



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17215/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On 14 April 2021**

**Decision & Reasons Promulgated
On 26 April 2021**

Before

UPPER TRIBUNAL JUDGE PITT

Between

**MR MUHAMMAD TIPU SULTAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar, Counsel, instructed by Wilden Legal Solicitors
For the Respondent: Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision issued on 20 July 2020 of First-tier Tribunal Judge Neville which dismissed the appeal of the appellant against refusal of indefinite leave to remain.
2. The appellant is a national of Bangladesh, born on 5 March 1989.
3. The appellant came to the UK on 27 October 2009 with leave to remain until 31 October 2012. On 19 October 2012 he applied for further leave to remain as a Tier 1 Entrepreneur. On 1 July 2013 that application was refused. The appellant appealed and his appeal was allowed on 22 May

2015, the First-tier Tribunal decision remitting the case to the respondent for further consideration.

4. The respondent again refused the application on 5 November 2015. An appeal against the decision was again allowed on the basis that it was remitted to the Secretary of State on 27 February 2017.
5. The respondent refused the application again on 30 June 2017. The appellant again appealed. His appeal reference in that matter was IA/00196/2017. On 4 September 2018 the First-tier Tribunal dismissed his appeal. The appellant challenged the decision of the First-tier Tribunal and on 14 February 2019 the Upper Tribunal found an error of law and remitted the appeal to the First-tier Tribunal for remaking.
6. In a decision issued on 18 March 2019, First-tier Tribunal Judge Aujla again dismissed the appeal.
7. It is at this point that the parties disagree as to the appellant's legal position. The respondent maintains that he became appeal rights exhausted on 2 April 2019 as he did not appeal the decision of First-tier Tribunal Aujla. The respondent therefore considers that when the appellant made an indefinite leave to remain (ILR) application under paragraph 276B on 1 October 2019, he could not show the requisite 10 years' continuous lawful leave.
8. The appellant maintains that he did not receive the decision of 18 March 2019. He believed that the appeal remained pending and that his s.3C leave also continued. On 1 October 2019 he applied for ILR on that basis, maintaining that as of 27 October 2019 he would have had 10 years' continuous lawful leave. The respondent's view of that application is as set out in the previous paragraph and the ILR application was refused on 7 October 2019 as the appellant did not have 10 years' continuous lawful leave
9. The appellant maintains that the refusal of the ILR application alerted him to the decision of Judge Aujla issued on 18 March 2019 and he requested a copy of it from the First-tier Tribunal. He obtained that decision on 15 October 2019. He lodged an out of time application against it, requesting that time be extended to admit his application for permission to appeal to the Upper Tribunal.
10. In a decision of 29 January 2020, First-tier Tribunal Judge Macdonald extended time for an application to challenge the decision of the First-tier Tribunal in IA/00196/2017. The appellant maintains that the extension of time meant that his appeal should be regarded as pending between 2 April 2019 and when he lodged his appeal against the decision after receiving it on 15 October 2019 and that he should be regarded as having had s.3C leave over the same period of time.
11. Meanwhile, as well as pursuing his challenge to the decision of Judge Aujla in IA/00196/2017, the appellant lodged an appeal against the decision of 7 October 2019 which refused ILR. That led to these proceedings.

12. The appeal against the decision of 7 October 2019 came before First-tier Tribunal Judge Neville on 20 February 2020. Judge Neville set out the core issue to be decided in paragraph 2 of his decision; did the appellant have s.3C leave on 1 October 2019 as his appeal was still pending as provided in s.104 of the Nationality Immigration and Asylum Act 2002 or was the appeal “finally determined” on 2 April 2019 at which point his leave ended?
13. Judge Neville did not decide that question immediately where the respondent was not represented at the hearing and the views of both parties on the case of Niaz (NIAA 2002 Section 104: pending appeal) [2019] UKUT 399 (IAC) were considered necessary. He directed written submissions on the key issue and both parties complied with that direction.
14. In his decision issued on 20 July 2020 Judge Neville concluded that the appellant’s previous appeal (IA/00196/2017) had been “finally determined” as of 2 April 2019. The appellant did not have s.3C or any other kind of leave after that date. He therefore could not show 10 years’ continuous lawful residence for the purposes of paragraph 276B.
15. The reasons for this conclusion are set out in paragraphs 4 to 10 of the decision. The core of the appellant’s written submissions was set out in paragraph 4 of the decision. The appellant maintained that there was no dispute that he had not received the decision of Judge Aujla until 15 October 2019. The First-tier Tribunal, when extending time, had accepted that to be so. I can indicate here that that point remains undisputed now. The appellant argued, however, that his only having received the decision as of 15 October 2019 should lead to the conclusion that valid service had not taken place until that date.
16. Judge Neville did not accept that argument. He found in paragraph 5 of the decision that there had been no administrative error such that the appellant could show invalid service when the decision of Judge Aujla was issued on 18 March 2019. On the contrary, the First-tier Tribunal had followed the service provisions set out in Rule 33 of the Tribunal Procedure (First-tier) (Immigration and Asylum Chamber) Rules 2014. Having set out Rule 33, Judge Neville continued:
 - “6. Time can therefore be seen to run from when the decision and reasons are sent, not received. The appellant’s application for an extension of time was fully argued in the written grounds that accompanied the permission application itself. It also attached the relevant correspondence with the Tribunal as well as a signed certificate by the Tribunal member of staff who originally sent Judge Aujla’s decision. These show that the decision and reasons were sent to both parties by email on 18 March 2019. The appellant has never disputed this, either before Judge Macdonald or myself, asserting instead that they were never received. Indeed, this is why Judge Macdonald considered it appropriate to extend time.

7. All this means that the appellant's first argument must be rejected. Time for permission to appeal started to run when the decision and reasons were sent. It expired fourteen days later. Again contrary to the appellant's submissions, the principles set out by the House of Lords in R (Anufrijeva) v SSHD [2003] UKHL 36 do not require a different outcome. This is not a case of a person being unjustly disadvantaged or bound by an administrative decision that has not been communicated and therefore cannot be challenged. It is a process that provides for a judicial decision to be challenged by way of onward appeal but first requires permission to be sought within a certain time of a definite event, being when the reasons for the decision under challenge were sent to the relevant party. The discretion to extend time exists for just such eventualities as occurred here, where the reasons were sent but never received. The appellant next argues that an appeal cannot conceptionally be "finally determined" twice. This argument falters on Niaz, the Upper Tribunal holding that it most certainly can. I see no reason for distinguishing the present situation. Indeed, the issue arising in this appeal is much more straightforward than that with which the Upper Tribunal had to grapple in Niaz. I see no tension between Section 104 and the scheme for onward appeals from this Tribunal. Pursuant to Section 104(2)(a) an appeal is not finally determined at any time when an application for permission to appeal "could be made". Before the relevant time limit expires, a dissatisfied appellant has an absolute entitlement to make an application for permission to appeal. He or she will meet Section 104(2)(a). Afterwards however, as stated in the headnote to Bhavsar (late application for PTA: procedure) [2019] UKUT 196:

(1) There is nothing in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 that prevents the First-tier Tribunal from refusing to admit an application for permission to appeal to the Upper Tribunal, where the application is made outside the relevant time limit and the First-tier Tribunal does not extend time.

10. On 19 October 2019 the appellant could not make an application for permission to appeal, because he first required the Tribunal to extend the time limit for doing so. He therefore met none of the circumstances listed at Section 104(2). It being held in Niaz that those circumstances are exhaustive, his appeal must therefore have been finally determined and no longer pending. On the agreed chronology it had not been pending since 2 April 2019, when the time permitted for an application for permission to appeal expired. He became pending once more upon Judge Macdonald's decision to extend time, because an application for permission to appeal could then be made to the Upper Tribunal within the time limit provided by its Procedure Rules. This does nothing to alter the fact that no application for permission to appeal could be made before he did so."
17. The appellant obtained permission to appeal against the decision of First-tier Tribunal Neville on a narrow basis. The First-tier Tribunal interpretation

of s.104 and Niaz regarding pending appeals and when an appeal is “finally determined” was not challenged. The only ground of challenge is that in paragraph 6 of the decision, Judge Neville made a material mistake of fact in stating that the appellant had never disputed that the First-tier Tribunal had served correctly the decision of Judge Aujla in IA/00196/2017 on 18 March 2019. The judge was mistaken as the appellant had made such a challenge. That was shown by the inclusion at page 37 of the appellant’s bundle of a case note from the First-tier Tribunal, presumably from October 2019, which stated:

“Tc from rep re progress of appeal. Nothing on Aria since March. Rep advised that they did not receive an IA60, no note on Aria to confirm this either. Please can rep receive a call back to advise?”

18. It was conceded for the appellant before me that his position in his grounds and written submissions before Judge Neville on good service having occurred on 18 March 2019 was “neutral”. That is not an accurate description of the appellant’s position on whether the good service point before Judge Neville. He did not argue it. He did not at any point submit before Judge Neville that the First-tier Tribunal had failed to follow Rule 33 or in some other way failed to effect good service of the decision of Judge Aujla on 18 March 2019. His case was only that he did not receive the decision until 15 October 2019. The appellant could have argued that the decision of Judge Aujla was not properly served in his grounds of appeal to the First-tier Tribunal. He did not. He could have done so in his written submissions dated 11 March 2020 which were specifically directed by Judge Neville in order to fully ventilate the issues in the case. He did not. I did not find that mere inclusion of the case note on page 37 of the appellant’s bundle was capable of showing that the appellant did dispute good service before Judge Neville.
19. Further, the appellant also did not challenge good service as of 18 March 2019 when seeking an extension of time to appeal in IA/00196/2019. His position was the same as in this appeal, that he had not received the decision. It was on that basis that time was extended without there being any consideration of whether good service had occurred on 18 March 2019.
20. Judge Neville was therefore correct to find that there had been no dispute that the decision of Judge Aujla was emailed to the parties in line with the proper service provisions on 18 March 2019 and no error of law arises from that.
21. For what it is worth, as discussed with the parties before me, the Tribunal’s ARIA printout from appeal IA/00196/2017 shows that the decision of First-tier Tribunal Judge Aujla was sent to the appellant’s representatives on 18 March 2019. The notice that accompanied the decision indicated that the decision was sent to both parties by email on that date. Against those clear and consistent records, it is difficult to see how the telephone note at page 37 of the appellant’s bundle could be found sufficient to show that good service did not occur on 18 March 2019.

22. For these reasons, I did not find that the grounds had merit. The decision of the First-tier Tribunal does not disclose a material error on a point of law.

Notice of Decision

23. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 14 April 2021