



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: IA/27308/2014

THE IMMIGRATION ACTS

Heard at Field House
On 31 May 2018

Decision & Reasons Promulgated
On 5 June 2018

Before:

The Hon. Lord UIST and
Upper Tribunal Judge John FREEMAN

Between:

Jaison PAUL

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Pierre Georget* (counsel instructed by Ideal)
For the respondent: Mr Paul Duffy

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Simon Blackford), sitting at Taylor House on 13 March 2015, to allow an ETS appeal by a citizen of India, born 1986. The history of the proceedings, before and after that, is a little complicated, so best set out in the following table.

2. History

2010	appellant arrives on student visa
2013	applies for leave to remain, on basis of ETS test results (said to be result of proxy fraud)

NOTE: (1) *no anonymity direction made at first instance will continue, unless extended by me.*
(2) *persons under 18 are referred to by initials, and must not be further identified.*

- 19.06.2014 decision under appeal (refusal of leave to remain/s.10 removal decision for 15 July: order in issue): right of appeal *not* conceded
- 15.07.2014 Judge PJ Clarke directs appeal to proceed
- 13.03.2015 Judge Blackford allows appeal on merits
- 10.11.2015 Upper Tribunal (Lord Turnbull and Deputy Judge Andrew Monson) dismiss Home Office appeal
- 21.12.2015 permission granted to appeal to Court of Appeal
- 21.10.2017 Upper Tribunal decision set aside and re-hearing directed by consent

3. **Issues** The reason why the previous panel's decision was set aside, as set out in the document attached to the consent order, was the changing effect of the authorities on ETS cases. The primary issue however has all along been the Tribunal's jurisdiction, or not, to hear an appeal at all in this case. The decisions served on 19 June 2014 came in two parts:
- (a) one headed 'Refusal to grant leave to remain': this explained the reasons for that decision, and went on to note (passage in bold on p 2/3) that it had been decided to remove the appellant for having practised deception on his ETS test, and expressly stated (p 3/3) that there was no right of appeal; and
 - (b) the removal decision itself: this conceded a right of appeal, but only after removal.
4. There is no direct evidence as to whether (a) or (b) was served first; if it was (b), then it is common ground that it extinguished the appellant's leave, allowing him only his out-of-country appeal against the removal decision. Mr Georget has rightly conceded that, since the appellant asserts a right of appeal, then, subject to further questions of law and procedure with which we shall be concerned, it was for him to show that the refusal of leave came first.
5. That removes the basis for Judge Clarke's decision, which was that the "benefit of the doubt" had to be given to the appellant. This phrase, apparently introduced into refugee law from the laws of cricket, has no place in an ordinary immigration case such as this, where the party with the burden of proof has to establish the facts he relies on as more likely than not to be true. Much as we sympathize with the judge's position, faced with the need to make a last-minute decision before the appellant's planned removal, without a hearing or any help from either side, that was wrong. However, this was an 'excluded decision' (see the 2009 Order, article 3 (1) (m)), and not appealable to the Upper Tribunal.
6. Nor could the Home Office have been expected to challenge Judge Clarke's decision on judicial review: they would have been told they had an alternative remedy by arguing the point when the appeal came up for hearing. It was however clear from the presenting officer's minute, which Mr Duffy read out to us, that no such attempt was made. While we are prepared to accept Mr Duffy's point that the presenting officer would have repeated the invariable mantra about relying on the refusal letter, which, as already seen, asserted the lack of any right of appeal, she should have insisted on the jurisdiction point being heard, before the appeal proceeded on its merits, as it did.

7. We have every sympathy with Judge Blackford, who had before him an appeal which another judge had, very nearly eight months earlier, directed to proceed. There had been no indication of any challenge to that decision in all that time, or before the judge. No point on jurisdiction was in fact taken till the Home Office applied for permission to appeal to the Upper Tribunal. However the general law (subject to the specific authority to which Mr Georget referred us) was considered to be that tribunals are obliged to take an arguable jurisdiction point for themselves, whether or not it is in fact argued by either of the parties.
8. That authority is *Anwar & another* [2010] EWCA Civ 1275. The judgment was given by Sedley LJ, and the relevant facts of the cases concerned were very similar to those involved here. Mr Anwar and a lady who was no longer an appellant had appealed removal decisions, following assertions of deception, and the question was whether they had a right to appeal from within the United Kingdom under the relevant legislation (Nationality, Immigration and Asylum Act 2002, s. 82(1)). In Mr Adjo's case, the question was whether he had any right of appeal at all under that provision.
9. The reason for this distinction was that Mr Adjo had already exercised his right of appeal against a 2007 decision in his case: while the removal directions made then continued in force, and his 2008 human rights application had been refused the following year, that had not led to any new appealable immigration decision. In the other two cases, Sedley LJ analysed the jurisdiction question as follows:

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.

20. The reason for this ostensibly subtle distinction is one which matters. It is the distinction between constitutive and adjudicative jurisdiction which I sought to draw in a dissenting judgment in *Carter v Ahsan* [2005] EWCA Civ 990, ICR 1817, §16-27, which secured approval on appeal [2007] UKHL 51, 1 AC 696. The constitutive jurisdiction of a tribunal is the power to embark upon trying specified kinds of issue. Whether a foreign national has obtained leave to enter or remain by deception is, by common consent, such an issue. Its adjudicative jurisdiction may then depend on a number of factors, such as whether the appeal has been brought within time or – as here – whether the appellant has left the United Kingdom.

21. This in turn may depend on several other things. First it must depend on whether the out-of-country rule applies at all, which is likely to be a mixed question of fact and law. IJ Callender-Smith concluded in Mr Anwar's case that it did not apply. Secondly it may depend on whether the appellant has in fact left the country: he or she may be absent from the hearing but not, or allegedly not, from the United Kingdom. This will then be a triable issue. Until such issues have been decided it is impossible to say that the tribunal cannot hear the appeal.

22. One must not, of course, lose sight of the words of s.92(1) of the 2002 Act: "A person may not appeal ... while he is in the United Kingdom unless his appeal is of a kind to which this section applies" – and the section does not apply to an appeal against a deception decision under s.10(b): see s. 82(2)(g). But it is not every such formula which bars the door to justice. To take only the best-known example, the Limitation Act 1980, s. 2, provides: "An action founded

in tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.” It is trite law that unless the point is taken, this provision constitutes no bar. In consequence it can be waived by agreement or by unilateral decision. Another example can be found in requirements for leave to bring proceedings: see *Adorian v Metropolitan Police Commissioner* [2009] EWCA Civ 18.

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.

10. As can be seen from paragraph 16, the ‘in-country point’ was clearly taken before the hearing judge in both these cases; for that reason, and subject to the appellants’ right to argue human rights points on appeal, Sedley LJ held that the judge should have decided that he had no jurisdiction to hear the appeal.

11. The House of Lords decision to which Sedley LJ referred was. The relevant part (by Lord Hoffmann, with whom the other members of the House agreed) is this:

30. Although it is well established that the parties cannot by agreement or conduct confer upon a tribunal a jurisdiction which it does not otherwise have, the question in this case is whether an actual decision by a tribunal that it has jurisdiction can estop the parties *per rem judicatam* from asserting the contrary. ... when the tribunal has decided that it does have jurisdiction, the question of whether this decision is binding at a later stage of the same litigation, or in subsequent litigation, involves, as Sedley LJ explained in his dissenting judgment, quite different issues about fairness and economy in the administration of justice.

31. Issue estoppel arises when a court of competent jurisdiction has determined some question of fact or law, either in the course of the same litigation (for example, as a preliminary point) or in other litigation which raises the same point between the same parties The question is therefore whether the EAT was a court of competent jurisdiction to determine whether the Labour Party was a qualifying body within the meaning of section 12.

32. ... The decision as to whether the facts found by the tribunal answer to the statutory description is sometimes treated as a question of fact (from which there is no appeal to the EAT) and sometimes as a question of law (from which there is). In either case, however, the tribunal has jurisdiction to decide the question. I can see no basis for distinguishing between questions which "go to its jurisdiction" and those which do not. A decision that a contract falls outside the jurisdiction of the Tribunal because it is for services, or for service overseas, seems to me just as much a question which goes to the jurisdiction as the question of whether the Labour Party is within the jurisdiction because it is a qualifying body. Both are decisions of fact or law, which are (subject to appeal on questions of law) within the competence of the tribunal.

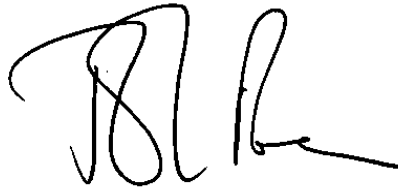
33. In my opinion, therefore, the decision that the Labour Party was a qualifying body for the purposes of section 12 was made by a competent court and is therefore binding upon the parties. It does not matter that a later decision, now approved by this House, has shown that it was erroneous in law The whole point of an issue estoppel on a question of law is that the parties remain bound by an erroneous decision.

12. This was the higher authority relied on by Sedley LJ in deciding *Anwar* as he did. Doing our best to summarize the relevant principles for present purposes, they are as follows:

- (a) the question whether an appeal lies to a tribunal against a particular type of decision at all is one of its 'constitutive' jurisdiction, and the parties cannot confer on it, either by agreement or inaction, any jurisdiction it does not have; but
- (b) questions as to the circumstances in which a right of appeal can be exercised (such as whether an appellant has left the country) are ones for the tribunal's 'adjudicative' jurisdiction, and whether or not the parties will later be estopped from denying it will depend on whether the point has been taken before the tribunal.
13. In this case Judge Clarke correctly held (see paragraph 5) that, through the combined effect of ss. 82 (2) (g) and 92 (1) of the Nationality, Immigration and Asylum Act 2002, no appeal lay against the removal decision, so long as the appellant remained in this country. However he held that there was a valid in-country appeal against the refusal of leave to remain, for the reasons already given. That was a type of decision against which the tribunal had power to hear an appeal, so that its jurisdiction to do so in particular circumstances must be regarded as 'adjudicative', and any assertion that it was lacking needed to be taken before the tribunal by the party making it.
14. As already explained, there was no opportunity for the Home Office to take that point before Judge Clarke, nor to challenge his decision on appeal or by judicial review. They could, and should have let the appellant's solicitors, and the Tribunal know, in advance of the hearing before Judge Blackford, that it was to be challenged; but the first opportunity effectively to do so was at that hearing. His decision on the merits was a perfectly conscientious one, and we find it inconceivable that, if the jurisdiction point had been taken before him as a live one by the presenting officer, he would not have dealt with it.
15. The first question for us however is whether the jurisdiction point was effectively taken before Judge Blackford, simply by the presenting officer relying on the refusal letter, which asserted that there was no right of appeal. If it were not taken in that way, then the Home Office must be regarded as content, at that stage, to let the appeal proceed, for the reasons given by Judge Clarke. They clearly cannot both be excused any obligation to challenge his decision when made, and to assert that no decision as to jurisdiction had been made by the Tribunal, and Mr Duffy did not seek to do so. Judge Blackford's decision has to be taken as including the reasons given by Judge Clarke.
16. We bear in mind what Lord Hoffmann said about 'fairness and economy in the administration of justice', and the lengths to which these proceedings have gone, almost entirely through the presenting officer's failure to bring the jurisdiction point to Judge Blackford's attention. While it was there to be seen on the face of the decision, if only at the very end, the judge can surely not be blamed for assuming, in the absence of any argument to the contrary, that the Home Office were content to let the appeal proceed on the basis of Judge Clarke's decision. While it might have been a good idea to check this point with the presenting officer, we cannot regard it as effectively raised for the judge's decision, given her failure to do so herself.
17. It follows that the Home Office cannot now argue that Judge Blackford's assumption of jurisdiction was wrong in law. Whether or not it was so does not matter, in the light of what Lord Hoffmann said at paragraph 33 of *Anwar*. There was no challenge to Judge

Blackford's decision on the merits of the case, either in the grounds for permission to appeal put before the First-tier Tribunal, or in the renewed grounds to the Upper Tribunal, or in the grant of permission. Despite the reference to them in the document attached to the consent order, we cannot see that any such point was raised on the appeal to the Upper Tribunal, and it follows that it must be dismissed.

Home Office appeal dismissed

A handwritten signature in black ink, consisting of stylized, overlapping letters that appear to be 'JLR' followed by a horizontal line.

(a judge of the Upper Tribunal)