**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/08136/2015**

**THE IMMIGRATION ACTS**

**Heard at Field House** **Decision & Reasons Promulgated**
**On 19 April 2016** **On 10 May 2016**

**Before**

**UPPER TRIBUNAL JUDGE WARR**

**Between**

**AWAIS KHALIQ**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Biggs, Counsel, instructed by Hanson Young Solicitors
For the Respondent: Mr Avery

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan born on 10 January 1988. He was granted leave to enter the UK as a Tier 4 (General) Student on 2 September 2010 until 23 April 2012. He was granted further leave to remain until 15 January 2015 in the same capacity. On 31 August 2013 he applied for further leave to remain but this application was refused. On 16

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February 2015, on the basis that the educational testing service (ETS) had confirmed to the respondent that the appellant's English language test had been obtained through deception, the application was refused under paragraph 322(1A) of the Immigration Rules. The application for leave to remain as a Tier 4 (General) Student was refused. On the same date the respondent took a decision to remove the applicant stating that he had the right of appeal from outside the country.

2. Undaunted by this the appellant appealed in-country and his appeal came before the First-tier Tribunal on 3 September 2015. The appellant was represented by Mr Biggs on that occasion.

3. Mr Biggs applied for an adjournment of the hearing before the First-tier Tribunal on the basis that he had been served a respondent's bundle on the day of the hearing and a jurisdictional issue had been raised by the respondent.

4. The Presenting Officer before the First-tier Tribunal raised no objection to the adjournment request.

5. The First-tier Judge found that in respect of the bundle of documents served on the day of the hearing the appellant had an out of country appeal referring to **Mehmood and Ali v Secretary of State** **[2015] EWCA Civ 744** and that there was no jurisdiction to determine the appeal against the removal decision.

6. In relation to the claim under Article 8 Mr Biggs referred to Section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 and the case of **Nirula v First-tier Tribunal** **[2012] EWCA Civ 1436**. However the judge found that when the appellant had applied for further leave to remain there was no reference to any claim pursuant to Article 8. The first time there had been a reference to a potential Article 8 claim was within the appeal form itself. The appeal form was dated 19 February 2015 and was lodged with the Tribunal on 25 January 2015. The appeal post-dated the removal decision. It was clear from **Nirula** that the claim had to precede the appeal and that had to mean the institution of an appeal rather than the date of hearing. The judge found no reason to adjourn and dismissed the appeal for want of jurisdiction.

7. Counsel settled grounds of appeal pointing out there had been procedural unfairness in that material had been handed to Counsel on the day of the hearing in support of the claim that the appellant had used deception. It was further indicated by the Home Office Presenting Officer that the respondent would take a jurisdictional point and in the light of these two matters Counsel had applied for an adjournment at the outset of the hearing taking the point that the jurisdictional issue was not clear cut and that the appellant's case was that there was jurisdiction because a human rights claim had been made before the issuance of the appeal on 25 February 2015 and this point had been left open by the Court of Appeal in **Nirula** at paragraph 25. As I have said, the Presenting Officer agreed to the adjournment application on both the grounds it was put.

8. The judge returned and refused the application on the jurisdictional issue. Counsel then invited the judge to hear him in full on the question of jurisdiction. The question of jurisdiction had been outlined during the course of the application for the adjournment. This request was refused.

9. It was contended that the judge had failed to make any findings of fact that were necessary not having the benefit of hearing Counsel make his submissions on the evidence. There had been accordingly procedural unfairness. The First-tier Tribunal granted permission to appeal finding it was necessary to explore the issue of jurisdiction and the judge may have erred in law.

10. In the respondent's response it was pointed out that there could have been no surprise in the point taken on jurisdiction since this had been raised in the notice of the immigration decision which had been served upon him. The human rights claim must precede any appeal which must be made in person to the Secretary of State.

11. Counsel at the hearing before me relied on the grounds of appeal and stated that the appellant had made his application on an Article 8 basis when encountered on 16 February 2014. The respondent had served a Section 120 notice on the appellant on 20 February 2016 and a response had been filed on 22 February 2016. A letter had been sent on 19 February 2016 and the appeal had been issued on 25 February 2016.

12. Mr Avery had not previously had sight of the Section 120 notice and noted that it was puzzling why it had been served.

13. Counsel informally lodged a bundle including the Section 120 notice and the response and an appellant's witness statement. Counsel pointed to the Home Office case notes on 19 February 2015 mentioning the appellant's relationship to a British citizen who was in the house with the appellant.

14. At the conclusion of the submissions I reserved my decision. I can only interfere with the decision if there was a material error of law. I am confident that the First-tier Tribunal Judge did not intend to act in any way unfairly and may not have appreciated the fact that Counsel had intended to develop his submissions on the jurisdiction issue had the adjournment application been refused. However the end result is that the matter was not properly explored and as it is a matter going to jurisdiction the point cannot be brushed aside. The Tribunal either has jurisdiction or it does not. This was an application which was not opposed by the Presenting Officer, in fact she agreed to it.

15. In the premises the judge was not given the benefit of Counsel's full argument on the question of jurisdiction and she might have assumed the point was more cut and dried than in fact Counsel maintained that it was on the particular facts of this case. As was pointed out by Counsel in the grounds of appeal, the requirement that a claim could be made after the

Section 10 decision but before the issuance of an appeal had been left open by the Court of Appeal. In the premises I am satisfied that the judge did err in law on a procedural point and accordingly it is open to me to consider the fuller evidence that has now been put forward. This raises a new and complicating factor in that the respondent appears to have served a Section 120 notice on the appellant and the response was filed by the appellant in time. Mr Avery did not have notice of this material until the hearing before me. If this Section 120 notice is what it appears to be, there would arguably be some fault on both sides for not bringing it to the attention of the First-tier Judge. Service of the notice might arguably give some support to the appellant's claim that the Secretary of State was made aware of the Article 8 dimension to his case at a time which may have relevance to the determination of the jurisdictional issue.

16. It is plain that the matter could not be resolved by me given the late service of the evidence and in any event it appears desirable that the appeal should be heard afresh in the light of the extent of the fact finding required. It will be necessary, for example, to hear from the appellant about the precise sequence of events and it will be necessary for the respondent to give consideration to the effect of the Section 120 notice if any on the jurisdictional point.

**Notice of Decision**

17. This appeal is accordingly remitted to be heard afresh before a different First-tier Judge.

18. The appeal is allowed to the extent indicated.

**Fee Award**

19. The First-tier Judge made no fee award and it is not appropriate to make one at this stage.

20. No anonymity direction is made.

Signed Date 3 May 2016

G Warr
Judge of the Upper Tribunal