



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/35231/2014

THE IMMIGRATION ACTS

Heard at Field House
On 19 November 2015

Decision & Reasons Promulgated
On 4 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

HASSAN MUNIR KHAN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr. C. Mannan of Counsel instructed by Bukhari Chambers
For the Respondent: Ms J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Afako promulgated on 26 June 2015 in which he dismissed the Appellant's appeal against the decision of the Respondent to refuse leave to remain as a Tier 4 (General) Student.

2. Permission to appeal was granted as it was “arguable that the judge erred in law in finding that the Appellant’s leave was curtailed given that the judge appears to have accepted that the Appellant did not receive notice of the curtailment. The judge considered that **Syed** had decided that there were circumstances where other forms of service would be sufficient [30]. Whilst the judge gives extensive reasons for his conclusion, it is arguable that the ratio of **Syed** is, as the Appellant submits, that actual notice is indeed required – see **Javed [2014] EWHC 4426 (Admin).**”
3. Further the notice of permission granting appeal states:

“If the Appellant’s leave was not validly curtailed, then it is arguable that he has been in the UK for 10 years continuously with valid leave and accordingly the judge erred in the basis on which he approached the Appellant’s private life in the UK. It is also arguable as set out in paragraphs 5 and 9 grounds (even if the leave was validly curtailed) that the judge erred in law in his approach to the fact that the decision of 16 September 2013 did not notify the Appellant of his right of appeal. The judge considered that the Appellant’s leave to remain expired in 2013 (see [43] and [33]) but there is an argument that because the notice of decision of 16 September 2013 did not inform the Appellant that he did have a right of appeal albeit on restricted grounds, the Appellant’s time for appealing and therefore his section 3C leave is extended and in the circumstances was extended until the Appellant in fact appealed to the tribunal - see **CHH (Notices Regulations) [2011] UKUT 00021**. Accordingly it is arguable that the judge should in any event have treated the Appellant as having continuing lawful leave.”
4. I heard submissions from both representatives. At the end of the hearing I reserved my decision, which I set out below with my reasons.

Submissions

5. There was no Rule 24 response on the file but Ms Isherwood produced one which essentially submitted that the Appellant was not credible and that the notice of curtailment had been validly served.
6. Mr. Mannan relied on the grounds of appeal.
7. Ms Isherwood submitted that the judge had addressed the case of **Syed (curtailment of leave – notice)** [2013] UKUT 00144 (IAC). In **Syed** curtailment letters were sent but they were returned to the Respondent. In the Appellant’s case, nothing was returned. The Appellant chose to cease studying 10 months before the curtailment letter was issued. The Appellant accepted that he had not notified the Respondent of his change of address. This responsibility lay with the Appellant. In the case of **Javed** the College had lost its licence. Here the Appellant had ceased studying but had not done anything to inform the Respondent.
8. The Respondent had sent the curtailment letter by recorded delivery to the last known address. She submitted that there was nothing else the Respondent could

have done. The decision to curtail was not returned to the Respondent. She referred to paragraphs [21] and [28] of the decision. The Appellant had made it impossible for the curtailment notice to be served. The onus was on the Appellant to notify the Respondent and he had failed to do so. Therefore the case of Syed could not apply. The judge found that the Appellant was not credible and that the curtailment letter had been delivered. She referred to paragraph [26] of the decision where the judge had applied the case of Syed. It was open to the judge to make these findings given the situation. The judge did not accept the Appellant's evidence. The Respondent had been kept in the dark about the Appellant's new address. I was referred to paragraph [14] of the decision.

9. In relation to the right of appeal I was referred to the judicial review application. The papers indicate that the Appellant knew he had a right of appeal at the time of the judicial review. I was referred to paragraph [8] of the decision.
10. Ms Isherwood submitted that at the date of the hearing, 19 May 2015, the Appellant had not been in the United Kingdom for 10 years by a number of days. The judge had made sustainable findings regarding Article 8. The Appellant's leave had expired on 8 September 2013 and the judge was entitled to come to his findings at paragraph [43]. He had treated the decision of 19 August 2014 correctly.
11. In response Mr. Mannan set out the chronology of the case. He submitted that the Appellant had come to the United Kingdom on 25 May 2005. His last grant of leave had been from 19 July 2012 until 14 June 2014. His evidence was that on January 2013 he had changed address to Horn Lane and had informed his college of this in or about January 2013. He had not informed the Respondent.
12. In relation to the curtailment of 28 June 2013, this did not say how the Respondent had been informed that the Appellant had failed to attend his course. If the Respondent had received a letter from the college with this information, it had not been disclosed, and it is possible that it had mentioned the Appellant's change of address. On 10 July 2013 the curtailment letter was sent to Sancroft Close. The Respondent's position at the First-tier Tribunal was that as far as she was concerned it had been posted and delivered and therefore the Appellant was aware of his curtailment on or about 10 July 2013.
13. The only evidence from the Respondent was the document entitled "Track and trace" dated 20 May 2015 which indicated that something had been delivered. It did not show what had been delivered. It did not show that it was delivered to Sancroft Close. It did not show that it had been received by anyone at that address let alone by the Appellant. It was submitted that this was a hopeless document for the Respondent to rely on. On 15 August 2013 the Appellant made an application for leave to remain using the address of Horn Lane. The application is clear that his address is Horn Lane. It was not known whether this had been before the judge in the First-tier Tribunal. However, on 15 August 2013, despite the Respondent being aware of the Appellant's address, the curtailment of leave was not cancelled. On 16

September 2013 the Respondent refused the application sending this decision to Horn Lane. The letter of 16 September 2013 states that there is no right of appeal.

14. On 25 September 2013 the Appellant wrote to the Respondent (page 36 of the bundle). This letter does not refer to the curtailment. The judicial review application did not mention curtailment, and the Respondent did not mention curtailment in the judicial review proceedings. On 13 June 2014 an Article 8 application was made, but again there was no mention by the Appellant of curtailment. On 29 August 2014 the application was refused, and curtailment was mentioned in the reasons for refusal letter for the first time. The application was not refused on substantive grounds.
15. It was submitted that the judge had erred as there was no evidential basis for saying that the curtailment notice had been properly served [32]. It was incumbent on the Respondent to make sure that the document was served properly. I was referred to paragraph [33] of the decision which refers to the fact that the Appellant's leave expired on 8 September 2013. However in paragraph [36] he refers to the decision of 16 September 2013 as being the notice against which the appeal is made. This is the basis of the incorrect conclusion regarding the curtailment [43].
16. In relation to the judge's treatment of Syed, in paragraph [22] he stated that actual service is required but contradicted this in paragraph [30] when he said that there were circumstances where postal service to the last address provided would be sufficient.
17. In conclusion he submitted that the Respondent was aware of the Appellant's correct address on 15 August 2013 but she did nothing about the curtailment, and did not mention it in her letter of 16 September 2013. Syed requires actual service and the judge had failed to focus on this.

Error of law

Curtailment

18. Paragraph (3) of the headnote to Syed states:

"Accordingly, the 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."

19. Javed states in paragraph [25]:

"In my judgment however, merely to send a curtailment of leave letter to the person's address and rely on the receipt signed by another individual who happens to be present when the letter was delivered is manifestly insufficient. Such a letter is not "given" to the person concerned as required by the statute. The burden of proving receipt lies on the Secretary of State; it is not for the person concerned to disprove receipt."

20. Paragraph [30] of the decision states:

“I therefore read Syed as determining that where a non-“immigration decision” to curtail leave has been made, actual service would normally be required, but there are circumstances where other forms of service, including postal service to the last address provided by the Migrant will be sufficient.”

21. I find that this is not what Syed held. It is clear from the headnote that the Respondent must “be able to prove that notice of such a decision was communicated to the person concerned, in order for it to be effective.” Syed does not state that postal service to the last address provided will suffice.

22. The evidence before the judge of service of the curtailment letter was the “Track and trace” document referred to above. There is no name and address indicated on this document. It is dated 20 May 2015, almost two years after the date on the curtailment letter, 10 July 2013. It does not indicate that anything was signed for. Under the heading “Progress of your item” it states “Please come back later. Information on your Royal Mail Signed For item is not yet available.”

23. The only other evidence of the curtailment letter is a copy of the letter itself. This is dated 10 July 2013 at the address given for the Appellant is Sancroft Close, but this letter in and of itself is not evidence that the letter has been sent. I find that there was no evidence before the First-tier Tribunal that any letter had been received by anybody at Sancroft Close. Further, even if the judge was right that postal service to the last address provided would be sufficient, I find there was no evidence before the First-tier Tribunal that the Respondent had sent the curtailment letter at all. The “Track and trace” document, as I have found above, does not contain an address. Neither does it confirm receipt.

24. I find that the decision contains an error of law in paragraph [30] in the application of the case of Syed. I also find that, on the evidence before him, referred to in paragraph [15], the judge was not in a position to find that the curtailment letter had been served at this address given that the “Track and trace” document relied on by the Respondent contains no such confirmation of delivery.

25. Further, I note that the chronology of this case indicates that, while the Respondent claims that she served the notice of curtailment on the Appellant on 10 July 2013, on 15 August 2013, a month later, the Appellant made a further application for leave to remain. His address is given as Horn Lane. On 16 September 2013 the Respondent refused this application by way of a letter which was sent to the Appellant at Horn Lane. There is no reference in this letter to the fact that the Appellant’s leave had already been curtailed by a letter dated some two months earlier. The Appellant made a judicial review application in respect of this decision and there is no reference in the documents to the fact that the Appellant’s leave had already been curtailed.

26. I find that within six weeks of the date of the curtailment letter, the Appellant made an application to the Respondent which contained his correct address. The Respondent refused his application making no reference at all to the fact that she had curtailed his leave some two months earlier. She made no reference to the fact that she had sent any correspondence to his previous address. She did not serve a copy of the curtailment letter on the Appellant at the address now notified to her. I find that the Respondent, while claiming to have served the curtailment letter on the Appellant some two months previously, proceeded as if this letter had not been served and as if his leave was not subject to curtailment. The Respondent only claimed that his leave had been curtailed in August 2014, over a year after she claims to have served the curtailment notice.
27. Paragraph [32] of the decision states:
- “Accordingly, I find that the Appellant’s leave to remain was in fact curtailed by the decision of the Respondent of 10 July 2013, which was properly served on the Appellant at Sancroft Close, and that the consequence of that decision is that the Appellant’s leave had lapsed well before the refusal to grant further leave 19 August 2014, which accordingly, cannot be treated as a refusal of leave to vary leave to remain.”
28. I find that there was no evidence before the judge that the letter of curtailment had been received at the property, let alone that it had been received by the Appellant. I therefore find that the judge was not entitled to make this finding in paragraph [32]. I find that the Appellant’s leave was not validly curtailed. I therefore find that the Appellant had valid leave to remain when he made his application for leave to remain under Article 8, and that he had a right of appeal against the decision of 19 August 2014.

Article 8

29. Although the judge did not find that the Appellant had a right of appeal against the decision of 19 August 2014, he nevertheless judge considered Article 8, [39] to [46]. He found that while there were no suitability grounds identified for rejecting his claim, he had lived in the United Kingdom for 10 years [41] but given his decision regarding curtailment, the judge stated “Therefore he has been in this country lawfully for little more than eight years and is not able to demonstrate that he qualifies for indefinite leave to remain on the basis of 10 years lawful stay in this country.” [43].
30. I have found that the Appellant’s leave was not validly curtailed and therefore I find that he has had lawful leave to remain in the United Kingdom since 25 May 2005. I find that the judge’s decision that the Appellant’s leave had been validly curtailed and therefore that he had only been in the United Kingdom lawfully for a little more than eight years affected his consideration of Article 8. It was submitted by Mr. Mannan at the hearing that I should remake the decision and allow the Appellant’s appeal on the basis that he has been in the United Kingdom lawfully for 10 years

under paragraph 276B. However, I find that the Appellant had not been in the United Kingdom for a full 10 years as at the date of the hearing, 19 May 2015, so even had the judge found that the curtailment was not valid, the Appellant would not have been able to meet the requirements of paragraph 276B.

31. Paragraph 276B provides:

“The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person’s behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.”

32. The Appellant states in the grounds of appeal that he is entitled to indefinite leave to remain on the basis of having spent 10 years legally in the United Kingdom [9]. However, no further evidence was provided for the hearing before me to show that this leave was continuous, and although the judge stated in the decision that no suitability grounds for rejecting his application had been identified, the Respondent has not considered an application by the Appellant under paragraph 276B and therefore has not considered paragraphs (ii) to (v) above. The directions provide that any further evidence upon which is intended to rely be served prior to the hearing, yet no further evidence was submitted and, given that the Appellant was relying on

a paragraph of the immigration rules upon which he had not been able to rely before, and which he had not raised in his grounds of appeal before the First-tier Tribunal, I would have expected further evidence before me to show that he met the requirements of paragraph 276B in their entirety. No evidence was provided to show me that the 10 years he has spent the United Kingdom has been continuous residence within the meaning of the immigration rules.

33. It is open to the Appellant to make an application under paragraph 276B against the background of my finding that he has been in the United Kingdom with leave to remain for a period of 10 years.

Notice of Decision

The decision involves the making of an error on a point of law and is set aside.

I remake the decision dismissing the Appellant's appeal under Article 8.

Signed

Date 19 December 2015

Deputy Upper Tribunal Judge Chamberlain