IAC-AH-DP-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16177/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th September 2015	**On 3rd November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS FARJANA BOBY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss T Kabir, Counsel
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born on 30th August 2015. On 31st December 2013 the Appellant made a combined application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system and for a biometric residence permit. On 20th March 2014 the Appellant's application was refused on the basis that she had overstayed in the United Kingdom for a period of more than 28 days. The Secretary of State's contention was that the Appellant's leave to remain was curtailed to expire on 19th May 2012 but that the Appellant had not submitted a valid application for leave to remain until 31st

December 2013 and that this was more than 28 days therefore after the Appellant's previous leave to remain had expired.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Aujla sitting at Richmond on 10th November 2014. In a decision promulgated on 21st November 2014 the Judge found that the Appellant had no right to appeal against the Respondent's decision and therefore there was no valid appeal extant before him.

3. On 29th December 2014 the Appellant lodged Grounds of Appeal to the Upper Tribunal. That application was refused by Designated First-tier Tribunal Judge Zucker on 3rd February 2015. On 18th February 2015 renewed Grounds of Appeal were lodged to the Upper Tribunal.

4. On 13th May 2015 Upper Tribunal Judge Perkins granted permission to appeal. He considered that he was satisfied that it was reasonably arguable that the First-tier Tribunal had no evidence before it to support a decision that the Respondent had served a notice of curtailment on the Appellant rather than evidence that the Respondent believed that she had. He pointed out that the Tribunal would appreciate submissions from the parties on the following points confirming (if this be their position) that a decision by the First-tier Tribunal has no jurisdiction and is appealable to the Upper Tribunal. Further he invited the Respondent (but did not direct) to disclose in any reply precisely the evidence relied upon to prove that the Appellant was given notice of curtailment of leave and how the evidence supports that conclusion.

5. On 29th May 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. That response points out that the Judge had noted that the Appellant did not attend the hearing and that the Appellant had asserted that she did not receive the curtailment. However it was contended that it was clear from the Respondent's records that two letters had been despatched to the Appellant by recorded delivery. Given the failure of the Appellant to attend the hearing and to provide any cogent evidence to support her assertion that she did not receive the curtailment notice it was contended that it was open to the Judge to accept thereafter the assertions and evidence relied upon by the Respondent.

6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal. The Appellant appears by her instructed Counsel Miss Kabir. The Secretary of State appears by her Home Office Presenting Officer Mr Bramble.

Submissions/Discussion

7. Miss Kabir indicates that this is a procedural appeal. Her initial starting point is that there is a basis for an appeal to be heard and she relies on the authority of *Abiyat and Others (rights of appeal) Iran [2011] UKUT 00314 (IAC)* which is authority for the contention that there is a right of

appeal to the Upper Tribunal against a decision of the First-tier Tribunal declining jurisdiction when that decision has been made after full consideration and is embodied in a determination. Mr Bramble on behalf of the Secretary of State does not seek to challenge that authority.

8. Miss Kabir consequently turned to address the issue as to whether or not the notice of curtailment has or has not been properly served. He submits that the First-tier Tribunal erred in law by endorsing the decision of the Respondent relying on the mere assertion of the fact by the Respondent that the decision to curtail the Appellant's leave was duly communicated to the Appellant at her address and that the Respondent had failed to prove that it was actually communicated to the Appellant. She relies on the authority of *Syed* **(***curtailment of leave – notice) [2013] UKUT 00144*. She submits that though there is mention of the case in the determination the judge has failed to mention whether the case was considered and how. She points out that *Syed* is authority for outlining the duty of a Respondent in curtailing a migrant's leave and that the Secretary of State has to be able to prove that notice of such a decision was communicated to the person concerned in order for it to be effective and that the Secretary of State cannot rely upon deemed postal service.

9. She submits the fact that the Appellant did not attend the hearing to give evidence that she had not received the notice of curtailment would not have made much difference in the outcome of the appeal since it was the Respondent's burden to discharge their duty of proving that the notice was communicated properly. She points out that the Appellant was not in a position to prove that she did not receive the notice except answering "no" to a question if put to her whether she received the notice of curtailment. She submits that the Secretary of State had failed to discharge their burden in line with *Syed*.

10. In response Mr Bramble starts by reciting *Ved and Others (appealable decisions; permission application; Basnet) [2014] UKUT 150* and whilst acknowledging that this case is not on all fours with the current scenario refers me to paragraphs 21 onwards pointing out that these paragraphs addressed the powers of the Upper Tribunal to deal with an appeal in this scenario. He does accept that such powers do exist. It seems to me therefore that there is an acknowledgement by both legal representatives that there is a power for me to hear this appeal.

11. Mr Bramble therefore submits that the question to be considered is whether or not the First-tier Tribunal Judge had properly adopted and applied *Syed*. He points out that it is not known what documentation was served but does refer to paragraph 13 of the First-tier Tribunal Judge's determination as far as it relates to documents produced by the Respondent. He points out that the question therefore remains as to whether or not those documents have been communicated to the Appellant. He acknowledges that he is uncertain as to whether any of the Home Office documents produced were the ones referred to by the Home Office Presenting Officer but he is uncertain as to what further documents

could have been provided. In such circumstances he asked me to find that there is no material error of law and to dismiss the appeal.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

14. Upper Tribunal Judge Perkins in granting permission invited the Secretary of State to disclose in any reply precisely the evidence relied upon to prove that the Appellant was given notice of curtailment of leave and how the evidence supports that conclusion. The Rule 24 response does no more than to submit that two letters were despatched to the Appellant by recorded delivery. *Syed* is authority stating that the Secretary of State cannot rely upon deemed postal service. I find the arguments put forward by Miss Kabir to be persuasive.

15. Mr Bramble has argued whilst he is uncertain as to what documents were produced by the Home Office Presenting Officer it is uncertain as to what further documents could have been provided by the Home Office and accepts that the Home Office do not have the means to track documents in order to prove service. In such circumstances however I am satisfied that the Judge was wrong in law to find that the notice of curtailment was communicated to the Appellant and therefore valid in that there is an absence of documents provided by the Respondent to show that that was

the case. In such circumstances the Judge has failed to apply *Syed* or to give any analysis of that authority on this particular case. It is clear that following *Syed* that the Tribunal would have been most likely to come to a different conclusion and in such circumstances there is a material error of law.

16. The correct approach therefore is to find that there is a material error of law and then to remake the decision allowing the appeal to the extent the matter is remitted back to the Secretary of State for further and fresh consideration. I note from comments made by Miss Kabir that if that approach is adopted that the Appellant is confident that she can meet the requirements of the Immigration Rules. That is not a matter for this Tribunal to determine and further it is not the scope of this Tribunal to enforce what could very well be construed as a procedural unfairness to the Appellant and this finding will I acknowledge give the Appellant one final opportunity to show to the Secretary of State that her application is in order and should succeed.

Notice of Decision

The decision of the First-tier Tribunal disclosed a material error of law and is set aside. The decision is remade allowing the appeal to the extent that the matter is remitted back to the Secretary of State for further consideration.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris