The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/26034/2014**

THE IMMIGRATION ACTS

Heard at Field House
On February 13, 2015

Determination Promulgated
On February 19, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR SHALIN SURYAKANT AMIN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Jegaroyah, Counsel, instructed by Vision Solicitors
For the Respondent: Ms Wilding (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant is a citizen of India. On November 22, 2009 the appellant was granted leave to enter the United Kingdom as a Tier 4 student. His visa was valid until March 30, 2011. On March 29, 2011 he submitted an application for further leave to remain as a Tier 4 student and this was granted on May 3, 2011 extending his leave until April 12, 2013. On April 12, 2013 the appellant submitted an application for further leave to remain as a Tier 4 student but this was refused with no right of appeal on May 15, 2014. On June 17, 2014 he was served with form IS151A and IS151A part 2

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namely a decision to remove him under Section 10 of the Immigration and Asylum Act 1999. On June 18, 2014 removal directions were set for June 26, 2014.

2. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on June 19, 2014. At the same time the appellant's solicitors filed an application for judicial review on June 24, 2014. His Honour Judge Platts sitting as a High Court Judge refused this on the papers. The reasons given were that parliament had given him an out of country appeal and following the decision of Bilal Jan v SSHD [2014] UKUT 265 judicial review was not appropriate. On the evidence the respondent was entitled to conclude the appellant had used deception on the ETS test as his name had been provided to the respondent as one of those who tests had been cancelled. The respondent did not act unlawfully in refusing leave to remain issuing removal directions or detaining the appellant.

3. The appellant applied for an oral hearing and that was listed for November 4, 2014.

4. In the meantime the appeal notice was put before a duty judge on July 15, 2014 who decided that there was jurisdiction to hear the decision to refuse his application to remain as a Tier 4 student because the letter refusing leave was undated and it could not be said to have been taken after the Section 10 decision.

5. The matter was listed for hearing on November 4, 2014 before Judge of the First Tier Tribunal Lal (hereinafter referred to as the "FtTJ"). An application to adjourn that hearing pending the outcome of the judicial review was refused on October 27, 2014 and at the hearing the FtTJ ruled that the appellant had a right of appeal because the matter had been before a duty judge who had ruled on this issue. In a determination promulgated on November 11, 2014 the FtTJ rejected the appellant's appeal having heard oral evidence from the appellant.

6. The appellant lodged grounds of appeal on November 18, 2014 and on December 31, 2014 Judge of the First-tier Tribunal Fisher found it was arguable the respondent had failed to demonstrate to the correct standard that satisfactory false documents had been submitted.

7. The matter came before me on the above date and on that occasion the appellant was present and represented as set out above.

SUBMISSIONS ON ERROR OF LAW

8. Ms Jegaroyah submitted there was an error in law because the FtTJ made findings without any evidence from the respondent to prove the fraud. The respondent had to produce evidence to support the fraud and had failed to do so before the FtTJ. The refusal letter contained inconsistencies because on the one hand the respondent accused the appellant of fraud but on the other hand she concluded his test scores could not be authenticated. As regards jurisdiction she submitted the FtTJ accepted there was jurisdiction despite the respondent raising the issue at the hearing. The

FtTJ was correct in finding there was jurisdiction because of what is said in paragraphs [86] and [92] of Shabaz Ali v SSHD [2014] EWHC B999.

9. Mr Wilding argued there was no jurisdiction because the respondent took the Section 10 decision the same day. But even if the decision was taken a different day the Section 10 decision nullifies the previous leave and accordingly the application to extend leave legally could not have been made. The only time he would have a right of appeal would be if there were an historic human rights appeal. The Court in Shabaz Ali does not assist the appellant because at paragraph [95] the Court accepted that the FTT is the correct venue to determine disputes rather than the Administrative Court and in paragraph [91] the Court made clear "the appeal structure set out by Parliament specifically envisages that challenges to the factual accuracy of that evidence takes place through an out of country appeal." As regards the merits of the claim itself the FtTJ did not err because the High Court rejected the claim when it considered the judicial review.

DISCUSSIONS AND FINDINGS

10. The preliminary issue for me to consider was whether there was an in country right of appeal.

11. A Section 10 decision invalidates existing leave as was confirmed by the Court of Appeal in R on the application of RK (Nepal) [2009] EWCA Civ 359 when Court of Appeal found that a decision to remove a student pursuant to section 10 of the 1999 Act automatically terminated any extant leave he had because it was not a decision to curtail leave under the Immigration Rules and so not a decision to vary leave as listed in section 82(2) of the 2002 Act. Accordingly there was no in country right of appeal except on asylum and human rights grounds.

12. If the Section 10 decision had been taken before the refusal of the appellant's application to extend his stay then the position would be as described by Mr Wilding and as envisaged in Shabaz Ali.

13. It is important to recognise the difference between a decision taken before and one taken after the Section 10 decision. Where the decision is taken after the section 10 decision then it is not a decision under Section 82 of the 2002 Act because Section 82(2)(d) concerns a "refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain."

14. In R (on the application of Ashfaq Ali) v SSHD (s3C extended leave: invalidation) IJR [2014] UKUT 494 the appellant's application for leave to remain was refused and he was issued with a removal decision under section 10 of the 1999 Act. Upper Tribunal Judge Lane concluded that the applicant "needs to show that the decision to refuse to grant him leave to remain was in fact made before the decision pursuant to section 10 of the Nationality and Immigration Act 1999 to remove him as a person who had

breached his conditions and/or attempted to use deception in connection with an application".

15. The FtTJ had before him an undated letter but I accept Ms Jegaroyah's submission that the respondent's own case history (see form ICD 2599) confirms the refusal to extend leave application was taken on May 15, 2014 and therefore pre-dates the section 10 decision. Although that refusal letter referred to the respondent being satisfied the appellant was liable to administrative removal under section 10 the reality is that decision was not taken until June 17, 2014 and clearly post-dates the refusal notice.

16. In common with both the duty judge and the FtTJ I am satisfied that there was a right of appeal against the decision to refuse to vary his leave because the decision was taken <u>before</u> the section 10 decision.

17. I therefore reject Mr Wilding's submission that the FtTJ had no jurisdiction.

18. I now turn to the substantive appeal. This was a decision under paragraph 322(1A) HC 395. This section applies where

> "Where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application."

19. The respondent refused the appellant's application for leave to remain because-

> "… During an administrative review process ETS have confirmed that your test was obtained through deception. Because the validity of your test results could not be authenticated your scores from the test taken on 03 April 2013 at Queensway College have been cancelled. As deception has been used in relation to your application it is refused under paragraph 322(1A) of the Immigration Rules."

20. When the matter came before the FtTJ the respondent relied on the refusal letter and produced no evidence to support her case. The FtTJ took oral evidence from the appellant and concluded in paragraph [5]-

> "The Tribunal is satisfied that it can place little weight on the evidence of the appellant. The Tribunal is satisfied that the refusal of leave raises explicitly a number of issues as to the bona fides of the appellant as a student. The appellant has not evidentially addressed these and has not been able to answer significant questions, such for example, why he had not been back to Queensway College where the alleged fraudulent examination had taken place. The appellant was unable to give a reason why he had not gone back and was unable to provide details of any efforts to show that he had undertaken a legitimate TOIEC."

21. Mr Wilding submitted that the High Court had the benefit of seeing the generic witness statements of Millington and Collings and refused the application for judicial

review. The matter had not been fully pursued in the High Court as the appellant had withdrawn his appeal it appeared. The FtTJ rejected the appeal on the evidence given to him and that decision was open to him.

22. Ms Jegaroyah submitted the respondent bore the burden of proving her case and when the case came before the FtTJ the respondent did not rely on any of the judicial review evidence and simply relied on the refusal letter. Ms Jegaroyah submits the respondent had to establish a precedent fact and by producing no evidence-not even details of his test result-she failed to demonstrate the precedent fact and the FtTJ had erred in requiring the appellant to effectively prove his test was genuine.

23. I have considered very carefully what the FtTJ had before him and I am satisfied that the respondent's case was totally lacking in substance. The refusal letter is no different to the appellant saying he took the test and his result was genuine. The respondent failed to produce the evidence to support her case and maybe if she had then the FtTJ would have had evidence to consider. The burden to prove a dishonest act is on the person who makes the claim and I am satisfied the respondent had to prove the dishonest act (to the appropriate standard) and I am satisfied a letter of refusal goes nowhere near satisfying that burden.

24. Having read the FtTJ's determination I am satisfied the FtTJ erred because he approached the appeal from the position that the appellant bore the burden of proving he took a genuine test as evidenced by his finding in paragraph [5] of his determination. This is a material error and in the circumstances he erred and I must set aside his decision.

REMAKING OF DECISION

25. Mr Wilding submitted a copy of the JR decision of October 21, 2014 but this was only a paper application. The appellant renewed his application to the full court and a hearing was listed for November 4, 2014 but the application was withdrawn because when the matter came before the FtTJ he accepted jurisdiction of the appeal and the whole purpose of the JR proceedings was to obtain an in country appeal. Little weight can be attached to a paper hearing when an appeal against that decision had been lodged.

26. Today the respondent's evidence is extremely limited and no evidence of fraud has been put before me with the respondent placing reliance on the fact the appellant did not produce any evidence to support his case. This approach overlooks the fact that the respondent bears the burden of proof in this case.

27. Richards LJ described the test the respondent must meet in R (AN and another) v SSHD [2005] EWCA Civ 1605 when he found the respondent was required to prove the allegation on the balance of probabilities. Richards LJ went onto state "the flexibility …lies not in any adjustment to the degree of probability required for an allegation to be proved…but in the strength or quality of the evidence that will in practice be required…."

28. This is a serious matter for the appellant because he not only would lose his right to study here but also potentially faces a ten-year ban from the United Kingdom so the respondent must provide sufficient evidence to prove the fraud. As I have already stated a refusal letter is insufficient.

29. In the absence of any evidence to support what is in the refusal letter I must allow this appeal.

DECISION

30. The decision of the First-tier Tribunal did disclose an error in law and I set aside that decision and allow the appeal.

31. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order was not made in the First-tier and I see no reason to amend that order.

Signed: Dated: **February 19, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

There was no application for a fee award.

Signed: Dated: **February 19, 2015**

Deputy Upper Tribunal Judge Alis