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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31340/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28th January 2015

Decision Promulgated
On 23rd February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHOAIB SHABBIR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Kandola, Home Office Presenting Officer
For the Respondent: Mr J Dhanji, Counsel

DECISION AND REASONS

Details of the Parties and Proceedings

1. The appellant in the Upper Tribunal is the Secretary of State for the Home Department. The respondent, Mr Shoaib Shabbir, is referred to hereafter as the claimant. He was born on 13th December 1987 and is a citizen of Pakistan. He appealed before First-tier Tribunal Judge Pirotta (the Judge) at Birmingham on 20th December 2014 against the decision of the Secretary of State to remove him from the United Kingdom by way of

directions under section 10 of the Immigration and Asylum Act 1999 after service of an IS.151A form on the appellant informing him of his immigration status, liability to detention and removal. This notice was followed by an IS.151A Part 2 notice informing the claimant of the removal decision and the consequent invalidation of his leave under section 10(8) of the 1999 Act. The Judge allowed the appeal under the Immigration Rules.

2. Permission to appeal to the Upper tribunal was granted to the Secretary of State on 15th December 2014 by First-tier Tribunal Judge Holmes for the following reasons:

> No human rights claim was advanced by the Appellant to the respondent prior to 1st October 2014 (the date of decision). In the circumstances the decision of 1.10.14 was an "immigration decision" under section 82(2)(g), but the right of appeal against it was governed by section 92 which states that the only right of appeal against the decision was one that could be exercised from outside the UK. Arguably the Judge has failed to engage with the absence of any jurisdiction to entertain the appeal and the guidance to be followed in Ali [2014] UKT 494, Mahmood [2014] UKUT 439, or Jan [2014] UKUT 265.

3. The matter accordingly came before me to determine whether there is an error of law.

Consideration of Submissions

4. The decision of the Secretary of State followed the provision of information from the Educational Testing Service (ETS) of an anomaly with the speaking test of the claimant which indicated the use of a proxy test taker and therefore the use of fraud on the part of the claimant. He was issued with a form IS.151A on 14th July 2014 and an IS.151A Part 2 on 21st July 2014 informing him of his immigration status, liability to removal and notification of the removal decision respectively. He was informed of his right to appeal only out of country.

5. At the hearing before the Judge he considered the merits of the appeal at the outset, in paragraph 4 of the determination, without considering any issue of jurisdiction. He found that the Secretary of State could not provide the evidence of proxy test taking from the ETS and concluded that the decision was not supported with evidence and was therefore unlawful and decided to remit the matter to the Secretary of State for further consideration "and a fresh decision based on evidence which could be demonstrated, and a right of appeal if necessary, in the case of an adverse decision, because the Secretary of State would be able to take all facts into account in a new decision which I was under the impression formed part of a larger consideration in an application by the Appellant".

6. The Judge was under the misapprehension at the hearing that there were several issues for consideration in an application made by the appellant

but states in his determination that subsequently, after the representatives did not correct his misunderstanding, he ascertained that the decision "stood alone" on the basis of deception with no other issues to be considered by the Secretary of State. The Judge concluded his determination by stating, in paragraph 11, that: "therefore, contrary to my original opinion, the appeal must succeed, not only to declare the decision of the Secretary of State unlawful but to allow the appeal altogether".

7. Mr Kandola relied before me on the grounds of appeal asserting that the Tribunal had no jurisdiction to hear this appeal for the following reasons. The Secretary of State made the section 10 removal decision on the basis of leave to remain being obtained by deception and it was a decision subject to appeal only from outside the United Kingdom. The cases of R (on the application of Ashfaq Ali) v Secretary of State for the Home Department (s3C extended leave: invalidation) IJR [2014] UKUT 494(IAC) and R (on the application of Bilal Mahmood) v Secretary of State for the Home Department (candour/reassessment duties; ETS: alternative remedy) IJR [2014] UKUT 439 (IAC) are relied upon.

8. The Tribunal is submitted to have erred by failing properly to establish jurisdiction. In accordance with the case of Mahmood held that a person whose leave is invalidated on the basis that the Secretary of State considers deception has been used in connection with an application for leave will, at present, normally have an out of country right of appeal. The availability of that right is, presumptively, an adequate alternative remedy to be pursued by the person concerned.

9. The Judge purported to deal with the decision of the Secretary of State made on 14th July 2014 to remove the claimant from the United Kingdom. In oral submissions Mr Kandola submitted to me, in addition to the submitted grounds of appeal, that the Judge further erred in considering this decision because it was withdrawn and substituted with a fresh decision on 1st October 2014. The Judge recorded, but made no findings about, the submission to him at the hearing by the Home Office Presenting Officer that the decision made in July 2014 had been withdrawn and reissued on 1st October 2014 on the same grounds but with the addition of a refusal to exercise discretion which was omitted from the original decision.

10. Mr Kandola submitted that the July 2014 decision had therefore been withdrawn, if not in advance of the hearing in writing, at the latest by the HOPO orally at the hearing before the Judge. A letter was before the Judge from the Secretary of State to the claimant, dated 1st October 2014, informing him of the withdrawal of the July decision and the making of the new decision in October 2014. For this reason Mr Kandola submits the Judge had no jurisdiction because the notice of appeal related to the July 2014 decision and not to the fresh decision made on 1st October 2014 in response to which no appeal had been filed before the hearing which followed shortly afterwards, on 20th October 2014. The Tribunal was

obliged to treat the appeal as withdrawn under Rule 17 of the First-tier Tribunal Rules on notification from the Secretary of State, either orally or in writing, of the withdrawal of the decision.

11. Mr J Dhanji took issue with this approach because the Secretary of State's appeal in the Upper Tribunal was not made or granted permission on this ground; the issue of whether there was an in-country appeal was the subject of the permission. However, Mr Dhanji dealt with the issue by submitting that the Secretary of State's behaviour by sending a representative to the hearing before the Judge demonstrated that the appeal was on-going; there would have been no purpose in sending a Home Office Presenting Officer if there were no outstanding appeal. Even if I accepted this submission for the claimant I find that Secretary of State's appeal to the Upper Tribunal succeeds in any event on the submitted grounds because there was no jurisdiction for the Judge to hear an in-country appeal.

12. Mr J Dhanji accepted that in order to have jurisdiction to hear the appeal as an in-country appeal the claimant must have made an asylum or human rights claim in the United Kingdom before the 1st October 2014. He accepted that under section 92 (1) and (2) of the Nationality, Immigration and Asylum Act 2002 a person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which that section applies; the section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f) [, (ha)] and (j) and under section 82(2) the decision is this case is under 82(2)(g) as follows and therefore not capable of an in-country right of appeal:

> 82 (1) Where an immigration decision is made in respect of a person he may appeal [to the Tribunal]
> (2) In this Part "immigration decision" means—
> (a) refusal of leave to enter the United Kingdom,
> (b) refusal of entry clearance,
> (c) refusal of a certificate of entitlement under section 10 of this Act,
> (d) 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,
> (e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,
> (f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,
> (g) a decision that a person is to be removed from the United Kingdom by way of directions under [section 10(1)(a), (b), (ba) or (c)] of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom).

13. There is, however, an in-country right of appeal under section 92 of the 2002 Act when an asylum or human rights claim has been made in the

United Kingdom. Mr Dhanji submitted that by virtue of a reference in the grounds of appeal against the July 2014 decision such a claim had been made prior to the October 2014 because of the reference in those grounds, albeit brief, to a breach of the claimant's human right to a fair trial under the Human Rights Act. Mr Dhanji accepted that this a complicated way of approaching the issue but submitted that in accordance with the case of Jisha v Secretary of State for the Home Department [2010] EWHC 2043 (Admin) (05 August 2010), at paragraphs 21 and 22 in particular, even a weak claim can qualify as such a claim within the necessary definition.

14. I bear in mind that in Jisha the decision concerned the interpretation of paragraph 353 of the Statement of Changes in Immigration Rules, HC 395, which, unlike the appeals provisions of the 2002 Act, is an important fail-safe provision to ensure that human rights and asylum claims are properly considered before a final decision to remove a claimant, which may well be after an unsuccessful appeal. The interpretation of the words of page 353 is therefore likely to be rather wider than is necessitated by the construction of the appeal rights themselves.

15. I reject Mr Dhanji's argument because I find it to be undermined by the skeleton argument before the Judge for the claimant prepared for that hearing by his counsel. At paragraph 5 of the skeleton argument it is explicitly stated that no human rights grounds of appeal were raised in the grounds because of the nature of the decision; permission was therefore sought in the skeleton argument to vary the grounds of appeal to argue a breach of Article 1 Protocol 1. There is nothing to show that the Judge either considered or granted such permission and nor is there any indication that he treated such a claim as having been made. Nor was such a claim apparently argued or relied upon before him at the hearing.

16. In these circumstances I find that the Judge made a material error of law by failing to consider whether he had any jurisdiction to hear the appeal before purporting to allow it outright on its merits. In these circumstances I find that there was no jurisdiction for all the reasons set out above and the decision of the First-tier Tribunal is accordingly set aside and is remade by dismissing the appeal.

Notice of Decision

17. The making of the previous decision involved the making of a material error on a point of law. There was no jurisdiction to hear the appeal and the decision of the First-tier Tribunal is set aside and remade by dismissing the appeal.

18. The appeal of the Secretary of State in the Upper Tribunal succeeds.

Anonymity

The position remains that no anonymity direction has been made.

Signed: J Harries

Deputy Upper Tribunal Judge
Date: 20th February 2015

Fee Award

No fee has been paid or is payable and there is therefore no fee award.

Signed : J Harries

Deputy Upper Tribunal Judge
Date: 20th February 2015