Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33934/2014

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 22 January 2015	**On: 27 January 2015**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ATA UR RAHMAN

Respondent

Representation:
For the Appellant: Mr P Nath, Senior Home Office Presenting Officer
For the Respondent: Ms S Bassiri-Dezfouli, instructed by Primarc Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Rahman's appeal against the respondent's decision to refuse his application for leave to remain as a Tier 4 (General) Student Migrant.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Rahman as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Pakistan born on 23 March 1982. He entered the United Kingdom on 29 July 2011. He was granted leave to enter as a Tier 4 General student until 3 January 2015.

4. According to the respondent, the appellant's sponsor's licence was revoked on 12 June 2013 and a decision was therefore made, on 10 October 2013, curtailing his leave to remain so as to expire on 9 December 2013, thus giving him 60 days in which to find a new sponsor and make a fresh application.

5. According to the appellant, however, he never received any curtailment decision. What he claims occurred is that his college was closed down in November 2013 and that he then contacted the Home Office on two occasions, through his solicitors, on 1 December 2013 and 26 February 2014 to enquire about his status, but received no response. He therefore found another college and made a new application for leave to remain as a Tier 4 Student Migrant on 3 March 2014.

6. The appellant's application was refused on 17 August 2014, with no right of appeal. The basis for the refusal was that he was not in possession of a valid CAS since his sponsoring college was not listed as a Tier 4 sponsor as at that date; that he had been unable to show the level of funds required to satisfy the maintenance requirements of the rules; and that he was an overstayer. The refusal letter stated that his previous leave had expired on 9 December 2013. Since he had no leave at the time his application was made, there was no right of appeal.

7. The appellant, however, lodged an appeal against that decision on the grounds, *inter alia*, that the respondent ought to have granted him 60 days in which to make a fresh application.

8. The appeal came before First-tier Tribunal Judge Taylor on 27 October 2014. There was no appearance for the respondent at the hearing and neither was there a respondent's appeal bundle. The judge noted that there was no evidence that the appellant's previous leave had been curtailed. There was no curtailment letter and the decision of 17 August 2014 made no reference to curtailment. Accordingly he found that the refusal decision contained a fundamental error of fact in asserting that the appellant's leave expired on 9 December 2013, when in fact he had existing leave until 3 January 2015. He found that the appellant should have been given a "60 day letter" granting him a period of time in which to find a new college and make a fresh application. He allowed the appeal on that limited basis.

9. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the appellant's leave had been curtailed to 9 December 2013. Reference was made to the curtailment letter being produced with the grounds (although it does not appear to have been attached). The grounds

asserted that if it was accepted that the appellant had been unaware of the curtailment, then he would still be in possession of leave until 3 January 2015.

10. Permission to appeal was granted on 16 December 2014 on the basis that the Tribunal had no jurisdiction to entertain an appeal against the decision of 17 August 2014, whether the appellant's leave had been curtailed or not.

Appeal Hearing

11. At the hearing Mr Nath produced the curtailment letter but was unable to produce any evidence or information to show that it had been sent to the appellant. His submission was that, regardless of the curtailment, the Tribunal had no jurisdiction to entertain the appeal.

12. Ms Bassiri-Dezfouli relied on the case of Syed (curtailment of leave – notice) India [2013] UKUT 144 in submitting that the appellant's leave had not been validly curtailed in October 2013 as the appellant had never received a curtailment decision and the respondent had failed to prove that the decision had been served upon him. In response to the question of jurisdiction in view of the extant leave at the time the 17 August 2014 decision was taken, it was her submission that that decision effectively terminated the appellant's leave and thus gave rise to a right of appeal. She submitted that the respondent ought to have given the appellant 60 days in which to make a fresh application, in line with the relevant policy and that the failure to do so was unfair and unlawful. The appellant had been unfairly penalised when he had made every attempt to inform the Home Office of his circumstances but had received no response to his letters. That was what the First-tier Tribunal Judge had concluded and there was no error of law in his decision.

Consideration and Findings

13. It seems to me that Judge Taylor had no legal basis to make the decision that he did and that he in fact had no jurisdiction to entertain the appellant's appeal. There was no valid appeal before him. If it was accepted that the appellant's leave had been effectively curtailed on 9 December 2013, then the application of 3 March 2014 was made at a time when he had no extant leave and he therefore had no right of appeal, as the refusal letter explicitly stated. Alternatively, if it was not accepted that his leave was curtailed as stated by the respondent, then he continued to have existing leave to remain until 3 January 2015 and such leave remained extant at the time of the respondent's decision, so that the decision of 17 August 2014 was not an immigration decision giving rise to a right of appeal for the purposes of s82(2)(d) of the 2002 Act.

14. On the basis of the evidence now before me, my view is that the appellant's leave was not curtailed in December 2013. There is no evidence that the curtailment letter of 10 October 2013 was ever served on the appellant and accordingly the principles in Syed apply such that the appellant's leave cannot be taken as having been validly terminated at that time. The

amendments to the Immigration (Leave to Enter and Remain) Order 2000, as made by the Immigration (Leave to Enter and Remain) (Amendment) Order 2013, in paragraphs 8ZA and 8ZB, do not, in my view, take the matter any further as there is simply no evidence that the letter was ever sent to the appellant or that an attempt was made to serve it on him.

15. It remains the case, therefore, that when the appellant's application for further leave was refused on 17 August 2014, he still had valid leave to remain, such that that refusal did not constitute an immigration decision giving rise to a right of appeal. I do not accept Ms Bassiri-Dezfouli's argument, that the letter of 17 August 2014 effectively terminated the appellant's extant leave, since there is no legal or other basis for so concluding.

16. As regards the question of fairness, I accept that the apparent failings on the part of the respondent in responding to the appellant's communications and in seeking to make a curtailment decision have left him in an invidious position whereby he has, through no apparent fault of his own, found himself without leave and without a right to appeal the decision refusing him leave. However, it is the case that the Tribunal simply has no jurisdiction in the matter and it is for the appellant to seek an exercise of discretion in his favour by the respondent or alternatively to challenge the respondent's apparent failings through other channels.

17. For the purposes of the appeal before me, however, the appropriate course is to set aside the decision of the First-tier Tribunal and re-make the decision by dismissing the appeal on the basis of a lack of jurisdiction.

DECISION

18. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Mr Rahman's appeal for lack of jurisdiction.

Signed
Upper Tribunal Judge Kebede

27 January 2015