



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA367532014

THE IMMIGRATION ACTS

Heard at Field House

On 3rd May 2016

**Decision & Reasons
Promulgated
On 8th June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR JASPAL SINGH

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Miss A Cooke, Counsel instructed by Bhogal Partners
Solicitors

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. For ease of comprehension, the parties are referred to by their status before the First-tier Tribunal.
2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Lloyd allowing the Appellant's appeal against the Secretary of State's decision dated 22 August 2014 notifying the Appellant

of his liability to removal pursuant to section 10 of the Immigration and Asylum Act 1999 and simultaneously curtailing his leave.

3. The First-tier Tribunal promulgated its decision allowing the Appellant's appeal against the Respondent's decision on 12 August 2015.
4. The Respondent appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Simpson. The grounds upon which permission to appeal was granted may be summarised as follows:
 - (i) It is arguable that the judge did not have jurisdiction to hear the appeal as the appeal was instigated and lodged while the Appellant was in the United Kingdom.
5. It is of note that both parties were represented before the First-tier Tribunal, and neither party, particularly the Respondent raised this issue prior to these grounds of appeal.

Error of Law

6. At the close of submissions I indicated that I would reserve my decision. I find that there is no error of law in the First-tier Tribunal's decision. My reasons for so finding are as follows.
7. It was not in dispute that the Respondent could bring a jurisdictional point on appeal at this stage and it was accepted that I was apprised of the appeal and held the requisite jurisdictional capacity to dispense with the issue on appeal. The authority relied on by both parties to this extent is *Virk and Others v Secretary of State for the Home Department* [2013] EWCA Civ 652.
8. The chronology underlying the lodging and instituting of the appeal by the Appellant are of importance. It is also pertinent to note that the point taken on appeal by the Respondent was not raised by her at the First-tier Tribunal but only on appeal, although this would not be reason in of itself to reject the appeal pursued. Miss Cooke makes clear that the Appellant's solicitors lodged the appeal form IAFT-3 on 23 September 2014 by special delivery and that the Appellant left the United Kingdom thereafter on 25 September 2014. Ms Fijiwala did not seek to take issue with that date even though the Grounds of Appeal to the First-tier Tribunal sought to suggest that the date of departure was 26 September 2014.

9. The crux of the appeal turns upon when the appeal was instituted, that is to be gauged as far as possible by reference to the Asylum and Immigration Tribunal (Procedure) Rules 2005 (hereinafter the “2005 Rules”) which both parties accept was in force at the relevant time. According to those Procedure Rules, Rule 6 which is entitled “Giving Notice of Appeal” and sub-paragraph 1 of that rule states as follows:

“An appeal to the Tribunal may only be instituted by giving notice of appeal against a relevant decision in accordance with these Rules”.

10. According to Rule 55 of the 2005 Rules entitled “Filing and Service of Documents”, under sub-paragraph 1, a Notice of Appeal can be filed by post, document exchange, fax or e-mail specified for that relevant purpose. Miss Cooke relied on Rule 55 sub-paragraph (5) which states that any document that is served on a person in accordance with the Rule shall, unless the contrary be proved, be deemed to be served:

(a) where the document is sent by post or document exchange from and to a place within the United Kingdom on the second day after it was sent.

11. In that regard Miss Cooke submits that the Notice of Appeal was sent on 24 September 2014 and should be deemed to have been received on 26 September 2014. Ms Fijiwala on the other hand highlights that the IAFT-3 is stamped as being received by the First-tier Tribunal on 24 September 2014, the day after it was sent.

12. However, in my view, nothing turns upon Rule 55. This is because receipt of the application is not to be conflated with the institution of proceedings. This is easily illustrated by the fact that receipt of the IAFT-3 on 24 September 2014 (based upon the stamp seen on the appeal form) did not result in the institution of an appeal to the First-tier Tribunal. This is because after receipt of the appeal on 30 October 2014, the First-tier Tribunal wrote to the Appellant’s solicitors stating that the appeal appeared to have not been lodged in time, to which the Appellant’s solicitors replied by letter dated 4 November 2014 that it was sent by them on 23 September 2014 by special delivery after several failed attempts to fax the Grounds of Appeal the same day.

13. However, following the Appellant’s solicitors’ letter of 4 November 2014, the First-tier Tribunal again wrote to the Appellant’s solicitors on 15 December 2014 directing both the Appellant’s representatives and the Respondent to confirm if or when the Appellant left the United Kingdom. The Respondent does not appear to have engaged with those directions at all, however the Appellant’s solicitors did and replied by letter dated 22

December 2014 stating that the Appellant left the United Kingdom voluntarily on 25 September 2014.

14. According to the notes held on the Tribunal's file, which neither the Appellant nor the Respondent had a copy, the appeal nonetheless proceeded despite the Tribunal being on notice of the above jurisdictional issues. This is clear due to the following later note which appears on the Tribunal's file dated 12 March 2015. This file note proceeds directly from the manuscript note by the First-tier Tribunal on 4 December 2014 and 15 December 2014 and again on 22 December 2014 directing the parties to engage with the jurisdictional issues. The note on the Tribunal's file of 12 March 2015 reads as follows:

*Proceed

He lodged his appeal after he left the UK so its valid.

D Burrell

12/3/15

15. That decision demonstrates that the First-tier Tribunal was aware that there was an issue in relation to the validity of the appeal as to when the Appellant left the United Kingdom. In my view the decision of the First-tier Tribunal on 12 March 2015 indicates the clear date upon which the Tribunal accepted the Appellant's IAF3 form and Grounds of Appeal and Notice of Appeal as being validly lodged and the appeal proceedings being instituted for the first time. Neither representative was able to point me to any definition of the term "institution of proceedings", however to my mind and without further guidance, this decision of the First-tier Tribunal does appear to fit that description given the jurisdictional queries from the First-tier Tribunal as to the validity of the appeal and when the appeal would have become valid *de facto*. This is in keeping with section 104 of the Nationality, Immigration and Asylum Act 2002 (hereinafter the "2002 Act") which makes clear that an appeal is pending when it is "instituted".

16. I am furthermore of the view that the First-tier Tribunal would have been aware of the file note and this jurisdictional issue, despite objection not being raised by any party in that regard. This is obvious because paragraph 5 of the determination states as follows:

The Appellant returned to India on 26th September 2014. However, he presented a Notice of Appeal on 24th September 2014 which is the basis of the present hearing before this Tribunal.

17. I am fortified in my decision and am mindful in particular of the overriding objective of dealing with cases "fairly and justly" in reaching my decision and in my above interpretation of the rules against the instant facts, pursuant to Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

18. Miss Cooke highlights that this appeal is an extremely important one to the Appellant given that by virtue of this decision he has established that he did not use deception in his previous ETS/TOEIC examinations and consequently did not use deception as previously alleged by the Respondent and successfully challenged on appeal. Indeed, given that the Respondent did not seek to challenge any finding in the determination of the First-tier Tribunal other than this jurisdictional point, the deprivation of the appeal outcome, and the unchallenged findings on appeal in particular, would have immensely severe consequences for the Appellant given the serious accusations of deception.
19. Were the determination to be overturned and set aside, according to Ms Fijiwala there would be no jurisdiction to hear the appeal given that the appeal was brought according to her submissions on 24 September before the Appellant left the United Kingdom on 25 September this would make the appeal invalid under Section 82 and under Section 92 of the 2002 Act.
20. It seems to me that even if I am wrong in my above analysis of the appeal, the findings on appeal and the appeal outcome should be preserved in light of the overriding objective under Rule 2(2)(a) and (b) and the need to *“(deal) with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties”, “avoiding unnecessary formality and seeking flexibility in the proceedings”*. Notwithstanding the reasons I have already given that Ms Fijiwala’s submissions are misguided, I am further exercised by the overriding objective and in my view fairness and justice demands that the determination of the appeal remain undisturbed, particularly given that the appeal represents the only independent adjudication of whether the Appellant used deception or not in his English language tests, the benefit of which he should not be deprived of, given that his Notice of Appeal even if received on 24 September 2014 before his departure was not considered valid until the decision of 12 March 2015 when the proceedings were instituted.

Decision

21. The decision of the First-tier shall stand and is hereby affirmed.
22. The First-tier Tribunal did not make a fee award and I have not been asked to depart from that decision.

Signed

Date 01/06/2016

Deputy Upper Tribunal Judge Saini