



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/36289/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 21st December 2015

Decision & Reasons Promulgated
On the 11th January 2016

Before:

DEPUTY JUDGE OF THE UPPER TRIBUNAL MCGINTY

Between:

MISS PREETI BHITRAKOTI
(Anonymity Direction not made)

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant

Representation:

For the Appellant (Secretary of State): Mr Kandola (Home Office Presenting Officer)

For the Respondent: Mr Mawla (Legal Representative)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Flynn promulgated on the 29th May 2015, in which he found that the Appellant did have an in-country Right of Appeal and allowed the Appellant's appeal on Human Rights grounds under Article 8. Throughout this appeal, for the purpose of clarity, I will refer to the Secretary of State as "the Secretary of State", and to Miss Bhitrakoti as "the claimant", given that this is an appeal by the Secretary of State.

2. Within the Grounds of Appeal it is argued that the original appeal had been certified as clearly unfounded under Section 94 of the Nationality, Immigration and Asylum Act 2002, thus restricting any appeal to an out of country appeal. It was further argued that Judge Flynn had failed to give any adequate reasons as to why the certificate could not be upheld and that it was not incumbent upon the Secretary of State to provide evidence that the certification decision was signed off by a senior caseworker and that the refusal letter had given clear reasons as to why the appeal could not succeed under the Rules and under the exceptionality provision.
3. It was further argued within the Grounds of Appeal that the decision in that regard was unreasoned and irrational.
4. It was further argued within the Grounds of Appeal that the decision of the First-tier Tribunal in respect of the substantive issue on Article 8 amounted to a material misdirection given the Court of Appeal's decision in SS (Congo) and AM (Malawi) and that the First-tier Tribunal's conclusions on legitimate expectation and the grant of leave to finish her studies was irrational and should not stand.
5. However, permission to appeal has been granted by Upper Tribunal Judge Coker on the 23rd September 2015 on one ground only, namely that it is arguable that there was no jurisdiction for the First-tier Tribunal to hear an appeal against a decision that had been certified; such an appeal only being justiciable after that Appellant had left the UK. Permission to appeal was not granted in respect of the other grounds of appeal and I have therefore not considered them in reaching my decision.
6. In his submissions on behalf of the Secretary of State Mr Kandola argued that irrespective as to whether or not the matter had been rightly certified, the appeal having been certified there was no jurisdiction for the First-tier Tribunal Judge to consider the appeal and that the question as to whether or not it had been rightly certified was a matter for judicial review, rather than appeal. He further argued that the Appellant could have made a fresh application based upon a change in circumstances, had she so wished. Such a course of action is of course still open to her, but he sought to argue that the Judge did not consider whether or not there are compelling circumstances, but had simply allowed the appeal based upon the fact that there had been a recent earthquake in Nepal, five days prior to the appeal hearing.
7. Mr Mawla on behalf of the Claimant, sought to argue that the Judge did have jurisdiction to hear the appeal under Article 8. He relied upon the court of appeal case of Anwar and Adjo v The Secretary of State for the Home Department [2010] EWCA 1275 and the findings of Lord Justice Sedley between paragraphs 19-23 of the judgement that it was only once the jurisdiction point had been taken by the Home Office that it operated as part of the proceedings. He argued that if one looked at the

decision of Judge Flynn, he dealt with the question of the preliminary issue between paragraphs 7 and 11 of the decision and that the Secretary of State had sought to argue that the certification had been done properly and that the arguments were not simply in respect of jurisdiction. He argued that prior to the appeal hearing date no objections had been taken on a jurisdiction basis. However, he conceded that this did not stop the Secretary of State raising jurisdiction at the appeal hearing, but argued that it had not been raised substantially at the appeal hearing such that the First-tier Tribunal could properly proceed with the appeal hearing, as it had done and was entitled to hear submissions on certification and in-country rights of appeal. However he conceded that in light of the case of TM (section 94 certificate-jurisdiction) Zimbabwe [2006] UKAIT 0005, that the Tribunal was not able to consider if in fact the decision had been properly certified, and was only able to consider if in fact it had been certified. However, he did argue that the First-tier Tribunal Judge did have jurisdiction.

8. In reply, Mr Kandola referred me to a fax which had been sent to the First-tier Tribunal on the 17th March 2015, in which it was stated that the Notice of Decision had made it clear that by virtue of Section 94 (2) and 94 (1A) of the Nationality, Immigration and Asylum Act 2002, the right of appeal can only be exercised from abroad and that ought to be presumed that the Home Office was raising the jurisdiction point in the case and that it should never have been listed for a substantive hearing and the fax sought that the appeal be struck out as being invalid. That fax is contained within the Tribunal bundle, and was sent to the tribunal at 2:15 p.m. on the 17th March 2015. The Tribunal had applied asking for a copy of the letter to be sent to the Appellant and the Tribunal to be written to again thereafter.

My Findings on Error of Law and Materiality

9. It is clear having read the original refusal decision dated the 28th August 2014 at paragraphs 30 through to 32 inclusive, that it was stated that the Appellant's Human Rights claim was one to which Section 94 (3) of the Nationality, Immigration and Asylum Act 2002 applied and that the Secretary of State was thereby required to certify that her claim was clearly unfounded unless satisfied that it is not clearly unfounded and that after consideration of all the evidence it had been decided that the Appellant's claim was clearly unfounded and that it was certified under section 94 (2) of the Nationality, Immigration and Asylum Act 2002 that her claim was clearly unfounded. She was further told in paragraph 32 that she may not appeal against the decision whilst in the UK.
10. The decision to certify was therefore clearly made within the original Refusal Notice and the certification stated at paragraph 30 that the Human Rights claim was clearly unfounded for the purposes of Section 94 (2). The Appellant was further told that she did not have a right to appeal against that decision whilst in the UK.

11. It is further clear following the case of TM (section 94 certificate: jurisdiction) Zimbabwe [2006] UKAIT 00005, in the decision of the Asylum and Immigration Tribunal before the Deputy President Mr Ockelton that the Tribunal had no jurisdiction to question whether a claim was properly certified and that only the question as to whether or not there had been a certification in any particular case, was the only matter before the Tribunal for the purposes of Section 94. In this case, therefore, although the First-tier Tribunal Judge Flynn did have the power to consider whether or not there had been a certification, he did not have jurisdiction to question whether or not the claim was properly certified.
12. I therefore find that First-tier Tribunal Judge Flynn did err in law in considering between [28] and [33] the issue as to whether or not the appeal was correctly certified, rather than simply looking as to whether or not there was a certification in place. Once the First-tier Tribunal Judge had established from the Refusal Notice that the claim had been certified, and that point had been taken by the Secretary of State both in the fax and at the appeal hearing, from that moment there was no longer jurisdiction to hear the appeal in country. The Judge did not have jurisdiction to consider whether or not the appeal had been properly certified. That was a matter for judicial review, and not a matter for appeal.
13. Although Mr Mawla seeks to rely upon the judgement of Lord Justice Sedley in the case of Anwar and Adjo v Secretary of State for the Home Department [2010] EWCA Civ 1275, as meaning that the Judge did have jurisdiction to hear the appeal, it was in fact made clear by Lord Justice Sedley at between paragraphs [19] and [23] of the judgement, that once the point has been taken by the Home Office it operated in bar of the proceedings and that it was only in circumstances where the point was not taken that the Judge would have been bound to proceed with the appeal. Although Mr Mawla sought to argue that the Home Office had not sought to raise a jurisdiction point before the appeal hearing, given that Ms Bello-Omoubude submitted on behalf of the Secretary of State at the appeal, as recorded in [23] of the decision that the Appellant had no in-country right of appeal, I find that she had properly raised the jurisdiction issue within the appeal, and from the moment the Judge had checked if there was such a certificate, he no longer had jurisdiction to consider the substantive merits of appeal.
14. He did not then have jurisdiction to consider whether or not the certificate had been issued correctly and whether or not the internal procedures had been followed. The fact that the Secretary of State may have raised those arguments, does not give then the Tribunal jurisdiction to consider a matter which it does not otherwise have jurisdiction to consider. Under Section 94 (2) of the Nationality, Immigration and Asylum Act 2002 "a person may not bring an appeal to which this section applies if the Secretary of State certifies their claim or claims mentioned in subsection (1) is or are clearly unfounded" Section

94 (1) clearly states "this section applies to appeal's under Section 82 (1) when an Appellant has made an asylum claim or human rights claim or (both)". Having certified the human rights claim that the Appellant was clearly unfounded in the refusal notice, and the Secretary of State having raised the issue of jurisdiction, the Judge no longer had jurisdiction to consider the merits of the appeal as an in-country appeal.

15. In respect of the argument that the Secretary of State did not raise a jurisdiction argument until the appeal hearing, is irrelevant. The Court of Appeal decision in Anwar and Adjo v Secretary of State for the Home Department is simple authority for the point that the Judge has to proceed with the appeal, if the jurisdiction argument is not raised. It did not impose any time limit before raising such an argument and there is no authority that such an argument has to be raised prior to the hearing or at any specified point before the hearing. Such a jurisdictional point can clearly be taken at the appeal hearing itself, and was taken by the Secretary of State in this case. In any event, I accept the submission from Mr Kandola on behalf of the Secretary of State that in fact the Secretary of State sent a fax to the First-tier Tribunal on the 17th March 2015 pointing out that there was a jurisdictional point and that the appeal can only be sought from abroad.
16. I therefore find that the decision of First-tier Tribunal Judge Flynn does contain a material error of law, in that the case having been certified, there was no in country right of appeal and that the Appellant's appeal could only be continued by her from abroad. He therefore did not have jurisdiction to consider the appeal while she was in the UK and therefore did not have jurisdiction to hear evidence from her. Although there had, on her account, been a change of circumstances since the date of the decision, given the earthquake, that does not in any way affect the jurisdiction issue, as the appeal before First-tier Tribunal Judge Flynn was an appeal from the original decision of the Secretary of State in the Refusal Notice, from which there was no in country right of appeal, the appeal having been certified as clearly unfounded. The Claimant could have sought judicial review in respect of that decision or could have made a fresh application based upon the change of circumstances and indeed, can still do so, but this did not give rise to jurisdiction in respect of the appeal whilst the appellant was still in country..
17. I therefore set aside the decision of First-tier Tribunal Judge Flynn as containing a material error of law and I remake the decision dismissing the Appellant's appeal on Human Rights grounds, there being no jurisdiction for the Tribunal to consider the appeal whilst the Appellant is still in the United Kingdom, pursuant to Section 94 (2) of the Nationality, Immigration and Asylum Act 2002.

Notice of Decision

The decision of First-tier Tribunal Judge Flynn does contain a material error of law and is set aside;

I remake the decision, dismissing the Appellant's appeal on Human Rights grounds, the Tribunal having no jurisdiction to consider the appeal whilst the Appellant is still in the United Kingdom under Section 94 (2) of the Nationality, Immigration and Asylum Act 2002;

No anonymity direction was made by the First-tier Tribunal Judge in this case, and it was not sought to be argued before me that the Claimant requires anonymity. I therefore do not make any anonymity order in this case.

Signed

Dated 21st December 2015

RF McGinty
Deputy Judge of the Upper Tribunal McGinty