Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23150/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination**
On 16th December 2014	**Promulgated**
	On 16th January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HAMANDEEP SINGH SANDHU

Respondent

Representation:
For the Appellant: Mr Shilliday, Home Office Presenting Officer
For the Respondent: Mr Q Annisuddin, Legal Representative

DECISION AND DIRECTIONS

1. The Secretary of State appeals, with permission, against the allowing of the respondent's appeal against her decision to remove him from the United Kingdom pursuant to Section 10 of Immigration and Asylum Act 1999. The appealed decision is that of First-tier Tribunal Judge Devittie, promulgated on the 30th October 2014.

2. The removal decision was taken in response to the Secretary of State's finding, which is disputed, that the respondent had used deception in obtaining entry clearance to the United Kingdom. That finding triggered the power of removal under Section 10(1)(b) of the 1999 Act. Furthermore, by virtue of Section 10(8), the effect of the removal decision was to invalidate the respondent's previous grant of leave to remain.

3. A removal decision of this kind may not be appealed whilst the person is in the United Kingdom *unless*, "the appellant has made an asylum claim, or a human rights claim, while in the United Kingdom" [the combined effect of the sub-sections (1) and (4)(a) of Section 92 of the Nationality, Immigration and Asylum Act 2002].

4. The Home Office Presenting Officer submitted in the First-tier Tribunal, by reference to the foregoing provisions, that the appellant did not have a right of appeal whilst he was in the United Kingdom. Judge Devittie dealt with that submission at paragraphs 6 to 8 of his determination –

> 6 The respondent raises the preliminary point, that's the issue of first section 10 removal notice under the immigration and Asylum act and 1999, and (as amended by section 74 of the 2002 acts, has the effect of invalidating all previous leave that the appellant may have had, and that consequently, as the appellant had no valid leave at the time he made the application to vary his leave, the decision to remove attracts only an out of country right of appeal.
>
> 7 The respondent has not provided any documentary evidence to prove that the appellant practiced deception. I am not therefore to make a finding on whether the allegation of deception is well-founded.
>
> 8 I accept that in terms of section 92 of the Nationality, Immigration and Asylum Act 2002, the appellant may not appeal his removal whilst he is in the United Kingdom. Appellant's counsel, however, makes a valid point, that section 92 provides an exception where an applicant has made a human rights claim against an immigration decision that would not otherwise be appealable in the United Kingdom. I accept that the appellant has made a human rights claim, whilst in the United Kingdom, and accordingly, that he does have a right of appeal. The appeal is allowed to that limited extent.

5. The grounds of appeal raise a number of claimed procedural errors, including (but not limited to) an error in recording the place at which the appeal was heard, a failure to note the identity of the respective representatives, and (having found that he had jurisdiction to do so) failing to proceed to determine the substantive merits of the appeal. However, the core ground of appeal (and the only one that was argued before me on the 16th December 2014) is that which is contained within paragraph 4 of the application for permission to appeal –

> FtJ Deivitte finds that s92(4)(a) does apply to this Appellant. He gives no reasons whatsoever for doing so. This is very clearly an error of law. The Secretary of State avers that the Appellant has never made a human rights

> application to her. The first point at which he asserted that removal would be a breach of his human rights was in his grounds of appeal to the FtT. It was submitted to the learned judge Devitte that to allow such a claim to engage s92(4)(a) would be to subvert the meaning of the statute. He fails to deal with this at all in his Determination.

6. As Mr Anisusdding pointed out, the above complaint is not entirely borne out by a reading of the determination as a whole. Thus, at paragraph 4 of his determination, the judge referred to "a letter addressed to the respondent by the appellant's representatives, dated 5 June 2014", which contains the following statement –

> Furthermore our client has been residing and studying in the UK since his arrival on 05/09/2009. During his time in the UK he has established a private and family life with his family and friends during five years. To remove [the appellant] from the UK would be a breach of his article 8 rights. Our client lives with his uncle (mother's brother) and family at [address supplied]. Our client has a girlfriend and is in a stable relationship. If removed to India, he cannot continue to enjoy his family life with these members.

However, as the Notice of Appeal to the First-tier Tribunal is also dated the 5th June 2014, the question of precisely <u>when</u> this letter was sent was obviously critical to the outcome of the appeal. Nevertheless, as Designated Judge McCarthy noted when he granted permission to appeal, this was not a matter upon which Judge Devittie made a specific finding, and I hold this to be a material error of law. I shall therefore remake the decision.

7. I have not been provided with a transmission report for the sending, apparently by facsimile message, of either the representatives' letter or the Notice of Appeal. Furthermore, the circumstantial concerning the order in which they were sent to their respective addressees is in conflict. On the one hand, the Notice of Appeal encloses a copy of the letter. This might suggest that the letter was sent first. However, the letter itself states that the representatives "have today lodged an in country Notice of Appeal against removal". The letter thus suggests that the Notice of Appeal had already been lodged when the letter was dictated. It is of course possible that they were sent simultaneously. The position is wholly obscure. I therefore find that the appellant has failed to discharge the burden of proving that he had made a human rights claim by the time that he lodged his Notice of Appeal.

8. Further, or alternatively, a "human rights claim" is defined by Section 113 as, "a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights" [Note: a date has yet to be appointed for commencement of the amended definition that is contained within the Immigration, Asylum and Nationality Act 2006, as cited in the current edition of Phelan: Immigration Law

Handbook]. The letter, however, is addressed to "Immigration Enforcement, NRC Capita", at an address in Solihull. I am not therefore satisfied, in any event, that the letter of the 5th June 2014 constitutes the making of a human rights claim to the Secretary of State, whether at a place designated for that purpose or at all.

Notice of Decision

9. The appeal of the Secretary of State is allowed.

10. The decision of the First-tier Tribunal to allow the respondent's appeal against the Secretary of State's decision to remove him from the United Kingdom is set aside, and is substituted by a decision that the Tribunal does not have jurisdiction to entertain the appeal because it was lodged at a time when the appellant was in the United Kingdom and had not previously made an asylum or a human rights claim.

Signed Date **16th January 2015**

Judge D Kelly

Deputy Judge of the Upper Tribunal