Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: HU/17782/2019 (P)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC	**Decision & Reasons Promulgated**
On 6 October 2020	**On 14 October 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

MOHAMED MINHAJ MOHAMED MAHROOF

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mr. B Malik of counsel

For the Respondent: Mr A McVeety, Senior Presenting Officer

DECISION AND REASONS (P)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues

could be determined in a remote hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Sri Lankan national with date of birth given as 8.4.88, has appealed to the Upper Tribunal with permission against the decision of the First-tier Tribunal promulgated 1.5.20, dismissing his human rights appeal against the decision of the Secretary of State, dated 15.10.19, to refuse his application for Leave to Remain on the basis of 10 years' long residence, pursuant to paragraph 276B of the Immigration Rules.

2. Permission to appeal was granted by First-tier Tribunal Judge O'Garro on 17.6.20, considering it arguable that the First-tier Tribunal Judge erred in law in failing to apply the correct interpretation of an "exempt person" under paragraph 276A(b)(iii) of the Immigration Rules, and that in conducting the article 8 ECHR proportionality balancing exercise the judge failed to give appropriate weight to the 'historic injustice' suffered by the appellant as a result of the respondent's failure to provide him with the '60 day letter' in accordance with her policy.

3. Shortly prior to the error of law hearing, the Tribunal received by email Mr Malik's extensive skeleton argument dated 2.10.20, together with a large volume of case authorities relied on. I confirm I have taken this material into account along with the oral submissions made at the error of law hearing.

4. The lengthy history is set out in the skeleton argument and need not be repeated here. In summary, the appellant entered the UK in October 2009 with leave to remain as a Tier 4 student subsequently extended until 25.8.14. Since that date he has had no valid leave to remain in the UK. On several occasions, particularly in 2013 and 2014, and thereafter, the respondent purported to curtail his student leave. The appellant's case is that the notice of curtailment with the 60-day period of grace was not received by the appellant until 13.3.19, with curtailment date of 12.5.19. On that date, the appellant made a human rights application for Leave to Remain, subsequently varied to a long residence application under paragraph 276B. It is the refusal of this application which is the subject of this appeal. The application was refused on the basis that the appellant did not have lawful leave between 25.8.14 and 13.3.19.

5. The argument before the First-tier Tribunal was as to whether the appellant was lawfully resident between 25.8.14 and 13.3.19 for the purposes of paragraph 276B, and the extent to which the respondent's alleged failure to serve the curtailment notice should

have been taken into account in the article 8 proportionality exercise. However, a number of other arguments were taken, as explained before.

6. It is important to note that at [10] of the impugned decision, the judge made the following findings of fact. The judge found that the appellant did not receive the first or second curtailment notices, and that the third notice was sent to the wrong address. The judge also found that a further curtailment letter sent on 11.2.14 was sent to the correct address but signed for by the appellant's neighbour who did not give it to the appellant until 12.4.14, on which date the appellant asked the respondent for a further 60-day letter, as the curtailment period had expired. The judge found that a further curtailment letter was sent on 11.8.14 but with the same February date, so that 60-day period was of no practical use to the appellant. On 18.8.14 the appellant sought another 60-day letter, a request repeated on 25.8.14, 8.7.15, and 19.5.16. In the meantime, the appellant's student leave expired on 25.8.14. After having made his human rights application on 6.3.18, on 13.3.19, the respondent provided the appellant with the 60-day letter, expiring 12.5.19.

7. The primary argument made by Mr Malik at the First-tier Tribunal and before me in the error of law hearing is that once an applicant receives a 60-day letter he becomes exempt from immigration control within the meaning of paragraph 276A(b)(iii).

8. It is necessary to Mr Malik's argument for the "exemption from immigration control" to apply not only to those who have received the 60-day letter but those who are waiting for it. It is also necessary for the argument to succeed that the 60-day letter dated 13.3.19 be construed as a grant of leave to remain.

9. For the reasons set out below, I do not accept any part Mr Malik's submissions on the issue of exemption from immigration control and have concluded that they are based on a fanciful and unsustainable interpretation of the Rules and Statute.

10. Paragraph 276A(b) provides that "lawful residence" means residence which is continuous residence pursuant to: (i) existing leave to enter or remain; or (ii) temporary admission (not applicable in this case); or (iii) "an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain."

11. First, I note that there is nothing within paragraphs 276A or 276B that provides for a person in the circumstances of this appellant to be exempt from immigration control, whether or not he has received the

60-day letter. I do not accept the argument that the grant of a period of grace within which an application for further leave will be considered takes a student migrant applicant outside of immigration control. It is a discretionary waiver of the effect of expiry of valid leave so as to cure the injustice of a person whose application would fail without the opportunity to vary the named educational sponsor. I note that other parts of paragraph 276A and indeed other related Rules including those at 276R onwards relating to member of HM Forces and their families, and make clear that exemption from immigration control relates to those provisions under the Immigration Act 1971. I note that the 1971 Act was amended by the Immigration and Asylum Act 1999, amending s8 and adding s8A. These amendments provide for categories of persons who are exempt from immigration control, including heads of state, heads of diplomatic missions, etc. The appellant does not fall within any of the specific categories of persons entitled to exemption from immigration control.

12. In the premises, I am satisfied that the phrase "Exemption from Immigration Control" referred to in paragraph 276A(b)(iii) refers to those defined under the 1971 Act as persons exempt from immigration control and has no application whatsoever to those in receipt or or awaiting a 60-day letter. Even if I am wrong as to the relationship between the exemption from immigration control referred to in paragraph 276A(b)(iii) and the 1971 Act, I am satisfied, as Mr McVeety submitted, it is not possible to read into 276A(b)(iii) something which is not there, namely applicability to those waiting for the 60-day letter.

13. It follows that Mr Malik's argument on this head cannot succeed on any basis. It is not necessary, therefore, to address the lengthy submissions and Mr Malik's extensive references to case law of tangential relevance to this issue and on general principles any further. I am satisfied that the judge was correct at [14] of the decision to conclude that the appellant was very much still the subject of immigration control with or without the 60-day letter, that his valid leave expired on 25.8.14, so that thereafter his immigration status was unlawful. As is clear from the free-standing requirement at paragraph 276B(v), the appellant must not be breach of immigration laws, except where paragraph 39E applies to disregard any current period of overstaying. It follows that once his leave had expired without in-time renewal in 2014, he could never qualify for the long residence provisions. The long residence application was doomed to failure from the outset.

14. Mr Malik made a number of unsustainable submissions during the course of his oral arguments. For example, he asserted in oral argument, and at [26] to [29] of his skeleton, that the decision was

perverse in that the judge found as a fact both that the appellant could "do no more", and that he was partly to blame for the delay in obtaining the 60-day letter. However, it is obvious from a reading of paragraph [19] of the decision that it was Mr Malik's submission to the First-tier Tribunal that the appellant could do no more, a submission with which the judge only partly agreed, explaining that there were lengthy periods in which the appellant sat back and did nothing to pursue the provision of the 60-day letter, including almost two years between May 2016 and March 2018. The judge did not find that the appellant could "do no more," but to the contrary, found that he could indeed have done more.

15. Mr Malik also submitted that the respondent was at fault in failing to serve the 60-day letter on the appellant in February 2014, asserting that it was sent to the incorrect address. However, when challenged on this assertion, it transpired that the letter had been correctly addressed to the appellant, as can be seen at page 27 of the appellant's bundle but signed for by a neighbour who failed to hand it to the appellant until April 2014. In his own letters at pages 20 and 27 of the bundle, the appellant accepted that if there was fault it was that of Royal Mail. In the premises, it was incorrect for Mr Malik to assert that the letter had been misdirected by the respondent or that the respondent was in any way at fault in respect of sending of the February 2014 letter.

16. These issues are, of course, relevant to whether there has been injustice or other prejudice to the appellant by the alleged failure of the respondent to provide the appellant with the 60-day letter. Mr Malik relied on Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 and his submissions at [6] to [11] of his skeleton argument, to submit that the appellant had been unfairly deprived of the "opportunity to vary" his student application. Mr Malik pointed out that as a result of Patel, the respondent instituted a policy to grant 60-day grace period in cases where the sponsor licence has been withdrawn post-application. Patel held that in such circumstances the applicant should have the opportunity to vary the application and be afforded a reasonable time within which to find a substitute college. However, this appellant's leave was curtailed following the revocation of the college licence and even before Patel the practice of the respondent was to grant a 60-day period of grace within which to find an alternative sponsor.

17. Effectively, until he received the curtailment notice, the appellant's leave continued and on that basis did not expire until 25.8.14. However, it is clear that by April 2014, when his neighbour handed over the February 2014 curtailment letter, the appellant was aware that the respondent intended to curtail his leave. According to his

witness statement, the appellant claims to have continued his studies until February 2014, at which time he learnt that his college's licence had been revoked. It was in fact revoked in May 2013. Whether he had been studying until February 2014 is not entirely clear as his letter of 17.4.19 stated that he had been out of education for more than six years.

18. Given that the appellant's leave was extant through to 25.8.14, it is not entirely clear why he needed a 60-day period of grace within which to find a new educational sponsor and make a fresh student application before the expiry of his leave in August 2014, although this is what he has asserted at [3] of his witness statement. At [5] of his witness statement he claimed that he was only handed the February 2014 curtailment letter on or around 1.7.14. However, as set out above, at [10(d)] of the decision the judge found that he had received this letter on 12.4.14. The appellant has not sought to challenge this finding of fact.

19. In any event, by early 2014 the appellant was aware of the intention to curtail his leave, on the basis that the sponsor's licence had been revoked, and, on Mr Malik's argument that the curtailment notice was not effective until received, he still had extant leave when he became aware of these facts. It may be, however, that he believed that his leave had been curtailed and that he needed a 60-day grace period to find a new sponsor and make a fresh student application.

20. Relying on the findings of fact summarised above, Mr Malik argued that there had been 'historic injustice' to the appellant by the alleged failure of the respondent to serve him with the 60-day letter necessary for him to obtain an educational sponsor and make an application for further student leave.

21. The injustice complained of by the appellant was deprivation of the opportunity to make an application for further student leave, not an opportunity to vary his application, or to be granted leave to remain. Neither can he vary leave once it expired on 25.8.14. However, as the First-tier Tribunal Judge found, there were periods during which the appellant did not pursue any student application or grant of a 60-day letter. As Mr McVeety asked rhetorically, if the appellant was not studying in the UK what else caused him to be so busy as to not have time to pursue the 60-day letter between his letter of request in May 2016 and his human rights application in March 2018? Why did he sit back for the best part of two years? Further, if there was delay, it is clear that not all of that delay was the fault of the respondent, who made several attempts to serve him. For example, the respondent was not to know that the February 2014 letter had not been received

by the appellant when it was sent to the correct address and not returned.

22. On the facts, I am satisfied that this is not a case of 'historic injustice' as alleged; at its highest it is one of some relatively short period of delay. Neither am I satisfied that there has been any material prejudice to the appellant, given his own significant inaction during the periods identified by the First-tier Tribunal Judge following the expiry of his leave in August 2014, and particularly when he accepts that on 13.3.19 the respondent granted him leave outside the Rules (LOTR), to expire on 12.5.19. The letter of 13.3.19 is instructive; it makes clear that although the appellant did not qualify for limited leave to remain or for discretionary leave, it was agreed that should he make an application for further Tier 4 leave within the currency of the LOTR, he would "exceptionally be allowed to switch back into Tier 4 provided all the other Tier 4 requirements have been met." He was warned that should he fail to submit a Tier 4 application within the short period of leave, he would not be granted a further 60 days grace. In the circumstances, it is difficult to see what prejudice the appellant has suffered. He was able to remain in the UK beyond the expiry of his leave in 2014 without being removed and granted a further period of leave in March 2019 to make a student application.

23. The remaining aspect of the grounds as drafted primarily address the weight to be given to the alleged 'historic injustice' or delay in failing to serve the appellant with the 60-day letter until 2019. However, Mr Malik accepted in oral argument that the case law establishes that there is a high threshold, periods in terms of years, before such delay could entitle the appellant to a grant of leave.

24. In this regard I note that in Herrera v SSHD [2018] EWCA Civ 412, the Court of Appeal said that it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence. It is well-established law that the weight to be given to any particular factor in an appeal is a matter for the judge and will rarely give rise to an error of law, see Green (Article 8 -new rules) [2013] UKUT 254.

25. Having carefully considered the impugned decision of the First-tier Tribunal in the light of the submissions made to me, I am satisfied that the First-tier Tribunal Judge did accord appropriate weight to the alleged injustice, having considerable sympathy for the appellant's plight.

26. The appellant's complaint is that that the alleged failure of the respondent to serve him with a 60-day letter on curtailment prevented him from applying successfully to extend his Tier 4 student leave. It is said that without the 60-day letter he was unable to secure an educational sponsor. At [19] of the decision the judge expressed sympathy and accepted that the appellant, "*wrote to the respondent on 5 separate occasions to inform them that the letter was outstanding. Mr Malik submitted that I could do no more.*" As stated above, the judge agreed with Mr Malik's submission only to a limited extent, pointing out that there were lengthy periods when the appellant, on whom was the onus to regularise his immigration status, made no communication with the respondent in the period between 2104 and 2018, including a period of almost two years between May 2016 and March 2018. The judge concluded that the appellant "*must also shoulder some of the responsibility as a result of his inactivity*."

27. It is clear from the decision that the judge gave considerable weight to the appellant's alleged predicament, referring at [20(b)] of the decision to factoring into the proportionality assessment the "*lost opportunity*". There the judge also pointed out that the lost opportunity was to secure a new sponsor, not to acquire entitlement to Indefinite Leave to Remain, so that any further leave would depend on the outcome of future applications. The 60-days grace was to enable him to apply, not a guarantee that leave would be granted, let alone indefinite leave to remain.

28. The judge also gave weight to the appellant's private life, despite the strictures of section 117B of the Nationality, Immigration and Asylum Act 2002. Ultimately, the judge found that even accounting for the errors of the respondent, the proportionality balance tipped in the respondent's favour; that is to say in favour of immigration control and against the appellant's long-residence claim. I am satisfied that decision was entirely open to the judge on the evidence and for which cogent reasoning has been provided.

29. At [20] of the recently submitted skeleton argument Mr Malik attempts to pursue a ground of appeal neither raised at the First-tier Tribunal appeal hearing or in the grounds of appeal and in respect of which permission has not been given. He asserts as a 'Robinson-obvious' point that if there has been a historic injustice against an immigration applicant, the respondent should exercise any relevant future discretion outside the Rules on the basis that the appellant had in fact leave to remain notwithstanding that formally that leave remained invalidated. Reliance is made on Ahsan and others v SSHD [2017] EWCA Civ 2009. However, the reference in that case related to a part of a theoretical approach to the judicial review of the

Secretary of State's refusal of leave where a tribunal has found that an appellant did not cheat in order to obtain an English language test certificate. This issue is a matter outside the scope of a statutory appeal and the sentence from the decision quoted at [20] of the skeleton argument is neither the ratio of the case nor precedent for the point being made by Mr Malik. As stated, this was not a ground of appeal raised at the First-tier Tribunal, nor in respect of which application was made to amend the grounds, and it need be addressed no further in this decision.

30. In summary, for the reasons set out above, I am satisfied that there was nothing perverse or irrational about the decision of the First-tier Tribunal. The judge gave cogent reasons open on the evidence for finding against the appellant on all arguments raised. I am not satisfied there was 'historic injustice' to the appellant or unfairness or prejudice that was not fully taken account of in the proportionality assessment.

31. In the premises, I find no material error of law in the decision of the First-tier Tribunal.

Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the human rights appeal remains dismissed.

I make no order for costs.

I make no anonymity direction.

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 6 October 2020