



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

Appeal Number: IA/00092/2018

THE IMMIGRATION ACTS

Heard at Field House

On 7 March 2019

**Decision & Reasons
Promulgated
On 1 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR GURMEET SINGH
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Ms S Jones, Senior Home Office Presenting Officer

For the Respondent: Ms R Popal, instructed by ATM Law Solicitors

DECISION AND REASONS

1. Although the Appellant in these proceedings is the Secretary of State I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a national of India, appealed to the First-tier Tribunal against the decision made by the Secretary of State on 7th May 2014 to refuse his application for leave to remain as a Tier 4 (General) Student Migrant under the points-based system. First-tier Tribunal Judge Dhaliwal allowed the appeal. The Secretary of State now appeals to this Tribunal

with permission granted by Designated Judge Peart on 27th November 2018.

3. The Secretary of State's decision to refuse leave to remain was based on the conclusion by the Secretary of State that the Appellant had obtained a TOEIC certificate from Educational Testing Services (ETS) by deception and the application was refused under paragraph 322(1A) of the Immigration Rules. The Secretary of State indicated on the reasons for refusal letter that there was no right of appeal against that decision and served at the same time a decision to remove the Appellant indicating that he had a right of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 after he had left the United Kingdom.
4. It appears that the Appellant took no action against this until 2018 when, under a covering letter from his solicitors dated 25th April 2018, he lodged a Notice of Appeal against that decision. The covering letter contended at the outset that the Appellant was entitled to an in-country right of appeal and requested that the First-tier Tribunal accept jurisdiction. According to the Tribunal file, on 16th May 2018 the Appellant's solicitors wrote to the Tribunal seeking an urgent decision in relation to jurisdiction given that the Appellant was to be removed that day. According to the papers on the Tribunal file a Duty Judge made a decision on 22nd May 2018 that there is an in-country right of appeal in light of the decision in **Ahsan and Others v SSHD [2017] EWCA Civ 2009**. The parties were advised on a notice of hearing issued on the same date that there would be a hearing on 12th October 2018.
5. It appears from the papers before me that the Secretary of State requested that the Tribunal give urgent consideration to the matter of the validity of the appeal and a direction was issued by Designated Judge McCarthy on 6th June 2018 to both parties stating that the Tribunal was satisfied that there was a valid in-country appeal and that the hearing would take place as listed in light of the decision in **Ahsan**.
6. The hearing took place on 12th October 2018 before First-tier Tribunal Judge Dhaliwal. In her decision she addressed the issue of jurisdiction at paragraph 3 stating the background to the lodging of the appeal and confirming that the Tribunal accepted the Appellant's appeal as being a valid appeal and extended time.
7. First-tier Tribunal Judge Dhaliwal went on to consider the evidence before her and concluded that the Secretary of State had not discharged the burden of proving that the Appellant had practised deception in relation to the TOEIC certificate. The judge allowed the appeal on human rights grounds.
8. In the Grounds of Appeal the Secretary of State seeks to challenge that decision on one ground only. It is contended that the Tribunal erred in accepting that there was jurisdiction to hear the appeal in the circumstances. It is contended that the First-tier Tribunal erred in its

approach to the decision in **Ahsan** which, it is contended, is not authority for the proposition that any decision certified under Section 94(1) or Section 10 which involves ETS can be appealed in-country. It is contended that **Ahsan** finds that current arrangements in place for an out-of-country appeal do not provide an effective remedy and therefore a breach of the right to a fair hearing or effective remedy and that it does not automatically follow that a court is entitled to assume jurisdiction contrary to a statutory provision. It is asserted that the Secretary of State may put in place measures to ensure a fair hearing takes place for evidence to be taken through video conferencing or may withdraw the decision and issue a decision that does confer an in-country right of appeal. It is contended that it does not allow a Tribunal to assume jurisdiction where it does not have jurisdiction.

9. Although she did not concede the appeal Ms Jones felt unable to make any submissions in relation to the matter. Ms Popal pointed out that, in circumstances such as this where the Appellant appealed to the First-tier Tribunal asking for a decision in relation to jurisdiction which the First-tier Tribunal subsequently made, it is up to any party who disagrees with that decision to challenge that decision by way of a judicial review in accordance with the **Cart** principles. She further relied on the decision in **Saqib Zia Khan v Secretary of State [2017] EWCA Civ 424** paragraph 18 and 19. She pointed out that the Secretary of State had failed to exercise this remedy and that in light of the timeframe was now out of time for seeking to exercise this remedy. She submitted that the Secretary of State is using the error of law stage to challenge the decision of jurisdiction when it could have been challenged at an earlier stage. She highlighted that the Secretary of State was not challenging the substantive aspects of this decision but simply the jurisdictional issues. In her submission this was not the correct forum. She submitted further that the Secretary of State only raised this issue in the application for permission to appeal to the Upper Tribunal after the appeal had been allowed this amounts to an abuse by the Secretary of State. She referred to the cases of **Ahsan, Kiarie and Byndloss v Secretary of State for the Home Department [2017] UKSC 42** and submitted that these decisions all indicate that an out-of-country appeal is not a sufficient remedy. She also referred to the case of **Khan v Secretary of State for the Home Department [2018] EWCA Civ 1684**. She submitted that in all of these authorities it was accepted that there would be human rights decisions with a right of appeal issued but that did not happen in this particular case. In any event in her submission the Secretary of State's remedy was to challenge the original decision and it is not clear why he had failed to do so.
10. Ms Jones relied on the cases of **TM (S94 certificate: jurisdiction) Zimbabwe [2006] UKAIT 00005** and **Rahman v Secretary of State for the Home Department [2018] EWCA Civ 1572**. She accepted that the case of **Rahman** related to the issue of costs. She accepted that this was a two-stage process.

Error of Law

11. I accept the submission put forward by Ms Popal that the appropriate remedy for the Secretary of State was to challenge the decision of the First-tier Tribunal to admit jurisdiction following receipt of the Appellant's appeal. This decision was notified on 6th June 2018 and is a clear decision that the First-tier Tribunal considered that it had jurisdiction in relation to this appeal. The Secretary of State did not challenge that decision. The First-tier Tribunal Judge went on to hear the appeal noting that the issue of jurisdiction was not in dispute at paragraph 3. The Secretary of State was not represented at that hearing and did not challenge the jurisdiction issue. In my view it is not appropriate for the Secretary of State to seek to challenge now the jurisdiction of the First-tier Tribunal by way of an appeal on a point of law to the Upper Tribunal. This is not the appropriate forum. In any event the First-tier Tribunal allowed the appeal on human rights grounds. There is no challenge to the basis on which the First-tier Tribunal Judge did so. I see no merit in the Secretary of State's challenge in these circumstances.

Notice of Decision

There is no material error of law in the decision of the First-tier Tribunal. The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date: 27th March 2019

A Grimes

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 27th March 2019

A Grimes

Deputy Upper Tribunal Judge Grimes