



IAC-CH-SA-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/47145/2014
IA/44945/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 19th April 2016**

**Decision & Reasons
Promulgated
On 6th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

**MR A NAZIR
MR S F UMER
(ANONYMITY DIRECTION NOT MADE)**

Respondents

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Representation:

For the Appellant: Mr S Muquit and Mr S Karim, Counsels
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Secretary of State appeals the decisions of the First-tier Tribunal Judge Flynn, both promulgated on 22nd September 2015, in which she allowed the Appellants' appeals against administrative removal under Section 10

of the Immigration and Asylum Act 1999. The files have been linked in the context of raising the same issue.

2. The Respondent's grounds assert an error of law in respect of both decisions on the basis that the First-tier Tribunal Judge did not have jurisdiction.
3. I set out the relevant part of the judge's decision below:

"Preliminary Issues

7. *Mr Raja submitted a witness statement from Matthew Harold and annexes. In his submission, the appellant had no in-country right of appeal.*
 8. *Ms Jones submitted that the respondent had failed to establish a prima facie case of deception and therefore the appellant had an in-country right of appeal.*
 9. *Mr Raja submitted that there was an in-country right of appeal only on human rights grounds in accordance with Section 92(4).*
 10. *Ms Jones agreed with Mr Raja's submission and said the appellant's legal representatives had written to the Secretary of State on 27 November 2014 before the appeal was issued. The appeal was only on human rights grounds because there was no evidence of deception by the appellant.*
 11. *Mr Raja submitted that the spreadsheet attached to Mr Harold's statement and the report on Stanfords' College were sufficient evidence that the appellant had used deception.*
 12. *I decided that neither the extract from the ETS spreadsheet nor the college report was sufficient evidence because the spreadsheet contained only minimal details such as the appellant's name, date of birth, nationality and test date; and the report did not implicate the appellant. The only reference to deception was a statement in the spreadsheet that the test was "invalid". I considered this was insufficient evidence to establish deception and therefore the appellant had an in-country right of appeal."*
4. In short neither of these Appellants had an in-country right of appeal. The submission of representations to the Respondent on 27th November 2014 did not assist the Appellants. In Mr Nazir's case the Respondent's decision was dated 14th November 2014, the appeal lodged on 24th November 2014, leaving aside the issue as to whether or not the representations were a human rights claim, the chronology alone revealed that no human rights claim had been made prior to the appeal. In Mr Umer's case the decision was dated 22nd October 2014, the date of appeal 6th November 2014, and therefore his representation, even if a human rights claim, was self-evidently not made prior to the appeal.

5. The Respondent relied on the cases of Nirula [2012] EWCA Civ 1436; RK (Nepal) [2009] EWCA Civ 359, Alighanbari [2013] EWHC 181 (Admin), Kiarie [2015] EWCA Civ 1020. The Appellants' relied upon the cases of Rashid Anwar and Prosper Adjo [2010] EWCA Civ 1275.
6. Mr Jarvis for the Respondent argued that the judge was not in a position to confer jurisdiction to herself outside of that afforded by statute.
7. Before me Mr Karim and Mr Muquit acting on behalf of the Appellants both conceded that as a matter of law neither of the Appellants had an in-country right of appeal. Mr Muquit for Mr Nazir argued that although the Notice of Decision took the jurisdiction point, informing Mr Nazir that his only recourse was to an out of country appeal, at the First-tier Tribunal, as Mr Jarvis conceded in his skeleton, Mr the Respondent had conceded the position, so that it could not be fairly raised now.
8. In response Mr Jarvis invited me to find that any such concession was on a mistaken basis, relying on the Appellant's Counsel's assertions that a human rights claim had been made prior to the issuing of the appeal. The Respondent should not be held to any such concession.
9. Mr Muquit and Mr Karim were as one in arguing that the prejudice to the Appellant afforded by an out of country appeal in terms of expense and inconvenience in terms of interruption to studies were such that a concession should not be withdrawn.
10. Mr Muquit additionally argued that in terms of the ETS deception point the out of country appeal right was not an adequate or sufficient remedy in the context of Judge Flynn's findings that the generic evidence was an inadequate basis upon which the Respondent could establish forgery.
11. The jurisdiction point was taken by the Respondent in both of the Appellant's notices of decision. It is a matter of law. It is not open to the Respondent to confer it, whether by later concession, made on a correct or incorrect understanding of the factual matrix, or otherwise. It is not open to the Ft-TJ to assume jurisdiction. The first tier Tribunal did not have jurisdiction. That is a matter of law.
12. The position is well established in legal principle, but if authority is needed one needs look no further than the Court of Appeal [2013] EWCA Civ 652.Virk. This is not a case where the point had not been taken and the matter progressed to the point that the issue could not on any proper basis be considered to be live.
13. I go on however to comment on the claimed concession. Neither Mr Karim, Mr Muquit or Mr Jarvis represented before the First-tier, so that the matter was not within their own knowledge. There was no evidence from representatives present at the First-tier. Mr Jarvis for the Respondent treated paragraph 9 of the judge's decision as a reflection of a concession. Mr Karim and Mr Muquit similarly argued that there had been an apparent

concession on the face of the decision. I disagree. On the face of the decision no concession is apparent. If the judge intended to say at [9] that the matter had been conceded, paragraphs [10], [11] and [12] would be superfluous. The judge has not expressly relied on any concession, but has made her own decision that the Appellant had an in-country right of appeal, apparently based on an assessment of the evidence concerning deception, all of which points to a conflation of the issues and misdirection in respect of the jurisdiction point. Further if Mr Raja incorrectly accepted Counsel's submission that a human rights claim had been made prior to the lodging of the appeal, any such concession was based on an incorrect factual matrix because neither of these Appellants made human rights claims prior to the lodging of the appeal. At its highest he mistakenly conceded a factual matrix which afforded jurisdiction. It was not open to him to concede jurisdiction.

14. I find no merit in the submission that an out of country appeal provides an inadequate venue for the dispute in respect of the ETS evidence and issues of deceit. The matter has been extensively litigated and an out of country appeal right found an adequate response.
15. For all the reasons above the Secretary of State's appeal succeeds.

Notice of Decision

16. The First-tier Tribunal materially erred in law for lack of jurisdiction. The decisions are set aside and, in each of these appeals, replaced by the decision is that there is no valid appeal.
17. No anonymity direction is made.

Signed _____ Date _____
Deputy Upper Tribunal Judge Davidge

**TO THE RESPONDENT
FEE AWARD**

There is no valid appeal and therefore there can be no fee award.

Signed _____ Date _____
Deputy Upper Tribunal Judge Davidge