



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/00090/2016

THE IMMIGRATION ACTS

Heard at Field House
On 19 March 2018

Decision & Reasons Promulgated
On 22 May 2018

Before

UPPER TRIBUNAL JUDGE DAWSON
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MISS ASRAT JAHAN AZAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. Khan instructed by Universal Solicitors
For the Respondent: Ms. Z. Ahmad, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Bangladesh, born on 14.2.91. She entered the United Kingdom on 8 October 2011 as a Tier 4 (General) Student and was last granted an extension of leave to remain on 3 January 2013 until 30 November 2015. On 28 August 2014, the Respondent curtailed that leave, asserting that she had used deception in order to gain leave to remain in the United Kingdom and had used a proxy in her speaking test with the ETS. She was served with a notice to a person liable to removal and notified that she was entitled to appeal against the decision after she had left the United Kingdom. The Appellant nevertheless appealed against that decision whilst still in the United Kingdom. Her appeal came before the First tier Tribunal for hearing on 9 January 2015. In a decision and reasons promulgated on 26 January 2015, the appeal was allowed.

2. The Respondent sought and obtained permission to appeal to the Upper Tribunal on the basis that the Judge had materially misdirected himself in considering he had jurisdiction to hear the appeal and had failed to give adequate reasons for rejecting the Respondent's evidence in support of her assertion that the Appellant had employed deception. The appeal came before Upper Tribunal Judge Taylor for hearing on 26 August 2015. In a decision and reasons promulgated on 17 September 2015, she allowed Respondent's appeal on the basis that the First-tier Tribunal Judge plainly had no jurisdiction to determine the appeal.
3. The Appellant then left the United Kingdom on 27 January 2016. On 22 February 2016, she submitted a notice of appeal against the Respondent's decision of 28 August 2014. The appeal came before First-tier Tribunal Judge Morris for hearing on 6 June 2017. The Appellant was represented and the appeal proceeded on the basis of submissions. In a decision and reasons promulgated on 22 June 2017, the FtT Judge dismissed the appeal on the basis that the Appellant was not permitted to bring a second appeal against the Respondent's decision, particularly when the first appeal had been dismissed and that there was no valid appeal before her.
4. The Appellant sought permission to appeal against this decision, in time, on the basis that the First tier Tribunal Judge had materially erred in law in finding there was no valid appeal in that the Appellant had the right to exercise an out of country appeal and that this was confirmed by the decision in Roohi (2014 Act: saved appeal rights) IJR [2015] UKUT 00685 (IAC). The decision was further procedurally unfair.
5. Permission to appeal was granted by First tier Tribunal Judge Robertson on 11 January 2018 in the following terms:

"The grounds of application are arguable. This is because the Appellant only ever had an out of country appeal; the First tier Tribunal Judge who heard the Appellant's appeal in January 2015 was found, by the Upper Tribunal on 26 August 2015, to have erred in law because he lacked the jurisdiction to hear the appeal was an in-country appeal. The Appellant therefore left the UK and exercised her out of country right of appeal, as provided by Rule 19(3)(a) of the Tribunal (First-tier Tribunal) (Immigration and Asylum Chamber) Procedure Rules 2014. Had the First-tier Tribunal not accepted jurisdiction in August 2015, it is likely that the Appellant would have left the UK earlier and exercised her out of country appeal at an earlier date. It is arguable that the Judge erred in failing to consider the merits of the Appellant's appeal."

6. This appeal came before the Upper Tribunal for an error of law hearing on 12 March 2018, when it was adjourned for 7 days in order to obtain the Respondent's position on the appeal, in light of the judgment of the Court of Appeal in Ahsan [2017] EWCA Civ 2009 and so that a panel could be convened in the event it was decided that it would be appropriate for the Upper Tribunal to issue guidance.
7. The appeal then came before us on 19 March 2018, when Ms. Ahmad, for the Respondent, conceded that the approach of the First tier Tribunal Judge was erroneous and that he had erred in law. She stated that in terms of policy instructions, the Respondent's position is that there are roughly 80 cases about to be heard in the First tier Tribunal, including 6 leading cases on section 94(b) of the NIAA 2002 and that a

Presidential panel was being convened to issue guidance on these cases, which was due to be heard on a date between April and June 2018. In these circumstances, she submitted that remittal of this appeal would appear to be the best course of action. She submitted that the First tier Tribunal would be considering whether video conferencing out of country would enable a fair hearing to take place. She further submitted that the Home Office were offering to provide costs for video conferencing but would need adequate time to put those arrangements in place.

8. In his submissions, Mr Khan submitted that we should decide this appeal and that, in light of the judgment in Ahsan, a section 10 decision requiring an appeal out of country is a breach of Article 8 of ECHR. He submitted that the documentary evidence has not changed since the decision of First tier Tribunal Judge Hillis because the Appellant has left the country and the issue is whether the Tribunal needs to hear further oral evidence from her and following Ahsan at [89] and [90] the Tribunal will need to decide whether the video link facilities are adequate for hearing oral evidence.
9. The parties were given time to consider the, at that time, unreported Presidential decision in AJ (now reported as AJ (s 94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 00115 (IAC), the headnote of which provides:

“(1) In the light of Kiarie and Byndloss v Secretary of State for the Home Department [2017] UKSC 42, the First-tier Tribunal should adopt a step-by-step approach, in order to determine whether an appeal certified under section 94B of the Nationality, Immigration and Asylum Act 2002 can be determined without the appellant being physically present in the United Kingdom.

(2) The First-tier Tribunal should address the following questions:

- 1. Has the appellant’s removal pursuant to a section 94B certificate deprived the appellant of the ability to secure legal representation and/or to give instructions and receive advice from United Kingdom lawyers?*
- 2. If not, is the appellant’s absence from the United Kingdom likely materially to impair the production of expert and other professional evidence in respect of the appellant, upon which the appellant would otherwise have relied?*
- 3. If not, is it necessary to hear live evidence from the appellant?*
- 4. If so, can such evidence, in all the circumstances, be given in a satisfactory manner by means of video-link?*

(3) The First-tier Tribunal should not lightly come to the conclusion that none of the issues covered by the first and second questions prevents the fair hearing of the appeal.

(4) Even if the first and second questions are answered in the negative, the need for live evidence from the appellant is likely to be present. A possible exception might be where the respondent’s case is that, even taking a foreign offender appellant’s case at its highest, as regards family relationships, remorse and risk of re-offending, the public interest is

still such as to make deportation a proportionate interference with the Article 8 rights of all concerned.

(5) If the First-tier Tribunal concludes that the appeal cannot be lawfully determined unless the appellant is physically present in the United Kingdom, it should give a direction to that effect and adjourn the proceedings."

10. Ms Ahmad confirmed that the Respondent was standing by the decision under appeal and that she had no instructions that they were seeking to amend it nor did she propose to amend it
11. Mr Khan submitted that, in light of the Court of Appeal's findings in Ahsan (op cit) the only lawful conclusion on the basis of the evidence today is that an out of country appeal would not satisfy the finding at [92]. He submitted that there is a degree of tension between consistency in decision making and the just disposal of the appeal. The evidence before this Tribunal is that there is no evidence indicating that a video link would be available for her to give evidence. He sought to rely on the decision of the Upper Tribunal in AJ (op cit) at [33]. In respect of whether oral evidence would make a difference in this case he submitted that the issue is whether it is taken live or by video link. He did not accept that the matter needs to go back to the First tier Tribunal and that there was nothing to suggest anything has changed since the judgment in Ahsan consequently the only lawful conclusion as a result of [92] is that the section 10 decision is unlawful and is a breach of Art 8 rights. He invited the Upper Tribunal to find a breach of Article 8 and allow the appeal.
12. Ms Ahmad submitted that the best course of action would be remittal to the First tier Tribunal. She accepted that there is a need for guidance on whether video conference is an adequate remedy but this should not pre-empt the decision in the planned test cases before the First tier Tribunal.

Decision and reasons

13. We found an error of law in the decision of First tier Tribunal Judge Morris, which in any event, Ms Ahmad had conceded on behalf of the Respondent and set aside the decision of the FtT. We decided to remit the appeal for a hearing *de novo* before a different Judge of the First tier Tribunal. We announced our decision at the hearing and now provide our reasons.
14. It is clear from the judgment of Lord Justice Underhill in Ahsan, which was of course also concerned with appeals relating to ETS/TOEIC, at [89] to [98] that: "*an out-of-country appeal would not satisfy the Appellants' rights, either at common law or under article 8 of the Convention, to a fair and effective procedure to challenge the decisions to remove them.*"
15. Ultimately, there has to be a fact sensitive assessment by the Tribunal of whether or not the Appellant utilised a proxy test taker in her ETS test and thus exercised deception. First tier Tribunal Judge Hillis found in the Appellant's favour in this regard, having heard the Appellant give evidence in "virtually fluent" English [22].

This finding was subject to an appeal to the Upper Tribunal, however, it was not in fact determined by the Upper Tribunal due to the fact that Upper Tribunal Judge Taylor found in favour of the Respondent in respect of the jurisdictional issue, which was, at that time, correct. What is clear to us is that the Appellant must be given the opportunity to give oral evidence at her appeal and that ought to be in person “*unless facilities for giving evidence by video-link are realistically available.*”

16. We are aware that the FtT have been hearing appeals by Appellants who are abroad with more advanced video linking; it is matter for the FtT to give directions as to the way forward in this case, however, we are mindful that there has been substantial delay in this case already and that the Appellant has been unable to finish her University degree. Her appeal is one that deserves priority.

Signed *Rebecca Chapman*

Dated: 16 April 2018

Deputy Upper Tribunal Judge Chapman