Neutral Citation Number: [2016] EWCA Civ 615

Case No: C5/2015/2180 and 2724

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
IA/25133/2014; OA/10126/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2016

Before :
LADY JUSTICE BLACK
LORD JUSTICE BEATSON
and
LADY JUSTICE KING

- -

Between :

Secretary of State for the Home Department	**Appellant**
- and -	
(1) Muhammad Shehzad	**Respondents**
(2) MD Chowdhury	

Lisa Giovennetti QC and Colin Thomann (instructed by **Government Legal Department**) for the **Appellant**
Ramby de Mello and Rashid Ahmed (instructed by **Abbey Solicitors**) for the **First Respondent**
The Second Respondent did not appear and was not represented

Hearing date: 19 May 2016

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Approved Judgment

Lord Justice Beatson:

I. Overview:

1. The Secretary of State appeals against the decisions of the Upper Tribunal promulgated on 3 January and 18 May 2015, affirming decisions of the First-tier Tribunal. The respondents are Muhammad Shehzad and Shafiul Bashar Chowdhury. In decisions dated 21 August 2014 and 28 January 2015, the First-tier Tribunal allowed appeals by Messrs Shehzad and Chowdhury against decisions by the Secretary of State to curtail their leave to remain in the United Kingdom made pursuant to paragraph 322(1A) of the Immigration Rules and, pursuant to section 10 of the Immigration and Asylum Act 1999 ("the 1999 Act"), to remove them from the United Kingdom. The decisions were made on the ground that Messrs Shehzad and Chowdhury had sought leave to remain in the United Kingdom by deception.

2. As is now well-known, after a *Panorama* programme on 10 February 2014 revealed that widespread fraud had been used in the Test of English for International Communication ("TOEIC"), which is required in order for a person to be credited with the necessary points under the Immigration Rules, Educational Testing Services (hereafter "ETS"), the organisation which had conducted the tests, reviewed all tests taken. I describe the fraud and the review at [11] below. The Secretary of State's decisions to curtail Messrs Shehzad and Chowdhury's leave and to remove them were made after ETS informed her officials that there was an anomaly in their tests indicating that the tests had been taken by a proxy.

3. It is common ground that for a decision to be made under paragraph 322(1A) there must be material justifying a conclusion that the individual under consideration has lied or submitted a false document. It is also common ground that the Secretary of State bears the initial burden of furnishing proof of deception, and that this burden is an "evidential burden". That means that, if the Secretary of State provides *prima facie* evidence of deception, the burden "shifts" onto the individual to provide a plausible innocent explanation, and that if the individual does so the burden "shifts back" to the Secretary of State: see *Shen (paper appeals: proving dishonesty)* [2014] UKUT 00236 (IAC) at [22] and [25] and *Muhandiramge (section S-LTR 1.7)* [2015] UKUT 675 at [10]. As to the standard of proof, the civil standard of proof applies to this question. The approach in *Re B (Children)* [2008] UKHL 35, [2009] 1 AC 11 to the standard of proof required to establish that a child "is likely to suffer significant harm" under section 31(2) of the Children Act 1989 is of relevance in the present context. It was held in that case that the standard required is the balance of probabilities. Baroness Hale stated (at [70]) that "neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

4. This court has considered other questions arising out of decisions to curtail leave and remove those who were considered to have used deception in their TOEIC tests. In *R (Sheraz Mehmood and Shahbaz Ali) v Secretary of State for the Home Department* [2015] EWCA Civ 744, [2015] 1 WLR 461 and *R (Sood) v Secretary of State for the Home Department* [2015] EWCA Civ 831, [2016] Imm AR 61 it was held that there is only an out of country appeal in such cases and that judicial review is not normally available.

5. In these appeals, two questions arise. The first question is whether the Upper Tribunal erred in upholding the conclusions of the First-tier Tribunal that the Secretary of State had failed to discharge the evidential burden of proving deception so as to shift the burden onto Messrs Shehzad and Chowdhury. Did the tribunals err in their consideration of the evidence on behalf of the Secretary of State, including that in the statements of Peter Millington and Rebecca Collings, two civil servants in the relevant part of the Home Office? The evidence of Mr Millington and Ms Collings has been relied on by the Secretary of State in all the cases arising out of curtailment of leave as a result of a decision that deception had been used in the TOEIC tests. It is not the only evidence relied on by the Secretary of State in the cases of Messrs Shehzad and Chowdhury: see [12], [25] and [30] below.

6. In the appeals before us the FtT held that the Secretary of State's evidence is (Shehzad, FtT, [10]) "generalised and … [does] not specifically relate to [Mr Shehzad] or to the test he took". It is also stated (Chowdhury, FtT, [15]) that it is "in effect generic and does not show the exact reason why ETS invalidated the certificate of [Mr Chowdhury] in particular, and provides no evidence relating to [Mr Chowdhury's] personal circumstances".

7. In Mr Chowdhury's case, the FtT judge also stated that the Home Office evidence, primarily that of Mr Millington and Ms Collings, was that "there can be multiple reasons for invalidation, some of which may not involve fraud or deception" and that there can be "other reasons for 'invalidation' other than the use of a proxy test-taker": [16] – [17]. The FtT judge was (see [18]) satisfied that it was possible that invalidation was due to an irregularity at the particular testing centre rather than any specific evidence of dishonesty.

8. The second question before the court concerns only Mr Shehzad. It is whether the First-tier and Upper Tribunals had jurisdiction to hear an in-country appeal against the Secretary of State's decision, served on 6 June 2014, rejecting his application for further leave to remain on the basis that he had used deception in his TOEIC test. It is submitted by Ms Giovennetti QC and Mr Thomann on behalf of the Secretary of State that the tribunals did not have such jurisdiction because, although a decision to remove a person under section 10 of the 1999 Act is an immigration decision which carries a statutory right of appeal to the First-tier Tribunal, because it is not one of the immigration decisions to which section 92 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") applies, it is not a decision which can be appealed while a person is in the United Kingdom. There is an exception in section 92(4) of the 2002 Act. It provides that a person who "has made an asylum or a human rights claim" while he is in the United Kingdom may exercise an in-country right of appeal. The Secretary of State's case is that it is a pre-requisite to the operation of section 92(4) that the person has made such a claim to the Secretary of State before instituting his appeal and that Mr Shehzad only did so after the decision refusing his application was served on 6 June 2014 in his grounds of appeal against that decision. The court was not informed of the date on which the grounds of appeal were filed.

9. There were also a number of procedural issues in Mr Shehzad's case. The Secretary of State filed her appellant's notice over a month after the expiry of the 28 day period in the rules. Mr Shehzad had not filed his skeleton argument in time and did not file a Respondent's Notice. However, very shortly before the hearing, the court approved a consent order extending time for both parties.

10. For the reasons given at [31] – [40] below, I have concluded that the Secretary of State's appeal in the case of Mr Shehzad should be allowed on the ground that the tribunals had no jurisdiction to hear an in-country appeal in his case. It is therefore not necessary to consider whether the tribunals also erred in their approach to the evidence in his case, although (see [30] below) in my judgment, that part of the Secretary of State's case faced difficulty. In the case of Mr Chowdhury, for the reasons I give at [24] – [27] below, I consider that the tribunal erred in law in its approach to the evidence before it and that his case must be remitted to the Upper Tribunal.

II The factual background:

11. *(i) The Panorama programme and ETS's review of the TOIC tests:* Access to several language test centres run by ETS in this country was gained by reporters working for the BBC's *Panorama* programme. They used covert recording devices and their investigation revealed significant fraud in the taking of the tests, in particular the use of "proxies" to take the oral English tests set by ETS, which were administered remotely via computer. After the programme, ETS reviewed the validity of test scores awarded by it. Its review included an analysis of the voice recordings submitted for the spoken English component. It appeared to ETS from that analysis that, in numerous cases, the same voices appeared repeatedly on different test recordings and that that indicated that the voice was that of a "proxy" who had taken the test on behalf of many candidates. ETS's review consisted of the use of computerised voice recognition software and two independent "human reviews" by separate anti-fraud staff trained in voice recognition. Where a "match" was identified at each of the three stages, ETS concluded that a proxy had been used and the test was categorised as "invalid". In other cases, including where problems were identified at a test centre, the test was categorised as "questionable". The process is described more fully in the decisions of the Upper Tribunal in *R (Gazi) v Secretary of State for the Home Department (ETS – Judicial Review)* [2015] UKUT 00327 at [6] – [15] and *SM and Ihsan Qadir v Secretary of State for the Home Department* [2016] UKUT 229 (IAC) at [8] – [26] and also in the decisions of this court in *Mehmood and Ali* and *Sood*, to which I referred at [4] above.

12. *(ii) The evidence:* The principal evidence relied on by the Secretary of State is that of Mr Millington and Ms Collings to which I have referred. Their evidence is also summarised in the cases of *Gazi* and *Qadir*. It has been described as "generic": see *Gazi* at [6] and [9] and *Qadir* at [1] and [13]. This is because their evidence did not show the exact reason why ETS invalidated the certificate of a particular person or provide evidence relating to the personal circumstances of an individual. The Secretary of State also relied on evidence in the form of a screenshot of the results including the tests of Messrs Chowhury and Shehzad. I refer to this evidence and to the way it was treated by the FtT at [25] and [30] below. I also refer to the evidence relied on by Mr Chowhury at [28] below.

13. *(iii) Muhammad Shehzad*: Mr Shehzad, a citizen of Pakistan, was in this country with leave which expired on 15 April 2014. On that day, he submitted an application for leave to remain in the United Kingdom as a Tier 4 student. On 24 March 2014, ETS informed the Secretary of State that it had identified Mr Shehzad's ETS language test as having been taken by a proxy.

14. Following that and consideration of Mr Shehzad's case, the Secretary of State decided to refuse Mr Shehzad's application for further leave to remain under paragraphs 322(1A) and 245ZX(a) of the Immigration Rules and to exercise the power of removal under section 10(1)(b) of the 1999 Act. The two decisions were served on him on 6 June 2014. The decision refusing Mr Shehzad's application for further leave to remain because deception had been used was in a letter dated 14 May 2014.

15. Mr Shehzad's grounds of appeal were that there had been no evidence of the alleged deception and he had been deprived of the opportunity of commenting on ETS's evidence. At that time, he for the first time also advanced human rights based arguments. The Secretary of State, in a letter dated 3 July 2014, maintained that the First-tier Tribunal lacked jurisdiction to consider these appeals on an in-country basis because the service of form IS151A on 6 June 2014 invalidated Mr Shehzad's previous leave, and the decision to remove him attracted only an out-of-country right of appeal under sections 82 and 92 of the Nationality, Immigration and Asylum Act ("the 2002 Act"). On 9 July 2014, a duty judge of the First-tier Tribunal rejected the Secretary of State's objections as to jurisdiction on the ground (see FtT at [6]) that Mr Shehzad had an in-country right of appeal pursuant to section 92(4) of the 2002 Act against the 14 May 2014 decision rejecting his application, which was made before the decision to remove him on 6 June 2014.

16. At the hearing, the FtT judge concluded that the jurisdictional issue had been determined by the duty judge against the Secretary of State. In a determination promulgated on 21 August 2014 the FtT judge allowed Mr Shehzad's appeal for the reasons summarised at [6] above and [18] below. In short, he concluded that there was no specific evidence to show that Mr Shehzad's English Language Testing Certificate had been obtained by fraud, the Secretary of State had therefore not discharged the burden of proving deception to the requisite standard, and it was not necessary to address the human rights-based submission. In a determination promulgated on 3 January 2015 the Deputy Upper Tribunal judge considered that the FtT's determination assessed the position thoroughly and made findings as to the evidence that the FtT judge was entitled to make so that there was no material error of law: see [14] and [15].

17. *(iii) Shafiul Bashar Chowdhury*: Mr Chowdhury applied for leave to remain as a Tier 4 (General Student) migrant on 24 January 2014. The Secretary of State was notified by ETS that his spoken English test had been invalidated on the basis of a voice match before his application was determined. In a letter dated 26 August 2014, Mr Chowdhury was informed that his application had been refused under paragraphs 322(1A) and 245ZX of the Immigration Rules on the ground that there was "substantial evidence to conclude that [the] certificate was fraudulently obtained". At the same time, the Secretary of State informed him that she had decided to remove him under section 10 of the 1999 Act. The application for leave was also refused on the ground that Mr Chowdhury did not have a valid Confirmation of Acceptance for Studies ("CAS").

18. Mr Chowdhury left this country voluntarily and exercised his out-of-country right of appeal after his return to Bangladesh. In a determination promulgated on 28 January 2015, the FtT allowed his appeal for the reasons summarised at [6] and [7] above and [25] below. An appeal by the Secretary of State to the Upper Tribunal was dismissed in a determination promulgated on 18 May 2015. The Deputy Upper Tribunal judge

stated (UT determination at [4]) that the FtT judge's decision was sufficiently reasoned for the Secretary of State to understand why she had lost and that (see [5]) "the judge was well aware of the straightforward ETS Lookup Tool document that provided [Mr Chowdhury's] details and showed his test to be invalidated". She also stated (at [5]) that "the [FtT] Judge's concern was, however, that there was insufficient specified evidence as to why this particular claimant's test was invalidated" and that he was entitled to conclude that there were reasons for invalidation other than that a proxy taker had been used.

III. The approach of the tribunals to the evidence

19. I summarised the FtT's approach to the generic evidence of Mr Millington and Ms Collings regarding ETS's analysis of the spoken English component of the TOEIC test at [6] and [7] above. These appeals are only concerned with whether their evidence, together with evidence that the test of the individual under consideration has been assessed as "invalid" rather than as "questionable" because of problems at the test centre, suffices to satisfy the evidential burden of showing dishonesty that lies on the Secretary of State and to impose an evidential burden on the individual to raise an innocent explanation. The question before us is thus not the ultimate reliability of the evidence or the ultimate disposition of the appeals. Those matters were considered by the Upper Tribunal in *Qadir* which, after a full hearing, rejected the evidence. An appeal by the Secretary of State against the decision in *Qadir* is pending in this court. There may be other cases in the pipeline.

20. *(i) Background: Qadir's case*: It is convenient to begin by considering the decision in *Qadir.* In that case, the FtT dismissed the appeals of SM and Mr Qadir but the Upper Tribunal set the decisions aside as erroneous in law and remade them. In the Upper Tribunal, as well as the evidence of Mr Millington and Ms Collings, the tribunal had before it a report by Dr Philip Harrison, a forensic consultant, which criticised their evidence. It also heard oral evidence from SM and Mr Qadir which was tested in cross-examination. The tribunal concluded that the generic evidence on which the Secretary of State relied was insufficient to discharge the legal burden of proof on the Secretary of State of proving that the TOEIC certificates were procured by dishonesty. It endorsed the criticisms of Dr Harrison and also accepted the evidence of SM and Mr Qadir as plausible and truthful.

21. For present purposes, it is significant that in *Qadir* the tribunal stated (at [67] – [68]) that the evidence of Mr Millington and Ms Collings sufficed to shift the evidential burden onto the person whose leave had been curtailed. In that case, there was no submission that their evidence did not discharge the evidential burden lying on the Secretary of State at the initial stage. The tribunal described the threshold which an evidential burden entails as a "comparatively modest threshold" and stated that "by an admittedly narrow margin, we are satisfied that the Secretary of State has discharged this burden" and that the effect "is that there is a burden, again an evidential one, on the appellants of raising an innocent explanation". The tribunal then considered the evidence before it and reached the conclusion that the Secretary of State had not discharged the legal burden of proof that lay on her.

22. As I have stated, the question in these appeals only concerns the initial stage and whether, with the evidence of Mr Millington and Ms Collings, the evidential burden on the Secretary of State is satisfied. If it is, it is then incumbent on the individual

whose leave has been curtailed to provide evidence in response raising an innocent explanation.

23. At the hearing, Ms Giovennetti informed the court that the other cases pending in the tribunal or in this court involve a range of different evidence adduced by the individual. These included an independent comparison of that person's voice with the voice tested by ETS, evidence of attainment in English language, for example by educational qualifications in English (some in this country), and evidence of spoken English ability. I do not address the question of what evidence will be sufficient to enable a tribunal to conclude that there has been no deception. That is likely to be an intensely fact-specific matter. These appeals and my judgment are only concerned with the initial stage and the evidential burden at that stage.

24. *(ii) Mr Chowdhury's case:* It appears that the FtT's decision rests solely on its refusal to accept that the Millington/Collings evidence, together with identification of the individual as a person whose test has been "invalidated", suffices to shift the evidential burden. Although Mr Chowdhury had submitted a witness statement together with educational qualifications taught in English, both in this country and in Bangladesh (see FtT determination at [24]) , these are referred to only in the most general terms. The decision rests on the approach of the tribunal to the Secretary of State's evidence and it is clear that the FtT judge misunderstood that evidence.

25. The FtT judge stated that there was no evidence identifying Mr Chowdhury as a person whose test was "invalid". In fact, the evidence included a screenshot of the results which stated this was the position. The evidence also included the "ETS Lookup Tool" which showed the tests that were "invalid". The determination also shows other mistakes and misunderstandings of the process undertaken by ETS and explained in Mr Millington and Ms Collings's statements. In particular, the FtT judge's conclusion (see [7] above) that "there could be multiple reasons for invalidation, some of which may not involve fraud or deception", failed to appreciate the distinction in the evidence between cases categorised as "questionable" and those categorised as "invalid". In "questionable" cases it was accepted that there may not have been deception. In "invalid" cases, this was not accepted. That was because the voice on the audio recording of the test under consideration (e.g. Mr Chowdhury or Mr Shehzad's test) matched the voice of someone who had taken another test using a different name.

26. With regard to the decision of the Upper Tribunal, I accept Ms Giovennetti's submission that it is not possible to derive from the FtT's determination that, as the Deputy Upper Tribunal judge found, the FtT judge was "well aware of the straightforward ETS Lookup Tool document" that she stated showed Mr Chowdhury's test to be invalidated. This statement also shows that the Deputy Upper Tribunal judge misunderstood the nature of the evidence. Had she understood it properly, she would have had to deal with the failure of the FtT judge to treat the "ETS Lookup Tool" as evidence that Mr Chowdhury's test had been invalidated. The reason for the misunderstandings by the tribunals may be that the language used by Mr Millington and Ms Collings in their statements to explain a technical process is not altogether clear. But, whatever the reason, in these circumstances, in my judgment the *in limine* rejection of the Secretary of State's evidence as even sufficient to shift the evidential burden was an error of law.

27. Mr Chowdhury's appeal was an out-of-country appeal. He is now in Bangladesh. Shortly before the hearing in this court the Civil Appeals Office was informed that he no longer had legal representatives in these proceedings. It was possible to communicate with him by email before the hearing but, beyond the original grounds of appeal, the court has received no representations from him.

28. In my judgment Mr Chowdhury's case must be remitted to the Upper Tribunal. If my Ladies agree with my conclusion that the material submitted by the Secretary of State in his case sufficed to shift the evidential burden to Mr Chowdhury, the tribunal will have to consider the Secretary of State's evidence in the light of that decision. It will also have to consider Mr Chowdhury's evidence. That consists of his witness statement and the supporting documents. The evidence is that he has an Edexcel BTEC level 5 HND Diploma in Business taught in English and a BA degree from the International Islamic University Chittagong, also taught in English, and with B+ and B grades in Advanced English and Advanced English writing.

29. *(ii) Mr Shehzad's case:* For the reasons I give in section IV of this judgment, I have concluded that the Secretary of State's jurisdiction arguments succeed for the reasons given by Ms Giovennetti in her skeleton argument. It is therefore not necessary to decide whether the Secretary of State is right in contending that the tribunal also erred in its approach to Mr Millington and Ms Collings's evidence in Mr Shehzad's case. I, however, note that Mr Shehzad's case appears to differ from Mr Chowdhury's.

30. It appears that no material was put in front of the tribunal to show that Mr Shehzad's TOEIC speaking English test had been adjudged to be "invalid" as opposed to "questionable". All that the tribunal had in front of it were his results. The document at B1 of the bundle referred to by the tribunal (a screenshot) was partial in not showing the tab at the bottom which indicated that it was from the page of tests which were assessed as "invalid". That tab is also not on the extract from the "ETS Lookup Tool" attached to an email dated 4 April 2014 although the email states that the extract is "of test takers whose results have been invalidated". It thus appears that the documents before the FtT did not identify Mr Shehzad's test as "invalid". Ms Giovennetti accepted that there were problems with the way the material about Mr Shehzad had been put in front of the tribunal by the Secretary of State. She stated Mr Shehzad's case was one of the earliest cases and that matters were now handled very differently. The tribunal might be open to criticism in its treatment of the Millington/Collings evidence at the initial stage. But, in circumstances where the generic evidence is not accompanied by evidence showing that the individual under consideration's test was categorised as "invalid", I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage.

IV. The jurisdiction of the tribunal in Mr Shehzad's case

31. Section 92(4)(a) of the 2002 Act provides for an in-country right of appeal where a person "has made an asylum, or a human rights claim, while in the United Kingdom". I summarised the Secretary of State's position in relation to section 92(4) at [8] above. I consider that the duty judge fell into error for two reasons. The first is that he relied on the date of 14 May 2014 on the letter refusing Mr Shehzad's application for further leave rather than on 6 June, the date on which the decision was served on Mr Shehzad. It is clear from a number of decisions of this court that the Secretary of State's decision refusing leave took effect when it was served and not when it was

drafted: see *Ahmadi v Secretary of State for the Home Department* [2013] EWCA Civ 512, [2014] 1 WLR 401 at [25], *R (Shehraz Mehmood and Shahbaz Ali) v Secretary of State for the Home Department* [2015] EWCA Civ 744, [2016] 1 WLR 461 at [42] – [44], and *R (Sood) v Secretary of State for the Home Department* [2015] EWCA Civ 831, [2016] Imm AR 61 at [30].

32. The second and more fundamental reason is that it is pre-requisite for the in-country right of appeal under section 92(4)(a) that the individual concerned has made such a claim to the Secretary of State before instituting his or her appeal. It is not disputed that Mr Shehzad only made the claim in his grounds of appeal. In *R (Nirula) v Secretary of State for the Home Department* [2012] EWCA Civ 1436, [2013] 1 WLR 1090, Longmore LJ, with whom Sedley and Davis LJJ agreed, stated that the language of section 92(4)(a), making it applicable in cases where a person "has made an asylum claim or a human rights claim while in the United Kingdom" and its use of the "auxiliary perfect tense", "strongly implies that the claim must precede any appeal and that must mean before the institution of an appeal rather than at the date of the hearing of the appeal.". Longmore LJ considered that the probable reason why Parliament chose those words was to give the Secretary of State the opportunity to give a decision on any human rights claim before the appeal is determined so that her decision on that question can become part of any appeal. He stated that orderly process would be disrupted if, without any prior notification to the Secretary of State, a person can simply put a human rights claim in his notice of appeal.

33. Accordingly, subject to the submissions of Mr de Mello, on behalf of Mr Shehzad, on Rule 9 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 SI 2005 No. 230 ("Rule 9 of the 2005 Procedure Rules"), since the human rights claim formulated by Mr Shehzad was made for the first time in his grounds of appeal, he did not have an in-country right of appeal by virtue of section 92(4) of the 2002 Act and the tribunals did not have jurisdiction.

34. I turn to Rule 9 of the 2005 Procedure Rules. It provides:

> "(1) Where a person has given a notice of appeal to the Tribunal and the circumstances in paragraph (1A) apply, the Tribunal may not accept the notice of appeal.
>
> (1A) The circumstances referred to in paragraph (1) are that–
>
> (a) There is no relevant decision; […]
>
> (b) The notice of appeal concerns the refusal of an application for entry clearance which was not made for a purpose falling within section 88A(1)(a) or (b) of the 2002 Act, and the notice of appeal does not rely on either of the grounds specified in section 88A(3)(a) of the 2002 Act[; or]
>
> (c) The Lord Chancellor has refused to issue a certificate of fee satisfaction.
>
> (2) Where the Tribunal does not accept a notice of appeal, it must–

(a) Notify the person giving the notice of appeal and the respondent; and

(b) Take no further action [on that notice of appeal]."

35. Mr de Mello submitted that a rule 9(2) decision is a procedural or preliminary decision and as such not an appealable decision. He also submitted that the tribunal had jurisdiction because the Secretary of State did not appeal the duty judge's decision and the Upper Tribunal was not asked to consider that decision. He argued that an extension of time was required to appeal the decision of the duty judge which, as the Secretary of State accepted, could not be reviewed by the First-tier Tribunal. It followed, he maintained, that the only way the Secretary of State could have challenged the decision of the duty judge was by way of judicial review, and it is far too late to do so now. Accordingly, the duty judge's decision was valid. Mr de Mello went so far as to submit that, with the passage of time, that decision "became set in stone".

36. I reject Mr de Mello's submissions based on Rule 9 of the 2005 Procedure Rules. Rule 9 is headed "Where the tribunal may not accept a notice of appeal". It is absolutely clear that it is concerned with the position where the tribunal refuses to accept an appeal as valid. It is not applicable in circumstances such as Mr Shehzad's case, where the tribunal has accepted that the appeal is valid. To apply Rule 9 in a case such as this is also directly contrary to the approach of this court in other cases, including *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78 and *Nirula's* case to which I have referred.

37. I accept Ms Giovennetti and Mr Thomann's written submission that Mr de Mello's argument on this point is also incompatible with the overriding objective. They are correct to maintain that it would be inconvenient and wasteful to require a party seeking to contest a decision of the tribunal to hear an appeal to institute parallel proceedings by way of judicial review rather than raising the matter at the substantive appeal. The latter avoids inconsistency and duplication of proceedings.

38. In *JH (Zimbabwe) v Secretary of State for the Home Department* Richards LJ, with whom Laws and Wall LJJ agreed, rejected the submission of the Secretary of State that a decision taken by the tribunal of its own motion that there was no jurisdiction is not appealable: see [3], [7] and [8]. Richards LJ stated that it made no sense to treat the senior immigration judge's decision on jurisdiction as having been made under rule 9 or as a procedural or preliminary decision, and there was no reason for excluding such a decision from review or appeal under section 103A or 103B of the 2002 Act. In *Abiyat and others v Secretary of State for the Home Department (Rights of appeal: Iran)* [2011] UKUT 00314 (IAC), Mr Ockelton, the vice-president of the IAC, stated that *JH (Zimbabwe)* essentially decided that a decision as to jurisdiction made after the tribunal had begun to consider an appeal is not procedural and is not preliminary in the sense intended by the legislation, and that accorded with what one would expect. This was because while, where a tribunal declines to determine a case in which it has jurisdiction, the remedy is naturally a mandatory order in judicial review proceedings, the position is different where the tribunal accepts jurisdiction. Where a tribunal which is part of a structure in which there is a further right of appeal, decides to accept jurisdiction, the assumption would be that recourse where its decision to accept jurisdiction is disputed should be by exercising the right of appeal.

39. There was no suggestion in *Nirula*'s case, where this court considered a jurisdictional challenge by the Secretary of State, that a decision accepting jurisdiction fell under rule 9. The court also stated (see [30]) that there is no binding authority that the tribunal is not entitled to take the point that it has no jurisdiction and that that point has expressly to be taken by the Secretary of State.

40. The solution for which Mr de Mello contended would mean that the tribunal dealing with what has been accepted at a preliminary stage to be a valid notice of appeal would be unable to address the jurisdictional question. His argument based on the judgment of Sedley LJ in *Anwar v Secretary of State for the Home Department* [2010] EWCA Civ 1275, [2011] 1 WLR 2552 at [20] and the distinction his Lordship made between "constitutive" and "adjudicative" jurisdiction involves treating a decision which has been made where Parliament has stated there is no jurisdiction as valid. I have previously observed (see *R (Hill) v Institute of Chartered Accountants of England and Wales* [2013] EWCA Civ 555, [2014] 1 WLR 86 at [51] – [52) that it is important not to forget that, in his speech in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 at 209, Lord Wilberforce sought to analyse the position, avoiding such words as "jurisdiction", "error" and "nullity", which he stated "create many problems", and considered that the task of the court was to identify whether the administrative body has stepped outside the authority it derived from statute. Sedley LJ was, moreover, not addressing a situation where constitutive jurisdiction is challenged, and Mr de Mello's submission does not take account of the fact that, even in such a case, a collateral challenge is possible: see *Boddington v British Railways Board* [1999] 2 AC 143.

41. For these reasons, if my Ladies agree, the Secretary of State's appeal in Mr Shehzad's case will be allowed on the ground that the tribunal had no jurisdiction because the duty judge and the First-tier Tribunal judge erred in concluding that Mr Shehzad had an in-country right of appeal by reason of section 92(4) of the 2002 Act because he had made a human rights claim. His human rights claim was not made until he formulated his grounds of appeal against the decision, and section 92(4) does not, in those circumstances, provide a person with an in-country right of appeal.

V. Disposition

42. If my Ladies agree, for the reasons I have given both appeals will be allowed. In the case of Mr Shehzad, this is because the tribunals erred in their conclusions as to jurisdiction. Since the tribunal had no jurisdiction, his case is now at an end. In the case of Mr Chowdhury, the reason for allowing the Secretary of State's appeal is because both the FtT and the Upper Tribunal erred in concluding that the evidence before them did not satisfy the evidential burden of showing dishonesty that lay on the Secretary of State at the initial stage. I would remit his case to the Upper Tribunal.

Lady Justice King:

43. I agree.

Lady Justice Black:

44. I also agree.