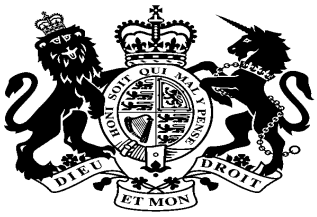

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04380/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 20 March 2019	**On 29 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

OMAR FARUK
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Swain (for JS Solicitors)
For the Respondent: Mr S Whitwell (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Omar Faruk, a citizen of Bangladesh born 2 September 1980, against the decision of the First-tier Tribunal of 19 November 2018, dismissing his appeal, itself brought (in form, though as explained below, effectively the appeal arises from an earlier decision) against the refusal of his application for further leave as a student of 27 February 2017.

Background to the present appeal proceedings

2. The immigration history supplied by the Respondent is that the Appellant arrived in the UK on 25 January 2010 as a Tier 4 student, which was extended on 31 January 2013 until 22 January 2015. The Respondent stated that on 5 May 2013 his leave was curtailed so as to expire on 22 July 2014. On 25 January 2015 he applied for further leave outside the Immigration Rules, which was refused on 29 March 2015.

3. He brought judicial review proceedings against that refusal, which were settled on the basis that the parties agreed that it was appropriate to recognise a right of appeal.

4. In his statement supporting his judicial review application the Appellant stated that he had been unable to obtain a CAS from a Sponsor within the available time, and had requested the Home Office to provide a new CAS over a six months period; however this request had been ignored. He stressed that on 5 June 2013 his representatives had requested that UKVI confirm his Sponsor's status. He had never subsequently received any notice of his leave's curtailment, notwithstanding the references in his immigration history as supplied by the Secretary of State to such a decision having been made.

5. Judge King refused permission for judicial review in a decision which nevertheless recorded the settlement of the judicial review proceedings. Judge King noted that the Secretary of State had proposed a Consent Order withdrawing her decision of 29 March 2015 on the basis that it was appropriate to reconsider the case and to recognise a right of appeal if the application was again refused on reconsideration, albeit without accepting that the curtailment decision was unlawful.

6. The refusal letter of 27 February 2017 flowing from that reconsideration did not accept that the Appellant had established very significant obstacles to integration to life in Bangladesh or that there were any exceptional circumstances requiring him to be granted leave to remain: his wish to complete his studies in the UK was deemed insufficient and would put him in a better position than other students

The First-tier Tribunal decision below

7. The Appellant appealed, essentially arguing that he should receive an opportunity to find another Sponsor within a 60-day period as contemplated by the Home Office policy addressing the circumstances of students whose Sponsor had lost their licence. He explained to the First-tier Tribunal that on 31 January 2013 he had made a Tier 4 application on the basis of studying at UK Education Professional College (UKEPC) to whom he paid fees of £4,000; he had found it via internet research, and had paid a consultancy firm, Zaaha Solution, £4,000, on 28 January 2013, to meet the college's fees and to secure him a CAS.

8. His course was due to start on 12 February 2013, though his leave was not granted until 19 March 2013. He had paid for the course by this time. He had learned that UKEPC was no longer on the Sponsor list from its website; he then discovered the college was shut when he went there in person on 25 March 2013. He contacted Zaaha Solution at the end of March 2013; they said they could not reach anyone from the college. He attempted to find another Sponsor but they would not offer a place to a person without leave to remain. He had not reported Zaaha to the police though he had told his solicitors that they had taken his money. He had not kept any receipt for the money he had paid Zaaha.

9. The First-tier Tribunal rejected the Appellant's evidence. It noted the claim on his behalf that his leave had been curtailed on 24 October 2013, but that there was no evidence to demonstrate this; the Respondent had maintained that the curtailment date was 5 May 2013. The Appellant had struggled to remember the name of the course he had applied for at UKEPC. It was not credible he would not have kept a receipt for the £4,000 in funds that he handed over to Zaaha Solutions, nor that he would have failed to check whether Zaaha had actually paid his fees to the college. A letter from Zaaha Solution of July 2014 in the Appellant's supporting evidence indicated that he had reverted to them for further services, which was not plausible had they failed to repay him the £4,000. He had not approached the Home Office to actively seek a 60-day letter.

10. The Tribunal concluded that his evidence could not be relied on, and was not established as having paid £4,000 to Zaaha Solution. He was found to have been aware of his leave's curtailment. He had not adequately evidenced his asserted attempts to find an alternative Sponsor, having only listed a series of colleges and universities to which his application had been sent. The authority of *Syed* was noted for the proposition that actual service was required for an immigration decision to be effective; however there was no credible evidence that the Appellant was not living at the address in question at the relevant time.

11. The Judge noted the authorities demonstrating that an extended period of study in the UK could amount to private life but that little weight would be attached to it where a person's immigration status was consistently precarious, as was the case here. The Appellant could reasonably be expected to return to his family in Bangladesh who had consistently sponsored his leave in the UK. Accordingly the appeal was dismissed.

Onwards appeal to the Upper Tribunal

12. Grounds of appeal argued that the First-tier Tribunal erred in law because

    (a) It failed to have regard to the authorities such as *Mehmood* requiring that notice be served in writing to the person affected and that the burden of proof was on the Secretary of State to establish this;

(b) There was no adequate reasoning on credibility and it appeared that a lack of corroboration had been held against the Appellant;
(c) The Judge had effectively found the Appellant to have fabricated evidence which was not a matter which had been put to him;
(d) No reference was made to letters from Zahaa and another organisation confirming that the Appellant required a 60-day letter before any Sponsor would accept him as a student;
(e) The assessment of private life was inadequate, brief and flawed.

13. Whilst the First-tier Tribunal refused permission to appeal on 13 December 2018, the UT granted permission on 20 February 2019 on the basis that it was arguable that the question of the service of the curtailment decision was relevant to the assessment of the Appellant's private life claim.

14. Before me Mr Whitwell for the Secretary of State indicated that there was important information which the Upper Tribunal should receive. He could not say why this had been overlooked when the appeal was presented on the Secretary of State's behalf in the First-tier Tribunal. He then made helpful submissions based on the true state of affairs as to attempts to serve the curtailment decision as revealed by the CID database, which confirmed that a letter of 24 October 2013 was sent to the 17 Preston Street address in Brighton, as shown by a recorded delivery slip. The Royal Mail had returned that letter to the Home Office during November 2013 on the basis that the letter had not been collected, nobody having signed for it when an attempted delivery was made at the 17 Preston Street. That same letter was re-issued on 19 May 2014, and returned to the Home Office on 10 July 2014 for the same reasons as previously. Therefore it was decided to serve the decision to file. Apex Law were recorded as having had confirmed the Appellant's correct address.

15. Mr Swain recognised that the Appellant could achieve no more from the appeal process than identifying a defect with the Home Office decision making requiring the application to be lawfully reconsidered.

Decision and reasons

16. It can be seen from the Chronology above that the February 2017 decision against which this appeal ostensibly lies was in fact simply the remaking of an earlier inadequate decision of 29 March 2015. Thus the decision ultimately appealed against was not one to which the new "relevant" provisions of the Nationality Immigration and Asylum Act 2002 have application; because the application was made (and refused) other than on human rights grounds and prior to 6 April 2015. The Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015 inserts Article 9(1)(c)(iv) into Commencement Order No. 3 such that the "saved" provisions are preserved in relation to "a decision made before 6th April 2015 in relation to which,

immediately before 6th April 2015, an appeal could have been brought or was pending under the saved provisions."

17. Thus the instant appeal is one brought under the saved provisions of the Nationality Immigration and Asylum Act 2002 against the March 2015 decision. Accordingly there are more grounds of appeal and potential arguments available to the Appellant that would have been the case on a new-style appeal under the "relevant provisions" of that statute. Those include the "not in accordance with the law" ground of appeal.

18. Without the injection of the further information from Mr Whitwell regarding the fortunes of the Secretary of State's attempt to serve the notice of decision on that, Mr Faruk's appeal's prospects would have been very limited. However, the new revelations demonstrate that the First-tier Tribunal made a significant error of fact amounting to an error of law, for which the Appellant was not responsible. The First-tier Tribunal believed the Appellant had received notice of curtailment, when in fact the letter seeking to inform him of that decision had been returned to the post office. The First-tier Tribunal's error was caused by the failure of the Secretary of State to disclose important information available on the information database available (only) to him that was highly relevant to a central issue on the appeal.

19. Although it is readily apparent that other matters weighed on the mind of the Judge below than just the issue of service, it is not possible to say with confidence that the Appellant's denial of having received notification of the curtailment decision would have been rejected had the true circumstances been known to the Judge. I accordingly find that the decision of the First-tier Tribunal must be set aside.

20. In the circumstances and given the position of the parties before me, it is appropriate to go on and to remake the decision on this appeal.

21. At the time of *Syed (curtailment of leave – notice) India* [2013] UKUT 144 (IAC), the Tribunal was able to issue a decision whose effect is expressed in the following headnote:

> "(1) The Immigration (Notices) Regulations 2003 do not apply to a decision under the Immigration Act 1971, which is not an immigration decision within the meaning of section 82 of the Nationality, Immigration and Asylum Act 2002.
> (2) There is no statutory instrument under the 1971 Act dealing with the means of giving notice for the purposes of section 4(1) of a decision under that Act, which is not an immigration decision.
> (3) Accordingly, the Secretary of State has to be able to prove that notice of such a decision was communicated to the person concerned, in order for it to be effective. Communication will be effective if made to a person authorised to

receive it on that person's behalf: see *Hosier v Goodall* [1962] 1 All E.R. 30; but the Secretary of State cannot rely upon deemed postal service."

22. Applying this approach, given that the curtailment decision was indeed one which was not appealable and so was not deemed served under the Notice Regulations, one might think that a purported notification that left its subject unaware of the decision due to their having left the country would be ineffective, leaving the leave sought to be curtailed intact.

23. However, as discussed in *Shoaib* [2015] EWHC 2010 (Admin), the legal framework that had that consequence altered via the introduction of Article 8ZA of the 2000 Order (as amended by The Immigration (Leave to Enter and Remain (Amendment) Order 2013, which came into force on 12th July 2013) such that it is now provided:

> "**8ZA.— Grant, refusal or variation of leave by notice in writing**
> (1) A notice in writing— ...
> (d) varying a person's leave to enter or remain in the United Kingdom,
> may be given to the person affected as required by section 4(1) of the Act as follows.
> (2) The notice may be—
> (c) sent by postal service to a postal address provided for correspondence by the person or the person's representative;
> **8ZB.— Presumptions about receipt of notice**
> (1) Where a notice is sent in accordance with article 8ZA, it shall be deemed to have been given to the person affected, unless the contrary is proved—
> (a) where the notice is sent by postal service—
> (i) on the second day after it was sent by postal service in which delivery or receipt is recorded if sent to a place within the United Kingdom;
> (ii) on the 28th day after it was posted if sent to a place outside the United Kingdom;
> (b) where the notice is sent by fax, e-mail, document exchange or courier, on the day it was sent."

24. So in these circumstances, the 2000 Order appears to entitle the Secretary of State to rely upon deemed, rather than actual, service. Of course, in general in English law notice of a decision must be given before it can have the character of a determination with legal effect, as emphasised by Lord Steyn in *Anufrijeva* [2004] 1 AC 604 at [26]:

> "26. The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system ..."

25. However, I do not understand that *Anufrijeva* is authority for the proposition that deemed notice provisions are ineffective. There the underlying facts were that the Secretary of State had a policy of deferring the communication of a refusal of asylum decision pending the immigration service's final decision on the grant or refusal of leave to enter. But in this case, the Secretary of State had made two attempts at timely notification. Had the Secretary of State managed to explain this to the First-tier Tribunal, it might not have erred in the manner it did.

26. However, wherever the burden of proof in fact lay, the fact that the Secretary of State failed to provide the First-tier Tribunal with the true facts as to service, undermines the cogency of the reasoning below.

27. The relevant Home Office Guidance around the time of the curtailment decision in relation to Tier 4 Student applications for leave to remain provided as follows:

> "Where the applicant was assigned a CAS by the sponsor before they were removed from the sponsor register, the applicant can apply to extend their leave. …
> 2. Where the application does not meet the requirements, refuse it.
> 3. Where it does meet the requirements, put it on hold. …
> 5. If the student's application has been held and the sponsor's licence is revoked, and the student has been a bona fide student and did not participate in the practices which led to the revocation, the options for action depend on the leave that they have:
> If they still have at least 60 days permission to stay remaining, you must curtail their leave so that it will expire once the period of 60 days has run out. During this 60 days they can seek a new CAS from a different sponsor and either vary their application, make a new application or leave the UK. If their permission to stay runs out whilst they are waiting for a decision on their application you must delay the refusal of their application for 60 days to allow them to seek a new CAS from a different sponsor and vary their leave."

28. Decisions such as *Thakur* [2011] UKUT 151 (IAC) demonstrate that Home Office policy is not to penalise students who bear no responsibility for the failings of a Sponsor. The decision of March 2015, upon which the refusal letter of February 2017 relied, had failed to consider whether the Appellant should have received the benefit of this policy. It seems to me that the whole chain of Home Office decisions is undermined by this failure. Thus the decision making is not in accordance with the law and the appeal must be allowed.

29. The Appellant's application of January 2015 accordingly remains outstanding before the Secretary of State. The Secretary of State must now consider whether it is appropriate to issue a 60 day letter in the light of the facts above.

Decision:

(1) The decision of the First-tier Tribunal contains a material error of law.
(2) The decision of the Secretary of State that was the subject of the appeal to the First-tier Tribunal and the Upper Tribunal was not in accordance with the law.
(3) Accordingly I allow the Appellant's appeal.

Signed: Date: 20 March 2019

Deputy Upper Tribunal Judge Symes