IAC-AH-DN-V3

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25133/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 4th December 2014	**On 3rd February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MUHAMMAD SHAHZAD
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Brown, Counsel
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 5th January 1989. The Appellant has an extensive immigration history as set out in the Secretary of State's notice of 11th August 2014. The Appellant's previous leave curtailed and expired on 15th April 2014. On that date he submitted an application as a Tier 4 Student. On 14th May it was identified that to support his student application the Appellant had submitted a fraudulently obtained English language test certificate. On 6th June 2014 a decision was made to remove the Appellant from the United Kingdom in

accordance with Section 10 of the Immigration and Asylum Act 1999. He was served with IS151A, 151A Part 2 and his Tier 4 Student leave to remain refusal on the grounds of deception.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Pacey sitting at Nottingham Magistrates' Court on 13th August 2014. In a determination promulgated on 21st August 2014 the Appellant's appeal was allowed on the basis that the Secretary of State had not discharged the burden of proof to the required standard and therefore the Appellant was not caught by the provisions of paragraph 322(1A) of the Immigration Rules.

3. On 1st September 2014 the Secretary of State lodged Grounds of Appeal. Those Grounds of Appeal contended firstly that the First-tier Tribunal Judge had misdirected himself in law with regard to jurisdiction in that the judge had refused to go behind an earlier decision of a Duty Judge and that the judge had materially erred in law in finding that there had been prior service of the refusal decision when both in law and fact they had been served and deemed to be served on 6th June 2014. Secondly it was contended that the judge had failed to have regard to relevant evidence on deception and had made a mistake of fact on a material point.

4. On 3rd October 2014 First-tier Tribunal Judge Osborne granted permission to appeal. Judge Osborne stated at paragraph 3:

> "In an otherwise focused determination in which the judge engaged with the evidence, it is nonetheless the case that the judge failed to refer to the evidence annexed to the Respondent's bundle at C1 and C2. It is therefore arguable that the judge overlooked that evidence when he made his findings at paragraph 10 of the determination. It is further arguable that in arguably failing to consider that evidence the judge arguably erred in law. All the issues raised in the grounds are arguable."

5. It is on that basis that this matter comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the sake of continuity throughout proceedings Mr Shahzad is referred to as the Appellant and the Secretary of State the Respondent albeit that this is an appeal by the Secretary of State. The Secretary of State appears by her Home Office Presenting Officer, Mr McVeety. The Appellant appears by his instructed Counsel, Mr Brown. There is no Rule 24 response filed by the Appellant's solicitors. Mr McVeety refers me to the skeleton argument dated 4th December on behalf of the Secretary of State upon which he relies.

Submissions/Discussions

6. Mr McVeety indicates that the appeal is divided into two sections, firstly the question of jurisdiction and secondly the question of evidence considered by the First-tier Tribunal Judge. He relies on his skeleton

argument. He submits that on the evidence before the First-tier Tribunal the Tribunal did not have jurisdiction and that the refusal letter (the variation decision) and the Section 10 decision dated 6th June 2014 were issued on the same day to the Appellant physically by an Immigration Officer. He submits that the First-tier Tribunal Judge materially erred in law in finding that there had been prior service of the refusal of the decision when both in law and in fact they had been served and deemed to be served on 6th June 2014 and he relies on the authority of *Anufrijeva, R (on the application of) v Secretary of State for Home Department and Another [2001] EWHC Admin 895*. He submits that there is no authority to enable the First-tier Tribunal Judge to go behind the preliminary issue and therefore assume the jurisdiction which he retains. He submits that the judge is therefore wrong to hear the appeal and that the decision should be set aside.

7. Mr Brown starts by taking me to the authority of the *Queen (on the application of) Nirula [2012] EWCA Civ 1436* pointing out that is authority for saying that it is necessary to be certain that the judge was wrong in the approach that he adopted and that had the judge raised human rights in his student application he would have a right of appeal but quite simply we do not know whether such issues were raised. He refers me specifically to paragraphs 11 and 24 of *Nirula* indicating that those paragraphs imply a general right and that there is now evidence in any event that the Appellant is a father of a British child. He submits that if there is no jurisdiction I have to be satisfied that there are no human rights issues raised before the judge and that the correct process to have been followed would have been for a judicial review to be applied for by the Secretary of State. He concedes that if there is no human rights application then the Appellant's position is more difficult but that jurisdiction only becomes material if there was no human rights application previously advanced.

8. Mr McVeety submits that the judge had materially erred in law in failing to deal with the documents. Mr Brown acknowledges that an assessment could be made at paragraph 10 of the determination but that the judge has carried out a proper analysis and that it was open to the judge to adopt the position that he found on jurisdiction and to draw the conclusions he reached at paragraph 11. He states thereafter it will be a matter for the Secretary of State to decide what to do if I am with him on the jurisdictional point.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. The first basis upon which I am asked to consider this matter is whether or not there is jurisdiction for the First-tier Tribunal Judge to hear this appeal. The very basis upon which the Appellant could have a right of appeal is as submitted by Mr McVeety he made a human rights claim to the Secretary of State as per Section 92(4) of the Nationality, Immigration and Asylum Act 2002. The first time that the Appellant has made a human rights claim is in his Grounds of Appeal in the present proceedings. The question arises as to whether or not the Appellant has made a human rights claim as defined in Section 113. I am considerably helped by the skeleton provided by Mr McVeety. The Appellant's Tier 2 application of 18th February 2014 did not include a human rights claim. However the reality of this matter is that it is very clear from the Grounds of Appeal to the First-tier Tribunal that Article 8 was raised and indeed was considered by the First-tier Tribunal Judge though he chose not to address it. It is pertinent to note that the First-tier Tribunal Judge states in the final sentence of his findings:

> "As I have found for the Appellant under the Immigration Rules it is not in my judgment necessary in the course of this determination to address human rights matters, either as reflected in, or outside, the parameter to the Immigration Rules."

12. Whether that is right or wrong is to a certain extent immaterial insofar as it is not raised as a Ground of Appeal by the Secretary of State. In order to succeed as to whether or not there is jurisdiction it is necessary for the Secretary of State to show that there were no human rights issues raised before the judge. It seems to me clear that they were raised. The fact however remains that the judge chose to adopt an approach by which he did not address human rights for reasons that he has given.

13. In such circumstances I am satisfied that the approach adopted by the judge is one that is sustainable and that the Secretary of State's arguments on jurisdiction fall away as there was extant before the Upper Tribunal an appeal under Article 8 albeit that it was not properly addressed by the judge because he did not consider it necessary. No challenge to that has been made at any stage within these proceedings.

14. Little is said in submission by the advocates regarding the second Ground of Appeal. Mr McVeety relies on the skeleton argument. Mr Brown submits the issue was adequately addressed within the determination. Paragraphs 9-11 of the determination assess the position thoroughly and makes findings that the judge was entitled to. In such circumstances the Secretary of State's contentions amount to little more than disagreement with the First-tier Tribunal Judge's findings.

15. In such circumstances the decision of the First-tier Tribunal does not disclose a material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal does not disclose a material error of law and the appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. No application is made to vary that order and none is made.

Signed Date **3rd February 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application for a fee order is sought and none is made.

Signed Date **3rd February 2015**

Deputy Upper Tribunal Judge D N Harris