



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006176

First-tier Tribunal No: HU/00277/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 September 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Md Jamal Uddin
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms J. Heybroek, Counsel instructed by Morgan Hill Solicitors
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

Heard at Field House on 11 July 2023

DECISION AND REASONS

1. This is an appeal against the decision of the Secretary of State dated 7 December 2020 to refuse a human rights claim made by the appellant on 15 June 2020. The appellant's appeal against the Secretary of State's decision was originally heard and dismissed by First-tier Tribunal Judge Monson in a decision promulgated on 8 August 2022, pursuant to section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").
2. By a decision promulgated on 17 May 2023, following a hearing I presided over sitting with Deputy Upper Tribunal Judge Skinner, the decision of Judge Monson was set aside with no findings of fact preserved, with directions for the decision to be remade in the Upper Tribunal. A copy of the Error of Law decision may be found in the **Annex** to this decision. It is against that background that the appeal resumed before me, sitting alone, on 11 July 2023, for the decision to be remade,

acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

The central issues

3. The appellant is a citizen of Bangladesh and was born in 1983. The central tenet of his case is that he has accrued ten years' continuous lawful residence, including pursuant to section 3C of the Immigration Act 1971 ("the 1971 Act"), thereby meeting the requirement for indefinite leave to remain under para. 276B of the Immigration Rules. As explained below, in order to determine whether he meets para. 276B, it will be necessary to consider:
 - a. Whether the appellant received a curtailment letter allegedly sent to him on 27 March 2012?
 - b. Whether an IS.151A notice conveying a removal decision under section 10 of the Immigration and Asylum Act 1999 ("the 1999 Act") had the effect of curtailing any extant leave held by the appellant?
 - c. Whether the Secretary of State was correct to rely on para. 322(1) of the Immigration Rules in her decision dated 7 December 2020?
4. It will also be necessary to consider the appellant's prospective reception in Bangladesh (para. 276ADE(1)(vi) of the Immigration Rules), and whether there are exceptional circumstances such that it would be unjustifiably harsh for the appellant to be removed from the United Kingdom.

The positions of the appellant and the Secretary of State

5. The full factual background is set out at paragraphs 4 to 12 of the Error of Law decision. In summary, the appellant was admitted to the United Kingdom as a student on 24 May 2009. His leave to remain in that capacity was renewed until 25 August 2014. His human rights claim to the Secretary of State on 15 June 2020, and his case before this tribunal is that, prior to the expiry of his then extant leave, he made a further application for leave to remain as a Tier 4 student, on 22 August 2014. That application, on his case, has not been lawfully determined by the Secretary of State, and remains outstanding. That being so, he continues to hold leave to remain, extended by section 3C of the 1971 Act. He has now accrued ten years' continuous lawful residence and qualifies for indefinite leave to remain under paragraph 276B of the Immigration Rules.
6. The Secretary of State takes a different view. According to her records, on 27 March 2012 the appellant was informed by letter that his leave was being curtailed with effect from 26 May 2012, on account of his educational institution, the London City Business School, losing its sponsor licence. He has thus been without leave to remain since then. There can be no question of him having accrued ten years' continuous lawful residence.
7. Further, the Secretary of State maintains, even if the appellant's application on 22 August 2014 was "in-time", it was rejected as invalid, by letter dated 11 September 2014. If any further clarity be needed, on 10 September 2014 the appellant was served with a removal decision under section 10 of the Immigration and Asylum Act 1999, as then in force. That form, an IS151A, had the effect of curtailing any leave the appellant continued to hold. The appellant was subject to enforcement action at the time and was placed temporarily in detention; he accepted that he had not studied at his college since 2012, thereby breaching the conditions of the leave he said that he held in any event, thereby engaging para. 322(1) of the Immigration Rules. He was subject to reporting conditions, which

he complied with, until he absconded in 2016. There can be no question that he held leave to remain in the period following the submission of the application on 22 August 2014: he did not.

8. The applicant's case in response is that he did not receive the curtailment notice dated 27 March 2012. The purported curtailment was of no effect because it was not validly served. To support this contention, the appellant prays in aid the fact that the Secretary of State subsequently treated him as having held leave to remain after the letter was purportedly sent. On 29 November 2012, the appellant applied for leave as a Tier 1 entrepreneur. The application was refused on 8 May 2013. It did not attract a right of appeal because, pursuant to the appeal regime then in force, a decision which did not result in an applicant being left without leave to remain was not an appealable "immigration decision". The fact that the Secretary of State treated the appellant's 29 November 2012 application as being in-time demonstrates, the appellant says, that he did, in fact, continue to hold leave to remain at that point.
9. The Secretary of State says that her decision of 8 May 2013 mistakenly proceeded on the footing that the appellant's application was in time. While that was a mistake, it cannot have had the effect of retrospectively restoring the appellant's curtailed leave.
10. The appellant's case in relation to the 11 September 2014 letter rejecting his application is that he did not receive it. The Secretary of State's own records state that it was returned to her, twice, and eventually "served to file". By definition, he could not have received it. The application of 22 August 2014 has not been validly rejected. Moreover, it is nothing to the point that the Secretary of State served an IS151.A form: the appellant was not an overstayer, as incorrectly claimed by the form. The IS151.A was served in error. It was of no effect.

The law

11. This is an appeal brought on the ground that it would be unlawful under section 6 of the Human Rights Act 1998 to remove the appellant from the UK, by reference to Article 8 of the European Convention on Human Rights (right to private and family life).
12. The appellant's residence in and prospective removal from the United Kingdom plainly engage Article 8(1) of the ECHR. The issue is whether the Secretary of State is able to establish whether his removal would be proportionate for the purposes of Article 8(2) of the Convention.
13. The proportionality of the appellant's prospective removal for the purposes of Article 8(2) ECHR is to be determined first by reference to the requirements of the Immigration Rules: where Article 8 is engaged, if the appellant is able to demonstrate that he meets the requirements of the rules, that will be determinative of the appeal in his favour (see *TZ (Pakistan)* [2018] EWCA Civ 1109). The relevant rules in these proceedings are those found in paragraph 276B of the Immigration Rules. It is not necessary to set the rules out: the central disputed issue at the heart of para. 276B is whether the appellant has accrued ten years' continuous lawful residence. Paragraph 276ADE(1)(vi) (very significant obstacles to integration) is also relevant. Again, I address this below.
14. Where the Immigration Rules are not met, it is still necessary to consider Article 8 outside the rules; a balance sheet approach should be adopted, weighing the factors on the appellant's and the Secretary of State's side of the scales. There

are a number of public interest considerations relevant to this exercise in Part 5A of the 2002 Act.

15. While it is for the appellant to establish that Article 8(1) is engaged, it is common ground that it is. It is therefore for the Secretary of State to establish that any interference in the appellant's Article 8(1) rights is justified under Article 8(2); in these proceedings, the means by which she does so is by pointing to the requirements of the Immigration Rules, and to the public interest in the maintenance of effective immigration controls, which is (amongst others) a statutory consideration in section 117B(1) of the 2002 Act. It is for the Secretary of State to prove that the relevant curtailment and rejection letters were sent. The standard of proof is the balance of probabilities.

The hearing

16. At the resumed hearing, the appellant gave evidence with the assistance of an interpreter in Bengali. He adopted his witness statement dated 30 May 2023 was cross examined.
17. The appellant relied on an Upper Tribunal bundle. I also had the benefit of the materials that were before the First-tier Tribunal, plus written submissions from Ms Heybroek (adopting and adapting those previously drafted by Ms Bayati, previous counsel in the case).

Findings of fact

18. I do not propose to set out the entirety of the evidence I heard and have considered; I will do so to the extent necessary to reach and give reasons my findings. Naturally, I did not reach any findings of fact until having considered the entirety of the evidence, in the round.
19. There were no preserved findings of fact from the decision of the First-tier Tribunal. As explained in the Error of Law decision, the scope of the issues involved were not such that was appropriate to remit the case to the First-tier Tribunal. The Error of Law decision featured rationality-based reasoning about the findings of fact that were (and were not) open to Judge Monson to reach; that is a further reason why it was appropriate to retain the appeal in this tribunal.
20. I make the following preliminary observations about the evidence.
21. First, the appellant's oral evidence featured significant additional details which were not in his statement. Some of the details were inconsistent with the case he previously advanced. Under cross-examination, the appellant was asked about the London City Business School losing its sponsor licence. He said that he knew at the time that the college's licence had been "suspended", but that it was not closed. He was able to continue studying there and waited to hear further news from the college while it sought to challenge the suspension. When nothing was forthcoming, he enrolled at a different college. He then said that when the college closed, he enrolled elsewhere. These are details that were not in his witness statement. There is also no evidence that he enrolled at a different college. The Secretary of State's refusal decision dated 7 December 2020 states that during a 2014 enforcement visit (at which the IS.151A form considered below was served on the appellant) the appellant accepted that he stopped studying altogether in 2012 and had been working at restaurants since then. These inconsistencies and omissions give rise to credibility concerns with the appellant's evidence.

22. The appellant also gave oral evidence that in 2016 his then solicitors advised him that he no longer needed to comply with the reporting conditions to which he was then subject. As I observed at the hearing, such advice would be highly questionable. Moreover, there are no written records of any such advice.
23. The picture that emerged from the appellant's evidence was of an individual willing to say what he thought was necessary in order to bolster his case. I found him to lack credibility.
24. Secondly, the Secretary of State's documentary evidence demonstrates that, where a decision notice is returned as undeliverable, it is the practice of her officials to update the 'GCID' records to that effect. That is what happened with the rejection letter dated 11 September 2014. I accept that that letter was not served on the appellant; the Error of Law decision held that it was not rationally open to Judge Monson to find that it was, in light of the Secretary of State's own records. I apply that reasoning as I reach these findings.

Issue (1): Did the appellant receive the curtailment letter allegedly sent to him on 27 March 2012?

25. The appellant's written and oral evidence was firmly that he did not receive this letter, and that, accordingly, it had not been validly served on him. Ms Heybroek submitted that the Home Office records featured no confirmation that it was sent to the address then held on record for the appellant, and that there is no evidence that it was delivered to that address, or received by the appellant. Further, the Home Office subsequently acted as though the appellant continued to hold leave to remain, thereby suggesting that the letter had not been sent.
26. In my judgment, the Secretary of State has proved that the 27 March 2012 letter was sent to the appellant. The GCID notes record that it was dispatched by Recorded Delivery on 27 March 2012 at 11.10. I reject the appellant's evidence that he did not receive it. I consider his evidence to lack credibility, in light of the matters raised above. I also note that there is no record of the 27 March 2012 letter having been returned as undeliverable, which would be expected had it not been delivered (as was the case with the undeliverable letter of 11 September 2014).
27. I also find the appellant's evidence that he genuinely thought that the application he submitted in 2014 remained under consideration for around six years, having not pursued the Secretary of State for a decision in the meantime, to lack credibility. That is especially so when one considers that he was placed on reporting restrictions by the Secretary of State, with which he complied until 2016, until he absconded. If the appellant genuinely thought that his 2014 application was under consideration for such a lengthy period, he would have sought to do something about it. His conduct at the time is inconsistent with what he claims he thought at the time, and now.
28. I accept the Secretary of State's explanation, given in the refusal letter of 7 December 2020, that the appellant's Tier 1 application dated 29 November 2012 was mistakenly treated by the decision of 8 May 2013 as being "in-time" when, in fact, it was not. I find that it is far more likely that the author of the 8 May 2013 letter made a mistake about the appellant's then status than the other way around. The GCID records clearly record that a curtailment letter was sent to the appellant on 27 March 2012 at 11.10.
29. In order for the author of the 8 May 2013 letter to have reached a considered view that, notwithstanding the recorded service of that notice on 27 March 2012,

the appellant nevertheless still held leave, it would have been necessary for the relevant official unilaterally to have concluded (without any input from the appellant) that the curtailment letter had not been served or otherwise received. On the materials before me, there is no rational way the author of the 8 May 2013 letter could have known what the appellant chose not to disclose to the Secretary of State until 15 June 2020, namely his case that he did not receive the curtailment letter. Still less could the relevant official have arrived at such a view in the face of GCID records, made in 2012, stating that the appellant's curtailment letter had been sent at the time. I note that the appellant was detained following an enforcement visit in September 2014 and had every opportunity to raise the issue of what he now claims was his extant leave at the time: he did not. What is far more likely – as the Secretary of State contends – is that the author of the 8 May 2013 letter was simply mistaken and had failed to notice that the appellant's leave had been curtailed on 27 March 2012 to expire on 26 May 2012. I note that on the basis of the same GCID records the IS.151A notice regarded the appellant as an overstayer following the curtailment of his leave on 26 May 2012: see para. 31, below.

30. I therefore find that it is more likely than not that the appellant was served with the curtailment letter dated 27 March 2012.

Issue (2): Did the IS.151A notice conveying a removal decision under section 10 of the 1999 Act curtail any extant leave held by the appellant?

31. Part 1 of the form gave the following reasons for the service of the notice:

“Your leave as a Tier 4 migrant was curtailed to expire on 26 May 2012. You failed to leave the UK when required to do so and submitted an out of time application on 22 August 2014. You are therefore considered to be an over stayer, this [*sic*] an offence contrary to section 24 (1)(b)(i) of the Immigration Act 1971, as amended.”

32. Part 2 of the IS.151A stated:

“As a result of the service of this decision you no longer have any leave and so any outstanding application you made for variation you have made for variation of your leave does not need to be determined as there is no existing leave to vary.”

33. The authority for that proposition was stated to be section 10(8) of the 1999 Act. Section 10 has been amended on a number of occasions; in the form it existed at the date the notice was served, it provided:

“(8) When a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him.”

34. Ms Heybroek submitted that the notice was of no effect because the reasons given by the notice were incorrect. There are two difficulties with this submission.
35. First, pursuant to my findings of fact set out above, the Secretary of State was entitled to serve the notice for the reasons she gave: the appellant's leave had been curtailed in 2012 through the effective service of a valid notice.
36. Secondly, and in any event, the notice was valid until challenged. At para. 8 of his witness statement, the appellant said that his then immigration advisers, RMS

Immigration Services, sought to challenge the notice with the Home Office, but that, since more than six years had elapsed since the notice was served, they had no copies of the correspondence. I reject that explanation. There are no references in the GCID notes to any such correspondence having been received, nor copies of the correspondence with RMS Immigration Services concerning their claimed inability to provide copies of the correspondence. I also note that appellant's human rights claim was made on 7 December 2020, within six years of the service of the notice, meaning that it should have been possible to obtain copies of the relevant correspondence from RMS Immigration Solutions prior to the submission of the human rights claim in any event.

37. It follows that even if the appellant *did* hold leave to remain immediately before 10 September 2014, it was curtailed by the service of the IS.151A in any event.

Issue (3): Was the Secretary of State correct to rely on para. 322(1) of the Immigration Rules?

38. It is not necessary for me to deal with this issue in light of my findings above.

Are there “very significant obstacles” to the appellant’s integration in Bangladesh?

39. I find that the appellant would not face very significant obstacles to his integration in Bangladesh. He speaks Bengali and is familiar with the customs and culture of Bangladesh. As he confirmed in evidence, he still has close family there, namely his mother and his sister. Their home is small but there was no evidence that the appellant could not be accommodated there, at least initially, while he makes longer-term arrangements for himself, if he so desires. He has managed to live in the UK for over ten years without leave to remain, or a lawful source of income; the resilience that doing so will have required will place him in good stead upon his return to Bangladesh. He will plainly be able to establish a private life of his own within a reasonable period in the country. I find the appellant will not face very significant obstacles to his integration in Bangladesh.

Conclusion on Article 8 under the Immigration Rules

40. For the reasons set out above, I find that the appellant's leave was curtailed with effect from 26 May 2012. The application he submitted on 22 August 2014 was submitted out of time. His leave was not extended by section 3C of the 1971 Act by the submission of the 2014 application since it had come to an end on 26 May 2012. The appellant has not accrued ten years' continuous lawful residence. This appeal cannot succeed on the basis that the appellant meets the requirements of para. 276B of the Immigration Rules.

Article 8 outside the Immigration Rules

41. I will adopt a balance sheet approach to determine whether there are exceptional circumstances such that it would be unjustifiably harsh for the appellant to be removed from the United Kingdom.
42. Factors on the Secretary of State's side include:
- a. The maintenance of effective immigration controls is in the public interest (section 117B(1), 2002 Act).
 - b. The appellant does not speak English, meaning his opportunities for integration in the United Kingdom will have been limited.

- c. The appellant does not meet the requirements of the Immigration Rules, in particular he has not established ten years' continuous lawful residence and will not face very significant obstacles to his integration in the country. There is a family home in Bangladesh, and his mother and sister still live there.
- d. The appellant's immigration status in the UK has been, at best, precarious, and has been unlawful for most of his time here. Any private life he has established in the UK attracts little weight.

43. Factors on the appellant's side of the scales include:

- a. The appellant has resided here since 2009 and has a strong desire to remain in the UK.

44. In my judgment, the factors on the Secretary of State's side of the scales outweigh those on the appellant's by a considerable margin. The appellant entered the UK as a student, which is a capacity of leave that carries no expectation of settlement. His leave was curtailed in 2012. He has been without leave ever since. He does not meet any of the criteria under the Immigration Rules for a lawful basis to stay. While I accept that the Secretary of State's letter dated 8 May 2013 appeared to convey the impression that the appellant held leave to remain, the appellant will have known the true position, and that correspondence did not convey any form of legitimate expectation that the appellant was entitled to any form of lawful residence pursuant to it. He will face no significant obstacles to his integration in Bangladesh. The public interest is strongly in favour of the appellant's removal.

Notice of Decision

The decision of Judge Monson involved the making of an error of law and is set aside, with no findings of fact preserved.

I remake the decision, dismissing the appeal.

As I have dismissed the appeal, there can be no fee award.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 August 2023

Annex - Error of Law decision



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

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First-tier Tribunal No: HU/00277/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

Md Jamal Uddin
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms C. Bayati, Counsel instructed by Morgan Hill Solicitors
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 23 March 2023

DECISION AND REASONS

1. By a decision promulgated on 8 August 2022, First-tier Tribunal Judge Monson (“the judge”) dismissed an appeal brought by the appellant, a citizen of Bangladesh born on 1 January 1983, against a decision of the Secretary of State dated 7 December 2022 to refuse his human rights claim. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
2. The appellant now appeals against the decision of the judge to the Upper Tribunal with the permission of First-tier Tribunal Judge Monaghan.

3. We informed the parties at the hearing that the appeal was allowed and gave directions for the decision to be remade in the Upper Tribunal. We reserved our reasons, which we now give.

Factual background

4. On 15 June 2020, the appellant made a human rights claim to the Secretary of State on the basis of his claimed ten years' continuous lawful residence, pursuant to paragraph 276B of the Immigration Rules. The appellant was admitted to the UK as a student on 24 May 2009, and was granted leave in that capacity valid until 25 August 2014. He has not been granted leave since then, but the premise of his long residence application was that an in-time application he made for an extension of his leave on 22 August 2014 remains pending. That being so, he claimed to the Secretary of State, the extension of his leave by section 3C of the Immigration Act 1971 has served to extend his lawful residence in the UK to a total of ten continuous years.
5. The Secretary of State took a different view. On her case, the appellant's leave was curtailed with effect from 26 May 2012, by a letter dated 27 March 2012 ("the March 2012 letter"), and he has been an overstayer since that date. Further, a subsequent application made by the appellant on 22 August 2014 was rejected as invalid by a letter dated 11 September 2014 ("the September 2014 letter") in any event.
6. The hearing before the judge proceeded on the basis of submissions alone. The central issues were whether March 2012 and September 2014 letters had been validly served by the Secretary of State on the appellant. Ahead of the substantive hearing, the First-tier Tribunal had made a number of case management directions requiring the Secretary of State to disclose her records relating to the service of the relevant notices. The Secretary of State complied with some, but not all, of those directions.
7. In relation to the March 2012 letter, a key feature of the appellant's case before the First-tier Tribunal (see para. 3 of the appellant's written submissions) was that subsequent to the purported date of curtailment on 26 May 2012, the Secretary of State had treated the appellant as though he still held leave to remain. On 29 November 2012, he applied to vary his leave to that of a Tier 1 Entrepreneur. The Secretary of State refused the application on 8 May 2013 in circumstances which did not attract a right of appeal because, the Secretary of State maintained at the time, the appellant still held leave to remain.
8. As for the September 2014 letter, the appellant's case was that he had not received it. The Secretary of State's own records noted that the letter had been "returned to sender" on two occasions. The letter had eventually been "served to file". He could not have received it.
9. In his careful and detailed decision, the judge considered the authorities concerning the valid service of notices by the Secretary of State and conducted a detailed survey of the evidence. He found that the appellant had received March 2012 letter: see paras. 37 to 44. That there was no signed delivery receipt for the letter was not "fatal" to the Secretary of State's case; it was inherently likely that the letter had been signed for, otherwise it would have been returned and recorded as such on the Secretary of State's "GCID" record: para. 38. The appellant had not presented as making a full and frank disclosure of what he knew, or ought to have known: para. 39. The appellant's evidence had not addressed the fact that he received an enforcement visit from the Secretary of State's officials and accepted to them that he had not studied since 2012. His

credibility was harmed by the fact he had claimed not to have received the September 2014 letter: para. 41. The judge found that the Secretary of State had proved that the appellant had received the March 2012 letter.

10. In relation to the September 2014 letter, the judge rejected the appellant's claim not to have received the letter. The GCID records in respect of the appellant indicated that his then representatives acted consistently with the appellant being aware that his application had been rejected: para. 47. His representatives would not have acted in that way had he not received the September 2014 letter, and, in any event, the account given by the appellant was that the application had been wrongly rejected, thereby underlining the appellant's claimed lack of knowledge of the rejection decision.
11. The judge also rejected an attempt by the appellant to contend that the 11 September 2014 rejection had been invalid: see paras 51 and 52.
12. The judge dismissed the appeal under the Immigration Rules, and outside the rules: paras 56 to 58.

Issues on appeal

13. There are two issues on appeal to this tribunal:
 - a. Whether the judge failed to give sufficient reasons for finding that the appellant received the March 2012 letter, by omitting to address the significance of the fact that, on 8 May 2013, the Secretary of State appeared to consider that the appellant held leave to remain. That being so, the judge erred by failing to take into account the impact that the Secretary of State's own conduct was consistent with the appellant's case that his leave had not been curtailed.
 - b. Whether the judge's findings concerning the appellant's receipt of the September 2014 letter were irrational. The Secretary of State's own records accepted that the letter had not been delivered, and that it was "served to file". By finding that the appellant nevertheless had received the letter the judge fell into error.
14. Resisting the appeal for the Secretary of State, Mr Lindsay submitted that the judge reached findings of fact that were open to him on the evidence before him. The judge considered the evidence in the round and did not reach a conclusion that was perverse. He was plainly entitled to make findings concerning the appellant's credibility in the manner that he did. In relation to ground 2, Mr Lindsay accepted that there was "some merit" to that ground but did not formally concede the appeal. Very fairly, Mr Lindsay accepted that, if the judge did fall into error in relation to the September 2014 letter, that may have affected his analysis of the March 2012 letter, since the judge's findings concerning the former impact his analysis of the latter, the credibility of the appellant having been considered in the round.

Issue (1): the judge failed to take into account a material consideration

15. It is necessary to recall that an appeal to the Upper Tribunal lies only on an error of law, not a disagreement of fact. Certain findings of fact are capable of being infected by an error of law, as notably summarised in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9].

"i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");

- ii) Failing to give reasons or any adequate reasons for findings on material matters;
- iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- iv) Giving weight to immaterial matters;
- v) Making a material misdirection of law on any material matter;
- vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
- vii) Making a mistake as to a material fact which could be established by objective and uncontested evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

16. An appellate court should be slow to conclude that a trial judge has fallen into error when reaching a finding of fact. There are many judgments of the higher courts which underline the distinction between errors of fact and law. In *Fage UK Ltd. v Chobani UK Ltd.* [2014] EWCA Civ 5 at [114], Lewison LJ said that an appeal court was merely able to engage in "island hopping" when reviewing the evidence considered by the trial judge, in contrast to the trial judge's role of considering "the whole sea of evidence." As Lady Hale PSC said in *Perry v Raleys Solicitors* [2019] UKSC 5 at [52], the constraints to which appellate judges are subject in relation to reviewing first instance judges' findings of fact may be summarised as:

"...requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

17. Moreover, there is no requirement on a judge expressly to address all the evidence or submissions in a case: see *Volpi v Volpi* [2022] EWCA Civ 464 at para. 2, in particular sub-para. (iii).
18. Against that background, however, we conclude that the fact that the Secretary of State herself engaged with the appellant on the basis that he did hold leave to remain in the period following the purported date of curtailment, 26 May 2012, was a significant factor which should expressly have been taken into account. The judge's failure to do so leaves the reader of the decision wondering why, notwithstanding the fact that the Secretary of State appeared to accept that the appellant held leave to remain on 8 May 2013, the judge found to the contrary. We accept that at para 43, the judge appeared to address the hypothesis that the Secretary of State had made an error in her May 2013 letter by referring to the appellant as though he held leave to remain, but he did not make an express finding on that issue.
19. In isolation, it may have been possible to infer from the judge's omission of this issue from his written analysis that he had accepted the account given by the Secretary of State in the refusal letter, namely that her decision to treat the appellant as though he held extant leave in her letter of 8 May 2013 had been in error. The judge, of course, was sitting in an expert tribunal, and can be assumed to have got it right.

20. However, a significant difficulty with imputing such reasoning to the judge is that it is necessary to consider his credibility findings in the round, which brings us to the next stage of our analysis.

Issue (2): the judge's conclusion concerning the September 2014 letter was irrational

21. We intend no discourtesy to this experienced judge, but in our judgment his findings concerning the September 2014 letter were not rationally open to him. It is with very great hesitation that this tribunal ever reaches a conclusion of irrationality concerning the findings of fact reached by a first instance trial judge. However, the Secretary of State's own records recorded that the correspondence had been sent - and returned - twice, and that the letter had eventually been served to file. In those circumstances, it was not rationally open to the judge to find that, despite the Secretary of State's records recording in clear terms the fact that the letter had not been delivered, that it had, nevertheless, been received by the appellant.
22. We have considered whether the judge must have concluded that the Secretary of State's records were wrong, and that she had incorrectly recorded the September 2014 as having been "returned to sender". That would have been a bold finding to make and would have required express reasoning. Such a finding would have been at odds with the judge's approach to the March 2012 letter, which ascribed determinative significance to the fact that the Secretary of State's records has *not* recorded that letter as having been returned to sender. Moreover, we cannot impute to the decision reasoning that is simply not there.
23. We are not surprised that Mr Lindsay's opposition to this ground of appeal was only in the most muted of terms and did not engage with the apparent factual impossibility that underlay the judge's findings. Nor are we surprised that Mr Lindsay very realistically and fairly accepted in his oral submissions that, if the judge had reached a factually impossible finding in relation to the September 2014 letter, his analysis of the March 2012 letter may have been tainted, since the judge expressly addressed the appellant's credibility in the round. We agree.
24. We have considered whether, properly understood, the judge's findings were that the appellant's solicitors knew about the rejection through other means, perhaps because of the parallel enforcement action that appears to have been taken against the appellant. If that is what the judge meant, he did not say so. The judge made a number of express findings that the appellant *had* received the letter which the Secretary of State's records accept was returned to her. For example, at para. 41, the judge said that the appellant's general credibility was damaged by his internally contradictory claim "that he did not receive the letter of rejection dated 11 September 2014", thereby implying that the judge found that he must have received the letter. At paragraph 45, the judge said that the appellant had not applied to bring judicial review proceedings against the September 2014 letter, and that there is no evidence of him seeking to challenge the validity of the service of the correspondence at the time. Those findings suggest that the judge found that the appellant had received the September 2014 letter.
25. We therefore find that the judge's findings on this issue throw his findings concerning the March 2012 letter into sharp relief, given those findings were reached on the basis of the judge's view of the appellant's credibility in the round: see para. 40. We find that the judge's failure expressly to address or make findings about the Secretary of State's May 2013 letter, and whether the

Secretary of State viewed the appellant as holding leave in the months following the purported curtailment of his leave, cannot, in our judgment, be absorbed within the general appellate deference to first instance trial judges' findings of fact. Those findings were reached taking express account of the irrational findings concerning the September 2014 letter.

26. We therefore set the decision of the judge aside and do not preserve any findings of fact.

Directions for the decision to be remade

27. In our judgment, notwithstanding the need for a number of factual findings to be reached, this is a decision which may be remade in the Upper Tribunal. We do not consider that the nature and extent of the findings of fact required are such that, having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the case to the First-tier Tribunal. The decision will be remade in this tribunal.
28. Ms Bayati queried whether we would need to hear evidence from the appellant. We indicated that that was not a matter for us, but that if the appellant did not give evidence, that may be a factor which informs any assessment of his credibility. Ms Bayati said that the appellant would need a Bangla interpreter in order to give evidence if she were to call him. That being so, we were unable to proceed to remake the decision at the hearing, and gave the directions set out under the Notice of Decision, below, for the matter to be reheard.

Notice of Decision

The decision of Judge Monson involved the making of an error of law and is set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 April 2023