



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/02473/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 30 January 2018

Decision & Reasons Promulgated  
On 21 February 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

MEHUL GHANSHYAMBHAI BHATT  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr M Iqbal of Counsel (London View Chambers)

For the Respondent: Ms Z Amad

**DECISION AND REASONS**

1. The appellant is a citizen of India born on 27 January 1978. He was granted leave to enter the United Kingdom as a Tier 4 (General) Student on 19 March 2010. This leave was extended on 6 August 2012 to 25 February 2014. However on 29 December 2012 his leave was curtailed to expire on 27 February 2013. The appellant made a series of applications for leave as a student and his final application made on 21 May 2013 was refused on 4 July 2013.

2. The appellant appealed the decision and his appeal came before First-tier Tribunal Judge Lal on 14 July 2015. Reliance was placed on the case of **Syed [2013] UKUT 144** by Counsel then appearing for the appellant to the effect that the notice of curtailment had not been properly communicated to the appellant. Judge Lal accepted this submission. Had the appellant received the curtailment notice he would have been afforded an opportunity to make an application in time and perhaps to find a new college. The appeal was allowed to the extent that the Secretary of State's decision was not in accordance with the law. The matter needed to be reconsidered by the Secretary of State and the appellant afforded such time as required to find a suitable sponsor.
3. On 9 February 2016 Counsel who represents the appellant under direct access wrote to the Home Office, pointing out that there had been no correspondence since the decision of Judge Lal. On 15 February 2016 there was a reply from the Home Office confirming that the appellant's case was currently being processed and that unfortunately the Home Office was unable to give a time frame for completion and that Counsel would be informed as soon as any further action was taken in the case.
4. On 6 September 2016 the appellant was sent what was said to be a copy of a letter dated 16 September 2015 refusing the appellant's application for leave to remain as a student made on 21 May 2013. It was said that the appellant had no right of appeal. His application had been made on 21 May 2013 but his leave had expired on 27 February 2013.
5. One of the issues in this case is whether the respondent's decision was in fact taken in September 2015 or September 2016 and directions were issued by Judge Shanahan on 4 October 2016 directing the Secretary of State to confirm which was the relevant date or whether there were in fact two decisions. An appeal was lodged on 21 September 2016. On 5 July 2017 a notice was issued stating that the appeal should proceed because it would be unjust not to extend time. However on 18 July 2017 a further notice was issued stating that the decision was out of time and time would not be extended. Enclosed was a decision of Judge Kaler referring to the decision on 16 September 2015 and the appeal being lodged on 21 September 2016. Ms Amad states that the key issue in this case is whether the decision was in fact reached in 2015 - in which case the appeal would be out of time - or whether it was as the appellant contends a decision in September 2016 in which case there was merit in the argument that the appeal was in time.
6. There had been no response by the Secretary of State in this case and I adjourned the proceedings briefly to enable the parties to confer. It was argued that the decision of September 2015 had been served by post and had been deemed to have been served on the appellant. Counsel took issue with the submission on various grounds. The first point he took was in relation to the claim in the notice that the appellant had no right of appeal against the decision. He pointed out that in section C of the decision it was said that the appellant had made his application on 21 May 2013 but his leave to remain had expired on 27 February 2013 and he did not have leave to remain at

the time of his application and had no right of appeal. Counsel submitted that no regard had been had to the decision of Judge Lal and that notice of curtailment had never been validly served. Counsel referred to **OS (Russia) v Secretary of State [2012] EWCA Civ 357**. This was a decision concerning an in country right of appeal as opposed to an out of country appeal and the appeal lay to the Special Immigration Appeal Commission (SIAC). The court was of the view (paragraph 41) that a failure to comply with the Immigration (Notices) Regulations 2003 would render the notice invalid and that the normal response of the court would be to quash the notice unless there was substantial compliance with the requirement that he was entitled to an in country right of appeal. The September 2015 decision was accordingly not lawful.

7. The second problem for the Secretary of State was that it was difficult to reconcile the claim that the decision had been reached in 2015 with the letter of 15 February 2016 stating that the appellant's case was currently being processed and that the writer could not give a time frame for completion.
8. Furthermore, the notice to the appellant should have been sent to his legal advisor under the Regulations. Counsel referred to Regulation 7(1) – the Regulation provided for notice to be sent by post to “an address provided for correspondence by the person or his representative ...”. It had not been sent to such an address.
9. Counsel relied on the point that the respondent had failed to comply with the directions of Judge Shanahan which I have referred to above.
10. Counsel also mentioned other complaints with the procedures of the First-tier Tribunal and the inconsistency of notices issued. Permission to appeal had been granted on all grounds. Counsel referred to various occasions where the respondent had put the wrong dates on letters and submitted it was not inconceivable that a similar mistake had been made in respect of the decision. There was also a separate issue about Mrs Bhatt's appeal. The appeal had been in relation to both appellants. The appellant's wife did not feature in the current appeal. Both appellants would have leave under Section 3C. They had however been treated as overstayers.
11. Ms Amad submitted that if I accepted the submission made by Counsel based on **OS (Russia)** then the appeal should be remitted back to the Secretary of State. She submitted that the notice of September 2015 had been served at the appellant's last known address and returned to the Home Office and had been validly served under Regulation 7(2). She appreciated that the same representative had appeared before Judge Lal and before the refusal decision. In relation to the lack of a decision against the appellant's wife she would notify the caseworker of the matter and apologised for the delay. Counsel invited me to find that the decision of First-tier Judge Kaler was materially flawed in law. The appeal had been lodged in time and should be remitted back to the respondent. The jurisdiction to remit on an error of law basis was still available as the appeal fell under the old regime. Essentially the remittal was on the same basis as the remittal ordered by Judge Lal. The respondent could address the issue of Mrs Bhatt in addition.

12. It was clear that the appellant's leave under Section 3C continued. Both he and his wife were awaiting a lawful decision and they should no longer have to put up with the problems they faced with their status being questioned by the respondent.
13. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me. I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.
14. There is a difficulty in the respondent's case as I have already mentioned in contending that the relevant decision is dated 16 September 2015 since as of 15 February 2016 it was said that the appellant's case was currently being processed. Counsel takes the point that the letter is difficult to reconcile with the decision of Judge Kaler since reference is made to the appellant's leave as curtailed expiring on 27 February 2013. The notice wrongly states that the appellant has no right of appeal and I accept the point taken by reference to **OS (Russia)**.
15. I am not satisfied that the decision was properly served on the appellant in September 2015 as claimed. Service of the decision on that date is inconsistent with the subsequent correspondence. In any event the letter does not properly inform the appellant of his right of appeal. The appellant has throughout been represented as is accepted by Ms Amad and notice was not given to the representative.
16. I am accordingly satisfied that the notice of the decision was given in September 2016 and not in September 2015 and that accordingly the decision of the First-tier Tribunal on 6 October 2017 to refuse to extend time was unlawful.
17. I remake the decision. I accept the submission of Counsel that the decision of the respondent was unlawful in that it failed to advise the appellant of his right of appeal in the light of **OS (Russia)**.
18. I remit the appeal back to the respondent on the basis that the decision was flawed in law. As indicated by Ms Amad the respondent will no doubt wish to consider the position of Mrs Bhatt. I should note Counsel's submission that both the appellant and Mrs Bhatt continue to enjoy leave to remain under Section 3C of the Immigration Act.

### **Notice of Decision**

19. Appeal allowed as not being in accordance with the law.

### **ANONYMITY DIRECTION**

I make no anonymity direction.

**TO THE RESPONDENT**  
**FEE AWARD**

As the appeal is allowed it would appear appropriate that any fee paid by the appellant is returned to him and I so direct.

Signed

Date 15 February 2018

G Warr, Judge of the Upper Tribunal