Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00049/2019

THE IMMIGRATION ACTS

Heard remotely via *Skype for Business*	**Decision & Reasons Promulgated**
On 26 February 2021	**On 8 March 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HARPREET SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Akhter of Edward Marshall Solicitors
For the Respondent: Mr Walker, Senior Presenting Officer

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with permission granted by the First-tier Tribunal (Judge Loke) against a decision made by First-tier Tribunal Judge Skehan on 8 January 2020. By that decision, Judge Skehan ("the judge") allowed an appeal which had been brought by Mr Singh against decisions made by the respondent on 9 August 2014 and 4 December 2014.

2. To avoid confusion, I shall refer to the parties as they were before the FtT: Mr Singh as the appellant and the Secretary of State for the Home Department as the respondent.

Background

3. The appellant entered the United Kingdom on 26 October 2009. He held entry clearance as a Tier 4 (General) Student Migrant which was valid from 15 October 2009 to 30 August 2013.

4. Before the expiry of his leave to remain, the appellant applied for further leave in the same capacity. The respondent made two decisions in response to this application. The first is contained in form IS151A, dated 9 August 2014, which states that the appellant is a person in respect of whom removal directions may be given in accordance with section 10 of the Immigration and Asylum Act 1999 because he is a person who used deception in seeking leave to remain. The reasons given for that decision were as follows:

> You are specifically considered a person who has sought leave to remain in the United Kingdom by deception following information provided to us by Education Testing Service, that on 17 July 2013 an anomaly with your speaking test indicated the presence of a proxy test taker.

5. Form IS151A Part 2, which bore the same date and accompanied the IS151A, stated that the appellant was entitled to appeal to the First-tier Tribunal (IAC) after he had left the United Kingdom. Directions were to be given for his removal to India.

6. I was told by Mr Akhter, on instructions from the appellant, that these notices were written on 30 June 2014 but were served on the appellant on 9 August 2014, hence the manuscript date on each. A third document was similarly dated. This was a two-page letter in which the respondent refused the appellant's application for leave to remain under Tier 4 of the Points Based System. There were three grounds of refusal under the Immigration Rules, although each was based on the allegation that the appellant had used a proxy to take an English language test and ETS's cancellation of his certificate for that reason. The decision described itself as a 'Refusal to Grant Leave to Remain'. The reason for that description is clear from section B of the letter, which was in the following terms:

> This decision is not an immigration decision under section 82. 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." This is not the situation in this case, as the effect of the prior section 10 decision means that any existing leave to enter or remain in the United Kingdom was invalidated under section 10(8) so you have no leave to enter or remain at the time the decision to refuse to vary leave to remain was notified.

7. The appellant's former representatives attempted to lodge an appeal against these decisions. It was submitted, as I understand it, that the appellant was able to pursue an appeal against one or more of the decisions above on human rights grounds. On 1 October 2014, First-tier Tribunal Judge Doyle decided that the appellant had no right of appeal. He noted that the appellant was only entitled

to appeal whilst in the United Kingdom if he could show that section 92 of the Nationality, Immigration and Asylum Act 2002 applied. Having considered R (Nirula) v FtT(IAC) [2012] EWCA Civ 1436, Judge Doyle held that the appellant had not made a human rights claim before the refusal of his application for leave to remain, as a result of which his right of appeal could only be exercised from abroad.

8. In the meantime, on 13 August 2014, the applicant had formally asserted that his removal to India would be in breach of his rights under the ECHR. The respondent refused that claim in a letter dated 4 December 2014. The respondent considered there to be no basis inside or outside the Immigration Rules to grant leave to remain. Under the sub-heading Certification – Designated State, the letter stated at [21]-[22]:

> In addition, your client's human rights claim is one to which section 94(3) of the Nationality, Immigration and Asylum Act 2002 applies. This requires the Secretary of State to certify that the claim is clearly unfounded unless she is satisfied that it is not clearly unfounded. After consideration of all the evidence available, it has been decided that your client's claim is clearly unfounded. Therefore, it is hereby certified under section 94(2) of the Nationality, Immigration and Asylum Act 2002 that your claim is clearly unfounded.
>
> As your client's human rights claim has been certified as clearly unfounded, he may not appeal while in the United Kingdom.

9. The appellant also issued judicial review proceedings challenging the respondent's decisions. Permission to proceed was refused by Upper Tribunal Judge Smith in a decision which was sent to the parties on 15 January 2016. Relying on what had been said by the Court of Appeal in R (Mehmood & Ali) v SSHD [2015] EWCA Civ 744; [2016] 1 WLR 461, Judge Smith held that there were no exceptional circumstances which tended to suggest that an out of country right of appeal was an inadequate remedy. Judge Smith also certified that the claim was totally without merit, thereby preventing the applicant from renewing his application to an oral hearing.

The Appeal to the First-tier Tribunal

10. On 17 May 2019, another firm of solicitors (SBM Solicitors of Hounslow) lodged form IAFT-5 with the First-tier Tribunal, seeking to appeal against the decisions which were communicated on 9 August 2014. There were lengthy grounds of appeal, the detail of which I do not propose to consider at this stage. In the section of the form which permitted an extension of time to be sought, however, the appellant's solicitors had written this:

> This appeal is filed in relevance of the recent decision of the Court of Appeal in Ahsan & Ors v SSHD [2017] EWCA Civ 2009 to the instant application.
>
> In short the applicant submits that Ahsan confirms that the respondent was wrong to certify the applicant's human rights claim,

> by his decision by letter dated 19.12.2014, purportedly pursuant to s94 of the Nationality, Immigration and Asylum Act 2002 as amended ("the 2002 Act"). This is because the human rights claim depended on the correctness of the respondent's allegation that the applicant was a TOEIC cheat, and the applicant's case that he is not a cheat is not bound to fail.
>
> In light of the above facts, we request the tribunal to extend time for appealing in the interest of Justice and Fairness.

11. The First-tier Tribunal issued directions, requiring the appellant or his representatives to explain why there had been a delay between the handing down of the decision in Ahsan on 5 December 2017 and the lodging of the appeal in May 2019. That direction elicited an uninformative statement from the appellant in which he stated that he had been told that he should be afforded an in-country right of appeal as a result of the decision in Ahsan. He stated that he had made human rights representations to the respondent on 22 January 2018 but had received no response.

12. On 10 October 2019, the respondent filed and served a short bundle of documents. The copy in the Tribunal's file contains some copied pages from the appellant's passport, a diploma in Business Management he obtained in April 2013, a copy of the certified refusal from December 2014 and the IAFT-5 with the grounds of appeal and supporting documents.

13. The file was placed before a Duty Judge, just as it had been in 2014. The judge decided not to make a ruling on the papers as to the validity of the appeal. It was noted instead that

> Appeal is not out of time since no ROA was given in the first place. As for validity, this can be argued as a preliminary point before the Trial Judge (given the complexities which exist, inappropriate to be resolved at this stage).

14. The matter therefore came before the judge, sitting at Hatton Cross on 8 January 2020. The appellant was represented by a solicitor, Mr Chohan. The respondent was represented by a Presenting Officer, Mr Iqbal. For reasons which are not altogether clear, the judge heard no argument on the validity of the appeal. She instead heard extensive argument on whether she should extend time for bringing the appeal. She decided that she should do so. She then considered the merits of the appeal and found, in summary, that the respondent had failed to adduce any evidence in support of her decision that the appellant had cheated in his ETS test. She concluded that there was no basis to conclude that the appellant's presence was not conducive to the public good and that the appellant met the Immigration Rules. She allowed the appeal on that basis, and on the basis that the decision was unlawful under section 6 of the Human Rights Act 1998 with reference to Article 8 ECHR.

The Appeal to the Upper Tribunal

15. The respondent advances a single ground of appeal against the judge's decision, which is that she misdirected herself in finding that there was a right of appeal (or an in-country right of appeal) against any of the decisions which had been made by the respondent. That ground is advanced in the original notice of appeal and developed in a skeleton argument which was filed by a Senior Presenting Officer, Mr Kotas, on 27 June 2020.

16. The appellant's response is set out in three documents. There are 'Submissions in Response' which were filed by the appellant himself on 3 July 2020. There are Further Submissions, the date of which I cannot ascertain. And there are written submissions settled by Mr Gajjar of counsel on 22 February 2021. I will turn to the detail of these documents in due course but it suffices for present purposes to set out the admirably concise summary of the appellant's position which appears at [23] of Mr Gajjar's submissions:

> There was no challenge to the issue of jurisdiction by the Respondent at the hearing. The Appellant's challenge to the 9 August 2014 [decision] did attract a right of appeal with the consequence that the issue of jurisdiction must fall away. The FTJ did not err on the question of timeliness.

17. I heard from Mr Akhter, who sought to develop the written submissions in oral argument. I did not need to call on Mr Walker.

Legal Framework

18. Significant changes were made to Part 5 of the Nationality, Immigration and Asylum Act 2002 by the Immigration Act 2014. Changes were made, in particular, to section 82 of the 2002 Act, which defines the types of decisions against which an appeal may be brought to the First-tier Tribunal (Immigration and Asylum Chamber).

19. Before I turn to the relevant provisions of the 2002 Act, I should mention s10 of the Immigration and Asylum Act 1999, which provides for the removal of certain persons unlawfully in the United Kingdom. Between 10 February 2003 and 20 October 2014, s10(1)(b) provided that a person may be removed from the United Kingdom in accordance with directions given by an Immigration Officer if he uses deception in seeking (whether successfully or not) leave to remain. By s10(8), as in force until 20 October 2014, the notification of a decision to remove a person under s10 had the effect of invalidating any leave to enter or remain previously given to him.

20. Since 20 October 2014, s82 of the 2002 Act has provided that a person may appeal to the Tribunal in the following circumstances

> (1) A person ("P") may appeal to the Tribunal where—
> (a) the Secretary of State has decided to refuse a protection claim made by P,

> (b) the Secretary of State has decided to refuse a human rights claim made by P, or
> (c) the Secretary of State has decided to revoke P's protection status.

21. Between 1 August 2008 and 19 October 2014, s82(1) provided that a person might appeal to the Tribunal where an immigration decision had been in respect of him. There were fourteen different types of immigration decision, as defined in s82(2), of which I need set out only two:

> (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,
>
> (…)
>
> (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),

22. Section 92 of the 2002 Act makes provision for the place from which an appeal may be brought or continued. Since 20 October 2014, s94(3) has provided that an appeal against the refusal of a human rights claim must be brought from outside the United Kingdom if, amongst other things, the claim has been certified on the basis that it is clearly unfounded.

23. Before the amendments which were brought about by the Immigration Act 2014, s92 of the 2002 Act provided that a person was not permitted to appeal under s82(1) whilst he was in the United Kingdom unless his appeal was of a kind to which the section related. By s92(2), one of the kinds of appeal to which the section related was an appeal against an immigration decision of the type identified in s82(2)(d) (as above). Section 92(4) provided that an in-country appeal could be brought against an immigration decision if the appellant "has made an asylum claim, or a human rights claim, while in the United Kingdom".

Analysis

24. As I understood the appellant's submissions, it is asserted that he had an in-country right of appeal against the decisions which were served upon him on 9 August 2014 and 4 December 2014. In respect of the latter decision, it cannot sensibly be suggested that the appellant was entitled to appeal before leaving the country. That decision was certified as clearly unfounded under section 94, the consequence of which could not have been clearer from s92(3): the appellant was only permitted to appeal after he had left the United Kingdom.

25. In respect of the decisions of 9 August 2014, the position is a little more complicated but the starting point is the uncontested statement at section B of the refusal letter of that date, which I have reproduced in full at [6] above. It is correct to observe that the appellant had made an application for further leave before the expiry of his existing leave under Tier 4 of the Points Based System.

All things being equal, the timing of that application would engage section 3C of the Immigration Act 1971, with the result that the appellant's leave continued in force until the application was decided. It is not in issue between the parties, however, that his statutorily extended leave was brought to an end (or invalidated, to use the statutory language) when the respondent made a decision under s10 of the 1999 Act.

26. As a result of the fact that the appellant's leave was invalidated by s10(8) of the 1999 Act on or before 9 August 2014, the result of the refusal of his application was not that he had no leave to enter or remain. The refusal of his application could not put him in that position because the prior decision under s10 had already done so. The refusal of his application was not, for that reason, an immigration decision as defined in s82(2)(d) as then in force. By virtue of The Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014, these provisions remained applicable to the appellant's case despite the changes made by the Immigration Act 2014.

27. It is clear, therefore, that neither the certified decision nor the refusal of leave to remain could be the subject of an appeal, or at least an appeal brought in-country. What of the decision under s10 of the 1999 Act, however? That was an immigration decision as defined by s82(2)(g) but that is not one of the decisions identified explicitly in s92 as carrying an in-country right of appeal. The only way in which that particular decision might have carried an in-country right of appeal was by the mechanism identified at s92(4); by the making of a human rights claim. As Judge Doyle correctly held in 2014, however, it was decided in R (Nirula) v FtT(IAC) [2012] EWCA Civ 1436; [2013] 1 WLR 1090 that the human rights claim must precede the immigration decision in question. But the s10 decision in this case was made on or before 9 August 2014, and the appellant only asserted that his human rights would be breached by his removal after he had received that decision. The fact that he made that claim could not convert a decision which carried only an out of country appeal into a decision which carried an in-country appeal. (Nor, for the same reason, does it make any difference to this question that the appellant made human rights representations to the respondent in 2018.)

28. It is therefore clear that the statutory schemes in force when the decisions against the appellant were made in 2014 did not permit him a right of appeal to the FtT. Judge Doyle was correct so to hold, albeit for rather more concise reasons than I have set out above. I turn now to consider the submissions made by the appellant in an attempt to overcome these obvious difficulties. The first, as I have noted above, is that the decision of the Court of Appeal in Ahsan & Ors v SSHD [2017] EWCA Civ 2009; [2018] HRLR 5 has somehow altered the position.

29. There were four appellants before the Court of Appeal in Ahsan, each of whom was accused of using a proxy to take a TOEIC test. Three had received s10 decisions which were, for the reasons I have set out above, only capable of being appealed after the appellants had left the country. The fourth appellant had made a human rights claim which had ben refused and would have attracted a right of appeal were it not for the respondent's decision to certify the claim as clearly unfounded. He too could only appeal after departure from the UK,

therefore. Each sought judicial review of the respondent's decision, contending that an out-of-country appeal was not an adequate remedy.

30. The Court of Appeal allowed each of the appeals, holding that an out of country appeal did not satisfy the procedural requirements of the common law or Article 8 ECHR in a case where the oral evidence of an appellant was important to the determination of the appeal, unless facilities for the giving of evidence by video link were available. Judicial review would therefore lie against such a decision. In principle, however, permission to proceed in such a case might properly be refused if the person in question could achieve an adequate remedy by an in-country human rights appeal. That would only be so if the court was satisfied that such an appeal would provide a remedy equivalent to that provided by a direct challenge to the decision in question.

31. As should be immediately apparent from that short summary of the ratio of Ahsan, it does not create a right of appeal where none existed under statute. It remains the position, as I sought to explain to Mr Akhter, that the First-tier Tribunal is a creature of statute with a limited jurisdiction. Where, as here, there was no conceivable route by which an appeal could be pursued whilst the appellant remained in the United Kingdom, Ahsan made no difference to the jurisdiction of the Tribunal. The significance of Ahsan, instead, is that it rendered rather more arguable that which had been totally unarguable – on the state of the authorities at that time – before Upper Tribunal Judge Smith. At the time that she refused permission to apply for judicial review, the Court of Appeal did not have the benefit of the decision in R (Kiarie & Byndloss) v SSHD [2017] UKSC 42; [2017] 1 WLR 2380 and an out of country appeal was held generally to represent an adequate remedy in a case such as this. Subject to considerations of timeliness, therefore, the applicant could have sought judicial review of the respondent's decision to proceed as she did instead of taking a route which would have permitted an in-country right of appeal.

32. If I understood Mr Akhter's written and oral submissions correctly, his principal point in reliance on Ahsan was this: given that an out of country right of appeal was held by the Court of Appeal to be inadequate, the First-tier Tribunal should ignore those actions on the part of the respondent which stood in the way of an in-country appeal. He submitted that the decision under s10 was unlawful, as was the certificate under s94, and the removal of either would permit the appellant to litigate in-country that which he would otherwise have to leave the UK to bring before the FtT. As I have endeavoured to explain above, however, the FtT's jurisdiction is governed by Part 5 of the 2002 Act and it cannot simply overlook the specific statutory consequences of decisions which remain in force. The fact that the order of events is as detailed above can only result in a conclusion that the FtT had no jurisdiction to consider the appeal, and Ahsan makes no difference to that conclusion, as submitted by the Secretary of State in her grounds of appeal and her skeleton argument.

33. Mr Akhter also sought to make a point in reliance on the fact (and it is a fact) that the respondent has never made any attempt to substantiate the allegation that the appellant cheated in his TOEIC test. But that is to confuse the merits of the appellant's claim with the jurisdiction of the Tribunal and to put the cart before the horse in a very real sense. The fact that a person has a good claim, or even an

unanswerable claim, cannot create jurisdiction where none exists in statute. In any event, the respondent has been entitled since 2014 to think that the appellant is a man with no in-country right of appeal. She has not been required to prove her case in the context of an appeal because she has always maintained that the appellant has not had a right of appeal before leaving the country. The absence of evidence before Judge Smith or before Judge Skehan does not begin to demonstrate that the respondent has no evidence to show that the appellant cheated; it merely serves to show that there has not yet been a forum in which that allegation was properly to be tested.

34. In his written submissions for the appellant, Mr Gajjar of counsel does not seek to develop the submission that there was a statutory right of appeal against the decisions made on 9 August 2014. The only reference to that submission is in the summary at [23], which I have reproduced above. I infer that he was mindful of his obligation not to advance any contention which he did not consider to be properly arguable.

35. What Mr Gajjar does submit, at some length, is that the respondent failed to take the jurisdictional issue before the FtT and should not be permitted to do so on appeal. He places particular reliance upon what was said by Sedley LJ (with whom Lloyd and Sullivan LJJ agreed) in Anwar, Adjo & Pengeyo [2010] EWCA Civ 1275; [2011] 1 WLR 2552 and by Longmore LJ (with whom Sedley and Davis LJJ agreed) in Nirula.

36. In Anwar, the court held that the bar contained in s92 (that is to say, the bar to an in-country right of appeal) only bound the tribunal once the Home Secretary had chosen to take the point. In Nirula, the court held that those *dicta* from Anwar were not *obiter* (as had been thought by the judge at first instance) but that it was not only the Home Secretary who was able to raise the jurisdictional bar; the point could also be taken by the Tribunal, of its own motion: [31]. At [32], the court echoed what had been said in Anwar, that the respondent could choose not to take any jurisdictional objection if she wished to take that course but that the decision would be 'precarious' if it had proceeded without anyone considering the jurisdictional position.

37. The point made by Mr Gajjar in reliance on these authorities is simply this: Mr Iqbal, the Presenting Officer, did not seek to submit that the FtT had no jurisdiction to consider the appellant's appeal. He, like the judge and the appellant's solicitor, instead dwelled for some time on the question of timeliness. In the absence of any attempt to raise the jurisdictional bar considered in the authorities, the judge was correct to hear the appeal and it is too late for the point to be raised at this stage.

38. To make these submissions is to overlook the plain terms of the decisions made by the respondent. The s10 decision stated in terms that it only attracted an out of country right of appeal. The refusal of the application for leave to remain stated in terms that it attracted no right of appeal. And the certified decision also explained that the appellant had to leave the United Kingdom before he could appeal. Even if the Presenting Officer had voiced no objection, that objection was plain on the face of all of the notices. The point had even been noted by the Duty Judge as one which the trial judge would be required to consider. It would have

been better if the Presenting Officer had sought to navigate the judge through the provisions and the authorities but his failure to do so cannot be taken as a decision to waive the point taken squarely in the papers.

39. Even if I am wrong in so concluding, I doubt that Anwar and Nirula go as far as Mr Gajjar suggests. I note that Longmore LJ made reference to the precariousness of a decision made by a judge in excess of jurisdiction where the point was not raised. Neither authority suggests that the point cannot be raised on appeal when it was not raised below, and the reference to such a decision being precarious tends to suggest precisely the opposite. That is immaterial to my conclusion, however, since the jurisdictional point was so clearly taken in writing by the respondent in this case. The judge erred in law in failing to consider the point and, had she done so, there was only one decision she could lawfully have reached. In the circumstances, I shall set aside the judge's decision as it involved the making of an error on a point of law. I substitute a decision to dismiss the appeal for want of jurisdiction. For the avoidance of doubt, the result of that decision is that none of the findings in the decision of Judge Skehan shall stand.

40. At Mr Akhter's request, I add this. There is in the papers before me a document dated 11 January 2018. It is addressed to a Home Office address in Sheffield and entitled 'This is a human rights application under section 120'. It contains some brief submissions about the appellant's case and some reference to Ahsan. It seems that the appellant's intention in writing this letter was to elicit from the respondent a decision which was capable of being appealed to the FtT without his leaving the country. He states, however, that he has never received any response to it. It appears to be the case that the document was indeed posted to the respondent on 22 January 2018, as there is a certificate of posting immediately behind it in the appellant's bundle. If the document was sent to the respondent, the appellant should receive some response so that he knows where he stands. What she cannot properly do is to ignore those representations when she is aware of what was decided by the Court of Appeal in Ahsan about the right to an effective remedy in the face of an allegation of deception.

Notice of Decision

I allow the appeal brought by the Secretary of State. The decision of the First-tier Tribunal involved the making of an error on a point of law and that decision is hereby set aside. I substitute my own decision to dismiss the appellant's appeal for want of jurisdiction.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

01 March 2021