



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/14800/2014
& IA/14814/2014

THE IMMIGRATION ACTS

Heard at Field House
On 3 February 2015

Determination Promulgated
On 16 February 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Khan Mohammad Nazmus Sakib
Shakila Sharmin
[No anonymity direction made]

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellants: Mr M Hasan, instructed by Kalam Solicitors
For the respondent: Mr P Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of both the second appellant and the Secretary of State, in respect of the first appellant only, against the determination of First-tier Tribunal Judge Wilsher promulgated 31.10.14, dismissing the appeal of the second appellant but allowing the appeal of the first appellant on immigration grounds against the decisions of the respondent, dated 27.2.14 and 26.3.14, to refuse leave to remain in the UK. The Judge heard the appeal on 16.10.14.

2. First-tier Tribunal Judge White granted permission to appeal to both the second appellant and the Secretary of State on 11.12.14.
3. Thus the matter came before me on 3.2.15 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Wilsher should be set aside.
5. The relevant background can be briefly summarised as follows. The first appellant came to the UK on 11.10.03 as a student. His leave was subsequently extended to 12.1.14. However, on 26.5.12 his leave was curtailed, because his educational sponsor lost its licence. He claims not to have received notice of curtailment and on 16.9.13 made an application for indefinite leave to remain (ILR) on the basis of 10 years' lawful residence. The application was refused on 27.2.14.
6. The second appellant, the spouse of the first appellant, first entered the UK on 22.12.08 with leave as his dependant. Her leave was subsequently extended to 12.1.14. On 9.1.14 she applied for further leave to remain as a partner, using form LFR(FP). The application was refused on 26.3.14.
7. Finding that the Secretary of State was not entitled to rely on mere postal service, citing Syed (Curtailment of Leave - Notice) [2013] UKUT 00144, Judge Wilshire concluded that the first appellant was not validly served with the curtailment notice and thus his leave continued unaffected. It followed that he did meet the 10-year continuous lawful residence requirement and is entitled to ILR pursuant to paragraph 276B, meeting all other requirements.
8. In respect of the second appellant Judge Wilshire considered that as the first appellant had secured ILR under the 10 year rule, and was no longer a points-based scheme migrant, his wife must be considered under Appendix FM and cannot benefit from the more generous provisions of paragraph 319C. As she did not meet the requirements of Appendix FM, in particular as to the financial requirements, her appeal was dismissed.
9. In granting permission to the Secretary of State to appeal the decision in relation to the first appellant, Judge White considered it arguable that the judge made an error of law in finding the notice of curtailment of leave had not been validly served.
10. In granting permission to the second appellant, Judge White found it arguable that there is inconsistency constituting an error of law by dismissing the second appellant's appeal whilst allowing that of her husband the first appellant.
11. The rule 24 response of the Secretary of State to the appeal of the second appellant is that Chikwamba is not relevant as it has been overtaken by the introduction of the family life provisions of the Immigration Rules, notably Appendix FM, which the second appellant does not meet. Further, the judge was in error in the approach to the circumstances of the second appellant at the date of his decision, since at that date whilst the first appellant had succeeded on appeal, he did not have ILR, which is a status that can only be granted by the Secretary of State.

12. In his submissions Mr Nath stated that curtailment decisions are routinely sent by recorded delivery, which was the process adopted in 2012 when curtailing the leave of the first appellant.
13. Syed points out that the Immigration (Notices) Regulations 2003 do not apply to a curtailment decision, as it is not an immigration decision under section 82 of the 2002 Act. There are no statutory provisions for the giving of such notices. "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." The Secretary of State cannot rely on deemed postal service. The respondent's Enforcement Instructions and Guidance was handed to me, which at 50.8.1 refers to Syed and points out that the position in Syed was rectified by the Immigration (Leave to Enter and Remain) (Amendment) Order 2013, allowing for postal or email service. However, this only has effect from 12.7.13. For service prior to that date the guidance states that the onus of proving that the notice was effectively served is on the Home Office.
14. The evidence adduced by Mr Nath includes the Case Record Sheet, dated 27.3.12, showing the curtailment decision, curtailing leave to 60 days, was dispatched by post to the first appellant's address at [-] Portland Road, [-] by recorded delivery, and citing the recorded delivery reference. The note also records that there had been a number of attempts to serve the curtailment decision via the college, but they were returned as 'Addressee gone away,' and thus the recorded delivery service to the first appellant's last known address. Mr Nath told me that the recorded delivery notice sent to the appellant's address had not been returned.
15. The Guidance does not say that postal service cannot be effective and sets out checks to be made that service was effective. If the notice was served to file or returned by post as undeliverable, it has no effect and a fresh curtailment decision must be made giving 60 days leave from that point. "If, when interviewed, the migrant claims not to have received the notice of curtailment, the officer must establish whether the notice was served to the correct address for the migrant. The address of an educational institution is not sufficient unless you can show that, on the balance of probabilities, the migrant subsequently received the notice from the college."
16. It follows that postal service can be relied on, provided the Secretary of State discharges the burden of proving effective service, on the balance of probabilities. That is probably why recorded delivery service was used. I note in Syed that the notice had been sent by recorded delivery but had been returned as undelivered and the notice was then served to file. The return of the letters by the Post Office proved that they had not been served on the appellant. Clearly, where a registered letter has been sent but returned as undelivered effective service has not taken place. Syed cited the case of R v Appeal Committee of County of London Quarter Sessions, Ex Parte Rossi [1956] 1 AER, where it was held by Denning LJ that a returned unopened and undelivered notice was not effective service, but the judgement goes on to state that effective service "could be done by proof that a notice had been sent to him in good time by post in a registered letter which had not been returned, for it could then be assumed that it had been delivered in the ordinary course of post."

17. It follows that mere posting of the notice cannot be sufficient proof of service. Even attempted recorded delivery service cannot be effective, where the notice is returned undelivered. But in the present case it was sent by recorded delivery to the first appellant's last known address, as confirmed by the print out of the computer CID file and the GCID Case Record Sheet, and not returned. The notice was sent to the address on file. I find that the Secretary of State was entitled to rely on unreturned recorded delivery as effective service. It follows that on the balance of probabilities the First-tier Tribunal Judge made a significant error of law by finding at §5 that the steps taken by the Secretary of State were insufficient to discharge the burden of proof and that this amounts to such an error that the decision cannot stand and must be set aside and remade.
18. In remaking the decision, taking into account the claim of the first appellant that he did not receive the notice, I reach the conclusion on the balance of probabilities that the curtailment had been effectively served on the first appellant. It was for the appellant to keep the Home Office apprised of his current address. If he had moved, he did not notify the Home Office. Whilst it may be speculation as to whether he would have been alive to the issue of curtailment because he must have known that the college's licence had been lost, it is relevant to the credibility of his claim that he not only did not receive the curtailment but was totally unaware of it. Frankly, I find that it would have been obvious to him that such a curtailment was very likely.
19. It follows that the first appellant's leave did not continue beyond May 2012 and thus he was not entitled to ILR on the long-residence provisions. He had no right to remain in the UK beyond May 2012. It also follows that the appeal of the second appellant must fail. The First-tier Tribunal was in error in finding that her application had to be considered under Appendix FM on the basis that the first appellant had ILR. As has been pointed out by the respondent's Rule 24 response, the fact that he succeeded on the appeal at the First-tier Tribunal does not equate to him having ILR at the date of application of the second appellant. He could not have such an immigration status until it was granted by the Secretary of State. However, the judge's error in this regard is not material as the dismissal of the appeal was inevitable once it becomes clear that the first appellant did not have leave to remain beyond May 2012. Neither appellant could have had any right to remain in the UK beyond May 2012.
20. Whilst article 8 ECHR has not been directly addressed, it is clear that neither appellant can meet the requirements of Appendix FM or paragraph 276ADE, for the reasons cited in the refusal decisions and which does not need to be repeated here. Neither appellant is settled in the UK and as they are together they do not qualify as parents of their son born 22.12.12, who is not a British citizen and has no right of settlement in the UK. Their family life can continue together in Bangladesh and there is thus no interference with that family life sufficient to engage article 8 ECHR following the Razgar five steps. Further, they have not shown that they have no ties to Bangladesh, including family, social and cultural. Whilst they may have developed private life in the UK, such private life was as student and latterly as persons without lawful leave to remain. In the light of cases such as Nasim and Patel, it is clear that the development of private life as a student in the UK is outside the

type of rights to be protected by article 8. In Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR. Whilst each case must be determined on its merits, the Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "serve to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity."

21. Even if there were compelling circumstances not adequately recognised by the Immigration Rules so as to justify considering leave to remain under article 8 ECHR private and family life outside the Immigration Rules, recognising that Appendix FM and paragraph 276ADE are not a complete code, I find on the Razgar balancing exercise between on the one hand the rights of the appellants and on the other the legitimate and necessary public interest in their removal to protect the economic well-being of the UK through immigration control, that the decisions to refuse to vary leave to remain and to remove the appellants from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006 are entirely proportionate and do not produce a result which is unjustifiably harsh. The appellants can have no legitimate expectation to remain in the UK except in accordance with immigration rules, with which they have failed to demonstrate compliance. They are not entitled to remain in the UK simply by reason of their length of stay, a good proportion of which was without lawful leave. Article 8 is not a shortcut to compliance with the Rules. The appellants came as student and dependant and the purpose of their visit has long since expired. I also have to take into account section 117B of the 2002 Act to the extent that I find that on their circumstances little weight should be given in the balance against the public interest in their removal to any private life or relationship with a partner developed whilst they have been in the UK unlawfully. In the circumstances, their removal is neither unjustifiably harsh nor disproportionate.

Conclusion & Decision

22. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing the appeal of each appellant.



Signed:

Date: 13 February 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been dismissed and thus there can be no fee award.



Signed:

Date: 13 February 2015

Deputy Upper Tribunal Judge Pickup