



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL

APPEAL NUMBER: IA/48059/2014

THE IMMIGRATION ACTS

Heard at: Field House
On 29 February 2016

Decision and Reasons Promulgated
On 13 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FAHEEM GUL MALIK
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: No attendance

DECISION AND REASONS

1. I shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”
2. On 26 February 2016 the claimant's solicitors, Marks & Marks sent an email to the Tribunal in which they enclosed “appellant's medical record”. The solicitors stated as follows:

“The appellant informed us that he is unable to attend the appeal hearing due to his medical condition. The appellant did not provide any further statement/document due to his medical condition. In the absence of

further instruction/fee from the client we are unable to submit further statements/documents. Please note that no barrister is instructed in this matter as we did not get the fee from the appellant."

3. The enclosed medical record stated that the claimant attended the Wealdstone Centre, in Harrow, on 1 March 2016 for a blood test. There is also a statement of fitness for work for Social Security or Statutory Sick Pay relating to him. A doctor has recorded that he assessed his case on 26 February 2016 and advised that he is not fit for work because of "exacerbation of backache – left sciatica."
4. There is however no assertion by the doctor that this rendered the claimant unfit to attend the hearing.
5. I am satisfied that both the claimant and his solicitors were notified by first class post on 2 February 2016 that his appeal will be heard on 29 February 2016. It was noted that if he or his representatives did not attend the hearing the Tribunal may determine the appeal in the absence of that party.
6. I am thus satisfied that the claimant is aware of the date of the hearing of the secretary of state's appeal. He is attending a medical unit for a blood test on 1 March 2016. It is not contended that he is unable to attend the hearing on account of that procedure. Nor is it contended in the medical letter that his sciatica prevents his attendance at the hearing of the secretary of state's appeal on 29 February 2016.
7. I am also satisfied that his solicitors have not received any further instructions or any fee from the claimant; they have stated that no barrister is instructed in the matter as they did not get any fee from him.
8. In the circumstances I am satisfied that the claimant has been notified of the hearing and having regard to the circumstances set out, I consider that it is in the interests of justice to proceed with the hearing.
9. The secretary of state appeals with permission against the decision of the First-tier Tribunal Judge, promulgated on 2 September 2015 allowing the claimant's appeal under the Immigration Rules and directing that the matter be remitted to the secretary of state for a decision to be taken on the claimant's outstanding application for leave to remain as a Tier 4 (General) Student.
10. On 14 January 2013, First-tier Tribunal Judge Parkes granted the secretary of state permission to appeal, stating incorrectly that this was against a decision of the First-tier Tribunal "whereby the appellant's appeal against the secretary of state's decision was dismissed." That is clearly a typographical error.
11. The grounds asserted that the Judge was wrong to find that the claimant had an in country right of appeal as the decision under appeal is covered by sections 82(2)(g)

and 92 of the Nationality, Immigration and Asylum Act 2002. The Judge had arguably confused which decision is being challenged and on that basis permission to appeal is granted.

12. In the Tribunal's decision it is noted that the claimant appealed against the respondent's decision dated 27 November 2014 to remove him from the UK [1]. In the IS.1.51A Notice to the claimant dated 27 November 2014, the secretary of state was satisfied that the claimant is a person in respect of whom removal directions may be given in accordance with paragraphs 8 to 10A of Schedule 2 to the Immigration Act 1971 as an illegal entrant.
13. In the "specified reasons" it is stated that he is "specifically considered a person who has sought leave to remain in the UK by deception".
14. It is asserted that for the purpose of his application dated 25 June 2014, he submitted a TOEIC certificate from Educational Testing Service to the Home Office and his sponsor in order for them to provide him with a Confirmation of Acceptance for Studies. ETS has a record of his speaking test.
15. It is further contended that ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of his test and confirmed to the secretary of state that there was significant evidence to conclude that his certificate was fraudulently obtained by the use of a proxy test taker. His scores from the test taken on 20 June 2012 at the Premier Language Training Centre "have now been cancelled by ETS." There was accordingly substantial evidence to conclude that his certificate had been fraudulently obtained [2].
16. On the same date, i.e. 27 November 2014, a Notice of Immigration Decision, IS.151A Part 2 was served on the claimant. A decision was made to remove him from the UK pursuant to s.10 of the Immigration and Asylum Act 1999. It was contended that as a result of the service of this decision, he no longer had any leave and so any outstanding application he made for variation of his leave does not need to be determined as there is no existing leave to vary.
17. He was informed that he was entitled to appeal this decision under s.82(1) of the 2002 Act "after you have left the UK."
18. At the hearing of his appeal before the First-tier Tribunal the claimant was represented by counsel. There was no attendance on behalf of the respondent. The First-tier Judge referred to the specified reasons for his removal as already set out in the "background". The secretary of state wrote to his solicitors in May 2013 that he also had a Tier 4 application that was submitted in November 2012, which constituted another outstanding application awaiting a decision. The solicitors notified the secretary of state that in the circumstances, the claimant was

withdrawing his application for further leave to remain that he had made on 26 April 2013. The secretary of state was asked to determine his outstanding Tier 4 application.

19. On 29 September 2014 his application made on 12 November 2012 was refused with no right of appeal. As noted, on 27 November 2014 he was served with the IS 151A, Part 1 and Part 2 notices.
20. At the appeal hearing, counsel at the outset contended that following “a judicial review” it was now accepted that the claimant had an in country right of appeal. The current appeal was against the removal decision dated 27 November 2014 [11].
21. The claimant attended the hearing and gave evidence. At [21] the Judge noted that on 18 September 2014 the claimant submitted through his solicitors a Tier 4 application for leave to remain. Having regard to correspondence referred to, that was not a “new” application but a replacement for the application originally made on 12 June 2012 [21].
22. The Judge noted that the claimant has an outstanding Tier 4 application made whilst he has leave to remain in the UK. He was not satisfied that the secretary of state discharged the burden of proof regarding the use of deception in obtaining an English certificate [26].
23. He also stated at [26] that “I was told by [counsel] that it had been conceded, following a judicial review application, that the [claimant] does have an in country right of appeal and I have proceeded on that basis.”
24. Ms Isherwood submitted that the First-tier Judge properly noted that the claimant was appealing against the secretary of state's decision to remove him from the UK dated 27 November 2014. She submitted, relying on the secretary of state's grounds, that the claimant had made an application for leave to remain as a Tier 4 (General) Student on 12 June 2012, two days before his leave expired. That was rejected for non payment of a fee on 17 July 2012. He then put in a fresh application on 20 July 2012, which was out of time and which was refused with no right of appeal on 7 November 2012.
25. On 12 November 2012, he appeared to have put in a third application but also a request for reconsideration of the non appealable decision of 7 November 2012. He submitted an application outside the rules (FLR)(O) on 26 April 2013, and informed the secretary of state that he wanted the Tier 4 application considered, which meant the Tier 4 application of 12 November 2012. The application of 20 July 2012 had already been refused and the application dated 12 June 2012 had been rejected.

26. It is contended that the Tribunal could thus not infer from the Home Office letter mentioning the application of 12 November 2012 that it was a reference to the earlier, rejected application dated 12 June 2012 or the subsequent refused application of 20 July 2012. It is contended that the removal decision was made on 27 November 2014, against which the appeal was lodged. However, that decision was withdrawn after the claimant lodged a judicial review "and the new one was not appealed against."
27. I have had regard to a letter dated 2 December 2014 sent to the First-tier Tribunal in which it is contended that the claimant asserts that his removal from the UK would breach his human rights and that he is therefore entitled to an in country right of appeal. The lodging of the appeal confers jurisdiction on the Tribunal to determine the appeal, including the question of whether the claimant has a right of appeal.
28. Ms Isherwood referred to [26] where the Judge concluded that the claimant had an outstanding Tier 4 application which was made whilst he had leave to remain in the UK. She submitted that there was no evidence, as contended by counsel at the First-tier Tribunal hearing, that "it had been conceded" following a judicial review application that the claimant does have an in country right of appeal. It was on that basis that the Judge proceeded.
29. The Judge was also not satisfied that the secretary of state had discharged the burden of proof relating to the alleged deception as set out in the specific statement of reasons. He found that the claimant "did not use deception." [25]
30. I find that counsel before the First-tier tribunal was correct in noting that the secretary of state had conceded following a judicial review application that the claimant did have an in country right of appeal.
31. I have had regard to the documentation which was part of the claimant's bundle. At page 42 there is a form of consent order dated 4 June 2015 in the judicial review before the Upper Tribunal, to the effect that the claimant has been granted an in country right of appeal and the appeal is listed for hearing on 29 June 2015. By consent, it was ordered that the claimant therefore had leave to withdraw his judicial review application.
32. There is also a letter from the claimant's solicitors sent to the government legal department as well as to the Upper Tribunal on 4 June 2015 in which the claimant applied to withdraw the judicial review application "by mutual consent." The form of consent was enclosed. The solicitor stated that they understood that the First-tier Tribunal would now decide the matter in question appropriately.
33. The appeal was in fact listed for hearing on 29 June 2015 which is the date the First-tier Tribunal Judge heard the appeal.

34. It was on that basis that the Judge found that he did have jurisdiction to consider the appeal. He concluded that the claimant did not use deception in obtaining the test certificate and that the removal notice was therefore not in accordance with the law. There is no ground of appeal against the finding that he did not use deception.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error on a point of law and shall accordingly stand.

No anonymity direction is made.

Signed

Date 31 March 2016

Deputy Upper Tribunal Judge Mailer