



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/12842/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 7th November 2014

Determination
Promulgated
On: 10th December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Mubashar Nawaz
(no anonymity direction made)

Respondent

Representation:

For the Appellant: Mr Kandola, Senior Home Office Presenting Officer

For the Respondent: Mr Ehtesham-Khan, Pride Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan date of birth 22nd May 1988.
2. On the 21st August 2014 the First-tier Tribunal (Judge M. Whalan) allowed his appeal against the Secretary of State's decision to remove him from the United Kingdom

pursuant to s10 of the Immigration and Asylum Act 1999. The matter in issue in this appeal is whether he had the power to do so.

3. The Respondent believed himself to be in the UK with leave to remain as a Tier 4 (General) Student Migrant when on the 4th March 2014 he was encountered in a take-away called Tabaq Chicken & Pizza. The Immigration Officers who found him there allege that he was clearly working in breach of the conditions attached to his leave. Checks established that the licence of his Tier 4 Sponsor had been revoked by UKBA in the previous October, and that on the 21st November 2013 a Curtailment of Leave Notice had been issued under paragraph 323A(b)(i) of the Immigration Rules. These events led the Secretary of State to serve the Respondent, on the 4th March 2014, with an 'IS151A' - a 'Notice to a Person Liable to Removal'.
4. The Respondent then made an application for leave to remain on human rights grounds. That application was refused on the 17th March 2014 when he was served with an 'IS151B' - a notice of directions to remove. The Secretary of State certified the human rights claim as clearly unfounded under paragraph 94(2) of the Nationality, Immigration and Asylum Act 2002. This limited the Respondent's right of appeal to an out-of-country appeal only.
5. When the matter came before the First-tier Tribunal it was accepted by the Respondent's representatives that he had no right of appeal under Article 8 because his human rights application had been certified. He pursued his appeal on the grounds that the decision was not in accordance with the law. He submitted that he had never received the curtailment notice in November 2013; this, he submitted, rendered the IS151A unlawful and in turn the IS151B. Paragraph 10 of the determination records this legal framework as being agreed between the parties. The Judge found that the curtailment notice had indeed never been served, that the IS151A was invalid and so too the IS151B. The decision was not therefore in accordance with the law and the appeal was allowed.
6. The Secretary of State now has permission to appeal on the ground that the legal framework allegedly agreed by the parties on the day was in fact wrong. That is because regardless of whether the curtailment notice had ever been served, the IS151A served on the 4th March 2014

operated to invalidate any leave that the Respondent had previously held. Section 10(8) of the Immigration and Asylum Act 1999 (as amended by s48 of the Immigration, Asylum and Nationality Act 2006) reads:

“when a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him”

The validity of the IS151A does not therefore depend on any earlier curtailment. Indeed, it might be observed that if the leave had already been curtailed there would have been no need to serve this document at all. The Respondent therefore submits that the IS151B was perfectly valid, as was the certification, and there was no in-country right of appeal. The Upper Tribunal is requested to find an error of law and remake the decision by finding there to be a want of jurisdiction.

7. In response the Respondent makes two arguments. The first is that the removal decision could only properly have followed a lawful curtailment. Since the latter had not been served on the Respondent it followed that the decision to remove pursuant to section 10 was not lawful. The second argument is that the Respondent had in fact two concurrent avenues of appeal under the Nationality Immigration and Asylum Act 2002, because he appeals against two distinct immigration decisions: s82(2)(e) as well as s82(2)(g). Since s92 of that Act only excludes the latter, the Respondent had an unfettered in-country right of appeal against the decision to vary his leave so that he has no leave to remain (the curtailment).

My Findings

8. The matter in issue in this appeal is whether the First-tier Tribunal had the jurisdiction to hear and determine this appeal whilst the Respondent remained in the UK.
9. The Secretary of State submits that this is a straightforward case of there being no in-country jurisdiction. The factors which led to the service of the IS151A were that the Respondent was in the UK as a Tier 4 Migrant and on the day he was apprehended apparently working in breach of conditions he had not been studying for at least the preceding five months, the

licence of his Tier 4 Sponsor having been revoked. He had made no applications to vary his leave nor had he identified an alternative Sponsor. The Secretary of State therefore deemed him to be a person who had failed to observe a condition attached to his leave to remain or enter. Those facts plainly justified service of the IS151A. The IS151B that was served subsequent to the rejection of the Respondent's human rights claim was therefore valid. It was this decision that was identified as the decision appealed against, and duly attached to the Respondent's application to appeal to the First-tier Tribunal. That was a decision to remove under s10 of the Immigration and Asylum Act 1999 and as it stated on its face, s10(8) provides that its service invalidates any previous leave to enter or remain held by the recipient.

10. Mr Ehtesham-Khan submits that the decision was therefore two immigration decisions in one. It was a decision to remove under s10, which would provide an out-of-country appeal, but it was also a decision to vary so that the subject was left with no leave. This, he submits, would give the Respondent an in-country right of appeal: s92 of the Nationality Immigration and Asylum Act 2002.
11. This argument was rejected by the Court of Appeal in RK (Nepal) [2009] EWCA Civ 359 at paragraphs 29-37, see in particular Aikens LJ at 35-36:

35. It must follow from the Court of Appeal's decision in **Lim** that the court has to respect the fact that the "*immigration decision*" against the applicants that was stated to be made under **section 10** of the **1999 Act** was just that. Therefore, it must fall within **section 82(2)(g)** of the **2002 Act** and so must only be capable of appeal out of country. I agree with Deputy High Court Judge Dove QC that a decision made under **section 10(1)** of the **1999 Act** cannot fall within **section 82(2)(e)**, when Parliament has stipulated that it falls within **section 82(2)(g)**. It is, in my view, irrelevant that the SSHD might have made a decision to curtail the applicants' leave under the **Immigration Rules**, thus bringing the case within **section 82(2)(e)**. She did not do so and there is no challenge in these proceedings to the fact that the decision to remove was made under **section 10**.

36. Parliament has decided that the SSHD can make a decision to remove a non - UK citizen under **section 10(1)** of the **1999 Act**, or by using the curtailment provisions of the **Immigration Rules**. The two routes are distinct and must not be blurred. If the SSHD decides to use the **section 10(1)** procedure, then that can only be challenged in the very limited circumstances

described by Sedley LJ in *Lim*. If that is not possible (and it has not been attempted at all in this case) then the applicant is confined to an out of country right of appeal.

12. Mr Ehtesham-Khan asks me to disregard that decision on the basis that the judgement makes “many references” to IDIs and policy guidance, “all of which, post Alvi, have no standing in law”. Setting aside the fact that the latter submission perhaps reveals a misunderstanding of Alvi, it is apparent from the decision in RK (Nepal) that the focus of the Court’s analysis was the statute itself. Moreover it is an interpretation that has been recently (that is to say, post-Alvi) upheld by in R (on the application of Mohamed Bilal Jan) v Secretary of State for the Home Department (section 10 removal) IJR [2014] UKUT 00265 (IAC).
13. There was, as far as I can see, no statutory basis for finding that the Respondent had an in-country right of appeal. This decision is therefore set aside.

Decisions

14. The determination of the First-tier Tribunal contains an error of law and it is set aside.
15. I re-make the decision as follows:

“the matter is dismissed for want of jurisdiction. The Appellant has no right of appeal”.

Deputy Upper Tribunal Judge Bruce
30th November 2014