IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36303/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 26th August 2015	**On 17th September 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ISRAT JAHAN AZAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mrs R Pettersen, Home Office Presenting Officer
For the Respondent: Mr M Iqbal, Counsel instructed by Liberty Legal Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Hillis made following a hearing at Bradford on 9th January 2015.

Background

2. The claimant is a citizen of Bangladesh born on 14th February 1991. She entered the UK on 8th October 2011 as a Tier 4 (General) Student and had valid leave to remain until 30th November 2015.

3. On 28th August 2014 the Secretary of State curtailed her leave alleging that she had used deception in order to gain leave to remain in the UK, specifically that she had used a proxy test taker in her speaking test with the Educational Testing Service (ETS).

4. The claimant has always strenuously denied the allegation.

5. On 28th August 2014 she was served with a notice to a person liable to removal, and, on 2nd September 2014, she was served with a decision to remove an illegal entrant/person subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999. She was informed that she was entitled to appeal against the decision under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 after she had left the UK.

6. Nevertheless the appeal was listed before Judge Hillis when the Presenting Officer raised the issue of jurisdiction. It was her submission that the judge had no jurisdiction to determine the appeal since the claimant had no valid in country right of appeal.

7. The judge wrote as follows:

> "I heard lengthy submissions from both representatives which lasted an hour and ruled that I did have jurisdiction to deal with the appeal in country as there are issues of fairness, procedural regularity and adherence to the Secretary of State's own guidance as set out in her enforcement instructions and guidance at paragraph 50.12 to be resolved in this appeal. In reaching this conclusion I have taken particular guidance from the decision in R (Mohamed Bilal) v SSHD (section 10 removal) IJR [2014] UKUT 00265.
>
> I find a significant issue in this appeal is that the respondent did not at any time seek any explanation from the appellant nor did they seek to interview her or to speak to her college tutor at Bradford College where she is currently studying an LLB law course, the degree being conferred by Leeds Metropolitan University. She did not serve any of the original documentation concerning the ETS investigation into this appellant's test result and did not curtail the appellant's leave to remain under paragraph 322(1A) as stated in the witness statement of Rebecca Collings at paragraph 38."

8. The judge then considered the appeal on its merits and concluded that the removal decision was not in accordance with the law.

The Grounds of Application

9. The Secretary of State sought permission to appeal on the grounds that the judge had materially misdirected himself in considering that he had jurisdiction to hear the appeal and had failed to give adequate reasons for rejecting the Secretary of State's evidence in support of her assertion that the claimant had employed deception.

10. Permission to appeal was granted by First-tier Judge Parkes for the reasons stated in the grounds on 10th March 2015.

The Hearing

11. The claimant appeared at the Bradford hearing centre but her representative unfortunately misread the hearing notice and attended Field House instead.

12. This case has been adjourned on two previous occasions at the instigation of the Tribunal and on a third at the request of the claimant's representative who asked that it be heard after the Court of Appeal decision in R (on the applications of Sheraz Mehmood and Shabbat Ali) v SSHD [2015] EWCA Civ 744. This has now been promulgated. I was therefore most reluctant to adjourn on a fourth occasion. I explained to the claimant that I would request her representative to fax to me written submissions in support of her case, which I would consider before reaching my decision. I then heard brief representations from Mrs Pettersen, who relied on her grounds.

13. An hour later I received a detailed skeleton argument from the claimant's representative resisting the Secretary of State's application. In summary, it is as follows.

14. The claimant argues that making a decision under Section 10 of the 1999 Act is a discretionary power in that the Secretary of State could either make a decision under Part 9 of the Immigration Rules which would give rise to an in country right of appeal or under Section 10 of the 1999 Act. In this case she had not exercised her discretion which rendered the decision unlawful. The claimant relies on the authority in Ukus (discretion: when reviewable) [2012] UKUT 00307 when the Upper Tribunal said:

> "Where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (Section 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in SSHD v Abdi [1996] Imm AR 148. In such a case, it makes no difference whether there is such a statutory power as is mentioned in paragraph 1 above."

15. If the Secretary of State enjoyed unrestricted liberty to subject the claimant to a decision under Section 10 then every such claimant could be deprived of an in country right of appeal which cannot have been the intention of Parliament.

16. In order to make a Section 10 decision the Secretary of State had to have credible evidence of deception in compliance with her published policy which states that the evidence should be clear and unambiguous and proved to a high degree of probability that deception had been used to gain leave. The Secretary of State did not refer to the guidance anywhere in her correspondence, decision letters or the Grounds of Appeal. A public body cannot act otherwise than in accordance with its published policy and to act otherwise renders the decision unlawful.

Findings and Conclusions

17. In this case the relevant decision was made under Section 10(1)(b) of the 1999 Act which states that a person who is not a British citizen may be removed from the UK in accordance with directions given by an Immigration Officer if he uses deception in seeking (whether successfully or not) leave to remain.

18. Under Section 82(1) of the Nationality, Immigration and Asylum Act 2002, where an immigration decision is made in respect of a person he may appeal to the Tribunal.

19. Immigration decisions are defined in Section 82(2). The relevant subparagraph here is Section 82(2)(g), i.e. a decision that a person is to be removed from the UK by way of directions under Sections 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (removal of persons unlawfully in the UK).

20. Section 92 of the 2002 Act identifies which types of immigration decision may be appealed by a person whilst he is still in the UK, and which attract only an out of country appeal. It is quite clear from Section 92 that a decision under Section 82(2)(g) may only be appealed out of country.

21. In R (on the applications of Mehmood) the Court of Appeal recently considered the question of whether an out of country appeal was an adequate alternative remedy. Indeed it was not argued that the out of country appeal was not adequate in general terms. At paragraph 49 Beatson LJ said:

> "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 SSHD [2007] EWCA Civ 733, R (RK (Nepal)) v SSHD [2009] EWCA Civ 359; and R (Anwar and Adjo) v SSHD [2010] EWCA Civ 1279."

22. The courts have consistently held that the out of country appeal provided by Parliament is not unlawful. There is absolutely no support at all for the argument put forward that Parliament cannot have intended the result of Section 10 of the 1999 Act to be the deprivation of in country appeal rights. The Act is absolutely clear about which decisions attract an in country right of appeal and which do not. In this case the decision made attracts an out of country appeal only.

23. It follows that all arguments about whether the Secretary of State unlawfully failed to exercise her discretion or whether the evidence she relied on was capable of supporting the allegation of deception could not

have been considered by the judge at all. They can only be considered in the context of an out of country appeal which the claimant should exercise if she feels that the decision was wrong.

24. The judge plainly had no jurisdiction to determine this appeal.

Notice of Decision

The original judge's decision is set aside. It is remade as follows. The appeal is dismissed for want of jurisdiction.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Taylor