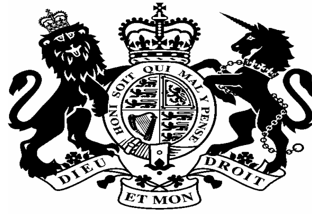

Upper Tribunal
(Immigration and Asylum Chamber)

Abiyat and others (rights of appeal) Iran [2011] UKUT 00314(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 June 2010 and 22 June 2011	
	20 July 2011

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

HADI ABIYAT
DAVOOD GANDAGHI
ADAM MOHAMMAD HASSAN
CLAUDE BETANA BABINGI

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Mackenzie, instructed by TRP Solicitors
For the Respondent: Mr P Deller (22 June 2010); Mr C Avery (22 June 2011), Senior Home Office Presenting Officers

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1. *There is a right of appeal to the First-tier Tribunal under s.83 of the Nationality, Immigration and Asylum Act 2002 against a refusal of asylum triggered by a subsequent grant of more than one year's leave to remain, even if there has been a previous unsuccessful asylum appeal.*

2. *There is a right of appeal to the Upper Tribunal against a decision of the First-tier Tribunal declining jurisdiction, when that decision has been made after full consideration and is embodied in a determination.*

DETERMINATION AND REASONS

Introduction

1. There are four appellants, linked only by the identity of the questions their cases raise. Those questions are: (1) Do they have a statutory right of appeal against the respondent's most recent decisions against them? (2) Do they have a right of appeal to the Upper Tribunal against the decision of the First-tier Tribunal that they have no statutory right of appeal against the respondent's decisions?

2. There were originally five appellants. The fifth, Sipho Khumalo, has withdrawn any appeal extant under file no AA/02555/2010. Notice acknowledging the withdrawal was sent out on 28 April 2011.

3. These matters were listed for hearing before the Upper Tribunal consisting of myself and Senior Immigration Judge Ward on 22 June 2010. We had considerable difficulty in reaching agreement on the answers to the questions posed. After considerable discussion we had agreed on the answer to the first question, with one reservation that I shall deal with in due course. We failed to reach agreement on the answer to the second question. SIJ Ward's illness and tragic early death have deprived me, and indeed the parties, of the further benefits of her wisdom. At a further hearing on 22 June 2011 the parties consented to my now determining these appeals alone.

The Facts

4. I do not need to set out the facts in any great detail; I take the following gratefully from the decision of the First-tier Tribunal. The first appellant is a national of Iran, born on 22 July 1968. The second appellant is a national of Iran, born on 8 January 1971. The third appellant is a national of Sudan, born on 1 October 1969. The fourth appellant is a national of the Democratic Republic of Congo, born on 5 December 1982. Each of them came to the United Kingdom in 2002, 2003 or 2004 and claimed asylum; each of them was refused. Each of them appealed unsuccessfully. Following the expiry of their appeal rights, each of them made further submissions to the Secretary of State, some on more than one occasion. There was no response to those submissions. However, between November 2009 and January 2010 each of the

appellants received a letter from the respondent. The material parts of each of the letters is as follows:

> "Your case has been reviewed. Having fully considered the information you have provided, because of the individual circumstances of your case, it has been decided to grant you indefinite leave to remain in the United Kingdom. This leave has been granted exceptionally, outside the Immigration Rules. This is due to your strength of connections in the United Kingdom and length of residence in the United Kingdom.
>
> This means that you are free to stay in this country permanently
> …
> On reviewing your case it is noted that you have an outstanding Fresh Asylum Claim (post ARE [appeal rights exhausted]). Unless you contact us within the next 14 calendar days we will assume you wish to withdraw the outstanding claim."

5. None of the appellants wished or wish to withdraw their outstanding asylum claims. They each claim entitlement to remain in the United Kingdom not exceptionally outside the Immigration Rules, but as refugees.

6. Each of the appellants gave notice of appeal to the First-tier Tribunal. A hearing was arranged before Senior Immigration Judge Renton and Immigration Judge C Lloyd on 22 March 2010. Having heard submissions from Mr Mackenzie, who has represented the appellants throughout, and from Mr C Hobb on behalf of the Respondent, they issued a document headed "Determination and Reasons" and concluding as follows:

> "DECISION
>
> 12. Our decision is that the purported appeals are dismissed in that we find that there are no valid appeals before the Tribunal. The Tribunal will take no further action in respect of them."

7. It is against that determination or decision that the appellants now seek to appeal. They were granted permission by Senior Immigration Judge Nichols on 23 April 2010.

The right of appeal to the Upper Tribunal

8. In para 1, I set out the questions raised by these cases, in the order in which they arose; but I need to answer question (2) first, because if the answer is in the negative, there will be no scope for my providing an answer to question (1). Expressed rather more fully, the issue raised by question (2) is whether there is a right of appeal to the Upper Tribunal against a decision of the First-tier Tribunal, reached after a hearing and expressed in the form of a determination, that the Tribunal has no jurisdiction to entertain a purported appeal.

9. The relevant statutory revisions are as follows:

10. Section 11(1)-(3) of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal, to be exercised only with permission, on any point of law arising

from a decision made by the First-tier Tribunal other than an excluded decision. s.11(5) gives the meaning of the phrase "excluded decision". The first five paragraphs of that sub-section list specific types of decision: none of them are relevant in these proceedings. Para (f) is as follows:

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

11. Sub-sections (6) and (7) of s.11 set out restrictions on the power to make Orders under s.11(5)(f). A description may be specified in such an order only if either there is already a right of appeal at least as large as that provided by s.11(1)-(3) or if there was no right of appeal before the relevant appellant structure was transferred into the Tribunal system created by the 2007 Act.

12. The latter provision is of some interest in considering issues such as that before me now, because it shows that the provisions relating to appeals from decisions from the Asylum and Immigration Tribunal (whose functions were transferred on 15 February 2010) are of relevance in construing any order made under s.11(5)(f). For example, a description specified in such an order is likely to have to be construed in such a way as not to include decisions which, prior to 15 February 2010, carried a right of appeal.

13. There is an order made under s.11(5)(f): it is the Appeals (Excluded Decisions) Order 2009 (SI 2009/275) (as amended). Article 3 of that Order provides, in part, as follows:

> "3. For the purposes of s.11(1) and 13(1) of the Tribunals, Courts and Enforcement Act 2007 [which has provisions relating to appeals to the Court of Appeal], 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."

14. If the appellants have the right of appeal, it is under s.83 of the 2002 Act.

15. The First-tier Tribunal has a procedure for dealing with cases where a Notice of Appeal is submitted by a person who has no right of appeal. That procedure is in the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230), which as amended continue to apply to proceedings before the First-tier Tribunal. Rule 2 contains definitions, of which the following is relevant:

> "'Relevant decision' means a decision against which there is an exercisable right of appeal to the Tribunal."

It is convenient also to set out the following definition here, also in rule 2.

> "'Determination', in relation to an appeal, means a decision by the Tribunal in writing to allow or dismiss the appeal, and does not include a procedural, ancillary or preliminary decision"

16. Rule 9 is headed "Where the Tribunal may not accept a notice of appeal" and is as follows:

> "(1) Where a person has given a notice of appeal to the Tribunal and the circumstances in para (1A) apply, the Tribunal may not accept the notice of appeal.
>
> (1A) The circumstances referred to in paragraph (1) are that –
> (a) there is no relevant decision; or
> (b) the notice of appeal concerns the refusal of an application for entry clearance which was not made for a purpose falling within section 88A (1)(a) or (b) of the 2002 Act, and the notice of appeal does not rely on either of the grounds specified in section 88A(3)(a) of the 2002 Act.
>
> (2) Where the Tribunal does not accept a notice of appeal, it must -
> (a) notify the person giving the notice of appeal and the respondent; and
> (b) take no further action."

17. The Senior President's Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal have relevant provisions. The wording was adopted in the light of the decision of the Court of Appeal in JH (Zimbabwe) v SSHD [2009] EWCA Civ 78, to which I shall make further reference shortly:

> **"3. Where the Tribunal may not accept a notice of appeal**
>
> 3.1 First-tier rule 9 (where the Tribunal may not accept a Notice of Appeal) imposes a duty on the Tribunal not to accept an invalid Notice of Appeal (in the circumstances described in rule 9(1A)) and to serve notice to this effect on the person who gave the Notice of Appeal and on the respondent.
>
> 3.2 The Tribunal will scrutinise a Notice of Appeal as soon as practicable after it has been given. First-tier rule 9 makes no provision for the issue for validity to be determined by means of a hearing or by reference to any representations of the parties.
>
> 3.3 Once the Tribunal has served the Notice described in paragraph 3.1, First-tier rule 9 provides that the tribunal must take no further action in relation to the Notice of Appeal. The decision under First-tier rule 9 is, accordingly a procedural or preliminary decision.
>
> 3.4 The fact that a hearing date may have been given to the parties does not mean that the appeal must be treated as valid. Accordingly, if at a hearing (including a CMR hearing) it transpires that the Notice of Appeal does not relate to a decision against which there is, in the circumstances, an exercisable right of appeal, the Tribunal must so find; but it will do so in the form of a determination, rather than by means of a notice under First-tier rule 9. "

18. In JH (Zimbabwe) the appellant's appeal to the Asylum and Immigration Tribunal was allowed; but on reconsideration the Tribunal substituted a determination dismissing the appeal. That decision was in its turn set aside by consent in the Court of Appeal which remitted the case for reconsideration by the Asylum and Immigration Tribunal differently constituted. The appeal was listed before a Senior Immigration Judge, who decided that there had never been any right of appeal to the

Asylum and Immigration Tribunal. He said that he was obliged to issue a notice to that effect under rule 9.

19. The appellant wanted to challenge that decision. Three Lord Justices (Laws, Wall and Richards LJJ) sat to consider the matter, ready to constitute themselves as a Court of Appeal if the appellant was entitled to appeal against the Senior Immigration Judge's decision, and as a Divisional Court if the decision was amenable to Judicial Review only. Richards LJ gave the leading judgment; the other members of the Court agreed with him. After setting out Rule 9 and the statutory provisions relating to reconsideration (which allowed an appeal to the Court of Appeal, with permission, from a decision taken after reconsideration) he said this:

> "7. For the Secretary of State, Mr Beer submits that the SIJ's decision was not a decision taken after reconsideration of the appeal, so as to engage a right of appeal under s.103B(1), but was taken pursuant to rule 9 of the Procedure Rules and was a procedural or preliminary decision within the meaning of s.103A(7). Although the case had been remitted by the Court of Appeal for a fresh reconsideration, what happened thereafter was that the SIJ expressly declined to reconsider the case, on the ground that the Tribunal lacked jurisdiction to accept the appeal in the first place. Mr Beer seeks to reinforce his case by policy arguments, contending that Parliament must have intended that Tribunal decisions on procedural or preliminary points would be final and would not be subject to appeal (though judicial review might still lie).
>
> 8. I have no hesitation in rejecting those submissions. In this case the tribunal had moved far beyond the rule 9 stage. The notice of appeal had been accepted by the tribunal and the appeal had already been determined and reconsidered once. The case had then gone to the Court of Appeal and had been remitted for a fresh reconsideration. That was how it came before the SIJ. I think it plain that his decision was reached on a reconsideration pursuant to the remittal and that the conditions for a further appeal to the court of Appeal under s.103B(1) and (2) were therefore satisfied. Although the SIJ referred to rule 9 it makes no sense to treat his decision as having been made under rule 9 or as a procedural or preliminary decision of the kind referred to in s.103A(7). It happens from time to time that the Tribunal, on the determination of an appeal or on reconsideration, decides that the Tribunal lacks jurisdiction to entertain the appeal. I see no good reason of principle or policy why such a decision should be excluded from review or appeal under s.103A or s.103B. In the unusual circumstances of the present case, where a decision on jurisdiction was made for the first time on a second reconsideration, it would in my view be extraordinary if no right of appeal existed. I am satisfied that a right of appeal does exist. "

20. What is clear from JH (Zimbabwe), which is binding on me, is that, at the time JH (Zimbabwe) was decided, there might be a right of appeal against a decision by the Asylum and Immigration Tribunal that it lacked jurisdiction. That right was recognised by the Court on the basis that, when there had been consideration of the appeal by the Asylum and Immigration Tribunal, it made no sense to treat a decision of the kind in question as merely procedural or preliminary. Thus it was not excluded from appeal by the statutory provisions (which were to all intents and purposes the same as those applying after 15 February 2010) excluding appeals against procedural, ancillary or preliminary decisions.

21. Both Richards LJ and the Senior President's Practice Statement leave open the question of whether decisions as to jurisdiction are for these purposes "procedural". Before me, Mr Avery submitted that a decision as to jurisdiction was procedural. Mr Mackenzie briefly submitted that a decision could only be procedural if it related to procedure in an appeal before the Tribunal. I am inclined to agree with that submission, but, in any event, it is very difficult to see how a decision that the Tribunal has no jurisdiction would be sometimes excluded from appeal and sometimes not, if it was in any event "procedural". It seems to me that a decision as to jurisdiction is not procedural; but it may be preliminary. "Preliminary" for present purposes has two possible meanings. It may mean "at the beginning", or it may mean in relation "in relation to the possibility of commencing". Again, if it has the latter meaning, it must have that meaning whenever the decision is taken; but if it means "at the beginning", it would apply to a notice under rule 9 issued before and instead of any other proceedings in the Tribunal, but would not apply to a decision as to jurisdiction issued later. Such a decision might be preliminary in the second sense, but not in the first. I conclude that JH (Zimbabwe) essentially decides that a decision as to jurisdiction made after the Tribunal has begun to consider an appeal, including a case where its consideration is limited to the issue of whether there is jurisdiction, is not procedural, and is not preliminary in the sense intended by the legislation governing the asylum and immigration tribunals.

22. Such an interpretation accords with what one would broadly expect. If a Tribunal (whether by initial notice under rule 9 or any other means) declines to determine a case in which it has jurisdiction, the remedy would naturally be a mandatory order obtained on judicial review. If, however, the Tribunal is part of a structure in which there is a further right of appeal, and it reaches a decision after consideration of an issue, the assumption would be that recourse should be had to the right of appeal. But, decisions taken on the way to arriving at a determination of appeal are probably excluded from the appellate process, because the latter's role is to entertain challenges against decisions which dispose of the appeal. There may be exceptional circumstances where a procedural or ancillary decision can properly be challenged (by judicial review) before the appeal has been determined, but, generally, the proper procedure is to await final determination; if there is an appeal, the grounds may include assertions about preliminary or ancillary decisions that led to it.

23. The outcome of JH (Zimbabwe) is clearly that, on the facts of that case, there was a right of appeal. It is I think worth pausing for a moment to consider in a little more detail what the appeal was against. The history of the case shows that although there had been consideration of the appellant's appeal twice by the AIT and once by the Court of Appeal, each decision had set the previous decision aside. Thus, when following remittal by the Court of Appeal, the SIJ made his decision, he was (newly) making the first judicial decision on the appellant's notice of appeal. It is that decision which is characterised by the Court of Appeal as not procedural or preliminary. It does not appear to me that the Court of Appeal's decision was limited to cases where there had been as lengthy a process as in that case; the distinguishing feature of the SIJ's decision was not that it was made after remittal by the Court of Appeal, but that it was made at a time when there had been proceedings before the

AIT, and it was therefore too late to say that the Tribunal had not accepted the notice of appeal or that the decision was "preliminary".

24. It would be possible to move straight from the wording of the provisions governing appeals against decisions of the AIT to those governing appeals against decisions of the First-tier Tribunal. As I have already said, the wording is to all intents and purposes identical. But to do that would be to omit an important step. It seems to me that the position is not merely that the wording of the Excluded Decisions Order can and probably should have the same meaning as the provisions relating to the AIT, but that it *must* have that meaning. I derive that conclusion from s.11(6) of the 2007 Act. If there was a right of appeal against such a decision of the AIT, there must after transfer of the functions of that Tribunal to the structure established by the 2007 Act, continue to be a right of appeal: it cannot be lawfully excluded by an order made under s.11(5)(f). Thus, whatever temptation there might be to construe the new words differently from the old is removed by the statutory provision under which the new Order is made.

25. In the present case, the First-tier Tribunal did not issue a rule 9 Notice as its immediate and only response to the appellants' notice of appeal. It took jurisdiction to consider whether there was a right of appeal, and the decision it issued was not procedural, because, as I have decided, a decision to decline jurisdiction is not procedural, and was not preliminary within the meaning of the Order, because, like the decision in JH (Zimbabwe), it was not made at the very start. The First-tier Tribunal's decision therefore carries the right of appeal to the Upper Tribunal. Permission has been granted, and that appeal is validly before me.

Was the First-tier Tribunal right to decide that it had no jurisdiction?

26. I turn then to the first of the two questions set out at the beginning of this determination. The First-tier Tribunal decided that the appellants had no right of appeal. Was the First-tier Tribunal right?

27. Since the Upper Tribunal heard argument in this case, those representing the appellant have pursued judicial review proceedings in relation to claimants whose cases were similar, save that the decisions made by the First-tier Tribunal were undoubtedly "preliminary", so carried no right of appeal. In R (S and others) v First-tier Tribunal (IAC) and SSHD [2011] EWHC 627 (Admin), Beatson J decided that the claimants had a right of appeal under s.83 of the 2002 Act, and that the First-tier Tribunal was wrong to refuse to entertain it. That is also the conclusion which SIJ Ward and I had reached and, in the circumstances, I need to say little more save that I adopt with gratitude the reasoning of Beatson J.

28. Section 83 of the 2002 Act is as follows:

> "**83. Appeal: asylum claim**
> (1) This section applies where a person has made an asylum claim and –
> (a) his claim has been rejected by the Secretary of State, but
> (b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in

aggregate).

(2) The person may appeal [to the Tribunal] against the rejection of his asylum claim."

29. The right of appeal is triggered by the grant of leave, not by the rejection of the asylum claim; s.83 does not require a link between the rejection of the asylum claim and the grant of leave; and s.83 does not exclude the right of appeal under that section if there has already been a previous appeal on asylum grounds against an immigration decision within the meaning of s.82.

30. All four of the present appellants had a right of appeal under s.83, which arose on the grant to them of a period of leave exceeding one year. (A grant of indefinite leave to remain is a grant for a "period": s.3(1)(b) of the Immigration Act 1971 refers to leave "either for a limited or for an indefinite period". This is the point to which I referred in paragraph 3 as a "reservation".)

31. It follows that each of the appellants, having been subject to a decision "which is appealable", was entitled to a notice complying with the requirements of the Immigration (Notices) Regulations 2003 (SI 2003/658). None of them has, so far as I am aware, yet received such a notice, so time for appealing has not begun to run against any of them. Each of them has, however, apparently waived the Regulations' requirements for notice of their right of appeal and has issued a notice of appeal. It follows that each of them has an appeal awaiting determination by the First-tier Tribunal.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER