IN THE UPPER TRIBUNAL

R (on the application of Kuruwitage) v Secretary of State for the Home Department IJR [2015] UKUT 0402 (IAC)

Field House
London

28 November 2014

BEFORE

UPPER TRIBUNAL JUDGE GLEESON

Between

MR ERANGA GAYASHAN KURUWITAGE

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr A Jafar, Counsel (Direct Access) appeared on behalf of the Applicant.

Mr Z Malik, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

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JUDGMENT

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JUDGE GLEESON: This is the decision on the judicial review application of Mr E G Kuruwitage, a Sri Lankan citizen. The judicial review is brought on the basis that the Secretary of State was acting *ultra vires* in using the Section 10 procedure and further that she should have considered whether to curtail his existing leave giving rise to an in-country right of appeal.

2. The facts in this case so far as relevant are as follows. The applicant entered the United Kingdom lawfully as a student on a Tier 4 visa valid until 12 October 2011. The conditions of that visa permitted employment.

3. The applicant then applied for further leave, which was granted, employment being prohibited. He has not had the right to work since 12 October 2011.

4. The applicant's studies ceased on 22 July 2013 because the sponsor licence for his college, Park West College, was revoked. Thereafter, it has not been shown that he came within any of the permitted categories of persons who may work.

5. The applicant was arrested at home on 4 March 2014 and admitted under caution, as evidenced by the Immigration Officer's official notebook, that he was working at e-Solutions for twenty hours per week, albeit unpaid. The information was confirmed by his employer. That is more than sufficient to trigger the Section 10 power to remove and the respondent proceeded to exercise it by making Section 10 removal directions.

6. The applicant admitted when arrested that he knew he was not entitled to work and that he had been working voluntarily and that, applying the definition of work, in paragraph 6 of the Immigration Rules was evidence of working in breach of conditions.

7. Upper Tribunal Judge Freeman granted permission for judicial review on the basis that it was arguable, since no evidence had been disclosed by the respondent, that the respondent had in her possession no material on which she could have considered that the exercise of her Section 10(1)(a) power was open to her. An immigration officer's notebook was subsequently disclosed which contained a record of an interview with the applicant in which he admitted that he had been working (albeit unpaid) and knew that he had no permission to do so.

8. I have been taken to passages in the judgment of Helen Mountfield QC sitting as a Deputy High Court Judge in *Shahbaz Ali v Secretary of State for the Home Department* [2014] EWHC 3967 (Admin) which was handed down yesterday, 27 November 2014 and also to [27] in the judgment of Mr Justice Silber in *Westech College v Secretary of State for the Home Department* [2011] EWHC 1484 (Admin).

9. The decision in *Shahbaz Ali* conveniently brings together and reviews all of the existing jurisprudence which has developed recently on the Section 10 question, beginning at paragraph 50 in the judgment. At paragraph 63, applying the dicta of Lord Justice Sedley at paragraph 24 of *Anwar & Anor v Secretary of State for the Home Department* [2010] EWCA Civ 1275, that the respondent's election to use the s.10 route to stifle in-country appeals was a 'serious abuse of power', the judge noted that the observation was *obiter dicta* and distinguished it. Overall, the decision in *Shahbaz Ali* is concerned principally with the situation where the applicant has had no opportunity at all to comment or be interviewed in connection with the respondent's perception of breach of condition (see in particular, paragraph [94] in *Shahbaz Ali*).

10. On the facts of this application, that was not the case. There was a statement by the applicant confirming that he was working and that he knew he had no right to work. Accordingly, the applicant cannot show, as he would need to do, that when the respondent made her decision to remove this applicant, there was no evidence on which she could have done so or that there was evidence that she did so by way of an abuse of power.

11. I have been told that the applicant has made a, presumably timely, application for an out-of-country appeal which can continue and in which he may make any factual or legal challenges which he wishes to advance in relation to the substance of the removal directions or the evidence on which the respondent made them. No sound reason has been advanced as to why an out of country remedy is insufficient in this case.

12. This application is dismissed.

13. I order the applicant to pay the respondent's costs of these proceedings, to be assessed if not agreed.

14. There being no application for permission to appeal I refuse permission to appeal under paragraph 44(4B) because I am not satisfied that there is any error of law in the decision which I have just given.~~~~*0*~~~~