Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52731/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 4 November 2014	**On 12 November 2014**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ROBERTSON

Between

MISS IRVY CABBAB LADERAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None
For the Respondent: Mr C Avery, Presenting Officer.

DETERMINATION AND REASONS

Immigration History

1. The Appellant is a female citizen of the Philippines, whose date of birth is 7 June 1988. She had leave to remain in the UK as a Tier 4 (General) Migrant until 5 November 2013. On 19 October 2013 she applied for leave to remain in the UK as the spouse of a person present and settled in the UK. Her application was refused and within the body of the letter dated 28 November 2013 (the RL) it was stated that she did not have a right of appeal because she had no extant leave when she made her application because her Tier 4 leave was curtailed with effect from 26 April 2013. The

Appellant maintained that she had extant leave until 5 November 2013 because she had not been served with a curtailment decision.

2. Designated Judge Manuell decided the appeal on the papers, finding that the issue of validity was a preliminary issue and as the Respondent had curtailed leave with effect from 26 April 2013, the Appellant had no extant leave when she made her application to vary leave on 19 October 2013 and an immigration decision had not been issued. There was, therefore, no right of appeal.

3. Permission to appeal was requested on the basis that: (i) irrespective of whether or not a decision had been issued, the Respondent had acted contrary to law and the Judge should have so held; (ii) the Respondent had failed to serve the curtailment decision and a curtailment decision must be communicated for it to be effective, as provided by **Syed (curtailment of leave – notice) [2013] UKUT 144 (IAC)**. Therefore the Appellant had extant leave until 5 November 2013 and a right of appeal.

4. Permission to appeal was granted by Designated Judge McCarthy, on the basis that (i) it was not clear from Judge Manuell's determination if he had regard to the history of the appeal and he had decided to determine the issue of jurisdiction without giving either party an opportunity to make submissions when the Appellant had requested an oral hearing; (ii) Judge Manuell overruled a decision on validity made by a duty Judge and, whilst he stated that the duty Judge had not given reasons for the decision, it was not clear what jurisdiction he had to overrule another First-tier Tribunal Judge once a decision had been made; and (iii) case law consistently holds that the Tribunal should be slow to deny an Appellant a right of appeal and that the Tribunal has jurisdiction to find that a decision is one to which s 82 of the Nationality, Immigration and Asylum Act 2002 applies even if a decision has not been issued. On the face of it administrative errors on the part of the Respondent may have resulted in the wrong notice being issued and the Appellant had waived her right to be properly served with the decision (cf **FO and others (service of notice of decision) Nigeria [2007] UKAIT 00093** and **AH (Notices required) Bangladesh [2006] UKAIT 00029**).

5. The Respondent filed a Rule 24 response, submitting that the Judge had not erred in finding that the Tribunal lacked jurisdiction; he clearly had regard to the curtailment decision at [2] and, although the Judge did not expressly state what supporting evidence he had before him, this did not go far enough to establish an arguable error off law. It was open to the Judge to find that the Appellant's assertion that she had extant leave was 'obviously wrong' based on the evidence before him.

6. The Appellant did not attend the appeal and a letter was received from her representative saying that he was without instructions. As to the grounds on which permission was granted, I indicated at the hearing that: (i) it was clear from the Tribunal file that the duty Judge had endorsed on the file that "it was likely that the Appellant had a valid appeal but the IJ may like to consider the point as a preliminary issue". Judge Manuell did not, therefore, overrule the decision of another First-tier Tribunal Judge; and (ii) although the Appellant had initially requested an oral hearing, she had

later, through her representatives, requested a hearing on the papers. The Judge was not obliged to request submissions on jurisdiction prior to determining this issue. This left only the third point to be dealt with; that is, was the curtailment decision served on the Appellant.

7. Mr Avery conceded that the curtailment decision had not been served on the Appellant and therefore the Appellant had a valid right of appeal. In the circumstances, he submitted that as the decision as to jurisdiction had deprived the Appellant of a fair hearing and no findings of fact had been made, it was an appropriate case to remit to the First-tier Tribunal for hearing.

8. In view of Mr Avery's concession, it was appropriate to find that the Judge had erred in law in finding that he lacked jurisdiction to hear the appeal.

9. Where a material error of law has been found in the determination of the FtT, paragraph 7 of the Practice Statements relating to the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal provides:

> *"7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:*
>
> *(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*
>
> *(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal*."

10. I am satisfied that the Appellant was deprived of an opportunity to put her case before the FtT and that the fact finding in this case is likely to be extensive, bearing in mind that no findings of fact have been made. I therefore remit this matter for hearing before the FtT for a de novo hearing. It would be advantageous to the Appellant to attend and the matter is to be listed for oral hearing. However, if she does not wish to attend and the Respondent is content for it to proceed by way of a decision on the papers, both parties should notify the First-tier Tribunal at least 7 working days before the date of the substantive hearing.

Decision

11. As conceded by Mr Avery, the decision of the FtT contained a material error of law as set out above and is set aside.

12. The Appellant's appeal is allowed.

13. The matter is to be remitted for hearing before the FtT with the following directions:

    a. The Appellant shall file and serve:
        i. A comprehensive bundle of documents that were before the FtT Tribunal at the date of the last hearing.
        ii. Any additional evidence, including statements, to be relied on for the purposes of the substantive hearing.

    b. The matter is to be listed with a time estimate of 2 hours.

    c. It is my understanding that an interpreter is not required. If the Appellant needs an interpreter, she or her representatives must contact the Tribunal and confirm the language and dialect required.

    d. This matter is not to be listed before Designated Judge Manuell.

Anonymity

2. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I see no reason to direct anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date **12 November 2014**

M Robertson
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the Appellant's appeal has been allowed, the fee award is to be determined when the substantive hearing is concluded.

Signed Dated **12 November 2014**

M Robertson
Deputy Upper Tribunal Judge