



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00480/2015

THE IMMIGRATION ACTS

Heard at Field House
On 29 January 2016

Decision & Reasons Promulgated
On 12 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUJEEB RAHAMAN JAHUBAR ALI
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr P Nath

For the Respondent/Claimant: Ms K Joshi, Legal Representative, A Bajwa & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Sweet sitting at Richmond Magistrates' Court on 7 July 2015) allowing to a limited extent the claimant's appeal against what the judge characterised as the decision of the Secretary of State dated 11 November 2014 to refuse his application for leave to remain in the UK as a Tier 2 Migrant, and to issue a Section 151A notice to a person liable to removal in accordance with Section 10 of the Immigration and Asylum Act 1999. The First-tier Tribunal did not make an

anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The claimant is an Indian national, whose date of birth is 16 October 1981. In June 2013 he applied for a Tier 1 (Entrepreneur) Migrant visa, relying on a TOEIC certificate as evidence of his English language ability. Before he had received a decision on his Tier 1 application, on 6 June 2014 he sought to vary his application for leave to remain, by converting his Tier 1 application to a Tier 2 application. In support of his Tier 2 application, he did not resubmit his TOEIC certificate, but relied instead on his MBA degree certificate from Staffordshire University as evidence that he met the English language requirement. Later in the same month the Home Office acknowledged receipt of his Tier 2 application.
3. On 26 November 2014 Stephen Timms MP wrote to the Home Office on the claimant's behalf to enquire about the progress of the application for leave to remain as a Tier 2 Migrant.
4. By letter dated 8 December 2014, Mrs Sajeev, assistant director in the Customer Services Operations Division, responded to Mr Timms as follows:

Our records show that Mr Jahubar Ali applied for LTR on 6 June. His application was considered and refused on 11 November. Please find attached the refusal letter for your information.

Mr Jahubar Ali has a right of appeal against the decision. We have no record of any outstanding applications for Mr Jahubar Ali.
5. Mrs Sajeev did not include a refusal letter dated 11 November. She enclosed instead an undated and unsigned IS15A notice addressed to the claimant. The notice contained a specific statement of reasons. The claimant was considered a person who sought leave to remain in the United Kingdom by deception. For the purposes of the application dated 13 July 2013, he had submitted a TOEIC certificate from Educational Testing Service to the Home Office in order for them to provide him with leave to remain as a Tier 1 (Entrepreneur). ETS had a record of his speaking test. ETS had undertaken a check of his test and had confirmed to the Secretary of State that there was significant evidence to conclude that the certificate was fraudulently obtained by the use of a proxy test taker. His scores from the test taken on 24 April 2012 at the London School of Scholars had now been cancelled by ETS. On the basis of information provided to her by ETS, the Secretary of State was satisfied there was substantial evidence to conclude that his certificate was fraudulently obtained.
6. The notice went on to state that the claimant was therefore a person who was liable to be detained pending a decision whether or not to give removal directions and, where relevant, his removal in pursuant of such directions.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. In the grounds of appeal to the First-tier Tribunal, the claimant's solicitors said that the Home Office had yet to serve the claimant with a Refusal Letter giving reasons or a notice of immigration decision. The claimant had only become aware of the refusal of his application as a result of what was communicated to his MP. His solicitors contended that the refusal was not in accordance with the law. The IS15A "refusal" wrongly referred to the Tier 1 application, when the relevant application was the Tier 2 application made on 6 June 2014. He had not submitted a TOEIC certificate with the Tier 2 application.
8. Before Judge Sweet, there was only an appearance by Ms Joshi on behalf of the claimant. She submitted the burden of proof was on the Home Office to prove any fraudulent conduct pursuant to the case of Gazi. The Home Office had not provided a document examination report or a document verification report. No decision had been made on either the Tier 1 or Tier 2 application. The claimant had not obtained a false TOEIC, but now intended to make a fresh application as he had been in the UK for ten years. He had not yet received a rebate for his fee for the first application, nor had his passport been returned to him by the Home Office. His mother was ill with a cancer, and there should be a finding that there had been no fraud by him.
9. The judge's findings were set out in paragraphs [9] to [11] of his subsequent determination, which I reproduce verbatim below.

9. The burden of proof is on the Appellant and the civil standard of the balance of probabilities applies. The Appellant appears to have made two applications to the Home Office which are relevant to this appeal. He had been in the UK as a Tier 4 student since June 2005, with valid leave (as extended) to 22nd June 2013.

10. On 22nd June 2013 he made a Tier 1 (Entrepreneur) application, which the Respondent says was dated 13th July 2013. In support of that application he provided his business plan, a venture capital document and a TOEIC certificate. It is in respect of that application that the Respondent claims that the TOEIC certificate (following a test taken on 24th April 2012) was fraudulently obtained. In fact the Appellant had converted his Tier 1 application to a Tier 2 application on 6th June 2014, but he has not received the refusal decision. A letter from the Respondent to his MP of 8th December 2014 (at page 43 in the bundle) refers to that application being refused on 11th November 2014, but the refusal letter has not been received, nor was it attached to the letter to the MP. The Appellant has submitted two TOEIC certificates, but I am satisfied that there is no evidence from the Respondent in the form of a DER or DVR showing that the certificate (or either certificate) was false. The burden of proof is on the Respondent to provide this evidence, pursuant to Gazi, and he has not done so. In order to seek leave to remain in the UK, the Appellant did not use a TOEIC certificate, but his Masters degree and his employer's sponsorship letter.

11. For all these reasons, I am satisfied that the appeal should be allowed to the extent that the Respondent should provide the refusal letter of 11th November 2014 in respect of the Tier 2 application made on 6th June 2014. The Respondent should reconsider his decision in light of the documents which were submitted with that application, namely the Appellant's Masters degree and employer's sponsorship letter, and make a fresh decision. That decision should not be made on the basis of a TOEIC

certificate which was not submitted with the Tier 2 application. If the decision is not in the Appellant's favour, he should be allowed to make a fresh appeal or to withdraw both his applications and make a fresh application, without any regard to previous alleged fraud. The Respondent should also consider his Article 8 ECHR claim. It would also refund the Tier 1 (Entrepreneur) application fee of £1,051 and return his passport.

The Application for Permission to Appeal

10. The Secretary of State applied for permission to appeal, arguing that the judge had materially erred in finding that the First-tier Tribunal had jurisdiction to hear the appeal. The claimant did not receive an appealable immigration decision. His IS15A notice only referred to the claimant's liability to removal, and did not constitute an appealable immigration decision under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.
11. The Home Office's reply to the MP's enquiry erroneously mentioned a refusal decision of 11 November 2014 when no such decision had in fact been served on that date. Even if it had been, the refusal would not have been appealable because the Tier 1 application of 13 July 2013 was out of time, and therefore a decision on it, (or on the varied application under Tier 2) would not have been an immigration decision. The claimant's previous Tier 4 leave expired on 22 June 2013. Although the 13 July 2013 application was cited in the IS15A notice, as that was when the TOEIC certificate from ETS was submitted, it could not be construed as a decision on that application.
12. Accordingly, any findings on the exercise of deception were both premature and inappropriate. The Tribunal had no power to direct matters such as a refusal letter for a non-appealable decision, or the refund of an application fee when the application had been varied.

The Grant of Permission to Appeal

13. On 16 November 2015 First-tier Tribunal Judge Ford granted permission to appeal for the following reasons:

It is arguable that the IS15A notice was not an appealable immigration decision and the Secretary of State is yet to serve an appealable decision on the [claimant]. The duty judge listed the matter for hearing on the preliminary issue of whether the [claimant] had an in-country right of appeal but Judge Sweet does not appear to have engaged with this issue.

It is arguable that Judge Sweet did not have jurisdiction to direct matters set out at paragraph 11 of his decision.

Reasons for Finding an Error of Law

14. Although not cited to me, I have taken account of **R (On the application of Sheraz Mehmood and Shahbaz Ali) v Secretary of State for the Home Department [2015] EWCA Civ 744** in which the Court of Appeal addressed two questions which have a bearing on this appeal. The first question is whether a person whose leave to be in

the United Kingdom has been invalidated by the Secretary of State, who has also made a decision to remove that person at a time when an application by that person for a variation of his leave is pending, has the right to an in-country right of appeal: “the Section 10 question”. The answer is no, unless there is a separate and earlier decision to refuse to vary the person’s leave to remain, giving that person an in-country right of appeal against the refusal to vary leave to remain. In the case of Mr Ali, this introduced a second question, “the sequencing question”, which the Court posed at paragraph [7]:

Does the sequence of the notices of decision invalidating his leave and the decision refusing his application for a variation of his leave mean that his right is to an in-country appeal whatever the answer to the first question? 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 Mr Ali?

15. Mr Ali was refused leave to remain on the grounds that he cheated in his English language test. In Mr Ali’s case, a Deputy Judge rejected the submission that the decision refusing to vary his leave was taken *before* the Section 10 removal decision. She recognised that the date on the refusal letter could give the impression it was the first decision in time but she found it was also intended that a removal decision would be served first and immediately before the refusal decision. She found the notice of the removal decision was in fact served on Mr Ali first, as was the intention, and the refusal letter was served on him afterwards.
16. The Court of Appeal upheld the Deputy Judge. At paragraph [42], Beatson LJ said that the fact that internally the Secretary of State may have decided to refuse Mr Ali’s application to vary his leave before making a decision to remove him was legally irrelevant. 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.
17. In contrast to the facts of Mr Ali’s case, in this case there has neither been service of an immigration decision nor has there been service of a Section 10 removal notice.
18. It was part of the claimant’s case before the First-tier Tribunal that he had not been served with an immigration decision in respect of either his Tier 1 application or his Tier 2 application. It was, and is, thus common ground between the parties that the IS15A notice does not constitute an appealable immigration decision under Section 82(1) of the 2002 Act. As there has been no decision on the appellant’s application for leave to remain as a Tier 2 Migrant, the First-tier Tribunal did not have jurisdiction to hear an appeal. There was no legally no decision against which the claimant could pursue an in-country appeal.
19. Although the Home Office stated in a letter to the MP that the claimant had a right of appeal, this “concession” was legally erroneous. While the First-tier Tribunal should in the ordinary course of events accept a factual concession by the Home Office, it cannot accept a concession which is legally incorrect.
20. The claimant has not been served with a valid Section 10 removal notice, so he is effectively in legal limbo. There is no remedy that the Tribunal can provide for this

situation in the context of a statutory appeal. It would be wholly inappropriate for me to issue any directions to the Secretary of State either in respect of the outstanding Tier 2 application, or in respect of an inchoate decision to issue a Section 10 removal notice on the grounds of deception. I can only observe that the current state of affairs is highly unsatisfactory, and it needs to be addressed as a matter of urgency. Mr Nath agreed with Ms Joshi that this should be done, and he undertook to use his best endeavours to ensure that the Home Office followed due process and complied with the necessary formalities so that the claimant will know in the near future where he stands legally.

21. In written submissions Ms Joshi sought a wasted costs order against the Secretary of State. But while the Home Office was wrong to encourage the claimant in the belief that he had a right of appeal, the claimant was wrong to bring an appeal in circumstances where his legal advisers knew that there was not an appealable immigration decision. So it has not been unreasonable for the Secretary of State to defend the appeal on the grounds of want of jurisdiction, and the claimant must look elsewhere for financial compensation.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and so the decision is set aside and the following decision is substituted: the claimant's appeal is dismissed for want of jurisdiction.

I make no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Monson