IAC-TH-WYL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31177/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th September 2015	**On 29th October 2015**
Prepared 23rd October 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR ANANTH CHINNUSAMY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Sowerby of Counsel
For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of India born on 4th June 1987. He appealed against the decision of the Immigration Officer made on 18th June 2014 to refuse to grant him leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant. His appeal was allowed by Judge of the First-tier Tribunal Lucas sitting at Victory House on 8th January 2015 to the extent that the Respondent's decision (to refuse to grant

leave to remain) was not in accordance with the law and therefore remained outstanding before the Respondent to take. The Respondent has appealed that decision and the matter has therefore come before me as an appeal by the Respondent to determine in the first place whether there was an error of law in Judge Lucas's decision. For the sake of convenience however I will continue to refer to the parties as they were referred to at first instance.

2. The Appellant was first granted leave to enter the United Kingdom on 25th August 2009 as a Tier 4 (General) Student valid until 30th October 2011. This was extended until 20th September 2014. However on 15th January 2014 eight months before the Tier 4 leave was due to expire the Respondent curtailed the Appellant's leave such that it now expired on 16th March 2014. This meant that the Appellant had to apply before that date if he wished to extend his leave and this he duly did on 19th February 2014. He made a combined application for leave to remain in the United Kingdom as a Tier 4 General Student Migrant under the points-based system and for a biometric residence permit. It was the refusal of the 19th February 2014 application by the Respondent that gave rise to the present proceedings.

The Explanation for Refusal

3. The letter informing the Appellant of the Respondent's decision stated that the Appellant did not have a right of appeal against it. The concern of the Respondent in this case was that the Appellant had submitted TOEIC certificates from the Educational Testing Services. During an administrative review process ETS had confirmed that the Appellant's test results were obtained through deception. As the results could not be authenticated the scores from the test year taken on 22nd February 2012 at Portsmouth International College had been cancelled. The Appellant's application was refused under paragraph 322(1A) of the Immigration Rules. This provides that where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Respondent or a third party variation of leave to remain is to be refused.

4. The letter went on to say that the Appellant had claimed 30 points under Appendix A of the Immigration Rules for a CAS but the Respondent was not satisfied he had a valid CAS. The reference number submitted with the Appellant's application had been withdrawn by the Sponsor. As a result the Appellant was liable to administrative removal as defined in Section 10 of the Immigration and Asylum Act 1999 because ETS had confirmed that the Appellant's test results were obtained through deception. It was not unfair to serve the Appellant with Form IS 151A which is a notice to a person liable to removal. The Appellant was awarded no points for a CAS because of the withdrawal of the CAS by the Appellant's Sponsor.

The Appeal Against the Respondent's Decision

5. The Appellant appealed against the Respondent's decision on Form IAFT-1 on 8th August 2014. In his Grounds of Appeal the Appellant explained that his first college

had been closed and his leave to remain was curtailed to expire on 14th March 2013 when he was given 60 days to submit a new application. This he duly did and leave to remain was granted until 25th June 2013. Unfortunately his second college was also closed and his leave to remain was again curtail this time to expire on 16th March 2014. He made a third in-time application for a Tier 4 (General) Student visa on 19th February 2014 but this was apparently refused on 18th June 2014, his Grounds of Appeal adding "according to Home Office records". The Appellant denied that he had been served with this decision of 18th June 2014 and was unaware that his application had been refused.

6. He was arrested by immigration authorities on 4th August 2014 and served with an undated refusal letter which contained no right of appeal. He was never served with the Respondent's decision of 18th June 2014. Removal directions were served on him on 7th August 2014 which were to be carried out on 20th August 2014. The undated refusal letter wrongly notified the Appellant he had no right of appeal and therefore failed to comply with the Immigration (Notices) Regulations 2003 which required the Respondent to notify the Appellant of a right of appeal. Time had not therefore begun to run against the Appellant although the Appellant appreciated that by appealing he waived the requirements of the Notices Regulations citing the case of **C (Jamaica) [2011] UKUT 121**.

7. On the other hand if the Tribunal took the view that time was running against the Appellant he argued that there were special reasons to justify extending time. The letter of rejection was not served on the Appellant until 4th August 2014 when he was arrested even though the decision (to refuse the Appellant's third application for leave to remain as a Tier 4 student) was purportedly made on 18th June 2014. In any event the Respondent's decision to treat his in-time application for leave to remain as invalid was procedurally unfair. The Respondent should have notified the Appellant of any deficiency in the application so that the Appellant had the opportunity to make good that deficiency. The Respondent's decision was not in accordance with the law.

The Issue of the Validity of the Appeal

8. The Appellant's appeal received on 8th August 2014 raised on the face of it an issue as to the validity of the Notice of Appeal. The matter was referred to Judge of the First Tier Tribunal Fisher, who was the Duty Judge at Arnhem House on 12th August 2014. He directed that the appeal should proceed to a hearing "at which point the Judge can hear evidence and decide whether there is a valid appeal and if so whether it was in-time and whether time should be extended". Judge Fisher noted that the refusal letter which was undated asserted there was no right of appeal but a similarly undated Notice of Decision suggested that there was an out-of-country right of appeal. This was a reference to Form IS 151A Part 2 which was addressed to the Appellant and informed him he had been served with Form IS 151A (informing him of his immigration status and liability to detention and removal).

9. The IS 151A Part 2 did not give a date when the Appellant had been served with IS 151A but did inform the Appellant that a decision had been taken to remove him from the United Kingdom which he was entitled to appeal once he had left the United Kingdom. Similarly no date of service of the IS 151A Part 2 was given although it appears from the Appellant's Grounds of Appeal which I have summarised above that removal directions were served on the Appellant on 7th August 2014 which would therefore appear to be the date of service of the IS 151A Part 2.

10. The appeal was listed and the Respondent was notified. This prompted the Respondent to write to the Tribunal on 12th August 2014 stating that the Tribunal had no jurisdiction in this case as there was no in-country right of appeal. The Respondent's letter stated that the IS 151A Part 2 was issued by the Respondent on 25th July 2014. The decision to remove under Section 10 was an immigration decision by virtue of Section 82(2)(g) of the Nationality, Immigration and Asylum Act 2002 which carried a right of appeal to the Tribunal under Section 82(1) of that Act. However Section 92(1) of the 2002 Act provided that a person may only appeal from within the United Kingdom where that Section applied. A decision under Section 82(2)(g) did not fall within Section 92(2) or (3) and Section 92(4) did not apply in this case.

11. Paragraph 6 of the Respondent's letter addressed the issue of whether the curtailment of the Appellant's leave might of itself give rise to an in-country right of appeal. The Respondent wrote:

> "It may be argued by the Appellant that there is an in-country right of appeal because the Section 10 decision made is also a Section 82(2)(e) decision, that is a curtailment decision. That would be wrong in law, the Court of Appeal held in **RK (Nepal) [2009] EWCA Civ 359** that curtailment of leave and a Section 10 removal are two distinct immigration decisions, they are not the same and a Section 10 decision only attracts an out-of-country appeal."

12. The Respondent's subsequent decision of 26th July 2014 to refuse to grant leave to remain was not an immigration decision under Section 82 because it concerned a refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal was that the person had no leave to enter or remain. That was not the situation in this case as the effect of the previous Section 10 decision made by the Respondent against the Appellant meant that any existing leave to enter or remain in the United Kingdom the Appellant might have was invalidated under Section 10(8). The Appellant had no leave to enter or remain at the time the decision to refuse to vary his leave to remain was notified to him. The only immigration decision that gave rise to a right of appeal in this case was the Section 10 removal decision and that was an out-of-country right of appeal only.

13. The Tribunal was requested to dispose of this matter in accordance with Rule 9 of the Procedural Rules 2005. I pause to note here that last point cites the wrong rule. The present procedure is governed by Rule 22 of the Tribunal Procedure Rules 2014 which provides that the Tribunal may not accept the Notice of Appeal where there is

no appealable decision and if it does not accept that Notice of Appeal it must notify the person providing the Notice of Appeal and the Respondent can take no further action on the Notice of Appeal.

14. The Respondent also relied on the authority of **Nirula [2012] EWCA Civ 1436** that as no human rights claim had been made to the Respondent before the purported appeal was lodged no right of appeal exercisable under Article 8 of the European Convention on Human Rights (right to respect for private and family life) could arise in this case.

The Hearing at First Instance

15. In view of the direction of Judge Fisher the Tribunal did not deal with the Respondent's letter there and then but the matter remained outstanding when it came before Judge Lucas on 8th January 2015. The determination of Judge Lucas is brief and he did not deal with the issue of whether the Appellant had a right of appeal out-of-country only but instead confined himself to the Appellant's complaint that he should have been given 60 days' leave in order to obtain a new CAS from a new Sponsor following the withdrawal of his CAS. After noting that both parties were represented before him he stated at paragraph 3:

> "An issue was to arise in this case that was to have the effect of frustrating its progress. It was agreed by both parties to this appeal that the refusal decision was made on the basis that the Appellant did not have a valid Confirmation of Acceptance for Studies (CAS). On behalf of the Respondent Mr Armstrong was to concede that the Appellant had not been given the appropriate 60 days' leave in order to obtain a new CAS from a new Sponsor. He was to state that this "should" have been done. He therefore accepted that the refusal decision was defective in this fundamental respect. Under these circumstances both parties to this appeal agreed that the appropriate course was for this appeal to be remitted to the Respondent for reconsideration on the basis that the Appellant should be given a further 60 days to identify a new Sponsor in order to issue a CAS certificate."

He allowed the appeal to that limited extent.

The Onward Appeal

16. The Respondent appealed Judge Lucas' decision saying that he had made a material misdirection in law because the Appellant was only entitled to appeal the Section 10 removal decision after he had left the United Kingdom. The Tribunal had no jurisdiction to hear the Appellant's appeal in-country. The grounds went on to summarise what had already been said by the Respondent in her letter of 12th August 2014 (see paragraphs 10 to 14 above) but this time cited the authority of **Mahmood**, a decision of the Upper Tribunal (**[2014] UKUT 00439**), and a further Upper Tribunal authority of **Ali [2014] UKUT 494**. The Appellant plainly did not have an in-country right of appeal and the First-tier Tribunal had materially erred in failing to properly establish jurisdiction. In the alternative there was no legitimate reason for Judge Lucas to remit the appeal for reconsideration. The Appellant had used deception

and even if there was jurisdiction to hear the appeal Judge Lucas should have substantively considered this issue in his findings before disposing of the appeal.

17. That latter argument appears to be based on the premise that paragraph 322(1A) is a mandatory ground for refusal. Thus even if the Appellant was entitled to an in-country right of appeal and there was merit in his argument that he should have been afforded a further 60 days to find a third college he could not satisfy the requirements in the Immigration Rules that he did not fall for refusal under the general grounds. The Appellant fell for refusal under the general grounds because of the alleged deception.

18. The application for permission to appeal came on the papers before Judge Hollingworth on 10th March 2015. He refused permission to appeal stating that the judge had carefully set out what had taken place at the hearing before him.

> "The permission application contradicts the position adopted by the Presenting Officer on behalf of the Respondent. No indication was given to the judge of the issues now raised. No error of law vitiates the determination which would lead to a different outcome in the light of the stance adopted by the Respondent at the hearing."

The grant of permission appears to assume that the Respondent's letter of 12th August 2014 which did indeed set out in some detail why the Respondent argued that there was in fact no valid appeal was no longer relied upon. It does appear that the Presenting Officer, Mr Armstrong did not refer to the Respondent's letter of 12th August 2014.

19. The Respondent renewed her application for permission to appeal on the same grounds as before and the matter came on the papers before Deputy Upper Tribunal Judge Kamara on 12th June 2015. She granted permission to appeal stating she disagreed with the reasoning of Judge Hollingworth who had previously refused permission. She wrote:

> "The Respondent made a decision to remove the Appellant pursuant to Section 10(1)(b) of the 1999 Act as it is said that he obtained leave to remain by obtaining a TOEIC certificate from ETS by deception. The notice of immigration decision states any right of appeal is only exercisable from abroad. This matter had been before a Duty Judge however no decision on validity had been made; the matter being left for the First-tier Tribunal Judge at the substantive hearing. This jurisdictional issue went unaddressed by the First-tier Tribunal Judge despite the Respondent having sent detailed submissions on the issue on 12th August 2014. There is also merit in the second ground regarding whether the judge ought to have considered the issues before him, if jurisdiction was established, rather than "remitting" the matter to the Respondent.

The Authority of Mehmood

20. I was handed a copy of the decision of **Mehmood [2015] EWCA Civ 744**, a Court of Appeal decision on a test case behind which apparently 27 other appeals had been stayed. In **Mehmood** the Appellants had been given notice by the Respondent of a decision to remove them having refused their applications for variation of leave pursuant to Section 10(8) of the 1999 Act. The Court of Appeal stated that there were

two questions which arose. The first was whether a person whose leave to be in the United Kingdom had been invalidated by the Respondent and who had also made a decision to remove the Appellant had an in-country or an out-of-country appeal.

21. The second question related to the Judicial Review procedure and concerned the circumstances in which notwithstanding there was a right to an out-of-country appeal it was appropriate for the matter to be dealt with in Judicial Review proceedings. This gave rise to considerations of whether the circumstances were sufficiently exceptional or special to make it appropriate to use Judicial Review to challenge decisions which could be challenged by an out-of-country appeal.

22. Interestingly at paragraph 7 the Court of Appeal raised a third question known as the sequencing question. The Court of Appeal put the matter thus:

> "Does the sequence of the notices of the decision invalidating [the Appellant's] leave and the decision refusing his application for a variation of his leave mean that his right is to an in-country appeal whatever? In answer to the first question [whether there is an in or out-of-country appeal] is the relevant date the date on the decision letter when it was assumed it was made or is it the date on which notice in writing of the decision was given to [the Appellant]?

Mr Mehmood was found to be working unlawfully. The second Appellant Mr Ali was considered to have obtained his ETS certificate by deception. The Court of Appeal confirmed the decision in **RK (Nepal)** that unless there were special or exceptional factors an out-of-country appeal was regarded by Parliament as an adequate safeguard for those removed under Section 10 of the 1999 Act. The existence of disputes of fact was rarely likely to constitute special or exceptional factors. Procedural fairness could be considered in the appellate process and were also unlikely to constitute special or exceptional factors. The Section 10 removal notices requiring the Appellant to leave the jurisdiction might be a real detriment but the fact that some inconvenience would result from being required to leave the United Kingdom was not in itself special or exceptional."

23. Finally at paragraph 72 the Court of Appeal stated:

> "… Mr Ali did not receive prior notice of the removal notice. This did not preclude him responding to the notice in the way Mr Mehmood did by making representations or by providing further evidence to the Secretary of State. … At least the gist of the evidence upon which a removal decision under Section 10 of the Immigration and Asylum Act 1999 is taken must be communicated to the subject of that decision at the time that the decision itself is communicated … That question and other matters of procedural fairness can be considered in the appellate process. They are unlikely to constitute a special or exceptional factor and do not in Mr Ali's case."

The Hearing Before Me

24. In consequence of the grant of permission the matter came before me to determine in the first place whether there was an error of law in the judge's decision such that it should be set aside and the matter remade. For the Respondent reliance was placed on the grounds of appeal in the earlier correspondence (see above). For the

Appellant Counsel argued that the Court of Appeal decision in **Mehmood** was subject to an appeal to the Supreme Court although no permission to appeal to the Supreme Court had yet been given. The issue of concern in this case was not so much whether there was a valid in country right of appeal against the Respondent's decision but rather whether there was a valid decision by the Respondent which could give rise to an appeal at all.

25. There was no date on the IS 151A or the IS 151A Part 2. The date of service of these two forms was not filled in in either case. As such there was no valid decision. At paragraph 42 of **Mehmood** the Court of Appeal had said that Section 4 of the Immigration Act 1971 explicitly provided that the power to give leave to remain or to vary any leave shall be exercised by notice in writing given to the person affected. What was legally relevant was the date and time of the service of notice in writing to the person affected. Until then there was legally no decision. If there was no decision the Appellant's application remained outstanding for the Respondent to take. If there was no jurisdiction to hear the appeal the Appellant could do nothing about that. What should happen was that the appeal should be remitted back to the First-tier Tribunal to investigate the matter further.

26. For the Respondent it was stated that the IS 151 forms had been issued by an officer of the Respondent. Those decisions were not invalidated by the omission of dates. The notice of appeal could be entered without signing it and it would still be taken as valid. The same went for the notices. The issue was whether a document (in this case the notices) was what it purported to be.

27. In reply Counsel submitted that the forms given to the Appellant were not signed or dated. Proof of service rested on the Respondent. It was the content which was important. The boxes on the IS151A stating which category the Appellant was in for the giving of removal directions were not ticked. The forms were defective even if they had been served on the Appellant.

The Error of Law Stage

28. The first issue I have to decide is whether there was a material error of law in Judge Lucas's decision such that it falls to be set aside. Plainly there was an issue in this case as to whether the Appellant had an in-country right of appeal at all. Judge Lucas did not deal with that. I appreciate the position which Judge Lucas found himself in. He was given little assistance by the Presenting Officer who did not apparently draw to the judge's attention the contents of the Respondent's letter dated 12th August 2014 which succinctly set out the Respondent's case that there was no valid in-country right of appeal. It was nevertheless an error of law for Judge Lucas not to deal with that issue. Even if the Presenting Officer had wrongly conceded that there was a valid in-country right of appeal, consent does not found jurisdiction. If there was no in-country right of appeal it was incumbent upon the Tribunal to say so.

29. Following the Court of Appeal decisions in **Mehmood** and **RK** it is clear that a Section 10 removal decision does not give rise to an in-country right of appeal. It was conceded on the Appellant's behalf by his Counsel that the Appellant had not

made a human rights application to the Respondent before the Notice of Appeal was filed. Following **Nirula** the Appellant could not rely on Article 8 matters for the first time in his notice of appeal thus he could not have an in-country right of appeal on that basis.

30. The result is that there was an error of law in the decision of the First-tier Tribunal such that it should be set aside. The issues in this case to be dealt with on the rehearing were very narrow and did not involve a detailed consideration of the facts and there was therefore no need for me to remit the matter back to the First-tier Tribunal to be heard again. I was in a position to take a decision on the rehearing of the appeal.

Findings

31. In doing so I had to determine whether there was a valid in-country right of appeal before me, the issue not decided by Judge Lucas but which had to be dealt with as a preliminary issue. Both parties agree that there is no valid appeal before me but for significantly different reasons with potentially significantly different results. The Appellant argues that he has no in-country right of appeal because he has not been properly served with a valid notices of immigration decision. If I were to find that there was no valid right of appeal on that basis the Appellant would be able to challenge any further attempts by the Respondent to remove him by way of Judicial Review or other proceedings. That is because his removal would not be lawful as there would be no immigration decision to base it upon. The issue of an in-country or out-of-country appeal would not arise. On the other hand if I accede to the Respondent's argument that valid notices have been served on the Appellant then I would find that there is no in-country right of appeal because the right of appeal is exercisable out-of-country only. This would not give the Appellant any right to challenge his removal and an appellate process could only begin once the Appellant had returned to India or otherwise had left the jurisdiction.

32. In finding as I do that there is no valid appeal before me I must explain on what basis I find there is no valid right of appeal. That involves a consideration of whether the notices which the Appellant received are valid notices despite the absence of certain information on those notices. There appears to be no dispute that the Appellant has received notices indicating to him his liability to removal under Section 10 nor is there any dispute that the Appellant has received the detailed refusal letter which explains the Respondent's case both in relation to paragraph 322(1A) of the Immigration Rules and the withdrawal of the CAS.

33. In her grounds of onward appeal the Respondent had relied upon the Upper Tribunal decision of **CHH [2011] UKUT 121**. This case had examined the provisions of the Immigration (Notices) Regulations 2003. At paragraph 8 the Tribunal set out what were then the contents of the 2003 Regulations although it is fair to point out that the 2003 Regulations were heavily amended from 6th November 2014 subject to transitional provisions by virtue of Statutory Instrument 2014/2768. The 2003 Regulations as now stated provide that a decision-maker must give written notice to

a person of any decision taken in respect of him which is appealable under Section 82(1) of the 2002 Act (Regulation 4). Regulation 5 sets out the contents of the notice which must include or be accompanied by a statement of the reasons for the decision to which it relates. The notice must advise the person of his right of appeal, whether or not such an appeal may be brought while in the United Kingdom, the grounds on which such an appeal may be brought and the facilities available for advice and assistance in connection with such an appeal. Regulation 7 provides that a notice required to be given under Regulation 4 may be given by hand, sent by fax or sent by postal service and goes on to deal with where there are problems with serving the notice because the Appellant's address is not known. The 2003 Regulations do not state that notices given under them must be dated nor indeed signed.

34. Not dating the documents may lead to enquiry on what the Court of Appeal referred to the sequencing question. However the notices which were served on the Appellant which he accepts he received on the dates he stated were in my view valid notices and were properly served upon him. It is correct that Form IS 151A notice to a person liable to removal is in the form of two alternative tick boxes. The Immigration Officer must be satisfied either: (i) that the person liable to removal is a person to whom removal directions may be given in accordance with paragraphs 8 to 10A of Schedule 2 to the Immigration Act 1971 as an illegal entrant or (ii) a person in respect of whom removal directions may be given in accordance with Section 10 as, inter alia, a person who has used deception in seeking leave to remain.

35. Whilst the relevant tick box has not been ticked in this case it is plain from the refusal letter served on the Appellant that he was well aware that the Respondent was satisfied that the Appellant was a person who used deception in seeking leave to remain because of the issue of the ETS test certificate. Indeed the IS151 itself goes on to say that in terms stating:

> "You are specifically considered a person who had sought leave to remain in the United Kingdom by deception following information provided to us by Education Testing Service (ETS) on 22nd February 2012. An anomaly with your speaking test indicating the presence of a proxy test taker."

That the appropriate box was not ticked is unfortunate but the notice gave a very clear indication to the Appellant of why he was liable to removal and in my view satisfied the provisions of the 2003 Regulations.

36. Form IS 151A Part 2 was addressed to the Appellant and gave the Appellant's Home Office reference. It informed the Appellant that a decision had been taken to remove him and informed him of his entitlement to appeal the decision after he had left the United Kingdom. Although that decision was also not dated, the signature box did say "Immigration Officer/on behalf of the Secretary of State". That is sufficient to indicate that the form was issued under authority and I accept the Respondent's submission on that point (see paragraph 26 above). Form IS 151A Part 2 was in standard form and gave the information required by the 2003 Regulations. I consider therefore that that too was a valid document and was properly served on the Appellant.

37. As a result I find that the Appellant did not have an in-country right of appeal in this case. He had been served with valid notices but they only gave him an out-of-country right of appeal. It follows therefore that the Appellant's appeal must be dismissed because there is no jurisdiction to hear it but it also follows that this decision of mine does not prevent the Respondent from removing the Appellant under the authority of the immigration decision. I therefore dismiss the Appellant's appeal against the Respondent's decision to remove him and give him an out-of-country right of appeal only.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision in this case by dismissing the Appellant's appeal against the decision of the Respondent to remove him and to refuse to grant him leave to remain in the United Kingdom.

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 28th day of October 2015

…….
Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

No fee was payable and I therefore make no fee award.

Signed this 28th day of October 2015

…….
Deputy Upper Tribunal Judge Woodcraft