**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/22601/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 11 June 2015** | **On 26 June 2015** |

**Before**

**UPPER TRIBUNAL JUDGE COKER**
**DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**

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

Appellant

**And**

**MR AHMED MONSUR**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr Bramble, Home Office Presenting Office
For the Respondent: Non attendance

**DETERMINATION**

**Introduction**

1. This is an appeal by the Secretary of State for the Home Department. To avoid confusion we will use Secretary of State ('SSHD') and Mr Monsur throughout.

2. Mr Monsur is a citizen of Bangladesh and his date of birth is 2 April 1988.

**Immigration History**

3. Mr Monsur was granted entry clearance as a Tier 4 (General) student on 2 December 2010. His leave was granted to 28 March 2014. On 24 March 2014 he applied for further leave to remain as a Tier 4 (General) student and for a biometric residence permit. The SSHD, in a decision dated 28 April 2014, refused the application. The reason for refusal was: '*You fail to meet the requirements of paragraph 245ZX(m) as you have overstayed in the United Kingdom. When you submitted your application on 24 March 2014 your leave had expired on 29 June 2012 which was more than 28 days before the submission of your application. As such you have overstayed in the United Kingdom… You therefore did not have leave to enter/remain at the time of your application. Therefore there is no right of appeal against this decision'.*

**The First-tier Tribunal Judge's Decision**

4. Mr Monsur appealed under section 82 of the Nationality, Immigration, and Asylum Act 2002 against the decision of the SSHD. He did not attend the hearing. First-tier Tribunal Judge Cooper ('the judge'), being satisfied that notice of the hearing was properly served, decided that it was in the interests of justice to proceed to determine the appeal. On being informed that Mr Monsur had not attended the hearing, the SSHD's representative said that she was content for the appeal to be heard in her absence.

5. The judge allowed the appeal in a decision dated 25 February 2015, promulgated on 26 February 2015. The judge found, at paragraph 17, that '*What the Appellant asserts in his Notice of Appeal is correct* [that the SSHD had made a mistake as to the date leave expired]. *RB contains a copy of the Appellant's passport which is endorsed with Entry Clearance which was issued at Dhaka on 2 December 2010 and was valid until 28 March 2014.*' At paragraph 19 the judge found that '*The Respondent…has not raised any other*

*ground for refusing the application save for the mistaken belief that his leave to remain had already expired.'*

**Permission to Appeal**

6. The SSHD applied to the First-tier Tribunal for permission to appeal against the judge's decision. Permission to appeal was granted by First-tier Tribunal Judge Ransley. The grounds of appeal assert:

> *'On the 22nd December 2011 the Appellants sponsor at the time, and who provided a transcript for the current application (London Capital College), surrendered their Tier 4 sponsor licence.*
>
> *The appellant's leave was curtailed with no right of appeal under paragraph 323A(a) of HC395 (as amended) so as to expire on 29th June 2012 and correspondence to that effect was sent to the Appellant.*
>
> *Whilst the narrative above was not before the Judge, it is respectfully submitted that the Judge arguably errs in law by referring to the Appellant's passport to establish the validity of the Appellant's leave, when there was an assertion by the Respondent that the Appellant's leave had expired on 22nd June 2012.*
>
> *It is respectfully submit that if the Judge had any doubts as to who was correct, the guidance in Shen (paper appeals; proving dishonesty) [2014] UKUT 236 (IAC) (20 May 2014) should have been followed…'*

**Non-attendance at Upper Tribunal Hearing**

7. Mr Monsur did not attend the hearing nor was he represented at the hearing. He sent a letter dated 8 June 2015 referring to the hearing date of 11 June 2015. We are satisfied that due notice of the appeal was served upon him at the address that was given. We are therefore satisfied that having been served notice of the hearing and having not attended it was in the interests of justice to proceed with the hearing in his absence in accordance with paragraph 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

**Discussion**

8. There are two issues to be determined. Firstly, did the First-tier Tribunal err in law in the approach to deciding the validity of leave at the time Mr Monsur made his application and secondly, whether the First-tier Tribunal had jurisdiction to entertain the appeal.

9. At the hearing we heard submissions from Mr Bramble on behalf of the SSHD. He handed up a copy of a letter from the Home Office UKBA dated 30 April 2012 addressed to Mr Monsur at the address currently recorded as his residence. This letter notified Mr Monsur that his leave had been varied so as to expire on 29 June 2012. The letter set out that the decision to curtail his leave was as a result of the sponsor licence for London Capital College having been surrendered. This information was not before the judge and we have therefore not admitted this evidence.

Legal Framework

**10.** At the relevant time section 82 of the Nationality, Immigration, and Asylum Act 2002 provided**:**

> 82 Right of appeal: general
>
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this Part "immigration decision" means—
>
> (a)…
>
> (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter

Error of Law

A. First issue – the approach to deciding the validity of leave

Decision on the Papers

*11.* This case was decided on the papers by the First-tier Tribunal with the concurrence of the SSHD. The context in which this occurred is of importance. As far as we can ascertain no documents or explanation to support the SSHD's assertion that leave had expired on 29 June 2012 were submitted to the First-tier Tribunal. An indexed bundle was submitted by the SSHD which included a copy of Mr Monsur's passport with the relevant entry clearance endorsed on it with an expiry date of 28 March 2014. This was the SSHD's bundle of documents that was intended to be relied on at the hearing. There was nothing contained in that bundle to gainsay the assertion that the date of 29 June 2012 was simply a mistake.

*12.* The SSHD's representative, who attended at the commencement of the hearing, must have been aware that Mr Monsur had asserted in his grounds of appeal that:

> '*they refused the application on the ground that the appellant's leave to remain was expired on 29 June 2012. It seems to the appellant that the immigration officer had made a mistake and…assessed the application on the basis of a different applicant's documents and passport…the appellant has the right of appeal. Because he submitted the application before the expire of his leave…*'

*13.* The representative must have been aware that Mr Monsur's passport had an expiry date of 28 March 2014 endorsed on the visa entry. She must have been aware of the contents of the SSHD's bundle (in particular that no evidence or explanation had been submitted to gainsay Mr Monsur's assertion with regard to a mistake as to the date) when she indicated that she was content for the matter to be decided in her absence on the documents before the judge. The SSHD's

representative did not take the jurisdiction point regarding the right of appeal on the day.

The approach of the judge

14. Mr Bramble submitted that the judge failed to take into account the decision letter which clearly notes that Mr Monsur failed to meet the requirements because he had overstayed. Mr Bramble drew attention to paragraph 17 in the judge's determination and asserted that the judge had failed to engage at all with the issue that the SSHD had clearly stated that leave had expired in 2012. Paragraph 17 of the judge's decision is inadequate when there is an explicit statement in the SSHD's letter regarding the date leave expired.

*15.* We consider that it is clear that the judge was aware of the evidence of the SSHD and considered that evidence. At paragraph 11 of the decision the judge records that the reason for refusal of the application was because leave to remain had expired on 29 June 2012 and at paragraph 12 that the SSHD stated in the refusal letter that because Mr Monsur did not have leave to remain at the time of application that he had no right of appeal.

*16.* Mr Bramble submitted that the judge erred in law in failing to engage with the conflict in the dates. We do not agree. It is important to consider the SSHD's letter as it sheds light on the finding of the judge and the plausibility of Mr Monsur's assertion as to mistake. The reasons given in the letter (set out at para 3 above) are exceptionally brief merely stating that leave had expired on 29 June 2012. No mention was made of the SSHD having curtailed his leave on that date or the reason for that curtailment. At paragraph 17 the judge made a finding that Mr Monsur's assertion in his notice of appeal is correct (that there was a mistake with regard to the date that leave expired). The judge then referred specifically to the SSHD's bundle which contained a copy of Mr Monsur's passport which is endorsed with entry clearance valid until March 2014. Mr Monsur's assertion in his grounds of appeal was entirely plausible (given the scant detail in the SSHD's letter) on the evidence which was before the judge. In the absence of any

explanation or evidence (which was readily available to the SSHD) to gainsay that assertion the judge was entitled to make the finding that she did. The judge did not, in our view, need to engage in any detailed analysis when reaching that finding which was quite simply acceptance of the documentary evidence, namely the copy of his passport (included in the SSHD's bundle) coupled with an acceptance of a plausible explanation by Mr Monsur. The SSHD failed to engage with Mr Monsur's explanation and made no attempt to gainsay what had been asserted despite submitting a bundle of documents for the appeal and having attended at the commencement of the hearing specifically giving consent for the appeal proceed on the basis of the documents before the judge.

17. In reliance on the case of Shen (paper appeals; proving dishonesty) [2014] UKUT 236 (IAC) (20 May 2014) ('Shen') Mr Bramble asserted that if the judge had competing concerns with regard to a material issue the judge should have asked further questions and not automatically accepted what Mr Monsur had said in his grounds of appeal.

*18.* In the case of Shen the Upper Tribunal gave guidance on the approach to follow where there is a direct conflict of evidence at paragraph 27:

> 27. In our view if the Judge entertained doubts as to the Appellant's story, he should have sought to investigate further. He could have exercised the powers that he has pursuant to rules 45 and/or 51 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 to require, for example, the Appellant to adduce supporting documentary evidence, or the SSHD to comment upon the Appellant's evidence and adduce such evidence as the SSHD considered appropriate to refute the Appellant's evidence.

19. In our view there was no direct conflict of evidence and clearly the judge did not entertain doubts about Mr Monsur's 'story'. There were two contrary assertions made as to the correct date that leave to remain was valid to. If that was all that was before the judge then further enquiries in accordance with the guidance in Shen might be required. However, in this case there was both documentary evidence (a copy of Mr Monsur's passport had been provided by the SSHD) and a

plausible explanation for the contrary assertion in the SSHD's letter, '*the immigration officer had made a mistake and…assessed the application on the basis of a different applicant's documents and passport*.' In the absence of any dispute at all with that explanation and in the particular circumstances of this case (regarding the SSHD's specific consent to proceeding on the papers in full knowledge of the grounds) the judge was not required to undertake any further enquiries.

20. We find that there is no error of law in the approach of the judge to the finding on the validity of leave at the time of Mr Monsur's application.

B. The second issue - jurisdiction

21. Mr Bramble was invited to make submissions on the position with regard to the jurisdiction of the First-tier Tribunal in light of the case of Anwar & Anor v Secretary of State for the Home Department [2010] EWCA Civ 1275 if we were against him on the judge's decision in respect of the validity of leave. Mr Bramble acknowledged that he was in some difficulty in light of that judgment in maintaining that the judge did not have jurisdiction to entertain the appeal.

22. We have considered whether or not the judge had jurisdiction to entertain the appeal and the position of this Tribunal in light of the evidence now provided that might demonstrate that leave had expired in 2012 so that Mr Monsur may not, in fact, have had a right of appeal. We note that Mr Monsur has not been provided, in the course of this appeal, with a copy of that letter and neither has the SSHD provided evidence that the requisite requirements for service of that latter were complied with in 2012.

23. We consider that this Tribunal is entitled to determine whether the First-tier Tribunal had jurisdiction to entertain the appeal. In the case of Virk & Ors v Secretary of State for the Home Department [2013] EWCA Civ 652 the court held at paragraph 10:

'…The jurisdiction conferred by ss. 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") to determine any point of law arising from a decision of the lower tribunal must include the power to determine whether such a right of appeal exists at all.'

24. In Anwar v Secretary of State for the Home Department [2010] EWCA Civ 1275 a decision of the First-tier Tribunal to entertain an appeal was later reversed on re-consideration on the ground that there was no jurisdiction to hear an in-country appeal. The Court of Appeal held that the First-tier Tribunal had adjudicative jurisdiction to entertain the appeal for the purpose of deciding whether the appellant had left the United Kingdom by the relevant time and that until that issue was resolved against the appellant it could not be said that it lacked jurisdiction. Sedley LJ at paragraphs 19-21 said :

'19. Was the AIT right in Ms Pengeyo's and Mr Anwar's cases to hold that the respective immigration judges had acted without jurisdiction? In my judgment they had jurisdiction to embark on the hearing notwithstanding that neither applicant had left the United Kingdom, but once the point was taken by the Home Office (and assuming it to be factually correct, since they might have been absent from the hearing) it operated in bar of the proceedings. Had the point not been taken in either case, the immigration judge would have been bound to proceed with the appeal.

20. The reason for this ostensibly subtle distinction is one which matters. It is the distinction between constitutive and adjudicative jurisdiction which I sought to draw in a dissenting judgment in Carter v Ahsan (No 1) [2005] ICR 1817, paras 16–27, which secured approval on appeal [2008] 1 AC 696. The constitutive jurisdiction of a tribunal is the power to embark upon trying specified kinds of issue. Whether a foreign national has obtained leave to enter or remain by deception is, by common consent, such an issue. Its adjudicative jurisdiction may then depend on a number of factors, such as whether the appeal has been brought within time or—as here—whether the applicant has left the United Kingdom.

21. This in turn may depend on several other things. First it must depend on whether the out-of-country rule applies at all, which is likely to be a mixed question of fact and law. Immigration Judge Callender-Smith concluded in Mr Anwar's case that it did not apply. Secondly it may depend on whether the applicant has in fact left the country: he or she may be absent from the hearing but not, or allegedly not, from the United Kingdom. This will then be a triable issue. Until such issues have been decided it is impossible to say that the tribunal cannot hear the appeal.'

25. Applying the approach set out above to this case the judge had to decide whether or not Mr Monsur had valid leave to remain at the time he made his application in order to determine if he had a right of appeal. Having found that he had valid leave the judge had jurisdiction to entertain and determine the appeal.

*26.* However, in light of the assertions now made before this Tribunal it appears that Mr Monsur may not in fact have had valid leave at the time he made his application and consequently may not have had a right of appeal. The issue before this Tribunal, therefore, is whether that fact retrospectively has the effect of depriving the First-tier Tribunal of its constitutive jurisdiction.

27. In *Ahsan v Watt (formerly Carter) (sued on behalf of the Labour Party)* [2007] UKHL 51, Lord Hoffmann at paragraphs 30 and 33 said:

> 30 '… But when the tribunal has decided that it does have jurisdiction, the question of whether this decision is binding at a later stage of the same litigation, or in subsequent litigation, involves, as Sedley LJ explained in his dissenting judgment, quite different issues about fairness and economy in the administration of justice…
>
> 33 In my opinion, therefore, the decision that the Labour Party was a qualifying body for the purposes of section 12 was made by a competent court and is therefore binding upon the parties. It does not matter that a later decision, now approved by this House, has shown that it was erroneous in law: see In re Waring; Westminster Bank v Burton-Butler [1948] Ch 221. The whole point of an issue estoppel on a question of law is that the parties remain bound by an erroneous decision.'

28. As we have found that there was no error of law in the approach of the judge when deciding that Mr Monsur had valid leave and therefore had jurisdiction to entertain the appeal, the fact that it may now be shown that the basis for that decision is erroneous does not deprive the First-tier Tribunal subsequently of its jurisdiction.

Conclusions

29. The First-tier Tribunal had jurisdiction at the time it made its decision to entertain the appeal. It has not subsequently been deprived of that jurisdiction.

30. There was no error of law such that the decision of the First-tier Tribunal is set aside.

31. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

Notice of Decision

The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed P M Ramshaw Date 23/6/15

Deputy Upper Tribunal Judge Ramshaw