Asylum and Immigration Tribunal

CD (s. 10 curtailment: right of appeal) India [2008] UKAIT 00055

THE IMMIGRATION ACTS

Heard at Field House
On 4 April 2008

Before

SENIOR IMMIGRATION JUDGE P R LANE

Between

CD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z. Nasin, Counsel, instructed by Messrs FLK Solicitors
For the Respondent: Ms L. Kalaher, Home Office Presenting Officer

A decision under section 10 of the Immigration and Asylum Act 1999 that involves the invalidation of any leave to enter or remain is to be treated for the purposes of the 2002 Act as a curtailment of that leave within section 82(2)(e), with the result that a person may appeal against that decision whilst he is in the United Kingdom, whether or not he has made an asylum claim or a human rights claim.

DETERMINATION AND REASONS

1. The appellant, a citizen of India born on 17 July 1978, was granted entry clearance to the United Kingdom as a student on 31 October 2005. On 30

March 2006 he was granted leave to enter as a student until 31 March 2007.

2. On 21 February 2007, the appellant applied for leave to remain as a student at Lloyds College, London, E7, studying for a BBA in Accounting and Finance. On 1 April 2007 the appellant was granted leave to remain in the United Kingdom as a student until 30 March 2008, in order to study at Lloyds College.

3. On 13 December 2007, however, the respondent decided that the appellant should be removed from the United Kingdom by way of directions because it had come to the respondent's attention that Lloyds College was not a bona fide education establishment. According to the respondent's letter, which accompanied her notice of decision:-

> "As part of an application for leave to remain as a student signed by on you on 21 February 2007 you submitted a letter of enrolment from Lloyds College dated 21 February 2007 stating that you had enrolled for a BBA Accounting and Finance course commencing on 16 January 2006 until January 2009. We are aware from our own enquiries that Lloyds College is not, and never has been, a bona fide educational establishment and that it is reasonable to believe that this would have been known to any person claiming to have studied or enrolled there.
>
> Therefore, we are satisfied, on the basis of the evidence available, that you have obtained leave to remain in the United Kingdom by means of deception.
>
> A decision has also been taken to remove you and spouse [sic] from the United Kingdom pursuant to powers contained in Section 10(1)(b) of the Immigration and Asylum Act 1999. Enclosed are forms IS151A which sets out [sic] your immigration status and liability to detention. You may appeal against the decision to remove you and your spouse under Section 82 of the Nationality, Immigration and Asylum Act 2002 from abroad, on the basis of one or more of the grounds of appeal contained within form IS151A Part 2 Notice of Decision, attached. In accordance with Section 10(8) of that Act, this decision invalidates any leave to enter or remain in the United Kingdom that you and your spouse have been granted. You and your spouse may wish to take note of the conditions of the 'One-Stop' procedure set out in form IS75 and complete and return IS76 if appropriate. Both forms are attached.
>
> You and your spouse now have no basis of stay in the United Kingdom, and should make arrangements to leave the United Kingdom without delay. If you and your spouse do not depart voluntarily, directions for your removal may be made."

4. At the hearing before the Immigration Judge, the appellant gave evidence. He told the Immigration Judge that he was not satisfied with the management and educational standards of Lloyds College and, consequently, on 23 April 2007, he decided that he should move to Stevens College of Technology and Management, where he remained on the same BBA course.

5. Relying upon a letter of 21 February 2007 from Lloyds College, which gave the DfES reference number of 21933, the Immigration Judge found that, certainly when the appellant applied for his further leave, Lloyds College was on the DfES register. It appeared to be common ground before the Immigration Judge that at some subsequent point, which the respondent was unable to identify, the college had ceased to be on the register. The significance of being on the register is apparent from paragraph 57(i) of the Immigration Rules, which requires a person to have been accepted for a course of study which is to be provided by an organisation which is included on the Department for Education and Skills' Register of Education and Training Providers.

6. The relevant provisions of section 10 of the Immigration and Asylum Act 1999 are as follows:-

> "(1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an Immigration Officer, if –
>
> …
>
> (b) he uses deception in seeking (whether successfully or not) leave to remain.
>
> (8) 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."

7. It is common ground that the service upon the appellant of form IS151A constituted notification for the purposes of section 10(8). At paragraph 9 of the determination, the Immigration Judge found:-

> "9. It seems to me to be not only draconian but plainly wrong on the part of the respondent to suggest that the appellant obtained leave to remain by means of deception. I reached that conclusion on the basis of the evidence before me that, in February 2007 and at the time of the appellant's last application for leave (21.2.08), Lloyds College was indeed on the DfES register being given the number 21933 (A15, respondent's bundle). The respondent is wrong to say that Lloyds College 'never has been a bona fide educational establishment…' It seems little short of astonishing that the respondent would seek to apply such legislation to a student with an exemplary past record who has fallen foul of a failing College. If the respondent had taken the time to research the facts she would have discovered that Lloyds College was on the register certainly in February 2007 when [the appellant] last applied – indeed the evidence was in the respondent's bundle."

8. The Immigration Judge went on to opine that the same predicament as faced the appellant "must apply to many students from overseas who have spent a great deal of money and put much effort into their studies. It is not suggested that [the appellant] is a poor student who has failed to produce evidence of the taking and passing of relevant examinations. He

is facing removal because, the respondent submits, he employed deception. For the reasons I have outlined that cannot be right."

9. At paragraph 11, the Immigration Judge accordingly allowed the appellant's appeal, with the result that he found that "the variation of leave application remains outstanding before the respondent". I have to say that it is unclear whether the appellant has made such an application. It is possible that, in saying what he did, the Immigration Judge considered that the grounds of appeal in some way constituted such an application since, at paragraph 10, he found that the appellant "had a legitimate expectation that the notice of appeal would receive proper attention from the Secretary of State". I shall return to this matter in due course.

10. The respondent's grounds do not seek to criticise the findings of fact of the Immigration Judge, including the finding that the appellant had not used deception in seeking his further leave to remain. Instead, the grounds assert that the Immigration Judge had no jurisdiction to hear the appeal. The immigration decision is said by the appellant to fall within section 82(2)(g) of the 2002 Act. Accordingly, section 92 provides that there is no in-country right of appeal, unless the appellant has made an asylum claim or a human rights claim. The respondent considers that "It is clear that in this case the appellant has not made such a claim" and this was not contested by Mr Nasin at the reconsideration hearing.

11. For reasons that will become apparent, it is convenient here to set out not only section 82(2)(g) but also section 82(2)(e)::-

> "(2) In this Part 'immigration decision' means –
>
> …
>
> (e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain;
>
> …
>
> (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c.33) (removal of person unlawfully in United Kingdom)".

12. The relevant provisions of section 92 are:-

> "(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.
>
> (2) This section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f), (ha) and (j).
>
> …

(4) This section also applies to an appeal against an immigration decision if the appellant –

(a) has made an asylum claim, or a human rights claim, while in the United Kingdom, or

(b) is an EEA national or a member of the family of an EEA national and makes a claim to the Secretary of State that the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom."

13. At the present time, the definitions of "asylum claim" and "human rights claim" in section 113 of the 2002 Act read as follows (although they are prospectively amended by the Immigration, Asylum and Nationality Act 2006):-

> "'asylum claim' means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or to require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention,
>
> ...
>
> 'human rights claim' means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c.42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights."

14. For the appellant, Mr Nasin submitted that the appellant had an in-country right of appeal because, in his notice of appeal, the appellant had raised a human rights claim.

15. The problem with that submission is that a human rights claim made in this way cannot be said to have been made to the Secretary of State. In ST (s92(4)(a): meaning of "has made") Turkey [2007] UKAIT 00085, the Tribunal (at paragraph 11) said that:-

> "As the Tribunal pointed out in SS & Others Turkey [2006] UKAIT 00074, the requirement that the claim be made to the Secretary of State means that if the only claim is in grounds of appeal, the requirements of s113 are met if the appeal was to an Adjudicator before 4 [April] 2005 because the appeals process was then that an in-country appeal had to be lodged with the Secretary of State. A claim made only in grounds of appeal to this Tribunal, however, is not lodged with the Secretary of State and cannot therefore meet the requirements of s113."

16. Mr Nasin's alternative submission, however, is much more powerful. This is to the effect that the decision which the respondent took in the present case, however else it might be categorised, amounted in practice to a "variation of a person's leave to enter or remain in the United Kingdom" such that "when the variation takes effect the person has no leave to

enter or remain" and, thus, fell within section 82(2)(e) of the 2002 Act. As can be seen, an immigration decision under section 82(2)(e) is a decision of a kind to which section 92 applies, with the result that there is an in-country right of appeal, regardless of whether the appellant has made an asylum claim or a human rights claim.

17. For the respondent, Ms Kalaher submitted that, on a proper analysis, the respondent had not varied the appellant's leave to remain, as described in section 82(2)(e), but had made a decision that was of the kind described in section 82(2)(g). So far as section 10(8) of the 1999 Act was concerned, the notification of that immigration decision had invalidated the appellant's leave to remain, which was not the same as curtailing the appellant's leave under section 82(1)(e).

18. On the facts as she perceived them to be, the respondent could have curtailed the appellant's leave to remain. Paragraph 323 of the Immigration Rules provides, *inter alia*, that a person's leave to enter or remain may be curtailed:-

> "(i) on any of the grounds set out in paragraph 322(2)–(5) above; or
>
> (ii) if he ceases to meet the requirements of the Rules under which his leave to enter or remain was granted."

19. Paragraph 322(2) and (3) are:-

> "(2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave.
>
> (3) failure to comply with any conditions attached to the grant of leave to enter or remain."

20. In the present case, the respondent did not proceed under those provisions, which undoubtedly would have fallen within section 82(2)(e) and thus have afforded the appellant an in-country right of appeal. Instead, she invoked section 10 of the 1999 Act and thereby not only achieved the *de facto* termination of the appellant's leave to remain but also took an important step towards securing the appellant's removal from the United Kingdom.

21. At this point, I should record that it was common ground at the reconsideration hearing that, whatever else the immigration decision might have been, it was not a refusal to vary the appellant's leave to remain in the United Kingdom (section 82(2)(d)). The respondent's grounds criticise the Immigration Judge for purporting to record, at paragraph 1 of the determination, that the decision was to refuse to vary leave to remain. However, it is plain from that paragraph that the Immigration Judge also recognised that the decision involved removal. In saying what he did in paragraph 1, the Immigration Judge was, no doubt, following what was said on the respondent's form ICD.1989 05/05, which,

under the heading “Decision”, stated that “On 13/12/07 a decision was made to refuse to vary leave to remain in the United Kingdom”. In the circumstances, the Immigration Judge’s error was perhaps understandable; but, in any event, it was not material.

22. If a person has never had any leave to enter or remain in the United Kingdom, or has no such leave at the date of the immigration decision in question, there is plainly a policy justification for limiting that person’s right of appeal, in the way provided in section 92 of the 2002 Act. If, however, a person does have such leave, the position would seem to be otherwise, else the variation of a person’s leave to enter or remain, so that leave is curtailed, would not sensibly sit within section 92(2). Where, on the very same facts as could give rise to a decision to curtail, the respondent instead decides to invoke section 10 of the 1999 Act, with precisely the same effect in practice, so far as the person in question is concerned, in that his current leave is brought to an end by operation of section 10(8), it is very hard to see how Parliament could have intended that person to be deprived of an in-country right of appeal. The fact that such a person might, in the absence of an in-country right of appeal, be able to apply for judicial review against the decision of the respondent to remove him from the United Kingdom is in no sense an answer. The fact that section 10(8) of the 1999 Act uses the word “invalidates”, in relation to any extant leave, does not preclude the immigration decision from falling within section 82(2)(e), as well as section 82(2)(g). If the position is equivocal, then as the Tribunal has said in GO (Right of appeal: ss 89 and 92) Nigeria [2008] UKAIT 00025, any ambiguity in provisions dealing with rights of appeal should be resolved by a construction that would preserve rather than remove those rights.

23. I have therefore concluded that the immigration decision in the present case, whilst falling within section 82(2)(g), is also to be categorised as one which falls within section 82(2)(e). Whatever else it did, the administrative process that the respondent chose to adopt, by invalidating the appellant’s leave to remain in the United Kingdom, constituted a curtailment of that leave, just as if paragraph 323 had been invoked. The appellant, accordingly, had an in-country right of appeal.

24. As I have already indicated, no issue is taken with the Immigration Judge’s findings of fact. In view of those findings, it is manifest that the respondent had no basis for making a decision by reference to section 10 of the 1999 Act, that the appellant should be removed from the United Kingdom by way of directions. The appellant had not used deception in seeking leave to remain.

25. The appeal accordingly fell to be allowed. As I have already mentioned, the Immigration Judge, at paragraph 11 of the determination, appears to have been of the view that the appellant had made an application for variation of leave, which, in the light of the Immigration Judge’s decision, remained outstanding before the respondent. As far as I can see, there is no such application. If in fact there is, this determination will not have any

effect upon it. If there is not, the last part of paragraph 11 of the Immigration Judge's determination can be disregarded.

26. There is no material error of law in the determination of the Immigration Judge and (subject to what is said above) I order that it shall stand.

Signed

Senior Immigration Judge P R Lane