Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21153/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons**
On 16 December 2014	**Promulgated On 12 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR BILAL KAMIL RANA
(ANONYMITY NOT DIRECTED)

Respondent

Representation:

For the Appellant: Mr M Shilliday, Home Office Presenting Officer
For the Respondent: Failed to attend

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State (with permission) against the decision of Judge Callender Smith to allow the respondent's appeal against his removal from the United Kingdom pursuant to Section 10 of the Immigration and Asylum Act 1999.

Background to the appeal

2. The Notice of Appeal to the First-tier Tribunal raises questions about the dates upon which a number of the relevant Immigration Decisions were

made and served upon the respondent. However, the copy documents on file seem to me to bear out the account that is given by the respondent in a witness statement that he made on the 23rd May 2014. This may be conveniently summarised as follows.

3. The respondent made an application for leave to remain, as a Tier 4 (General) Student, on the 31st January 2014. As the appellant had last been granted leave to remain from the 26th February 2013 to the 17th April 2014 this application was made 'in time'. However, following an investigation, the appellant concluded (rightly or wrongly) that the English language certificate that the respondent had submitted in support of his application had been obtained by deception. On the 6th May 2014, Immigration Officers arrested the respondent at his home. On the same day he was handed the following documents, each of which is dated the 6th May 2014:

   (i) A letter explaining the reasons for refusing his application for further leave to remain (hereafter, "the explanatory letter");

   (ii) A 'Notice to a Person Liable to Removal' (Form IS.151A) explaining that the appellant's official had concluded that the respondent was "a person in respect of whom removal directions may be given in accordance with section 10 of the Immigration and Asylum Act 1999 (administrative removal) as [amongst other things] a person who used deception in seeking (whether successfully or not) leave to remain;

   (iii) A 'Notice of Immigration Decision' (Form IS.151A Part 2) informing the respondent that the appellant had taken the decision to remove him from the United Kingdom.

4. The explanatory letter stated that there was no right of appeal against the decision to refuse his application for further leave to remain. The Notice of Immigration Decision stated that whilst there was a statutory right of appeal against the removal decision, this could only be exercised once the respondent had "left the United Kingdom".

5. Directions for the respondent's removal were issued on the 15th May 2014 and were set for the 20th May 2014.

Proceedings before the First-tier Tribunal

6. The Notice of Appeal to the First-tier Tribunal was received on the 19th May 2014. It was accompanied by an application for an extension of time that was in turn based upon the claim that the respondent had been misled into believing that the did not have a right of appeal against the decision to refuse his application for further leave to remain [see paragraph 4, above]. The Notice of Appeal also argued that the respondent was entitled to exercise his right of appeal against the removal decision whilst he was in the United Kingdom. That argument was predicated upon the assertion that the respondent had "submitted his Human rights Claim on 13 May 2014 under his private life before issuance of his removal directions".

7. A handwritten note by a Duty Judge, dated the 20th May 2014, sets out his conclusion that the Notice of Appeal was lodged 'in time', and that there was "at least an argument that there is a valid in-country appeal".

8. At the hearing, the Presenting Officer raised a preliminary issue concerning jurisdiction, which the Tribunal dealt with at paragraphs 12 to 18 of its determination:

> 12. As a preliminary issue the Presenting Officer invited me, on the basis of *(Mohamed Bilal Jan) v SSHD (Section 10 removal)* IJR UKUT 265 (IAC) to determine that I had no jurisdiction because a decision had been made for removal under Section 10 of the Immigration and Asylum Act. He referred me in particular to Paragraph 33 and 34 of that decision.
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> 13. The appeal had been before a duty judge who made a decision on 20 May 2014 that there was a valid appeal to come before the Tribunal.
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> 14. In deciding that I had jurisdiction to entertain the issues in this appeal I note, in particular, Paragraph 3 of the headnote of the above judgement which states: "The First-tier Tribunal has jurisdiction to consider issues of procedural fairness and the lawfulness of the exercise of discretion when deciding to make a removal decision under the ground of appeal permitting a challenge on the basis that the decision is "otherwise not in accordance with the law".
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> 15. To arrive at that position it is necessary to consider what the Appellant states both in his witness statement dated 25 September 2014 and in a letter he wrote when he was in detention dated 12 May 2014.
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> 16. In paragraphs 1 and 2 of the letter of 12 May 2014 he states that he passed both of the assessments and qualified for a CAS after the London School of Marketing had determined that his English capability was satisfactory and that the English language certificate provided was genuine. He then queries why the Home Office suggested that he took a fresh test in English and sent them the certificate.
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> 17. He raises the issue about why 40,000 candidates in the original test that he had taken had been issued with the same certificate and whether all 40,000 had received them because of fakes or deception.
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> 18. He points out that he was asked to provide another certificate from another English language provider, immediately took another exam and completed it successfully by scoring 6.5 overall.

9. The First-tier Tribunal thereafter concluded that, "without more direct information about the [alleged] fraud or deception" which the Secretary of State had levelled against the respondent, it was unable to be satisfied that the removal decision was "fair or lawful" [paragraph 21]. The Tribunal therefore allowed the appeal "to the limited extent that it is remitted to the [Secretary of State] to make a lawful decision" [paragraph 25].

The hearing before the Upper Tribunal

10. The respondent attended at the hearing before me on the 16th December 2014. However, his representative did not. At 15.11 hours, the Tribunal received a facsimile transmission from Denning Solicitors, in which it was stated that the Counsel whom they had instructed (and who had also appeared before the First-tier Tribunal) was "running late" due to an appearance at another Hearing Centre. Then, at 16.04, the Tribunal received a further facsimile transmission, from the same source, stating that "the instructed counsel … is unable to represent the matter today due to unforeseeable delay caused from his running matter in Taylor house". It therefore requested that the matter "be adjourned for another day".

11. Mr Shilliday strongly opposed the adjournment request. He argued that the fact that Counsel was 'double-booked' was not a good and sufficient reason to adjourn the hearing. I agreed with his submission. If there are arguable grounds of appeal against my decision, then these will arise from my making an error of law of my own rather than due to any claimed unfairness arising from Counsel taking on too many professional commitments. I therefore heard submissions from both Mr Shilliday and the respondent before deciding to allow the appeal.

Reasons for decision

12. It will be recalled that the respondent had applied for further leave to remain before his then extant leave to remain had expired [see paragraph 3, above]. At first blush, therefore, it may seem that the effect of refusal to vary his leave to remain was that the respondent "had no leave to enter or remain", and that this was therefore an 'immigration decision' against which there was an in-country right of appeal under Section 82(2)(d) of the 2002 Act. However, the effect of the removal decision was also to invalidate the respondent's extant leave to remain [see Section 10(8) of the 1999 Act and RK (Nepal) v SSHD [2009] EWA Civ 359]. It was thus the decision to remove the respondent that rendered him without leave to remain, rather than the refusal to grant his application for a variation of leave.

13. The question of whether a statutory right of appeal is exercisable from within the United Kingdom is governed by Section 92 of the 2002 Act. This states that a person may not appeal while he is in the United Kingdom, unless his appeal is of a kind to which that section applies [sub-section 1]. An appeal against a decision to remove a person from the United Kingdom pursuant to Section 10 of the 1999 Act is not a decision to which Section 92 of the 2002 Act applies, unless the person "has made an asylum claim or a human rights claim while in the United Kingdom" [sub-sections 2 and 4].

14. The argument that was advanced by the respondent in his grounds of appeal does not appear to have been that which was advanced by Counsel at the hearing in the First-tier Tribunal. Counsel appears to have argued

(and the Tribunal accepted) that jurisdiction was dependent upon "issues of procedural fairness and the lawfulness of the exercise of discretion when deciding to make a removal decision" [see paragraph 14 of the First-tier Tribunal's decision, quoted under paragraph 8 above]. This somewhat circular line of reasoning was supposedly based upon the authority of R (on the application of Mohamed Bilal Jan) v Secretary of State for the Home Department (section 10 removal) IJR [2014] UKUT 00265, and in particular that portion of the judgement which is summarised at paragraph 3 of the head-note. However, as Mr Shilliday correctly observed, those remarks were taken completely out of context. They were intended to underscore the right of a person to challenge a removal decision under Section 10 of the 1999 Act on the ground that it was "otherwise not in accordance with the law", thereby rendering a challenge by way of Judicial Review inappropriate. They were not intended to suggest that such a decision could necessarily be challenged upon this (or any other) ground from within the United Kingdom. On the contrary, the Upper Tribunal made it plain that such a challenge could normally only be pursued from outside the United Kingdom [see the second paragraph of the head-note].

15. The First-tier Tribunal thus made a material error of law in its assessment of the issue of jurisdiction. It is therefore necessary for me to remake the decision.

16. At paragraph 29 of Nirula v The First-tier Tribunal [2011] EWHC 3336 (Admin), Deputy High Court Judge Ockelton held as follows:

> The provision is that a person may appeal from within the United Kingdom only if he "has made" an asylum or human rights claim. It is perfectly clear that the making of the claim – a human rights claim in this case – must precede, at any rate, the Notice of Appeal. The provision makes no sense at all if a right of appeal is granted by appealing. No authority, in my judgement, is needed for that conclusion. It is the simple meaning of the words.

17. The respondent's Notice of Appeal claims that he made a human rights claim on the 13th May 2014. I have not however seen any evidence that he had made such a claim. Furthermore, it is not a claim that Counsel appears to have pursued before the First-tier Tribunal, and neither did the respondent pursue that argument before me. I accordingly find that the Tribunal did not have jurisdiction to entertain the respondent's appeal whilst he was in the United Kingdom.

Notice of Decision

18. The appeal is allowed.

19. The decision of the First-tier Tribunal to allow the respondent's appeal against his removal from the United Kingdom is set aside, and is substituted by a decision that the Tribunal does not have jurisdiction to determine the appeal and will not therefore take any further action in respect of it.

Signed Date

Judge Kelly
Deputy Judge of the Upper Tribunal