Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: IA/00048/2019 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**

Heard On: 11th September 2020 **On: 16th September 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Zagham Abbas Butt

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pinder counsel instructed by JKR Solicitors

For the Respondent: Ms H Aboni, Senior Presenting Officer

DECISION AND REASONS (P)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a citizen of Pakistan with date of birth given as 1.1.87, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 30.12.19, dismissing on human rights grounds his appeal against the decision of the Secretary of State, dated 24.2.15, to refuse his application for Leave to Remain in the UK as a Tier 4 (General) Student Migrant.

2. The appeal to the First-tier Tribunal was lodged remarkably late, on 9.5.19. However, in a decision promulgated 6.9.19, the First-tier Tribunal noted the explanation for delay, namely the appellant's claim that he unaware of and not served with notice of the respondent's decision until 25.4.19. In the premises, the judge was satisfied that time should be extended, so that the appeal was admitted.

3. Before the appeal was heard, the appellant served further grounds of appeal (undated) asserting that he was by then entitled to Indefinite Leave to Remain on the basis of 10 years' continuous lawful leave in the UK, pursuant to paragraph 276B of the Immigration Rules.

4. The First-tier Tribunal (Judge Dean) dismissed the appeal on 30.12.19, finding the respondent's decision to refuse his Leave to Remain student application proportionate. The judge then went on to find that the appellant had failed to demonstrate that his immigration status from 2008 onwards was lawful for a continuous period of 10 years. The judge again conducted a proportionality balancing exercise, finding that it fell heavily against the appellant and in favour of the public interest. The appeal was, therefore, dismissed.

5. The appeal having been dismissed, the appellant sought permission to appeal to the Upper Tribunal. In the meantime, in January 2020 the appellant's representatives served further grounds of appeal, though it is not clear if permission to amend the grounds had been granted. In any event, the First-tier Tribunal granted permission on all grounds on 3.4.20, it being considered arguable that Judge Dean was in error to find that all of the appellant's various applications had been refused and appeals dismissed and to hold this against the appellant in the proportionality balancing exercise. However, this was on the basis that the First-tier Tribunal in 2012 had in fact allowed the appeal. The judge granting permission also considered it arguable that the First-tier Tribunal failed to reach a conclusion as to the service of the refusal letter, dated 24.2.15, and that it was arguable that this had been accepted by the First-tier Tribunal (Judge Shanahan) in extending time for the appeal.

Consideration of the Error of Law Issue

6. I have carefully considered the impugned decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. In particular, I have taken into account Ms Pinder's skeleton argument of 18.6.20, together with the oral submissions made at the hearing before me.

7. At the outset of the hearing the two representatives appeared to be in agreement that there was sufficient error in the decision of the First-tier Tribunal to require it to be set aside. The Rule 24 Reply of the respondent appeared to accept that, though without any reasons being provided. It was in the light of that approach that the appellant's representatives attempted to short circuit matters by writing to the Tribunal under cover of letter dated 2.9.20, suggesting that the hearing listed before me should be vacated and the matter immediately remitted to the First-tier Tribunal. The Tribunal responded to the effect that although the parties may be agreed there is a material error of law in the decision of the First-tier Tribunal, this was a matter for the Upper Tribunal Judge to decide himself. Further, if an error of law is found, it would be for the Upper Tribunal Judge to decided where the decision should be remade.

8. In order to assist the two representatives, I explained to them that my provisional view was that Judge Cohen had dismissed the appellant's appeal in 2012, and invited them to address me on that issue.

9. It is clear that some confusion was caused by the earlier decision of the First-tier Tribunal promulgated on 28.6.12 (Judge Cohen). At [29] of the 2019 decision Judge Dean took as a factor against the appellant in the proportionality balancing exercise that "*every single application made by the Appellant has been refused and any appeal he has chose to make has been dismissed which I find weighs against the Appellant*." At [7] and again at [17] the judge stated that the appellant's Tier 4 appeal had been dismissed under the Rules and on human rights grounds by Judge Cohen in 2012, although Judge Dean noted that judge had made a recommendation that the respondent grant the appellant 60 days leave to remain in order to register with a new Tier 4 sponsor.

10. However, at [11] of the 2012 Tribunal decision, relying on Sapkota & Anor (Pakistan) v SSHD [2011] EWCA Civ 1320, Judge Cohen found that the respondent's decision to refuse his Tier 4 application was not in accordance with the law and there purported to allow the appeal "*to the limited extent of remitting the same to the respondent to act in accordance with appropriate case law, reconsider the appellant's application and if maintaining the refusal promptly issuing removal directions*." It was for that reason that Judge Cohen recommended the grant of 60 days temporary leave. Nevertheless, it is important to note that the decision concluded by dismissing the appeal.

11. In the meantime, the appellant went on to make a further application for Leave to Remain outside the Rules, refused without a right of appeal in December 2013. The

following year he made an EEA Residence Card application, which was also refused. Neither of those applications are particularly relevant to the issues in the appeal.

12. For the reasons set out below, and after taking into consideration the arguments of Ms Pinder, I am satisfied that given the way in which the Tribunal's decision in 2012 was drafted the appeal cannot be said to have been allowed, although that may have been the intention of Judge Cohen.

13. I first note that the respondent clearly understood that the appeal had been dismissed, stating as much in the subsequent refusal decision letter of 24.2.15. As set out below, I have reached the conclusion that the 2012 appeal was indeed dismissed and, therefore, that Judge Dean was factually correct in 2019 to state as he did at [29] of the decision, as set out above.

14. The Court of Appeal recently considered a similar situation in SSHD v Devani [2002] EWCA Civ 612, where the body of the decision of the Tribunal purported to allow the appeal under article 3 but the Notice of Decision dismissed the appeal on article 3 grounds. The Court of Appeal considered the Upper Tribunal's decision in Katsonga [2016] UKUT 228 (IAC), which held that whilst Rule 31 could be used to correct a misprint or make the judge's meaning clear, it could not be used to change the substance of a judgement or reverse a decision at the instance of the losing party. The Court of Appeal held that Katsonga was wrongly decided and that Rule 31 can be used to express what the court in question actually intended. "*In the case of a simple failure of expression – most obviously a straightforward slip of the pen – the error can and should be corrected even if it alters the outcome (as initially expressed) by 180°*". The Upper Tribunal in MH (Iran) v Secretary of State for the Home Department [2020] UKUT 00125 (IAC) reached a similar conclusion, pointing out that a First-tier Tribunal judge considering an application for permission to appeal can review the decision under Rule 35 and, where a decision concludes by stating an outcome which is clearly at odds with the intention of the judge, correct the obvious error under Rule 31.

15. It follows that it would have been open to the appellant to apply to have the obvious slip in the 2012 decision corrected under the 'slip rule' of Rule 31 of the Tribunal (First-tier Tribunal) (Immigration and Asylum Chamber) Procedure Rules 2014, or to seek permission to appeal the 2012 decision on the basis that there had been an obvious slip in dismissing the appeal. Neither action was pursued. In consequence, I am satisfied the appeal remained dismissed.

16. Although I am satisfied that the appeal was dismissed in 2012, on 14.11.14, the respondent issued the appellant with a 60-day letter, apparently implementing Judge Cohen's recommendation in the 2012 decision. Reading that decision, I accept that the respondent appears to have treated the appellant's 2011 application as still outstanding, purporting to suspend consideration of the application for a further period of 60 calendar days to enable him either to withdraw his application and make a new application in a different category, or to obtain a new CAS and submit a variation of his 2011 application. However, the 60-day period of grace expired in January 2015, without the appellant providing either a valid CAS letter from a Tier 4

sponsor or any new application. In consequence, on 24.2.15 the respondent refused the Tier 4 application made in December 2011.

17. Ms Pinder's skeleton argument and her oral submissions made a number of inaccurate assertions. First, she asserted that the November 2014 letter granted the appellant 60 days' leave. That is not the case. It does not necessarily follow that a discretionary period of grace within which to put his house in order amounts to the grant of a period or leave or extension of leave. No such reference to a grant or extension of leave appears in the November 2014 letter. As further explained below, that the respondent was willing to reconsider the 2011 application does not amount to granting leave whilst that decision is made. Ms Pinder also inaccurately submitted that after the November 2014 letter the appellant made an application. He did not; he provided no CAS and made no new application.

18. The history is that the appellant had entered the UK in September 2008 with a Tier 4 visa valid until 31.12.11. He made an in-time application to extend that leave, which was refused. He then made an in-time appeal to the First-tier Tribunal, so it follows that his leave was extended by virtue of s3C until the 28.6.12 dismissal of his appeal. Although the respondent was prepared to treat the appellant's 2011 Tier 4 application as remaining open up and until its decision of 24.2.15, refusing the application, that exercise of discretion on a recommendation of the First-tier Tribunal, does not equate to the extension of leave, or render his previous leave valid until the outcome of the reconsideration, the 2015 refusal decision. That the respondent was still prepared to give consideration to the application did not. extend his leave beyond the 3C cut off when his appeal was dismissed on 28.6.12.

19. It follows that the appellant's valid leave ended on 28.6.12 and he has had no further period of leave since. In the premises, he cannot be entitled to Indefinite Leave to Remain on the basis of 10 years' continuous lawful residence, regardless as to whether and when he became aware of the 2015 refusal decision. To that extent, Judge Deans was strictly correct to state that all the appellant's applications had been refused and all his appeals dismissed, so that no error of law can arise from that assertion.

Was it necessary to decide when the appellant became aware of the 2015 decision?

20. It is the respondent's February 2015 decision which the appellant claims to have been unaware of until 2019, resulting in his late-submitted appeal to the First-tier Tribunal in May 2019. For the reasons set out above, whether or not the claim of non-receipt is accepted, the appellant cannot demonstrate continuous lawful leave from 2008 through to 2019, a period in excess of 10 years. Whenever he received the February 2015 decision refusing to extend his Tier 4 leave, the fact is that his valid leave expired in June 2012.

21. Further, even if the appellant had received the February 2015 refusal decision and made an in-time appeal against it to the First-tier Tribunal, even a decision in his favour could not have extended leave which had already expired in 2012. Also, given that his Tier 4 leave had expired, and that he neither provided no new CAS, nor

made a further application on an alternative basis within the 60 days limit provided, there was absolutely no basis upon which he could have succeeded in an appeal based on the Immigration Rules. In this regard, Ms Pinder pointed out that as the 2015 refusal related to a decision on an application made in 2011, the appellant was entitled to appeal on both Immigration and Human Rights grounds.

22. Although the judge granting permission considered it arguable that the First-tier Tribunal had not reached a decision on service of the February 2015 refusal decision, at [22] of the impugned decision, the judge did rehearse the competing arguments and concluded at [23] that Judge Shanahan's decision extending time was limited to the issue of whether to grant an extension of time and did not address the substantive issue of service of the February 2015 refusal decision, or the appellant's awareness of the decision. I do not accept the argument that the First-tier Tribunal Judge was bound by the decision extending time to appeal, as suggested, and agree that that decision did not make a finding as to whether and when service of the refusal decision had been made. Although the First-tier Tribunal extended time and admitted the appeal in its preliminary issue decision 6.9.19, I am not satisfied that that decision was a finding that the appellant had not been served with the 2015 decision until 2019.

23. At [24] Judge Dean noted the appellant's claim that he only became aware of the February 2015 refusal decision when it was referenced in the refusal of his EEA Residence Card application. However, at [26] of the impugned decision the judge concluded that on the limited information and immigration history available, it was not possible to establish that the appellant's presence since 2008 had been lawful. "*In addition, I find the evidence submitted by the appellant is not sufficiently detailed or accurate to provide information to the required standard which establishes a period of 10 years continuous lawful residence.*" This was repeated at [27]: "*…without more, I find it cannot be determined on the information before me that there has been 10 years continuous lawful residence in this country. I therefore find that the appellant's mere presence in this country carries very little weight in the appellant's favour in this human rights appeal and is outweighed by the public interest*."

24. At [21] of the impugned decision, the judge referenced the decision of the High Court in R (on the application of Rahman) v SSHD [2019] EWHC 2952 (Admin). There the court noted that, pursuant to s4 of the 1971 Act, the burden of proving that notice in writing had been "given" to the applicant lay with the respondent. However, 8ZA and 8ZB of the Immigration (Leave to Enter and Remain) (Amendment) Order 2000 as amended in 2013, provides for notice to be given by (inter alia) being "*sent by postal service to a postal address provided for correspondence by the person or the person's representative*." Article 8ZB states "*(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.*" It follows that provided the respondent can demonstrate on the balance of probabilities that the letter was sent to the address provided by the applicant for correspondence, the respondent is entitled to presume that it has been received by him and that he is aware of its contents. The burden is on the appellant to prove non-receipt.

25. I am satisfied that the correct interpretation of the above is that the First-tier Tribunal found, and was entitled to find, that the appellant had failed to demonstrate that he had accumulated a period of 10 years' lawful residence. The burden was for the appellant to discharge but on the facts of the case as I find them to be, the appellant could not, in any event, have demonstrated 10 years' continuous lawful residence, as his leave expired in 2012. Properly understood, the chronology demonstrates that whether or not the appellant received or became aware of the February 2015 refusal decision when it was sent, or in 2019 as claimed, and although time was extended so that he was allowed to appeal the decision to the First-tier Tribunal, he could never have demonstrated 10 years' continuous lawful residence under paragraph 276B of the Immigration Rules, as his leave expired in 2012.

26. Further, even if the issue remains material, the burden was on him to demonstrate that he had not been 'given' the decision in 2015. There seems little doubt from the decision notice itself that it was sent to him at the address he had authorised for correspondence, namely his then legal representatives, SHN Solicitors at their address in London.

27. Given that no CAS was provided and he had no educational sponsor, the appellant could not succeed under the Rules on the appeal against the 2015 Tier 4 refusal decision. In passing, I note that one of his arguments at the First-tier Tribunal was that he could not get a place at an educational establishment because he was unable to take the requisite English language test because the Home Office had retained his passport. However, he could have either asked for the return of his passport or asked for arrangements to be made for it to be provided to an English language test provider. In the premises, the argument is without merit.

28. In summary, whilst complaint is made that the judge does not appear to have reached a decision as to whether to accept the appellant's claim that he neither received nor was aware of the February 2015 refusal decision until 2019, I have to conclude the issue was not material as it transpires a resolution of that issue could not be material to the outcome of the appeal on immigration grounds with reference to the long residence qualification. In the premises, no error of law is disclosed by this ground.

The Human Rights Appeal

29. The other right of appeal was on human rights grounds, in respect of which the extent to which the appellant met the Rules would be relevant to any article 8 proportionality balancing exercise. However, it has to be borne in mind that the appellant came to the UK with leave as a student which is not a route to settlement. Further, his only human rights claim is in respect of his private life; he claims no partner or child. Pursuant to section 117B of the Nationality, Immigration and Asylum Act 2002, little weight is to be given to private life developed in the UK whilst immigration status is precarious or unlawful. Whatever view is taken of the history set out below, the appellant's immigration status was always unlawful.

30. Ms Pinder raised in her submissions that because of Judge Cohen's slip, the appellant was unfairly deprived of reaching the 10 years' continuous lawful residence qualification. However, even had the appeal been allowed to the limited extent of remitting it to the respondent, it is not clear that the appellant could have reached that threshold.

31. Perhaps the strongest argument of those raised by Ms Pinder is that Judge Dean failed to accord the appellant any credit in the proportionality balancing exercise for the fact that Judge Cohen intended to allow the appeal in 2012 and that the appellant was thereby prejudiced.

32. For this purpose, I leave out of account the claim not to have become aware of the 2015 refusal decision until 2019, which carries its own conundrums, including why the appellant never pursued the matter with the respondent. Proceeding as if the appellant had received the 2015 when it was sent, it is difficult to put oneself into the shoes of a judge considering a hypothetical appeal in 2015 with such a convoluted history as set out above. However, I accept in principle that it would have been open to a judge to take into account in the article 8 proportionality balancing exercise that in 2012 Judge Cohan had intended to allow the appeal to the limited extent of remitting it to the Secretary of State to make a lawful decision, recommending a 60 day period to enable the appellant to obtain a CAS from an educational sponsor. It is, therefore, worth considering what weight could or should have been given to that fact.

33. First, it is now practically impossible now to wind the clock back and determine in any objective way what the appellant would or might have done had the appeal been allowed in 2012 by remitting for remaking of the decision by the Secretary of State and then been allowed his 60 days. However, I can only observe that the appellant effectively demonstrated by his failure to act within time on the November 2014 grant of 60 days to find an educational sponsor (a decision which he admits he did receive) that he was unable or unwilling to continue with educational studies in the UK. There is no credible evidence to suggest that his behaviour would have been any different in 2012 to that exhibited in 2014. The appellant's argument is effectively a series of 'ifs'. If Judge Cohen had allowed the appeal his leave would have remained extant, and if the respondent had back then given the appellant 60-days, and if he had provided a CAS, and if he had received the 2015 refusal decision in 2015, he would have been able to appeal with his leave extant. However, none of that would have got him to 10 years' long residence then. He would in addition have had to rely on proving that he had not become aware of the 2015 decision until after he qualified for 10 years' long residence, which it is not clear he would have been able to do. Frankly there are simply too many ponderable or variables to reach a conclusion that Judge Cohen's slip caused the appellant any prejudice that could carry material weight in a subsequent article 8 proportionality balancing exercise. The appellant was given the opportunity to find a CAS but evidently squandered that so that on reconsideration his application made in 2011 was refused in 2015. When he received or became aware of that decision is not material to the proportionality assessment as it does not affect the length of his lawful leave.

34. Having carefully considered the judge's assessments between [16] and [18] and between [27] and [29], I am satisfied that the judge made a lawful consideration of all relevant factors for and against the appellant in an article 8 proportionality balancing exercise where the appellant was relying on private life only against the public interest in immigration control. The judge was not wrong to conclude that all the appellant's applications had been refused and his appeals dismissed. It is also relevant that the appellant had not sought to either appeal or have corrected the 2012 dismissal of his appeal. Even though Judge Cohen may well have intended to allow the appeal in 2012 to the limited extent of remitting the decision to the Secretary of State to be remade, as it turns out the respondent followed the recommendation in 2014, allowed the 60-days grace period, and made an effective reconsideration of the decision in 2015. In effect, the appellant was not prejudiced by reconsideration of his Tier 4 application, the requirements of which he could not, in any event, meet. I find no error of law in respect of the article 8 proportionality assessment.

35. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appeal of the appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 14 September 2020