



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/45738/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 15th July 2014

Determination

Promulgated

On 25th July 2014

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PRANESH ARUN MAHENDRAN

Respondent

Representation:

For the Appellant: Mrs R Petterson, Home Office Presenting Officer

For the Respondent: Mr A Salam, Solicitor, Salam & Co Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's challenge to the decision of Judge Upson made following a hearing at Bradford on 10th February 2014.

Background

2. The claimant came to the UK on 9th October 2008 with entry clearance to study at the University of York valid to 31st October 2011. On 23rd November 2011 he made an out of time application to extend his leave as a Tier 4 Student which was granted on 2nd March 2012 valid to 28th October 2013.
3. During the second year of his studies, in 2011 to 2012, the Appellant failed his end of year exam and was placed on leave of absence in order to allow him to resit, and he subsequently successfully passed. He was due to return to the university on 6th October 2013. According to his statement the claimant says that his course ends on 27th June 2014.
4. On 11th February 2013 the Secretary of State wrote to the Appellant stating that the UK Border Agency had been informed by the University of York on 8th November 2012 that he had ceased studying with them. As he had ceased studying as notified by his Tier 4 Sponsor the Secretary of State decided to curtail the claimant's leave under paragraph 323A(a)(ii) (2) and 323(ii) of the Immigration Rules until 12th April 2013.
5. This was not an appealable decision since Section 82 of the Nationality, Immigration and Asylum Act 2002 does not provide a right of appeal where an applicant still has leave to enter or remain in the UK and so is entitled to stay here. The claimant was advised that, although he was not required to leave the UK at the present time, his leave was due to expire on 12th April 2013 and he needed to make arrangements to plan his departure.
6. The claimant had advised the Secretary of State that he lived with his mother outside term time and in York during term time. The curtailment decision was served on the Appellant at his solicitors, Salam and Company, 44 Brook Street, Chester, Cheshire.
7. He did not receive the notice.
8. York University applied for a new Confirmation of Acceptance for Studies at the start of the academic year in October 2013 and at this point became alerted to the fact that the claimant's leave had been curtailed on 11th February 2013.
9. The matter was listed for hearing at Bradford. The Secretary of State wrote to the Tribunal prior to the hearing arguing that the appeal should not be listed since there was no right of appeal. Reference is made to that in the determination in that Judge Upson, who states at paragraph 6 that there was a preliminary matter to be resolved, which related to whether the curtailment of the leave was properly served.
10. The argument was put that the curtailment decision had not been lawfully served, because it was only served on his previous solicitors who had been engaged solely for the purpose of making the application for leave, and

were no longer in contact with the claimant, even though the Secretary of State had an address, namely that of his mother, on the file.

11. The judge stated that he had had regard to the guidance notes that the Secretary of State relies upon when serving curtailment decisions which state that a non-appealable curtailment notice to a UK address can be served "if you cannot give notice to the migrant in person". He concluded that the Secretary of State was under a duty to serve the notice on the claimant in person if at all possible and since they had an address where they could find him and they knew that he had been studying at York University they could have established his whereabouts.
12. He accepted that the involvement of the previous solicitors ended on the determination of the application in the claimant's favour, and it was incumbent upon the Secretary of State to establish whether or not they were still acting for him when they chose to serve the notice upon them. The claimant had not paid them any form of retainer. The fact that the engagement of the same firm by the claimant to deal with the present matter did not absolve the Secretary of State of their duty. Salam and Company were not the claimant's representatives for the purpose of the receipt of this notice.
13. He wrote as follows:

"I do not accept the submission that the lack of action by Salam and Company upon receipt of the notice is a matter between him and them. I have found that they were not his representatives for the receipt of this notice and I have found that there was a duty on the Respondent to establish that before relying on the sending of the notice to them as proper service of it. I find therefore that the Appellant's leave has not been terminated. I invite the Respondent to reconsider this matter in the light of this decision."
14. On that basis he allowed the appeal.

The Grounds of Application

15. The Secretary of State sought permission to appeal on the following grounds.
16. First, the judge had erred in finding that there was a right of appeal at all. The only decision in this case was the curtailment decision taken in February 2013 which is not a decision taken under Section 82(2) of the 2002 Act. There has never been any jurisdiction to hear the appeal. This is a distinguishable matter from that in the case of Syed (Curtailment of leave - notice) [2013] UKUT 00144 which was a removal decision i.e. one falling within Section 82(2). In the present case, the leave was curtailed, there has never been any further application made by the claimant and no jurisdiction to hear the appeal.

17. Second, the judge erred in finding that the leave had not been curtailed. The claimant had given the address of his then representatives Salam and Company as his correspondence address of his application. He did not give a personal address and when York University contacted the Secretary of State to inform her that the claimant did not study there any more the Secretary of State used the last known contact address for him, namely that of his representatives. The claimant's mother's house had never been given to the Secretary of State as the correspondence address, there was no indication that his mother still lived there in February 2012/3 and the letter specifically stated that he lived with her in the holidays. 11th February was in term time. At no stage did the claimant inform the Secretary of State that the correspondence address which had been given with the application was any different. This was his responsibility not that of the Secretary of State. It was incumbent on the representatives to inform the Secretary of State that they were no longer acting and to return the curtailment letter, which they did not do. Neither did Salam and Company inform the claimant of the curtailment letter.
18. Permission to appeal was granted by Designated Judge MacDonald for the reasons stated in the grounds on 14th April 2014.

Submissions

19. Mrs Petterson relied on the grounds and argued that the non-receipt of the curtailment letter could not create a right of appeal on a non-appealable decision.
20. Mr Salam relied upon the wording in Section 82(2)(e) which creates a right of appeal against a decision where:

“Variation of a person's leave to enter or remain in the UK if when the variation takes effect the person has no leave to enter or remain.”
21. He argued that in this case the curtailment only took effect when the claimant became aware of the decision on 17th October 2013, by which stage the leave had been curtailed and he no longer had any leave to remain.
22. He relied on the arguments put forward to Judge Upson and submitted that according to the Secretary of State's own guidance the curtailment decision should have been served personally. Salam and Company only had authority to make the application and since the claimant had provided his mother's address and his address in York the Secretary of State was obliged to serve him at either his York address or his out of term address. He relied on the decision of Syed and submitted that since the curtailment decision had not been communicated to the person concerned, it was not effective until October 2013 by which time the claimant had no leave to remain and accordingly had a right of appeal against the decision within Section 82(2)(e).

Findings and Conclusions

23. Syed was concerned with a decision of the Secretary of State to remove an Appellant who had applied for indefinite leave to remain in the UK on the grounds of long residence, but whose prior leave had been “curtailed” and not received by him. The main issue was whether that Appellant’s leave had been validly curtailed in the absence of evidence that he had known of the curtailment. The Secretary of State had sent the notice by Recorded Delivery twice but it had been returned and the notice was then served on file.
24. Syed held that the Secretary of State has to be able to prove that notice of the decision was communicated to the persons concerned in order for it to be effective. Communication will be effective if made to a person authorised to receive it on that person’s behalf (Hosier v Goodall [1962] 1AER 30 but the Secretary of State cannot rely upon deemed postal service. The Tribunal concluded that the Appellant's leave to remain had not been validly terminated by the attempted service by Recorded Delivery and, since it had not been terminated, the decision to remove him from the UK was unlawful.
25. The argument is different here. Mr Salam is attempting to argue that a non-appealable decision becomes an appealable one if not properly communicated to the claimant within the currency of his leave, solely on the basis that by the time the claimant become aware of it, his leave had been purportedly curtailed some six months earlier, and when the curtailment became effective the consequence was that he had no leave to remain.
26. If Mr Salam’s argument is right on the issue of service, the effect would be that the claimant's leave had not been lawfully terminated, but it does not convert a non- appealable decision to an appealable one. A non-appealable decision cannot become appealable simply on the basis of the time when it reaches the claimant.
27. In any event, I am not satisfied that communication of the curtailment decision was not effective.
28. The guidance relied on by Mr Salam states that:

“Where possible unless records show the person is not in the UK you must serve non-appealable curtailment services to a UK address if you cannot give the notice to the migrant in person.”
29. In order of preference the notice must be sent to:

“The UK postal address of the migrant or their representative provided for correspondence.”
30. The guidance does not impose on the Secretary of State an obligation to serve the claimant in person. She complied with it in serving the address

on the correspondence address given in the last application on file. There would be good reason for her not to serve on the only other address on file, the York address, since on the information before her he was no longer studying there.

31. The responsibility for communicating the notice of curtailment lies expressly with Salam and Company who failed in their duty to the claimant, both by not informing him of the letter and by not informing the Secretary of State, if this was the case that they were not in contact with him. Their position is difficult to maintain given that this is the same set of solicitors, ability different branches, in both applications.
32. Accordingly I conclude that the curtailment was lawfully served, and the judge erred in law in finding otherwise.

Decision

33. The original judge erred in law. His decision is set aside. The claimant's appeal is dismissed for want of jurisdiction.

Signed

Date

Upper Tribunal Judge Taylor