IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04919/2019**

THE IMMIGRATION ACTS

Decided under Rule 34 Without a Hearing	**Decision & Reasons Promulgated**
At Field House	**On 19 January 2021**
On 11 January 2021	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

DHRUVLLKUMAR PRAVINKUMAR CHAUHAN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This is the remaking of an appeal against a decision of the respondent made on 8 March 2019 to refused the appellant's applicant for leave to remain on the basis of 10 years' lawful residence. His appeal against that decision was dismissed by the First-tier Tribunal in a decision promulgated on 5 July 2019. That decision was set aside by Upper Tribunal Judge Plimmer for the reasons given in her decision of 27 November 2020, a copy of which is annexed to this decision.

2. As Judge Plimmer noted in her decision [1], the sole issue is whether the appellant's leave to remain had been curtailed at a point in 2012. Having found that the FtT had erred in its approach, she set aside its decision, directing that in light of the agreement of the parties [8], skeleton arguments were to be served prior to the matter being listed for hearing, but in the hope that a hearing would not be necessary.

3. In her position paper of 6 December 2020, the respondent explains that enquiries had revealed that two distinct CID records exist for the appellant

which may explain why the curtailment decision of 2012 was not effectively served on the appellant, and why the respondent had not followed through on an intent to apprise him of that when he came back into contact.

4. The respondent concludes:

> "It would therefore be appropriate for the Upper Tribunal to allow [the appellant's] appeal, if it sees fit to do so."

5. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. Given that no relevant objection to this course of action has been raised, and bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, I am satisfied that in the particular circumstances of this case where there has been no objection to a decision being made in the absence of a hearing that it would be right to do so. In reaching that conclusion I have had regard to the decision of Fordham J in JCWI v President of the Upper Tribunal [2020] EWHC 3103.

6. Having considered all the evidence, I am satisfied that, as the respondent accepts, the appellant was not properly served with the curtailment in 2012, and that in consequence, there was no break in the continuity of his residence. Bearing in mind that both parties accept that the sole issue in the appeal was whether the appellant's residence had been continuous, I am satisfied that he did. I am satisfied also, on the evidence, that the other requirements of the immigration rules were met; there are no submissions to the contrary. It cannot therefore be argued that there are any public interest considerations such that interference with the appellant's article 8 rights is justified, and I allow his appeal on that basis.

7. Given that the appellant has shown that he does, in fact, meet the requirements of the immigration rules, it would be appropriate for him to be granted indefinite leave to remain, not limited leave.

Notice of Decision & Directions

1 The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2 I allow the appeal on human rights grounds.

Signed Date 11 January 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04919/2019

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 3 November 2020 via Skype	.....

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MR DHRUVLLKUMAR PRAVINKUMAR CHAUHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Jones, Counsel
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS (V)
(given ex tempore)

The appellant has appealed against a decision of the First-tier Tribunal ('FTT') promulgated on 5 July 2019 in which his human rights appeal was dismissed. That appeal turned on one issue, whether or not the appellant's leave to remain was curtailed at a point in 2012. If it was curtailed, then the appellant could not amass the requisite ten years

in order to meet the requirements of paragraph 276 of the Immigration Rules. If it was not curtailed, as I understand the respondent's position, he would have amassed the requisite ten years and his appeal therefore should have been allowed under Article 8, ECHR.

At the hearing before me Mr Diwnycz on behalf of the respondent accepted that the FTT made three material errors of law in concluding that the appellant's leave had been curtailed in 2012. I do not need to set those out in any detail because as both parties agreed that the FTT decision could not stand and needed to be remade.

In my judgment Mr Diwnycz was entirely correct to concede that the FTT decision discloses three material errors of law. First, in finding at [13] that the respondent had served a notice of curtailment by post validly, the FTT failed to take into account the respondent's own position within her Case Information Database ('CID') note. That states this:

> "We have attempted to serve a curtailment decision to the migrant. However they have been returned as addressee gone away therefore we have served the decision to file under Section 7(2) of the Immigration (Notices) Regulations 2003."

That demonstrates that the respondent attempted to serve the said curtailment notice by post but it was not successful and it was therefore served to file. Mr Diwnycz was entirely correct to agree that in those circumstances the FTT erred in law in finding that there is valid postal service, whichever legal framework applied. For the avoidance of doubt, Mr Jones argued that a particular legal framework applied. Although his argument seemed to me at first blush to be persuasive I indicated that this was a matter to be considered at a later stage.

Second, the FTT's alternative finding that the curtailment notice was properly served to file [17] and [18] failed to take into account relevant matters.

(i) In an earlier 2016 FTT decision dealing with whether or not the appellant had been dishonest in sitting an English exam, the appellant was found to be entirely credible. Although the FTT's decision under appeal refers to the 2016 decision, Mr Diwnycz agreed, that a previous curtailment may well have been relevant. We still do not know or there is no evidence as to why there was a curtailment in 2012.

(ii) In a further application for leave to remain on 17 July 2013 the respondent granted that application and the appellant was given leave from 15 August 2013 until 16 May 2015. That prima facie indicates that at the time the respondent did

not regard the appellant to be an overstayer, otherwise he would not have been able to meet the requirements of the Rules.

These are two matters that one would have expected the FTT to have addressed before accepting the curtailment in 2012. Having failed to address those two matters, the FTT committed an error of law.

Third, the FTT's further alternative finding that the appellant was subsequently served with a notice of curtailment failed to deal with evidence that was adduced before it. That evidence included a witness statement from the appellant dated 28 May 2019, in which he clearly and categorically stated that he was never served with any 2012 curtailment notice. He was served with one later but he applied to vary his leave and then appealed against that. The FTT has not clearly engaged with that evidence. That is particularly troubling because in the 2016 FTT decision that I have referred to this was said about the appellant:

"We have had the benefit of seeing and assessing him and found him to be a credible witness."

It follows that in those three respects the FtT erred in law and Mr Diwnycz was entirely correct and pragmatic to accept as such.

As to disposal, both parties agreed that this is a decision that can be remade by way of submissions only, indeed that is what happened in the FtT, and for that reason I agree it should be remade in the Upper Tribunal ('UT'). Both parties also agreed with the following directions:

The appellant shall file and serve a skeleton argument within 14 days of today's hearing.

The respondent shall respond to that skeleton argument 14 days thereafter in the form of a position statement which sets out the respondent's clear position with reasons.

The matter will then be listed before the UT on the first available date after 2 December 2020.

I finally observe that there seems to me to be a reasonable prospect for settlement in this case. As I observed at the hearing, the resources that we utilise to have hearings during the pandemic need to be as focussed as possible. I appreciate that both parties have resource implications and concerns of their own but this is a case where early consideration of the issues by the parties may, and I put it no higher than that, have the result that a hearing is unnecessary and that hearing slot could be used by other parties.

I am therefore pleased that Mr Diwnycz has indicated that he is going to retain ownership of this case as far as he is able to do so and that if there can be settlement that will take place at an early stage.

Notice of decision

The FTT decision contains an error of law and is set aside. The decision will be re-made in the UT.

Signed: *Ms Melanie Plimmer* Dated: 18 November 2020
Upper Tribunal Judge Plimmer