IAC-FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17924/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 March 2015	**On 13 May 2015**

Before

THE HONOURABLE MR JUSTICE COLLINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ASHRAFHUL HASSAN OLID
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr M A Chowdury, KC Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Shamash given on 4 December 2014 whereby she allowed the appellant's appeal against the decision of the Secretary of State that he should be removed from the country because he was said to have been working in breach of the conditions of his leave to be in this country.

2. It is unquestionably the case that were he to have been found to have been working that would have been a breach of his conditions and was capable in the circumstances of founding a proper basis for his removal.

Of course the full circumstances in which he may have been working were highly material and that follows from the guidance issued under Section 10(1)(a) of the Act to caseworkers. What is there said is that if Section 10 removal is to operate because of working in breach of a condition in relation to employment, the breach must be of sufficient gravity to warrant such action and essentially there should ideally be an admission under caution, a statement by the employer implicating him or her, documentary evidence such as payslips and so on and records and sight by the Immigration Officer of the offender working, preferably on two or more separate occasions, over an extended period.

3. What happened here it seems was that a visit was carried out on 3 April 2014 and it is said that at the place in question, which I presume was a restaurant, the appellant was found, it was said, to be working and when being questioned during two interviews the summary is that he is said to have admitted helping out at the restaurant on Thursdays, Fridays and Saturdays in exchange for food and accommodation. The judge heard evidence from the proprietor of the restaurant and he said that he indeed had given the appellant accommodation and provided him with food. It was not a question of him working. He never received any money and there was no question of any tax returns or relevant documentary material.

4. The conclusion of the First-tier Judge was not helped because the two interviews under caution records were not produced. The Presenting Officer was asked to provide but apparently declined to seek an adjournment to obtain the record of the interviews. That was frankly a wrong approach. Clearly the record of the interviews was material. However, it seems probable that the reason that the judge did not grant an adjournment was because in the light of the Presenting Officer's approach she decided that in all probability she would allow the appeal in due course. She no doubt had a statement from Mr Chowdury. Of course what she did not have was the appellant or any evidence from the appellant and the reason for that was that the appellant had left the country in May 2014, about a month or so after the appeal had been lodged and it is to be noted that the notice indicating the Section 10 decision stated that decisions had been taken to remove him but he was entitled to appeal after he had left the United Kingdom, that is to say that he only had an out of country right of appeal. That was wrong. Section 82(1)(d) of the 2002 Act provides that where a decision which means that existing leave to remain is brought to an end it is one which attracts an in-country right of appeal in accordance with Section 92(1) of the Act as then in force.

5. It frankly is, to say the least, surprising that that mistake was made. However, the appellant, who apparently was then acting in person, lodged his appeal and then left the country, believing that he only had an out of country right of appeal. That is what I am informed by Mr Chowdhury, who has appeared on his behalf, although I have no statement to that effect.

However, if he followed what he was told that perhaps is not altogether surprising.

6. However, the difficulty in his path is that by virtue of Section 104(4) of the 2002 Act which was then in force his leaving the country meant that his appeal was to be treated as abandoned. That is a mandatory provision and there is no way round it. I should say that it has now been repealed by the 2014 Act but that repeal of course was not effective as at May 2014. It may be I suppose that the reason why it has been repealed is that it was recognised that it might be sensible to allow an appeal to proceed as if an out of country appeal even if the individual leaves the country.

7. It may be wondered why now, since he has left the country and has no present intention to return to this country, to maintain the appeal was in his interests and the answer is that if in the future he should want to come to this country for a visit perhaps or for any proper reason the fact that he has been removed under Section 10 will be held against him and that is a matter that he would like to overcome.

8. It seems to me that in the circumstances having regard to what has happened in the course of this case and having regard to the decision of the judge which was a decision she was entitled to reach on the material before her, particularly as the guidance was such as in my view made it somewhat doubtful whether this was a removal decision that was entirely justified, it would be wrong to hold against him were he to make any future application for entry to this country that this Section 10 action had been taken.

9. I note with pleasure that Mr Tarlow, who has appeared on behalf of the Secretary of State, fully accepts that this approach I have indicated is one which in all the circumstances would be only fair in connection with this particular appellant but that, as I said to Mr Chowdhury, is I am afraid the best that I can do for him because, albeit the matter should have been spotted by those who appeared below and indeed I am afraid by the judge as well, regrettably it was not. I would just say I think that anyone in this jurisdiction can be forgiven in the light of the complications in the immigration law as it has developed for overlooking some particular point.

10. Be that as it may, for the reasons I have given I have to allow this appeal and quash the decision of the First-tier Judge but, as I have indicated, in my view this should not be held against the appellant in the future.

Notice of Decision

The appeal is allowed under the Immigration Rules.

No anonymity direction is made.

Signed Date **5 March 2015**

Mr Justice Collins