



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

Appeal Number: IA/47281/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 25 November 2015**

**Decision & Reasons Promulgated  
On 3 December 2015**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**YAO YU**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr P. Haywood, Counsel instructed by Stephen and Richard Sols.

For the Respondent: Mr B. Bramble, Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The appellant entered the UK on 10 May 2008 with entry clearance as a student that was valid until 28 February 2009. On 02 February 2009 he applied for further leave to remain as a student. The respondent states that the application was refused on 16 August 2010 with a full right of appeal. The appellant asserts that he didn't receive the decision. As a result no appeal was lodged. He was served with notices informing him of

his liability to removal on 31 May 2012. On 06 July 2012 the appellant applied for leave to remain on human rights grounds. On 08 August 2013 the respondent refused the application with no right of appeal because the appellant was deemed to have had no leave.

2. The appellant sought to challenge the decision by way of an application for judicial review filed on 08 November 2013. The grounds of challenge argued that the decision to deny him an in-country right of appeal was unlawful because his application for further leave to remain as a student was outstanding. Permission to bring judicial review proceedings was granted on 22 May 2014 in the following terms:

“The Claimant says, and in her Acknowledgement of Service, the Defendant does not deny, that he made an in time application for extension of leave in 2009. The letter copied at pages 148a-b of his bundle provides some support for that assertion. The most recent letter of refusal does not record either that application or its refusal: see the penultimate paragraph on page 2 of the letter of 08 August 2013. If the Claimant is right (and I repeat that the Defendant does not say that he is wrong) it looks as though his most recent application ought to have been treated as a variation of this 2009 application, and its refusal would have carried the right of appeal. In the circumstances his claim is arguable.”

3. The claim was settled by way of a Consent Order dated 11 July 2014 in which the respondent agreed to reconsider the application, and if leave was not granted, undertook to grant an in-country right of appeal. The respondent reconsidered the application but refused leave to remain on human rights grounds in a further decision dated 06 November 2014. The respondent continued to treat the appellant as an overstayer and issued a notice of immigration decision notifying him of his liability to removal under section 10 of the Immigration and Asylum Act 1999 (“the IA 1999”).
4. First-tier Tribunal Judge North (“the judge”) dismissed his appeal in a decision promulgated on 05 March 2014. The judge considered the medical records and other evidence relating to the appellant’s mother (who is now a British citizen) in some detail [12-14]. He concluded that the evidence didn’t show that his mother was physically dependent on him and that there was nothing associated with her health that required the appellant to remain with her in the UK [15]. He went on to consider whether the appellant’s mother would face any particular difficulties if she chose to return to China with the appellant and his wife but concluded that she lived there with him before coming to the UK without any significant difficulties. The judge was satisfied that if she remained in the UK they would be able to keep in contact through visits, telephone calls and other means of communication and that there were no unusual elements of dependency that required consideration [16].
5. The judge went on to make findings relating to the immigration rules and concluded that the appellant did not meet any of the family or private life requirements contained in Appendix FM or paragraph 276ADE [18-19]. He then turned to consider whether there were any compelling or exceptional

circumstances to show that removal would breach of Article 8 outside the immigration rules. He considered the letters of support from friends in the UK but considered that they could keep in contact from abroad. He noted that the appellant had studied in the UK and could return to China with additional skills. He considered that there would be no significant consequences for the appellant on return. The judge went on to consider public interest issues and noted the normal practice of removing “those who have remained unlawfully”. He concluded that removal would be proportionate to the legitimate aim of maintaining an effective system of immigration control [19].

6. In considering whether there were any exceptional circumstances the judge noted that the appellant did not have a criminal record in the UK but went on to say:

“I find however, that he has shown a disregard for the immigration regulations having remained in the UK after his application for further leave was refused on 16/08/2010. The appellant asserts that he has been waiting for that decision; however, he has not shown that he or anyone on his behalf made enquiries as to the progress of that application or that there are any circumstances for example change of address or course provided, which might have prevented the respondent’s decision reaching him. On balance, I find he at least acquiesced in the non-arrival of the decision notice. The appellant has not shown that there were any circumstances beyond his control that prevented him from returning to China. I conclude therefore that his length of residence is not a factor in itself which requires that he be allowed leave to remain under the rules or on a discretionary basis.”

7. The appellant seeks to challenge the First-tier Tribunal decision on the following grounds:
- (i) The First-tier Tribunal Judge erred in his assessment of Article 8 outside the immigration rules and failed to conduct a step by step assessment in accordance with the principles outlined in *R v SSHD ex parte Razgar* [2004] 3 WLR 58. In particular, the First-tier Tribunal failed to make findings as to whether there was the requisite level of dependency to establish family life with his mother.
  - (ii) The First-tier Tribunal erred in failing to consider the public interest factors outlined in section 117B of the Nationality, Immigration and Asylum Act 2002 (“the NIAA 2002”).
  - (iii) The First-tier Tribunal failed to make adequate findings as to whether the appellant was an overstayer, which was material to the issue of whether the immigration decision was in accordance with the law.

### **Decision and reasons**

8. After having considered the grounds of appeal and oral arguments I am satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.

9. I set out the history of the case in some detail because it is apparent from the chronology why the appellant's assertion that he did not receive a decision refusing leave to remain as a student in 2010 is significant to the lawfulness of the decision currently under appeal.
10. The appellant produced evidence to show acknowledgement of the application he made for leave to remain as a student in 2009. The chronology supports his assertion that he was still waiting for a decision from the respondent because it is apparent that he only made the application for leave to remain on human rights grounds shortly after he was served with notice of his liability to removal as an overstayer in 2012 i.e. at that point he understood the respondent's position was that a decision had been made in relation to the student application. It is difficult to see how the appellant could produce any other evidence to prove a negative.
11. The respondent initially refused the human rights application without a right of appeal because it was understood that he was an overstayer. However, it must have been quite clear by the time of the judicial review proceedings that the appellant asserted that he never received the refusal of leave to remain as a student. This formed the heart of the argument as to why he should have been granted an in-country right of appeal. The respondent settled the proceedings by consent and issued a further decision refusing the human rights application, again, treating the appellant as an overstayer. The appellant's grounds of appeal to the First-tier Tribunal made quite clear that he continued to dispute that he was an overstayer and that as a consequence the section 10 IA 1999 removal decision was not in accordance with the law.
12. Despite being on notice both in the judicial review proceedings and First-tier Tribunal appeal that the lawfulness of the decision to remove the appellant under section 10 was in issue it appears that the respondent has at no point produced any evidence to show that a decision to refuse leave to remain as a student was made in 2010 and properly served in accordance with The Immigration (Notices) Regulations 2003 (as amended). Even if the appellant had moved address the regulations make provision for service to the last known address or deemed service if an address is not known. The respondent asserts that a decision to refuse leave to remain as a student was made on 16 August 2010 but has failed to discharge the evidential burden of proof to show that it was properly served.
13. The First-tier Tribunal proceeded to determine the appeal without making any clear finding as to whether the appellant's evidence on this point was accepted or not. The judge proceeded to make his findings on the assumption that the appellant was an overstayer although it appears from the judge's comments in paragraph 20 (see paragraph 6 above) that he accepted the appellant's assertion that he didn't receive the decision. The judge's failure to make a clear finding in relation to a material fact that


went to the heart of the lawfulness of the immigration decision is capable of amounting to an error of law.

14. The other two grounds of appeal are less persuasive because it is apparent from the judge's findings that he took into account the nature of the appellant's relationship with his mother and whether there were any unusual elements of dependency. While the five step approach set out in *R v SSHD ex parte Razgar* [2004] 3 WLR 58 was not set out in a formal or structured way the wording of paragraphs 19-20 of the decision shows that all the relevant elements were considered including the strength of the appellant's ties to the UK, length of residence, familial relationships and the public interest in maintaining an effective system of immigration control. Although he did not make specific reference to the public interest factors outlined in section 117B NIAA 2002 he considered most of the relevant issues. While it is arguable there were other issues that the judge specifically did not consider such as English language, financial self-sufficiency and the precarious nature of his immigration status, I find that that this failure does not, in itself, amount to a material error. The Tribunal in *AM (Malawi) v SSHD* [2015] UKUT 0260 made clear that no positive benefit is likely to accrue from the factors outlined in section 117B(2) (English language) and 117B(3) (financial self-sufficiency).
15. However, it is clear that the initial error regarding the judge's failure to make clear findings as to whether the appellant was an overstayer infected his overall assessment of Article 8 outside the immigration rules. He made quite clear reference to the public interest in removing those who have remained "unlawfully" and of the appellant having "shown a disregard for the immigration regulations" after having remain in the UK after the application for leave to remain as a student was refused. This is likely to have coloured the judge's overall assessment of the proportionality of removal. As such the first error undermined the sustainability of his other findings.
16. I conclude that the First-tier Tribunal decision involved the making of an error on a point of law and I set aside the decision.
17. After further discussion at the hearing it was agreed that in remaking the decision the consequence of my finding was that the respondent's decision was not in accordance with the law. There is no evidence to show that the respondent properly served a decision refusing leave to remain as a student in 2010 thereby demonstrating that the appellant was an overstayer and the section 10 removal decision was lawful. The effect of this finding is that the appeal is allowed to the limited extent that the human rights application remains outstanding before the Secretary of State.

## DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

I re-make the decision and ALLOW the appeal to the limited extent that the respondent's decision is not in accordance with the law

Signed   
Upper Tribunal Judge Canavan

Date 26 November 2015