



Neutral Citation Number: [2022] EWCA Civ 855

Case No: CA-2020-000959

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM UPPER TRIBUNAL (IMMIGRATION AND ASYLUM**  
**CHAMBER)**  
**UPPER TRIBUNAL JUDGE HANSON**  
**HU/10446/2019**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24 June 2022

**Before:**

**LORD JUSTICE HOLROYDE**  
**LORD JUSTICE BAKER**  
and  
**LORD JUSTICE LEWIS**

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**Between:**

**NARESH KUMAR MAREPALLY**  
**- and -**  
**SECRETARY OF STATE FOR THE HOME**  
**DEPARTMENT**

**Appellant**

**Respondent**

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**Jay Gajjar and Ahmad Badar** (instructed by way of direct access) for the **appellant**  
**Nicholas Ostrowski** (instructed by **Government Legal Department**) for the **respondent**

Hearing date: 17 May 2022  
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**Approved Judgment**

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on Friday 24 June 2022.

**Lewis LJ:**

## **INTRODUCTION**

1. This is an appeal against a decision of the Upper Tribunal promulgated on 11 August 2020. By that decision, the Upper Tribunal dismissed an appeal from the First-tier Tribunal which itself had dismissed an appeal by the appellant, Mr Marepally, against a decision of the respondent of 6 June 2019 refusing the appellant's application for indefinite leave to remain in the United Kingdom made on the basis that he had completed 10 years' continuous lawful residence in the United Kingdom.
2. In brief, the appellant applied on 25 January 2017 for leave to remain in the United Kingdom as a Tier 5 (Temporary Worker) Migrant. That application was refused on 29 March 2017. The respondent sent the appellant a notice of the decision but the notice did not inform him that he had a right of appeal. Consequently, the appellant contends that his application had not been determined and section 3C(2)(a) of the Immigration Act 1971 ("the 1971 Act") extended his existing leave to remain until a notice was served which did inform him of his right of appeal. As he had entered the United Kingdom on 21 February 2009, and as a notice informing him of his right of appeal against the earlier decision had not been sent by 21 February 2019, he contends that he had completed 10 years' continuous lawful residence in the United Kingdom and so was entitled to indefinite leave to remain under paragraph 276B of the Immigration Rules. The respondent was, therefore, wrong to refuse his application for indefinite leave and his appeal against the refusal should have succeeded.
3. The respondent contends that the appellant's leave to remain was in fact curtailed and expired on 21 January 2014. An application for leave made on that day was determined to be invalid on 3 April 2014. Consequently, the appellant had no leave to remain after that date at the latest. Secondly, and alternatively, the respondent contends that the appellant's leave to remain ended once his application for leave to remain as a Tier 5 (Temporary Worker) had been refused on 29 March 2017 and the time for appealing that decision had passed. The respondent contends that no appeal against the 29 March 2017 decision could have succeeded and there is no proper basis for treating any existing leave to remain as continuing. Consequently, the appellant had not completed 10 years' continuous lawful residence by 21 February 2019. The Upper Tribunal was therefore right to dismiss the appeal against the refusal of leave.

## **THE LEGAL FRAMEWORK**

4. A person who is not a British citizen needs leave to enter and remain in the United Kingdom. Leave may be given for a limited or an indefinite period: see section 3 of the 1971 Act. A person who is given limited leave may apply for that leave to be extended (or may apply for the grant of indefinite leave to remain). The respondent will decide whether to grant or refuse any application for leave. Certain decisions may be appealed under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Amendments restricting the scope of the rights of appeal were made by the Immigration Act 2014 ("the 2014 Act").
5. The Immigration (Notices) Regulations 2003 ("the 2003 Regulations") made under section 105 of the 2002 Act deal with the giving of notice of decisions. Regulation 4

requires the decision-maker to give written notice of an appealable decision. Regulation 5 deals with the contents of the notice and provides, so far as material, that:

**“Contents of notice**

5(1) A notice given under regulation 4(1) –”

(a) is to include or be accompanied by a statement of the reasons for the decision to which it relates

.....

(3) ... the notice given under regulation 4(1) shall also include, or be accompanied by, a statement which advises the person -

(a) his right of appeal and the statutory provisions on which his right of appeal is based;

(b) whether or not such an appeal may be brought while in the United Kingdom;

(c) the grounds on which such an appeal may be brought.....”.

6. The 1971 Act recognises that an application for an extension of leave to remain may not be determined, or any appeal or review may not be concluded, before the existing leave expires. Section 3C of the 1971 Act, therefore, provides for the continuation of an existing leave in certain circumstances. It provides, so far as material, that:

**“3C Continuation of leave pending variation decision”**

(1) This section applies if—

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

(b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when—

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought while the appellant is in the United Kingdom against the decision on the

application for variation (ignoring any possibility of an appeal out of time with permission),

(c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom is pending (within the meaning of section 104 of that Act) .....

(d) an administrative review of the decision on the application for variation—

(i) could be sought, or

(ii) is pending.

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

.....

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).”

7. Section 3C of the 1971 Act therefore extends leave when an application has not been determined or when the time for appealing has not passed. Regulation 2 of the Immigration (Continuation of Leave) (Notices) Regulations 2006 (“the 2006 Regulations”) provide that:

“2. For the purposes of 3C of the Immigration Act 1971 an application for leave is decided –

(a) when notice of the decision has been given in accordance with regulations made under section 105 of the Nationality, Immigration and Asylum Act 2002; or where no such notice is required,

(b) when notice of the decision has been given in accordance with section 4(1) of the Immigration Act 1971”.

8. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (“the Rules”) make provision for appeals to the First-tier Tribunal. Rule 19(1) provides that an appellant must start proceedings by providing a notice of appeal to the tribunal. Rule 19(2) provides that “the notice of appeal must be received not later than 14 days after [the person is] sent the notice of decision against which the appeal is brought”. There is provision for applying to extend time for providing the notice of appeal in rules 4(3)(a) and 20 of the Rules.

9. The purpose of section 3C of the 1971 Act is to protect the immigration status of those with existing leave to remain who have applied for a variation of that leave and who

are awaiting a decision on the application or who are exercising appeal or review rights in respect of that decision. Continuing a person's existing leave during that period will prevent the person becoming an overstayer and being subject to the disadvantages faced by those who remain in the United Kingdom without leave. The purpose of the section is not to enable persons to be able to rely on continuations of leave for the purpose of building up 10 years' continuous lawful residence in order to claim indefinite leave under paragraph 276B of the Immigration Rules although the fact that section 3C extends periods of lawful residence may have an impact on that issue. See generally, paragraphs 40 and 41 of the judgment of Sir Stephen Richards, with whom the other members of the Court agreed, in *R (Akinola) v Secretary of State for the Home Department* [2021] EWCA Civ 1308, [2022] 1 WLR 1585.

## **THE FACTUAL BACKGROUND**

10. The appellant is a national of India born on 29 June 1982. His immigration history is complex and not always clear. The material facts for present purposes are as follows.

*The Appellant seeks leave to remain in the United Kingdom as a student*

11. On 21 February 2009 the appellant entered the United Kingdom with entry clearance as a Tier 4 (General) Student which was valid until 31 January 2011. His leave to remain as a student was extended until 30 April 2014.
12. On 26 April 2013, the respondent decided to curtail the appellant's leave so that it would expire on 21 January 2014. The appellant applied on 21 January 2014 for further leave to remain as a student. On 3 April 2014, that application was rejected as invalid as the appellant had not supplied the required biometric data. One of the critical issues governing the appellant's immigration status is whether those events brought his leave to remain to an end on 21 January 2014 or, at the latest, on 3 April 2014. If so, the appellant did not have any leave to remain after that time. Regrettably, that issue has not been addressed in these proceedings. We were told that that issue may depend, at least in part, upon factual issues such as whether notice of curtailment of leave was served on the appellant.
13. On 29 April 2014, the appellant applied again for leave as a student. That application was refused on 19 February 2015 and the appellant was informed that he had a right of appeal. He did appeal to the First-tier Tribunal. On 6 May 2016, the appeal was allowed. The First-tier Tribunal noted that the respondent had only given one reason for refusing the application, namely that the appellant did not have a valid Certificate of Acceptance for Studies ("CAS"). In fact, the appellant had submitted a CAS issued in January 2014 by the College of Advanced Studies. On 26 August 2014, the respondent had suspended that College's sponsor licence and the CAS was no longer valid at the time that the respondent came to take her decision. The First-tier Tribunal concluded that, in accordance with the respondent's guidance governing the revocation of a sponsor's licence, the respondent should have suspended the determination of the application for 60 days to enable the appellant to find another sponsor. The appellant had not been told that the sponsor's licence had been revoked so that CAS was invalid, and he had not been given 60 days to find a new sponsor and obtain a new CAS. The First-tier Tribunal found that the decision "was not in accordance with law" and allowed the appeal. At paragraph 18 of its decision, it said that it "was satisfied that the appellant's leave expired after submission of the application", that is after the 29 April 2014 application.

That sentence indicates, therefore, that the appellant had an existing leave which continued until after 29 April 2014. It does not appear to have been argued or suggested that leave to remain had in fact expired on 21 January 2014 when the appellant's leave was curtailed or, at the latest, on 3 April 2014 when it was decided that the application made on 21 January 2014 was invalid.

14. By letter dated 28 November 2016, the respondent informed the appellant that she would “suspend consideration of your application for a period of 60 calendar days”. The application referred to was the application of 29 April 2014.

*The Application for Tier 5 leave*

15. On 25 January 2017, the applicant submitted an application for leave to remain as a Tier 5 (Temporary Worker) Migrant. That status is available for certain categories of temporary workers including charity workers who meet specified requirements (see paragraph 245ZM of the Immigration Rules). The application was refused on 29 March 2017. The appellant was sent a notice dated 29 March 2017 stating:

**“Your application for leave to remain has been refused**

We have considered your application for leave to remain as a Tier 5 Migrant under the Points Based System and have refused. You can apply for an administrative review.”

16. The notice was accompanied by a statement of the reasons for the decision. As indicated, the notice did not inform the appellant that he had a right of appeal against the decision but (erroneously) told him that he had a right to seek an administrative review. He applied for a review on 19 April 2017. The review was completed on 12 May 2017 and the refusal of leave to remain was upheld. It was common ground that, as the application of 25 January 2017 was a variation of the 29 April 2014 application, it was to be treated as if it were made on the 29 April 2014. It was also common ground that, consequently, the appellant had a right of appeal against the decision of 29 March 2017. Article 9 and 10 of the Immigration Act 2014 (Commencement No 3, Transitional and Saving Provisions) Order 2014 applied the former provisions of section 82 of the 2002 Act to decisions refusing applications for leave as a Tier 5 Migrant made before 2 March 2015. That meant that the appellant had a right of appeal under section 82(1) of the 2002 Act against the decision refusing leave (and the restrictions on the right of appeal brought about by the 2014 Act did not apply).
17. On 7 June 2017, the appellant issued a claim for judicial review of the decision of 29 March 2017 refusing leave to remain and the review decision of 12 May 2017 upholding that decision. The grounds in the claim form asserted that the decision refusing leave to remain was unlawful and irrational. Permission to apply for judicial review was refused on the papers by the Upper Tribunal on 13 December 2017 and again, following an oral hearing, by Upper Tribunal Judge Lindsley on 23 April 2018. Upper Tribunal Judge Lindsley said that:

“It is not arguable that permission for judicial review should be granted in this case as whilst arguably incomplete or inadequate reasons were given for the decisions it is, on the material before me, inevitable that the decision would be the same if it were

remade and so it is not appropriate to grant permission for judicial review. The applicant could not arguably show compliance with paragraph 245ZQ(a) of the Immigration Rules, as he argued he could, because he was last granted leave to remain as a Tier 4 student migrant with St Peters College and there is no evidence whatsoever that this was a recognised body or a body in receipt of public funding”.

*The Appellant’s May 2018 application for leave based on the Convention*

18. An application for leave to remain made was made on 1 May 2018 on the basis of the appellant’s right to respect for his private life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).
19. That application was refused. The respondent sent the appellant a notice of the decision dated 11 January 2019. That was accompanied by a statement of reasons explaining why refusal of leave did not involve a breach of Article 8 of the Convention. The reasons also referred to the fact that the appellant’s leave to remain had expired on 21 January 2014. The appellant’s human rights claim was certified as manifestly unfounded under section 94 of the 2002 Act.
20. The notice informed the appellant that he had a right of appeal but, as the claim had been certified as manifestly unfounded, the appeal had to be brought from outside the United Kingdom.

*The Application for Indefinite Leave in 2019*

21. On 25 January 2019 the appellant then applied for leave to remain on the basis of long residence in the United Kingdom. His application stated that he had been resident in the United Kingdom for 10 years and two months. It is not easy to understand that, as he came to the United Kingdom on 21 February 2009. As at the time of the January 2019 application he had been resident in the United Kingdom for just over 9 years and 11 months. In any event, he varied that application on 6 April 2019 and applied for indefinite leave to remain on the basis that he had completed 10 years’ continuous lawful residence in the United Kingdom and satisfied the requirements set out in paragraph 276B of the Immigration Rules.
22. By letter dated 6 June 2019 that application was refused. The reasons accompanying the notice of the decision stated:

“It is noted from your immigration history that you have had no valid leave since 12/05/17. In addition it is considered that you have overstayed and therefore you are in breach of immigration laws.

You do not have 10 years continuous lawful residence in the UK and you are in breach of immigration laws therefore you fail to meet the requirements of paragraphs 276B(i) and (v) of the Immigration Rules”.

- 23 The statement also set out the reasons why the appellant did not qualify for leave to remain under any other paragraph of the Immigration Rules. It also set out the reasons why the respondent did not consider that refusal of leave would breach Article 8 of the Convention. The appellant was informed that he could appeal against the decision.

*The Appeal to the First-tier Tribunal*

- 24 The appellant did appeal to the First-tier Tribunal. The grounds of appeal were prepared by solicitors. They were lengthy, running to 100 paragraphs over 24 pages. By the time of the hearing before the First-tier Tribunal, the appellant's position had been refined in a written skeleton argument prepared by Mr Gajjar on the appellant's behalf. The First-tier Tribunal noted that Mr Gajjar submitted that the appellant "should be treated as having 10 years continuous lawful residence on the grounds that the break in his leave from 12 May 2017, occurred through 'historic injustice'". The injustice identified was that the 29 March 2017 refusal of leave should have carried a right of appeal (rather than simply a right to an administrative review) and so the review decision should be treated as a nullity and the respondent had yet to make a valid decision on the application. The appellant accepted that he had challenged the administrative review decision by way of judicial review and he had not raised the issue of being deprived of his right of appeal as part of that claim.
- 25 The First-tier Tribunal noted that when the appellant's appeal was allowed on 6 March 2016 the respondent gave the appellant 60 days to vary his application for leave. He did so by applying for leave as a Tier 5 Temporary Worker, in his case as a charity worker. The refusal of that application had been the subject of a claim for judicial review. The Upper Tribunal had refused permission to bring the claim for judicial review as the appellant did not, even arguably, qualify for leave to remain as a charity worker under the Tier 5 (Temporary Worker) Migrant category. The First-tier Tribunal in this appeal did not consider it appropriate to go behind that decision. The appellant's claim was based solely on his length of residence in the United Kingdom. The First-tier Tribunal concluded that, as matters stood, the appellant had remained in the United Kingdom unlawfully since 12 May 2017. Consequently, the appeal was dismissed.

*The Appeal to the Upper Tribunal*

- 26 The appellant was given permission to appeal to the Upper Tribunal. The appeal took place during the pandemic and was dealt with on the papers rather than at an oral hearing. The written grounds of appeal were lengthy. The Upper Tribunal dismissed the appeal. For present purposes, it is necessary only to focus on one ground and one finding by the Upper Tribunal (Judge Hanson). It noted that the appellant claimed that he was not told that he had a right of appeal against the decision of 29 March 2017 and that therefore the decision was invalid and his existing leave continued by virtue of section 3C of the 1971 Act until he lodged a notice of appeal waiving the procedural irregularity. At paragraph 16 of its reasons, the Upper Tribunal concluded that the chronology indicated that the appellant had, in fact, appealed against the refusal of the 29 April 2014 application on 17 March 2015 and so had waived any procedural error on the part of the respondent in failing to inform him that he had a right of appeal. With respect to the Upper Tribunal that conclusion is wrong although it is easy to see how the mistake occurred. The



appellant had appealed against the refusal of 29 April 2014 application and that appeal had been successful. He was allowed to vary the 29 April 2014 application and did so on 25 January 2017 by applying for Tier 5 (Temporary Worker) Migrant status as a charity worker. He had never been told of his right of appeal against the decision on that application and he had not waived any right of appeal.

*Subsequent proceedings*

- 27 On 5 October 2020, the appellant filed a notice of appeal in the First-tier Tribunal against the respondent's decision of 29 March 2017 (the decision refusing the application for Tier 5 (Temporary Worker) status).
- 28 On 23 February 2021, the First-tier Tribunal held that, while the appellant did have a right of appeal against that decision, the appeal was brought out of time. It considered that there were no circumstances justifying an extension of time. It decided that it would not accept the notice of appeal and would take no further action on it.
- 29 On the 17 May 2021, the appellant applied for judicial review of the decision holding that the appeal had been brought out of time. By a decision dated 2 July 2021, permission to apply for judicial review was refused. The reasons given note that, even if the appellant had a right of appeal, and even if the decision of 29 March 2017 failed to comply with the relevant regulations governing the giving of notice of the right to appeal, there was nothing to support the appellant's argument that an appeal would be within time whenever it was brought.

**THE APPEAL**

- 30 Permission to appeal against the decision of the Upper Tribunal of 11 August 2020 was granted by Elisabeth Laing LJ on four grounds which were that the Upper Tribunal erred in:
  - (1) finding that the appellant had waived his right to appeal in 2015;
  - (2) misunderstanding the appellant's case and failing to understand the importance of the right of appeal granted by section 82 of the 2002 Act as applicable at the material time;
  - (3) making an irrational finding that removal of the appellant from the United Kingdom would not be disproportionate as, if the requirements of rule 276B were satisfied so that the appellant had a right to remain on the basis of 10 years' continuous lawful residence, that would outweigh the public interest in removal;
  - (4) failing to give adequate reasons for its decision.
- 31 The respondent accepted that ground 1 of the appeal was well founded. She invited this Court to allow the appeal and to remit the matter to the Upper Tribunal for a rehearing as explained in her statement of reasons in support of allowing the appeal dated 28 March 2022.

- 32 The appellant declined to agree to the appeal being allowed on that basis. It seems that he wished to argue that all four of the grounds of appeal could be established.
- 33 On 17 May 2022, the respondent then applied for an extension of time for filing a respondent's notice seeking to uphold the decision of the Upper Tribunal on two additional grounds. These were that:
- (1) it was an abuse of process for the appellant to raise the issue that the respondent had failed to inform him of the right to appeal against the decision of 29 March 2017 as he should have raised that issue as part of the claim for judicial review of the 29 March 2017 decision brought in 2017; and
  - (2) the Upper Tribunal would have been bound to dismiss the appeal in any event as the appellant did not qualify for Tier 5 (Temporary Worker) status and any appeal would have failed and any leave he had would have come to an end in 2017. Thus, the appellant could not have qualified for indefinite leave to remain in 2019 on the basis of 10 years' continuous lawful residence.
- 34 At the start of the hearing of the appeal on 24 May 2022, we considered the application for an extension of time to file a respondent's notice. Part 52.13(4)(b) of the Civil Procedure Rules ("the CPR") provides that a respondent's notice should be served within 14 days after service of the notification that permission to appeal had been granted. The order of Elisabeth Laing LJ granting permission was sealed on 2 February 2022 and would have been served on or about that date. Any respondent's notice should have been served within 14 days, that is by about 16 February 2022. The respondent did not file a respondent's notice until 17 May 2022, that is three months later. Further, it was filed just a week before the hearing of the appeal. We were unimpressed with the two reasons given. First, it was said that the respondent was seeking to settle the matter. That is not a basis for failing to comply with CPR 52.13. Until an appeal is withdrawn, or disposed of, the rules apply and the respondent should comply with them. Secondly, it is said that the respondent changed counsel between the statement supporting allowing the appeal and the respondent's notice seeking to do the opposite and to uphold the decision on additional grounds. The fact that the respondent changed counsel and, presumably, obtained different legal advice would not, of itself, normally justify an extension of time for filing a respondent's notice.
- 35 There was, however, the following consideration which would justify dealing with the issues raised in the respondent's notice. As Mr Ostrowski for the respondent submitted, if his arguments were correct, then, as a matter of law the appellant did not have leave to remain in the United Kingdom after some time in May 2017 at the latest. The appellant could not, therefore, have qualified for indefinite leave to remain under paragraph 276B of the Immigration Rules. In those circumstances, there would be no purpose in remitting the matter to the Upper Tribunal as the appeal would have to be dismissed in any event. We were satisfied that the appellant had had sufficient time to prepare to deal with the issues raised in the respondent's notice and he would not be prejudiced if those matters were considered at the hearing of the appeal.
- 36 There were, therefore, two options open to the Court. One course of action was to allow the appeal on ground 1 and remit the matter to the Upper Tribunal. The Upper

Tribunal would then deal with all the issues, including the two issues in the respondent's notice and the potentially critical issue of whether the appellant's leave to remain had been curtailed in January 2014 and had expired then or at the latest on 3 April 2014. The other option was to continue with the appeal on all four grounds but on the basis that the two issues in the respondent's notice would be also argued. It was not possible for this Court to determine whether the appellant's leave had expired on 21 January 2014 or at the latest on 3 April 2014 as that involved matters of fact on which evidence would be required.

- 37 We therefore decided that the appellant ought to be given the option of either having the appeal allowed on ground 1 and the matter remitted to the Upper Tribunal or continuing with the appeal on all grounds (as he had previously indicated he wanted to do) but on the basis that the issues in the respondent's notice would be considered. We granted an adjournment to enable Mr Gajjar to take instructions on the appellant's preferred course of action. Mr Gajjar informed us that the appellant wished to continue with the appeal on the basis outlined above. We, therefore, proceeded to hear the appeal on all grounds and the two issues raised in the respondent's notice. We allowed the parties to make written submissions following the hearing. The submissions from the appellant dealt with (1) the claim that the application for leave to remain was not determined because of the failure to give him notice of his right of appeal (2) the relevance of the notice of decision of 11 January 2019 and (3) the decision of this Court in *Akinola*.

## **THE GROUNDS OF APPEAL**

- 38 I am satisfied that the Upper Tribunal did err. The basic error is that identified in ground 1 of the grounds of appeal. The Upper Tribunal erroneously considered that the appellant had in 2015 waived any procedural defect arising from the failure to inform him that he had a right of appeal. It erroneously thought that the appellant had appealed against the material decision (the decision of 29 March 2017 refusing the 25 January 2017 application). That in fact was wrong. The other grounds of appeal, in truth, either follow from that basic error or add nothing to ground 1. The Upper Tribunal failed to consider the matters referred to in grounds 2 and 3 because it had erroneously assumed that any procedural defect had been waived. It did not, therefore, consider what the consequences would be if there had been no waiver. Similarly, in ground 4, the Upper Tribunal did not give reasons about certain matters because it, erroneously, did not consider those to have arisen.

- 39 The real issue in my judgment is whether any defect in the notice given in respect of the decision of 29 March 2017 refusing Tier 5 leave is material to his current appeal against the decision of 6 June 2019 refusing indefinite leave to remain.

## **THE MATERIALITY OF THE ERROR BY THE UPPER TRIBUNAL**

- 40 Mr Gajjar, with Mr Badar, for the appellant, submitted that the notice served by the respondent of the 29 March 2017 decision was invalid in that it did not inform the appellant that he had a right to appeal against the decision and so did not accord with the requirements of regulation 5 of the 2003 Regulations. As a result, he submitted that the application for Tier 5 (Temporary Worker) leave made on 27 January 2017 had not been determined and his existing leave to remain continued by virtue of section 3C(2)(a) of the 1971 Act.

- 41 Mr Gajjar submits that a notice of a decision will necessarily be invalid, so that an application will not have been determined, where the notice fails to satisfy the requirements of regulation 5 of the 2003 Regulations. He submits that an applicant is, therefore, able to assert in every case and indefinitely that an application has not been determined and his leave continues where a notice fails to comply with the requirements of the 2003 Regulation. He submits, therefore, that the respondent in her decision of 6 June 2019, and the First-tier Tribunal, and the Upper Tribunal when hearing an appeal against a decision of the First-tier Tribunal, had to determine, or approach the matter, on the basis that the earlier notice of decision was invalid and there had been no determination of the application of 27 January 2017. Mr Gajjar relies upon *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 424, [2017] 4 WLR 156, especially paragraph 24, and *E1 (OS) Russia v Secretary of State for the Home Department* [2012] EWCA Civ 357.
- 42 Mr Gajjar accepted in his post-hearing written submissions that if the application for Tier 5 leave had not been determined, then that application was varied on 1 May 2018 when the appellant sought leave to remain on the basis that refusal of leave would breach his rights under Article 8 of the Convention. The respondent had sent a notice of the decision on that application. That notice did give reasons and informed him of his right of appeal from outside the United Kingdom. There is no dispute that the notice was sent before 21 February 2019, that is before the appellant completed 10 years' continuous lawful residence in the United Kingdom. Mr Gajjar submitted that the decision to certify the human rights claim as manifestly unfounded was arguably unlawful as it proceeded on the incorrect factual matrix that the appellant was an overstayer at the time of the decision in January 2019.

### *Discussion*

#### General Principles

- 43 The respondent will determine whether or not an applicant qualifies for leave to enter or remain in the United Kingdom. She must give notice of any appealable decision to the applicant. That notice is to include or be accompanied by the reasons for a decision and a statement advising of any rights of appeal.
- 44 One of the functions of the notice, therefore, is to give the applicant information about his right to appeal against a particular decision. The fact that the notice does not do so may have consequences, particularly where the person wishes to appeal against the decision. By way of example, a person wishing to appeal against a decision has to provide the First-tier Tribunal with a notice of appeal within 14 days of being sent the notice of decision: see rule 19 of the Rules. Failure to notify the person of his right of appeal may be a good reason for extending the time for appealing under rule 4(3) of the Rules. Further, if a notice is quashed in a claim for judicial review, then there will be no notice of a decision in existence and the respondent may have to send a fresh notice of the decision and the time for appealing against the decision may begin from that date. If the notice is not quashed, however, it will continue to exist and may continue to have legal effect. The fact that a notice is deficient and does not give all of the relevant information does not, therefore, mean that the notice is necessarily, and for all time, legally ineffective.

- 45 That is consistent with the decision in *EI (OS) Russia*. That case concerned a claim for judicial review of a decision cancelling the claimant's indefinite leave to remain. The respondent had served a notice of the decision on the person concerned but that notice did not inform him that he had a right to appeal from within the United Kingdom. The Court of Appeal recognised that there was a distinction between the decision itself and the notice of the decision: see paragraphs 27 and 28 of the judgment of Sullivan LJ, with whom the other members of the Court agreed, and paragraphs 21 to 22 of the judgment of Richards LJ, with whom the other members of the Court agreed, in *JN (Cameroon) v Secretary of State for the Home Department* [2009] EWCA Civ 307.
- 46 The Court then considered the impact of the failure to give notice of the right to appeal from within the United Kingdom. Sullivan LJ said the following at paragraphs 41 to 42 and 45.

“41. The importance of compliance with the notification requirements in paragraph (3) of regulation 5 is underlined by paragraphs (6) and (7) which provide for re-service of the notice containing the advice required by paragraph (3) in those cases where, initially, paragraph (3) need not be complied with. Against this statutory background, applying Lord Steyn's approach in *Soneji* [2006] 1 AC 340 (see para 21 above), I consider that Parliament would have intended that a failure in a notice of decision to comply with the requirement to advise an claimant that he was entitled to an in-country right of appeal would render the notice invalid.

42. The court's response to such invalidity would normally be to quash the notice, unless it was satisfied that there had been substantial compliance with the requirement: eg because the claimant had been made aware by other correspondence from the respondent that he did, in fact, have an in-country right of appeal, because the First-tier Tribunal had accepted an in-country appeal from the claimant, or because he had been allowed to present his appeal in the UK having been permitted to re-enter the country to do so.”

and

“45. This appeal process is initiated by the respondent making an immigration decision. The Regulations were made because it was recognised that persons who were served with such decisions needed clear advice about their rights of appeal against the decision: whether they had a right of appeal, could they bring the appeal while in the UK, on what grounds could they appeal? It is the statutory responsibility of the respondent to provide that advice. If it is discovered that for some reason, perhaps a decision of this court clarifying the legal position, as was the case in *MK*, the advice in the notice of decision was erroneous, the respondent would normally be expected to take steps, as a matter of good administration, to rectify her error. The respondent's

reluctance to exercise her discretionary powers to permit a person in the position of this claimant to return to the UK outside the Rules is understandable. In these circumstances, the only way in which the respondent could rectify her error would be by the service of a corrected notice informing the claimant of his in-country right of appeal. If the respondent either failed or refused to take any steps to rectify the error, it is difficult to see how the court could properly decline to quash the defective notice, thus depriving the wrongly excluded claimant of any relief.”

- 47 In other words, a failure to give the requisite information may potentially render the notice of decision invalid. The respondent may rectify the error by sending a corrected notice. In that case, the time to appeal would begin to run from the time that the corrected notice was sent to the person concerned. If the respondent does not do that, then a court dealing with a claim for judicial review may quash the notice, and usually will do so if that is necessary to enable the person concerned to have an effective appeal. A court may, however, find that the notice was not invalid, or may decline as a matter of discretion to quash the notice, if, for example, the person concerned has in fact been made aware of the right of appeal. In that case, the original notice of decision remains in force (as it has not been quashed) and continues to have legal effect, and the time for appealing begins when that notice was sent to the person concerned. The situations referred to by Sullivan LJ in paragraph 42 of his judgment are not the only circumstances in which a court may not regard a notice as invalid or where it may as a matter of discretion decline to grant a remedy quashing a notice of decision. A court may decline to quash a notice of decision if granting such an order would, for example, serve no practical purpose or where no injustice has in fact been suffered.
- 48 Mr Gajjar also relied upon the decision in *Khan*. That concerned a claim for judicial review. On 4 April 2012 the claimant had applied to vary his existing leave to remain (which expired on 30 July 2012) and to be granted further leave to remain as a Tier 1 (Post Study Work) Migrant. He asked the respondent to defer consideration of the application until he received his degree. On 20 November 2012, he applied for leave to remain on a different basis. That application was refused by a decision of 24 May 2013. The respondent contended that he had no right of appeal against that decision (as the November application was made after leave had expired on 30 July 2012). The claimant contended that he did have a right of appeal as the November 2012 application varied the 4 April 2012 application and his existing leave continued until the determination of the application as varied. The question of whether the claimant had a right of appeal was referred to as “the jurisdiction issue”.
- 49 The question for the Court of Appeal in *Khan* was whether the jurisdiction issue could be determined by a claim for judicial review or whether the person had an alternative remedy which he should use in that he could appeal to the First-tier Tribunal which could determine the jurisdiction issue, i.e. whether the appellant had a right of appeal, and if he did, it could go on to determine the appeal. The Court of Appeal held that generally the jurisdiction issue should be determined by the First-tier Tribunal as part of the process of appealing rather than by way of a claim for judicial review although, on the facts of that case, judicial review was,

exceptionally, an appropriate means of seeking to establish whether the claimant had a right of appeal. In the course of his judgment, Underhill LJ said this:

“24. I should record that it was common ground before us that if the claimant had now to pursue an appeal to the First-tier Tribunal there would be no distinct point about such an appeal being out of time. That is because, if he is right, he has never received a valid decision notice (see para 22 above) and accordingly time has never started to run against him.”

50 Mr Gajjar understandably relies upon that passage. That passage does not, however, amount to a binding ruling by the Court that any defect in a notice of decision renders it invalid and that the time for appealing against the decision does not begin to run until the appellant is sent a notice of decision which complies with the requirements of the 2003 Regulations. First, that was not the issue that the Court in *Khan* was deciding. It was dealing with the issue of which procedure was appropriate for determining whether a person had a right of appeal: the First-tier Tribunal on appeal or the Upper Tribunal by way of a claim for judicial review. Secondly, Underhill LJ does not reach any conclusion on the question. He simply records what was common ground between the parties. Thirdly, it is important to bear in mind that in *Khan* (as in *EI (OS) Russia*) the case concerned an individual who was seeking to appeal against a particular decision. The Court was not concerned with the situation where a person did not wish to appeal against the decision but, rather, wanted to claim that his existing leave had continued for many years because a notice had been sent at some stage which had not given him the information that was required. Finally, in my judgment, the position in *Khan* is consistent with a number of possibilities. If an appeal was brought out of time as a result of a defect in the notice such as the failure to inform Mr Khan of his right of appeal, that may be a good reason for extending time for appealing. Or the respondent could serve a corrected notice of decision once it was established that Mr Khan had a right of appeal so that the time would begin to run from the service of the corrected notice. Or a court dealing with a claim for judicial review of a notice may decide to quash a notice if it does not comply with the requirements of the 2003 Regulations and a fresh notice would then need to be sent and that would start the time for appealing afresh.

#### Applying the Principles to the Present Case

51 First, the respondent did send the appellant a notice of her decision of 29 March 2017 on the application for Tier 5 (Temporary Worker) leave. That notice told the appellant that his application had been considered but refused. It set out the reasons for the decision. The notice (erroneously) informed the appellant that he had a right of review. It did not inform him that he had a right of appeal. In fact, no such appeal could have succeeded as the appellant simply failed to meet the requirements of the relevant paragraphs of the Immigration Rules. The appellant did seek judicial review of the decision refusing leave to remain, and the administrative review decision upholding that decision, but that claim was dismissed as it was inevitable that he would be refused Tier 5 leave to remain as he did not satisfy the relevant requirements of the Immigration Rules. No challenge was made in the judicial review claim to the notice of the decision (as opposed to the decision refusing leave to remain itself). But any claim to judicial review of the notice would also inevitably

have been dismissed because the failure to inform the appellant of the right of appeal would not have caused any injustice or prejudice to the appellant as any appeal was bound to fail.

- 52 Secondly, in this case, the appellant is challenging the decision of 6 June 2019. The appellant put his case before the First-tier Tribunal on the basis that he had suffered “an historic injustice” because he was not informed of his right of appeal. The appellant has not, however, suffered any injustice. He is not now seeking to appeal the substantive decision refusing Tier 5 leave. He accepts that the refusal of Tier 5 leave was correct. He did, indeed, challenge that substantive decision by way of judicial review but the claim failed. The appellant is not seeking to rectify any injustice he suffered by not being given the opportunity of appealing against the refusal of Tier 5 leave. Rather, he is seeking to benefit from that the fact that he was not told about his right of appeal in 2017 as a means of trying to keep any previous leave to remain in existence in order to accumulate further periods of lawful residence so he could satisfy the requirement of 10 years’ continuous lawful residence and qualify for indefinite leave to remain under paragraph 276B of the Immigration Rules. The fact that he is unable to do so does not amount to an injustice, historic or otherwise.
- 53 In the present context, therefore, the fact that the Upper Tribunal erred in considering that in 2015 the appellant waived any defect in the notice of decision is immaterial. The First-tier Tribunal was not obliged to determine whether or not the notice sent in May 2017 was legally defective. That notice had not been quashed and the First-tier Tribunal was not hearing an appeal against that decision. It was satisfied that the appellant had suffered no historic injustice as a result of any defect in the notice and there is no possible ground for considering that its decision on that matter was wrong. There is no purpose, therefore, in remitting this appeal to the Upper Tribunal. It would have to dismiss the appellant’s appeal against the First-Tribunal’s decision.
- 54 The second reason why any error is immaterial is this. Even if Mr Gajjar were correct, and the application of the 27 January 2017 had not been determined, he accepts that that application was varied by the application made on 18 May 2018 for leave to remain to be granted on human rights grounds. That application was decided and a notice of decision sent in January 2019. That notice did provide the reasons and informed the appellant of his right of appeal. On any analysis that decision complied with all the requirements of regulation 5 of the 2003 Regulations. Any leave had come to an end and was not continued under section 3C before the appellant had completed 10 years’ continuous lawful residence. There would be no purpose served in sending the matter back to the Upper Tribunal as the appeal would have to be dismissed in any event. The fundamental fact is that the appellant did not have 10 years’ continuous lawful residence on 21 February 2019 and did not meet the requirements for the grant of indefinite leave. Any appeal against the refusal of the grant of indefinite leave would have to be dismissed.
- 55 Mr Gajjar submitted that the decision of 11 January 2019 was flawed by the view that he was an overstayer. The question is, however, whether the application had been determined. It had. The respondent had refused the application and the appellant had been given notice in accordance with the 2003 Regulations and, in particular, had been informed that he had a right to appeal from outside the United



Kingdom. That brought any existing leave to an end: see sections 3C(2)(a) and (b) of the 1971 Act. In the course of her reasons for the decision, the respondent had referred to the fact that the appellant's leave had expired on 21 January 2014. If the appellant had wished to appeal against the decision, on the ground that that was erroneous, he would have been able to do so. Mr Gajjar suggested that the decision to certify the human rights claim as manifestly unfounded was arguably wrong. But if the appellant had wished to challenge the certification, he would have needed to seek judicial review. He did not do so and the certification therefore stands. In any event, that does not alter the fact that the respondent had sent a notice in accordance with the requirements of regulation 5 of the 2003 Regulations. That meant the application had been determined and so leave did not continue under section 3C. The appellant did not therefore have 10 years' continuous lawful residence in the United Kingdom.

56 In those circumstances, it is not necessary to resolve the question of whether the appellant's leave actually expired earlier, in January or April 2014 as, in any event, it expired before 21 February 2019. It is also unnecessary to consider the respondent's alternative argument that it was an abuse of process for the appellant to raise in these proceedings the issue that the notice of decision sent in 2017 was defective.

## **CONCLUSION**

57 The Upper Tribunal erred in its consideration of the appellant's appeal against the decision of the respondent refusing his application for indefinite leave to remain. The errors were not, however, material, and there would have been no basis for the Upper Tribunal to have allowed the appeal against the decision of the First-tier Tribunal. Furthermore, on any analysis, the appellant did not have the requisite 10 years' continuous lawful residence in the United Kingdom to qualify for the grant of indefinite leave under paragraph 276B of the Immigration Rules and his appeal would have been dismissed in any event. I would dismiss this appeal.

### **Baker LJ**

58 I agree.

### **Holroyde LJ**

59 I also agree.