IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05579/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 December 2014	**On 23 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS

Between

MR AHTSHAM ABBAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Khalid of Lords Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

The History of the Appeal

1. The Appellant, Mr Ahtsham Abbas, a citizen of Pakistan, applied on 23 August 2013 for leave to remain in the UK as a Tier 4 (General) Student Migrant under the points-based system. His application was refused in a letter which does not bear a date and which was accompanied or followed by removal directions dated 24 January 2014 citing Section 10 of the Immigration and Asylum Act 1999.

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2. Citing correspondence between the Home Office and South Quay College, which was in the Respondent's bundle, in which the college stated that a letter from it addressed to the Appellant had not been issued by it and was not genuine, the Refusal Letter stated that the Appellant had submitted a false document and refused his application under paragraph 322(1A) of the Immigration Rules. On the first page it stated that: "**YOU DO NOT HAVE A RIGHT OF APPEAL AGAINST THIS DECISION – SEE SECTION C**". On the third page, under the heading "**SECTION C: RIGHT OF APPEAL**", it stated that: "There is no right of appeal against this decision".

3. Acting through Lords Solicitors the Appellant gave notice of appeal on 26 January 2014. The grounds of appeal narrated the history of events and stated that the revocation of the college from the register of Tier 4 was not the Appellant's fault. The Appellant should have been given sixty days to find a new Sponsor college. The decision was against common law fairness: **Thakur (PBS decision - common law fairness) Bangladesh** [2011] UKUT 00151 (IAC) and **Patel (revocation of sponsor licence - fairness) India** [2011] UKUT 00211 (IAC). The Appellant had not provided a false document. He had genuinely studied at South Quay College and successfully completed his course, for which the college had issued him the course completion letter. The Refusal Letter did not explain how the Home Office had verified the document. The Appellant was a genuine student in the UK who had spent a lot of time and money on his studies and would be left with incomplete studies if removed from the UK which was against his rights under common law fairness. When he made his application he had had valid leave to enter. He should be given an opportunity to address the grounds of refusal. A right of appeal was requested.

4. In reply to the Notice of Appeal, the Respondent wrote on 6 February 2014 to the Duty Judge. The letter stated that the forms IS.151A issued on 24 January 2014 under Section 10 of the 1999 Act as amended had the effect of invalidating all previous leave. The Appellant's application as a Tier 4 Student for leave to remain did not therefore attract a right of appeal and the decision to remove him attracted an out of country right of appeal. The Respondent therefore requested that the appeal be struck out as a preliminary issue.

5. At the hearing I gave both parties copies of this application, together with the decision of the Duty Judge on 17 February 2014 which is signed by Judge Freestone and which, insofar as I can read the judicial manuscript, reads as follows:

> "The Appellant is appealing the decision to refuse to grant him further leave. At the date of the application he still had leave. Therefore full ROA. The Respondent is saying that all previous leave was invalidated on 24.1.14. I take the view that this does not affect a

previous ROA but if the Respondent wishes to (?) argue this it can be raised at the substantive hearing."

6. I did not notice until after the hearing a similar manuscript decision dated seven days earlier on 10 February 2014. This reads:

> "A has a full right of appeal. He applied for further leave. The application was made whilst he has leave. This is a 82(2)(d) 2002 Act appeal. Please proceed to listing. 10/2/14."

7. This decision concludes with a squiggle which may be a tick or may be initials. It is not signed in the box for signature by the Immigration Judge. I suspect that it is a draft, perhaps prepared for the attention of the judge. If it is a judicial decision, it predated the second decision, which therefore superseded it. On any basis I take the decision of 17 February 2014 as the operative one.

8. On 20 February 2014 the appeal was listed for hearing at Hatton Cross on 22 August 2014. Lords Solicitors LLP were acting for the Appellant, and notice was given to them as well as to the Appellant. On 21 August 2014 Lords Solicitors wrote to state that the Appellant had withdrawn his instructions so that they were no longer representing him. On 22 August 2014 the Appellant wrote asking the Tribunal to decide the appeal in his absence and summarising his evidence about his studies and the closure of his college.

9. The appeal came before Judge Samimi at Hatton Cross on 12 September 2014. Neither party was represented. The judge recorded at paragraph 4 that the appeal had come before her as a paper appeal in accordance with Rule 15 of the Asylum and Immigration Procedure Rules (sic). Pedantically speaking this was not correct because there was a hearing conducted in the absence of the parties. Nothing turns on this.

10. The judge did not address at all the issue of jurisdiction. Nor did she refer to the judicial decision of 17 February 2014 nor the possible judicial decision of 10 February 2014. Whether she took these into account, or relied upon the decision of 10 February, can only be a matter of speculation. She did not refer to the statements in the Refusal Letter that the Appellant did not have a right of appeal, nor refer to this matter. Premised upon the existence of a right of appeal she considered the evidence. Citing **Shen (Paper appeals; proving dishonesty)** [2014] UKUT 00236 (IAC), **AA (Nigeria) v SSHD** [2010] EWCA Civ 773 and **Patel (revocation of sponsor licence - fairness) India** [2011] UKUT 211 (IAC), she concluded that, without any evidence suggesting that the sixty day policy had been complied with in order to give the Appellant an opportunity to find a new college, the appeal was allowed to the extent of being remitted to the Respondent to allow him this reasonable opportunity to make a new points-based system application. Finding that the

Respondent's decision was not in accordance with the law, she allowed the appeal.

11. The Respondent sought permission to appeal. The closely argued application essentially submitted that the removal decision was an immigration decision within the meaning of Section 82(2)(g) of the 2002 Act and, by virtue of Section 92(1) and (2) of the 2002 Act, the Appellant was not able to appeal against it whilst in the United Kingdom. So he had not had an in-country right of appeal and the Tribunal had materially erred in failing to establish jurisdiction.

12. Permission to appeal was granted by Judge McDade on 13 November 2014 in the following terms:

> "The Respondent has applied for permission to appeal the determination of Judge of the First-tier Tribunal Samimi in which she allowed the Appellant's appeal against the Secretary of State's refusal to allow him leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system. The grounds of application for permission to appeal assert that the judge materially erred in law hearing an appeal for which no right of appeal existed when arguably there only existed an out of country right of appeal. This point is arguable. There is an arguable error of law."

13. In readiness for the hearing Mr Khalid submitted a skeleton argument and a number of authorities, very helpfully annotated, for which I am grateful.

14. The Appellant attended the error of law hearing, at which both representatives submitted further authorities. The hearing, which lasted for an hour, took the form of submissions and discussion of the issues. At the end of the hearing I reserved my determination. I have taken into account the permission application, the skeleton argument and the oral submissions.

Determination

15. The discussion at the error of law hearing has assisted me to identify the issues in the appeal. These are concisely stated as the issues which engaged the Court of Appeal in **Anwar & Adjo** [2010] EWCA Civ 1275. As formulated by Sedley LJ, they are:

> "1. These three appeals raise a common issue: if the immigration decision which is being appealed to the Immigration and Asylum Chamber carries no right of in-country appeal, but the point is not taken on appeal to the First-Tier Tribunal, can it thereafter be contended that there was no jurisdiction to entertain the appeal?

> 2. Mr Adjo's case raises an important further issue: even if the principal ground attracts no right of appeal, does the introduction of a human rights ground carry an in-country right of appeal?"

I address these issues sequentially.

Jurisdiction

16. Addressing this issue, Sedley LJ said:

> "19. Was the AIT right in Ms 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 (and 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."

17. Discussing his reasons, he concluded:

> "23. Any apparently absolute bar to justice has to be scrutinised very carefully. The one contained in the 2002 Act is not of the kind which operates independently of the will of either party so as to bind the tribunal regardless. It offers a point which can be but need not be taken. In the present two cases, it was taken."

18. The issue, therefore, was whether, at a hearing at which neither party was represented, so that the judge was dependent upon the papers, the point about jurisdiction had been taken by the Respondent.

19. For the reasons which I have stated, I do not regard the apparent decision of 10 February 2014 as an effective judicial decision. Nor do I regard the judicial decision of 17 February 2014 as having resolved the matter, because it left the Respondent to raise the issue and, albeit allowing the appeal to proceed, could not bind the judge who heard it.

20. Miss Everett submitted that the issue had been clearly raised in the two references in the Refusal Letter to there being no right of appeal against the decision. Mr Khalid responded that the Refusal Letter gave no reasons for stating that there was no right of appeal and did not refer to Section 10 of the 1999 Act nor to Section 47 of the 2006 Act.

21. **Anwar** was considered by the Court of Appeal in **Nirula and Others v SSHD** [2012] EWCA Civ 1436. In that case the notice of decision stated that "the appellant had a right of appeal exercisable 'after removal'".

Longmore LJ held at paragraph 33 that in so stating the Respondent had taken the jurisdiction point.

22. As stated, the decision was made under Section 82(2)(g) of the 2002 Act and, by reason of Section 92(1) and (2) may be appealed only from outside the UK. Mr Khalid did not address this in his skeleton argument nor, despite my drawing his attention to it, cogently at the hearing. The issue is whether the restriction on the right of appeal had been raised at the hearing before the judge. I accept the submission of Miss Everett that it had been, in the Refusal Letter. The Refusal Letter states only that there is not a right of appeal, rather than that the right of appeal is exercisable only from outside the UK; but in the context of the hearing of an appeal brought from within the UK, nothing turns on this. The Respondent placed the issue before the Tribunal. Following **Anwar**, the effect was to operate in bar of the proceedings.

23. It follows that, in assuming a jurisdiction which she did not have, the judge materially erred in law.

Human Rights Grounds

24. The second issue is whether, in this event, human rights grounds carry an in-country right of appeal.

25. The grounds of appeal do not explicitly invoke the Human Rights Act. In their references to procedural fairness and the effect upon the Appellant of the interruption of his studies, I construe them to raise his qualified right to respect for his private life under Article 8 of the 1950 Convention. However, in his application form of 23 August 2013 I do not identify anything which can be construed as a human rights claim.

26. In **Nirula** the court held at paragraphs 17 to 25 that the words “has made … a human rights claim” in Section 94(2)(a) of the 2002 Act mean that the claim must have been made to the Respondent at the outset, to enable the Respondent to consider it, and not for the first time at the commencement of the appellate process in the Notice of Appeal. This, I find, the Appellant did not do. Hence the introduction of a human rights ground at that stage does not carry an in-country right of appeal.

27. Mr Khalid made submissions on matters which occupy the intermediate ground between an Article 8 human rights claim and procedural fairness. He submitted that the Refusal Letter did not state the reasons for the decision. This I do not accept, because it cited the correspondence with the Appellant’s college. He submitted that Section 10 of the 1971 Act was discretionary, and that no reasons had been given for the exercise of this discretion. In citing **Basnet (validity of application - respondent)** [2012] UKUT 00113 (IAC) at paragraph 27 he submitted that the onus of proof in the present case rested upon the Respondent, and had not been

discharged. This is effectively the same submission. Relying upon the authorities mentioned above, he submitted that common law fairness required the Appellant to have been granted a period of sixty days to attempt to find an alternative college. He produced in evidence refusals of the applications of, doubtless, other clients of his firm under Section 322(1A) which had conferred a right of appeal, and argued that it was unfair and discriminatory for the Respondent not to have treated the Appellant in the same way.

28. I have found that, since a human rights claim was not raised with the Respondent at the outset, the human rights ground now raised does not carry an in-country right of appeal. That claim shades into issues of procedural fairness by the Respondent. Whilst there is no clear bright line between the two areas, the short response to Mr Khalid's submissions is that they are matters not for the Tribunal but for the Administrative Court on judicial review.

In Conclusion

29. I have found that the Appellant did not have an in-country right of appeal. In finding or assuming to the contrary, the judge materially erred in law. I find too that human rights issues, if such they were, did not carry an in-country right of appeal. Thus the appeal was considered without jurisdiction to do so. The determination is set aside.

Decision

30. The original determination contained a material error of law and is set aside.

31. For want of jurisdiction, the Appellant has no in-country right of appeal.

32. There can therefore be no fee award.

Signed Dated: 23 December 2014

Deputy Upper Tribunal Judge J M Lewis