Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43098/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 January 2016	**On 22 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AHAMED SHIFULLAH AL SAAD

Respondent

Representation
For the Appellant: Ms. A. Broklesby Weller, Senior Home Office Presenting Officer
For the Respondent: Mr. Iqbal instructed by Liberty Legal Solicitors

DECISION AND REASONS

1. The respondent (hereinafter "the claimant") is a citizen of Bangladesh born on 1 January 1983 who entered the UK as a student in 2005.

2. On 23 April 2013, whilst lawfully in the UK with leave to remain as a Tier 1 (Post-Study Work) Migrant, the claimant applied for leave to remain as a Tier 1 (entrepreneur) under the Points Based System.

3. On 24 September 2013 the claimant was served with Notice of liability to removal from the UK under Section 10 of the Immigration and Asylum Act

1999 ("1999 Act") on the basis that he had submitted false documents in support of his application for further leave to remain. The Notice stipulated that he had a right of appeal after leaving the UK.

4. On 14 October 2013 the claimant was sent a letter refusing his application for a grant of leave to remain. The reasons for refusal were (a) that a false document had been submitted such that the application fell for refusal under Paragraph 322(1A) of the Immigration Rules and (b) that the requirements of the Points Based System under paragraph 245DD were not satisfied. The refusal letter stated that there was no right of appeal.

5. Notwithstanding that it had been made clear in both the refusal letter and Notice of liability to removal that an in-country appeal was not permitted, the claimant made such an appeal. In the grounds of appeal to the First-tier Tribunal ("FtT") the claimant argued that he was entitled to an in country right of appeal under Section 92(2) with reference to Section 82(2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

6. The appeal was heard by FtT Judge Majid. The Secretary of State was not represented at the hearing. In a decision promulgated on 19 June 2015, the FtT allowed the appeal. It did so without giving any consideration as to whether the claimant had an in-country right of appeal. In the first paragraph it stated that the appeal before the FtT concerned the respondent's decision dated 14 October 2013 refusing leave to remain. No reference was made to the earlier decision under section 10 of the 1999 Act.

7. The grounds of appeal submit that the FtT misdirected itself as to the law in assuming it had jurisdiction to hear the appeal. Before me, Ms Broklesby expanded on this, arguing that the FtT had misunderstood the appeal it was deciding as there was no right of appeal against the decision made on 14 October 2013 in light of the earlier decision under Section 10 of the 1999 Act. The appeal of that decision could only be made once the claimant had left the UK.

8. Mr Iqbal relied on a detailed Rule 24 Response. He argued that the Secretary of State had never filed an application seeking to argue that the appeal was invalid and had not contested the Tribunal's jurisdiction and therefore, following *Anwar & Anor v SSHD* [2010] EWCA Civ 1275, because the Secretary of State had not taken the jurisdiction point , there was no jurisdictional bar. Before me, Mr Iqbal argued, inter alia, that where the Secretary of State makes a decision giving rise to an in country appeal after making a decision with an out of country appeal, the second decision takes priority over the former.

Consideration

9. It is clear the FtT has misdirected itself as to the law and as such made a material error of law. It has proceeded on the basis that the matter before it was a refusal decision made on 13 October 2013 whereas the decision

being appealed was a removal decision under section 10 of the 1999 Act made on 24 September 2013. The FtT has moreover failed to give any consideration to the question of whether the claimant had an in country right of appeal. That this was at issue should have been abundantly clear to the FtT, notwithstanding the absence of a representative from the Secretary of State at the hearing, because (a) the Secretary of State's letter to the claimant stipulates there was no in country right of appeal and (b) the claimant's grounds of appeal before the FtT dealt extensively with the issue of whether the claimant was entitled to an in country right of appeal.

10. Having considered the evidence and submissions, I consider I am able to remake the decision without a further hearing and proceed to do so as follows:

11. At the material time, Section 82 of the 2002 Act identified specific types of "immigration decision" against which there is a right of appeal. These include, at sub paragraphs (d) and (e), and (g)

> (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,
>
> (e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain
>
> (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (removal of person unlawfully in United Kingdom)

12. Appeals that fall under subparagraphs (d) and (e) attract an in-country right of appeal under section 92 of the 2002 Act. An appeal under subparagraph (g) does not.

13. The claimant has a right of appeal under subparagraph (g) as a decision was made to remove him under section 10 of the 1999 Act. The issue before me is whether he also had a right of appeal under sub-paragraph (d) and/or (e) or otherwise.

14. In accordance with well established case law including for example *RK (Nepal) v SSHD* [2009] EWCA Civ 359, *Mohammad Bilal Jan v SSHD* [2014] UKUT 265 and most recently *Mehmood & Anor v SSHD [2015] EWCA Civ 744* and for the following reasons I find that the claimant's only right of appeal lies under sub-paragraph (g).

15. The decision to remove the claimant was served on 24 September 2013. Up until that time he was lawfully present in the United Kingdom. He had been given leave to remain from 26 April 2011 until 26 April 2013 and had applied for further leave on 23 April 2013. Accordingly, the leave which he

had been granted in 2011 was extended by the provisions of section 3C of the 1971 Act.

16. Section 10(8) of the 1999 Act states that: “Directions for the removal of a person given under this section invalidate any leave to enter or remain in the United Kingdom given to him before the directions are given or while they are in force." In *Mehmood* the Court of Appeal at paragraph [35] clarified that the effect of section 10(8) is that, from the date of the notification, “that which had previously been done is undone”.

17. Accordingly, the claimant’s leave to remain was invalidated pursuant to section 10(8) of the 1999 Act when the decision to remove him was made on 24 September 2013. From that time onwards he could not have a right of appeal under either subparagraphs (d) and (e), as he did not have any extant leave to be varied. The Section 10 removal notice having previously been served, the Secretary of State was correct to state in its refusal letter sent on 14 October 2013 that there was no right of appeal against that decision.

18. Accordingly, the claimant’s only right of appeal is against the section 10 decision under section 82(2)(g) of the 2002 Act, and he does not have an in-country right of appeal under section 82(2)(d), (e) or otherwise.

19. Mr Iqbal contended that because the Secretary of State had not raised the jurisdiction point there was no jurisdictional bar. I do not accept this argument. I agree with Mr Iqbal that the Secretary of State did not file an application with respect to jurisdiction or attend the hearing and raise the objection there. However, that does not mean it accepted jurisdiction. Its position in this regard was set out in the Notice to the claimant on 24 September 2013 where it unambiguously stated that the claimant could only appeal after leaving the UK. In any event, as made clear in *Virk & Ors v SSHD* [2013] EWCA Civ 652, the First tier Tribunal and Upper Tribunal are creations of statute whose jurisdiction is limited by section 82 of the 2002 Act. As in *Virk* (see paragraph [23] of that judgment), although decisions taken without jurisdiction may in due course become irreversible, that point has not been reached in this case and it is my finding that there is no jurisdiction for this appeal to be heard whilst the claimant is in the UK.

Decision

20. For the aforementioned reasons I set aside the decision of the First-tier Tribunal because it involved the making of a material error of law. I remake the decision and dismiss the claimant’s appeal.

21. No anonymity order is made.

Signed

Deputy Upper Tribunal Judge Sheridan Dated: 21 January 2016