

"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 –

…

(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."

18. The issue is therefore whether a decision to extend time for permission to appeal comes within the category of the excluded decisions. Part 3 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 sets out the procedure for appealing the decision of the First-tier Tribunal. It includes time limits by when such applications must be received and it also provides power to the Tribunal to extend time (rule 24 (4)). The only basis on which a party is able to appeal a decision of the First-tier Tribunal is regulated by rule 21(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which provides:

"21(2) A person may apply to the Upper Tribunal for permission to appeal to the Upper Tribunal against a decision of another Tribunal only if-

(a) they had made an application for permission to appeal to the Tribunal which made the decision challenged; and

(b) that application has been refused or has not been admitted.

….".

19. Mr Simon acknowledged the absence of legislative support for the position taken in the rule 24 response. We did not hear full argument on this aspect however and there may be an appropriate occasion to do so in another appeal. This appeal however turns on an issue relating to the jurisdiction of the First-tier Tribunal to proceed as it did. In the light of our conclusion on this issue set out below, we consider that an extension of time was correctly granted in order to correct a fundamental error by the First-tier Tribunal in determining the appeal. We now turn to whether Judge Blackford erred in deciding that the claimant did have an in-

country right of appeal on the basis that the humanitarian protection claim had not been certified.

The effect of certification of an appeal under s.94(1),(2)and(3) of the 2002 Act –

20. The relevant provisions of s.94 are in these terms:

> "94. Appeal from within United Kingdom: unfounded human rights or asylum claim
>
> (1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).
>
> (1A) A person may not bring an appeal against an immigration decision of a kind specified in section 82(2)(c), (d) or (e) in reliance on section 92(2) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) above is or are clearly unfounded.
>
> (2) A person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded."
>
> …".

21. Mr Simon accepted that s.94(2) was a catchall provision and so acknowledged his difficulties.

22. Mr Parkinson gave an undertaking that, having regard to the mass of evidence given before the First-tier Tribunal which went materially to the certification, the Secretary of State would reconsider the certification issue and would not reject the claim as not being a fresh one. If there was positive reconsideration, a new immigration decision would be made. Time for submission of new evidence was given until close of business on 8 May.

23. After this brief discussion, we gave our decision that the determination of the First-tier Tribunal contained a material error of law. We set aside its decision and proceeded to re-make it on the basis that there was no jurisdiction by the First-tier Tribunal to consider an in-country appeal.

24. Before leaving this matter however we make these observations on the impact of s.94(2) where, as in this case, there was a separate consideration by the Secretary of State on humanitarian protection grounds.

25. It is not disputed that the claimant made a claim to asylum asking to be recognised as a refugee. The Secretary of State noted in her refusal letter of 3 October 2012 that consideration had also been given whether the claimant qualified for humanitarian protection in accordance with paragraph 339C of the Immigration Rules and went on to quote the relevant provisions which adopt the terms of the Qualification Directive.

26. It is undisputed that the claimant had made an asylum claim, so triggering s.94(1). The decision made by the Secretary of State was a decision to remove an illegal entrant or other immigration offender, dated 23 May 2012 (although served later).

The decision makes it clear that although the claimant had a right of appeal he could not do so in-country because the certificate had been issued under s.94.

27. It is not clear from the court file why the First-tier Tribunal accepted the notice of appeal whilst the claimant was in-country. This may have been because of the distracting matter that, having requested an oral hearing, the claimant was required to pay £140 for his appeal to proceed. A case management review resulted in standard directions being issued by the First-tier Tribunal on 3 November 2012 by First-tier Tribunal Judge Vaudin d'Imecourt who appears not to have taken into account an e-mail from the Secretary of State's Angel Square Unit Co-ordinator, which addressed a number of pending appeals and with specific reference to this appeal indicated:

> "Status of bundle: this decision has been certified as clearly unfounded therefore the Tribunal has no jurisdiction to hear it."

28. It is clear from Judge Blackford's record of proceedings and the determination itself that the Secretary of State maintained her position on jurisdiction at the hearing. We accept that the position might have been different if the Secretary of State had not taken the jurisdiction point. This was considered in *Anwar v SSHD* [2010] EWCA Civ 1275 [19]:

> "Was the AIT right in Miss Pengeyo's and Mr Anwar's cases to hold that the respective immigration judges had acted without jurisdiction? In my judgment they had jurisdiction to embark on the hearing notwithstanding that neither appellant had left the United Kingdom but once the point was taken by the Home Office (in assuming it to be factually correct since they might have been absent from the hearing) it operated in bar of the proceedings. Had the point not been taken in either case, the immigration judge would have been bound to proceed with the appeal." (Sedley LJ)

29. We note however in *R (on the application of Nirula) v SSHD* [2012] EWCA Civ 1436, Longmore LJ has clarified the position at [30] *et seq*:

> "30. Of course any decision of this court is only authority for what it decides and for any reasoning necessary for that decision. One thing that is immediately clear from paragraphs 19-23 of the *Anwar* decision is that nothing is said on the question whether the Tribunal is entitled to take a point on its own jurisdiction of its own motion. That is a point which remains open for decision. It is not a particularly difficult decision. In my view any Tribunal is entitled (and indeed well advised) to air any doubts it has about its jurisdiction and invite submissions on that question and then decide it. *Anwar* does not question that proposition in any way."
>
> …
>
> 32. Mr Ockelton also thought (para 47(c)) it wrong to say that a failure to consider the issue of jurisdiction can give a Tribunal a jurisdiction it would not otherwise have. *Anwar* does not say so. What it does say is that the Secretary of State can choose not to take any jurisdictional objection if she wishes to take that course,

just as a defendant can waive his entitlement to plead limitation or, more likely, choose not to plead a limitation defence. If a Tribunal gives a decision without anybody considering the jurisdictional position the decision may be precarious but as Mr Ockelton himself points out in para 53 the decision stands until it is set aside. It will become less precarious once the time for applying for permission to appeal has expired."

30. That is not however the point in the appeal before us. The Secretary of State maintained throughout that the First-tier Tribunal did not have jurisdiction.

31. The immigration decision is not one which comes within s.94(1A). Instead it is one captured by the provisions in s.94(2), with reference to s.92(4)(a). Section 92(1) provides:

> "(1) A person may not appeal under s.82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies."

32. Section 92(4) provides:

> "(4). This section also applies to an appeal against an immigration decision if the appellant –
>
> (a) has made an asylum claim, or a human rights claim while in the United Kingdom, …".

33. A person may appeal whilst in the United Kingdom where an asylum or human rights claim has been made but not where there has been certification of that claim or claims as clearly unfounded. Certification under s.94 (2) operates even where a claimant seeks to rely on grounds available to a party under s. 84 of the 2002 Act. It is the claim (which may comprise asylum and human rights elements) that is certified, not the decision made on the claim, regardless of any grounds which might otherwise be raised against that decision.

34. By way of summary, therefore, we are satisfied that First-tier Tribunal Judge Blackford had no jurisdiction to determine the appeal on humanitarian protection grounds. In doing so he made a material error of law. We set aside his decision and substitute our decision that there is no jurisdiction to hear the appeal by the claimant against the immigration decision whilst he is in this country.

35. Accordingly the appeal by the Secretary of State in the Upper Tribunal is allowed. The Secretary of State is however bound by the undertaking given by Mr Parkinson as recorded above.

Signed

Upper Tribunal Judge Dawson Date 11 July 2013.