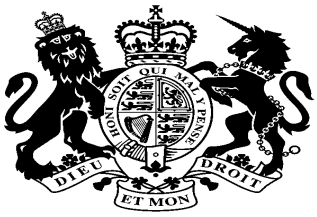

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35490/2014
IA/35491/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 8 October 2015

Determination Promulgated
On 26 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YUVA RAJ PANDEY
SUSHMITA TINARI

Respondents

Representation:
For the appellant: Ms N Willocks-Briscoe, Home Office Presenting Officer
For the respondents: Dr D Chhetri, solicitor

DECISION AND REASONS

1. The Secretary of State is the appellant in these proceedings but for convenience I will refer to the parties as they were in the First-tier Tribunal.

2. The appellants are nationals of Nepal. They appealed to the First-tier Tribunal against the decisions of the Secretary of State dated 9 September 2014 to remove them from the UK under section 10 of the Immigration and Asylum Act 1999. Judge of the First-

tier Tribunal Lingam allowed the appeals and the Secretary of State now appeals with permission to this Tribunal.

3. According to the papers before me the first appellant entered the UK in August 2009 as a Tier 4 General student. He and the second appellant married in June 2014 and she is his dependant for the purposes of these proceedings. The appellant undertook a Business Management course before going on to study an MSC in Healthcare at the University of West London. On 3 September 2014 the Secretary of State decided to remove the appellants. The notices served on the appellants advised that their right of appeal was exercisable after they had left the UK. In a letter dated 6 October 2014 the Secretary of State outlined the allegation that the first appellant had used a proxy test taker in taking an English test with the Educational Testing Service (ETS). The appellants appealed against the removal decisions and their notices of appeal were received on 8 September 2014.

4. First-tier Tribunal Judge Lingam issued a Direction on 18 May 2015 for the Secretary of State to file all relevant documentation relating to the appeals. The Secretary of State failed to do so and, as the appellants did not appear at the oral hearing, the Judge determined the appeals on the papers before her on 10 June 2015. In the absence of a respondent's bundle the Judge considered that that the Secretary of State had failed to particularise the assertion that the first appellant had passed his English language test using a 'proxy'.

5. The Secretary of State appealed against that decision on the grounds that the First-tier Tribunal Judge erred in considering the appeal because there was no jurisdiction for the First-tier Tribunal to hear the appeal as the appellants had no in-country right of appeal against the removal directions. The grounds of appeal contend that section 10 (1) (b) of the Immigration Act 1999 provides that a person may be removed where leave to remain has been obtained by deception and that section 92 of the Nationality, Immigration and Asylum Act 2002 provides that this type of immigration decision is only capable of an out-of-country appeal. It is contended that the First-tier Tribunal Judge materially erred in failing to properly establish jurisdiction.

6. At the hearing before me Ms Willocks-Briscoe relied in the decision in Mehmood & Another, R(on the application of) v SSHD [2015] EWCA Civ 744 to support her submission that the section 10 decision invalidated the leave of the appellants and that the appellants therefore only have an out-of-country right of appeal. She also relied on the decision in Virk & Others v SSHD [2013] EWCA Civ 652 to submit that statutory jurisdiction cannot be conferred by waiver or agreement or by the failure of the parties or the tribunal to be alive to the point and that it is open to either the First-tier Tribunal or the Upper Tribunal to take a point about jurisdiction even though it had not been raised.

7. Dr Chhetri referred to paragraph 49 of the Judgement of Beatson LJ in the decision in Mehmood where he states;

> "49. It was common ground that it is only where there are "special or exceptional factors" that the court will permit a substantive challenge to a removal decision by the Secretary of State pursuant to section 10 of the 1999 Act to proceed by judicial review rather than by the appeal channel provided by Parliament, here an out-of-country appeal: see *R*

> *(Lim) v Secretary of State for the Home Department* [2007] EWCA Civ 733, *R (RK (Nepal)) v Secretary of State for the Home Department* [2009] EWCA Civ 359; and *R (Anwar and Adjo) v Secretary of State for the Home Department* [2010] EWCA Civ 1279, reported at [2011] 1 WLR 2552. …."

8. Dr Chhetri submitted that there are exceptional circumstances in this case in that the appellants were not given the opportunity to reply to the allegations because the Secretary of State did not provide the documents to the First-tier Tribunal. He submitted that if removed the appellants will not get a fair trial as they would be unable to access legal advice. He submitted that the appellant and his wife are undertaking university studies which would be disrupted by removal. He also submitted that the appellant in the case of Mehmood has lodged an appeal to the Supreme Court. He further submitted that the first appellant has now submitted an application for leave to remain in the UK on the basis of his fear of return to Nepal as a result of his political activities. When I asked whether the appellants had sought a judicial review of the decisions in this case Dr Chhetri said that they had lodged JR applications in relation to the issue of disclosure of evidence in relation to the allegation of deception but not in relation to the jurisdiction issue. He submitted that in all the circumstances there were special and exceptional circumstances why the appellants' appeals should be considered in-country.

9. If jurisdiction does not exist in law it cannot be 'conferred' or 'accepted'. In Virk & Others v Secretary of State for the Home Department [2013] EWCA Civ 652 it was held that, although the Secretary of State had failed to raise before the First-tier Tribunal the issue of that Tribunal's jurisdiction to entertain an appeal, the Upper Tribunal was entitled to dismiss the subsequent appeal against the First-tier Tribunal's decision on the basis that the First-tier Tribunal had not had jurisdiction, notwithstanding that the point had not been raised below. The Court of Appeal said at paragraph 23;

> "Statutory jurisdiction cannot be conferred by waiver or agreement; or by the failure of the parties or the tribunal to be alive to the point. Although, as Longmore LJ pointed out, decisions taken without jurisdiction may in due course become irreversible, that point has not been reached in this case. It was, in my judgment, open to either the FTT or the UT to take the point about jurisdiction notwithstanding the failure of the Secretary of State to raise it herself."

10. In the instant appeals there is nothing in the papers before me to indicate that a duty judge considered the issue of jurisdiction. There is nothing to show that the Secretary of State raised the issue of jurisdiction in the First-tier Tribunal, in fact the Secretary of State did not provide any papers to the First-tier Tribunal at all.

11. However the refusal notices both told the appellants that they only had a right of appeal after the departure from the UK under section 82(1) of the Nationality, Immigration and Asylum Act 2002. The appellant's appeal in this case is limited to an appeal exercised after removal in accordance with section 92 of the 2002 Act.

12. Dr Chhetri submitted that the appellant's circumstances amount to 'special or exceptional factors' as outlined in the decision in Mehmood. However this submission can only be made in the context of a Judicial Review application seeking that remedy against a decision to remove where the right of appeal is only exercisable outside the UK.

13. In any event I do not accept that submission. The appellants in this case do not have any health problems. They did not submit any evidence to the Secretary of State or the First-tier Tribunal in relation to any circumstances which would cause them difficulty in returning to Nepal. They did not seek Judicial Review of the removal decisions. Whilst I note that the appellants have now made a further application for leave to remain in the UK this is made on an entirely different basis from the application under appeal in this case and on the basis of entirely different evidence.

14. In these circumstances I find that the First-tier Tribunal Judge erred in failing to consider the issue of jurisdiction in light of the assertion in the refusal notices that the appeals are only exercisable out-of-country. I therefore set aside the decision of the First-tier Tribunal in its entirety.

15. In these circumstances I find that the Judge made a material error of law by failing to consider whether she had any jurisdiction to hear the appeal before purporting to allow it. 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 appeals.

Conclusion:

The making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law.

There was no jurisdiction to hear the appeals and the decision of the First-tier Tribunal is set aside and remade by dismissing the appeals.

Signed Date: 23 November 2015

A Grimes
Deputy Judge of the Upper Tribunal