IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002516
First-tier Tribunal No: HU/51668/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 September 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL
UPPER TRIBUNAL JUDGE PINDER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD ALI AHMAD
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr M West, Counsel instructed by B Chowdhury Solicitors

Heard at Field House on 19 September 2024

DECISION AND REASONS

Introduction

1. The Secretary of State appeals with permission to the Upper Tribunal a determination of First-tier Tribunal Judge Symes ('the Judge'), promulgated on 30th May 2023. The Judge allowed Mr Ahmad's appeal against the Secretary of State's decision dated 24th March 2021 to refuse to his private life human rights application.

2. We refer to the Secretary of State as the Respondent and to Mr Ahmad as the Appellant, as they respectively appeared before the First-tier Tribunal.

3. The full history was set out by the First-tier Tribunal and need not be rehearsed in our decision. The following suffices for the purposes of this appeal.

4. The Appellant is a national of Bangladesh, who entered the UK as a student on 27th January 2011 with valid leave until 13th June 2012. The Appellant then applied in-time for an extension of leave to remain but this application was refused by the Respondent. The Appellant's appeal against that decision was allowed by Judge Wallace on 1st March 2013, on the basis that the Respondent had failed to follow her own policy and had consequently failed to make a lawful decision.

5. Thereafter, the Appellant was never served by the Respondent with a copy of the Notice of Decision that should have ensued following the Appellant's appeal being allowed in March 2013 and the First-tier Tribunal having found that the Respondent's decision was not in accordance with the law. The Appellant's attempts to clarify his status with the Respondent over a number of years were duly summarised by the Judge at [3] of the determination. As he recorded, those attempts were ultimately unsuccessful since the Respondent refused the Appellant's human rights application, in part because she disputed the Appellant's claim not to have been served with a decision following his appeal in 2013. The Respondent otherwise considered that there were no very significant obstacles to the Appellant's re-integration in Bangladesh.

The Judge's decision and findings – a summary

6. The Respondent was not represented at the appeal hearing in the First-tier Tribunal ('FTT') and the appeal was heard in the Respondent's absence. The Judge considered at [12] the Respondent's evidence in support of his position on the issue of service in 2013. The Judge recorded that the Respondent had disclosed having held on file a letter dated 8th April 2013, indicating that the successful appeal in 2013 would be implemented but the Judge found that this letter did not give notice of the terms of the leave due to be granted to the Appellant. The judge then concluded that there was no evidence that a valid Notice of Decision was ever served on the Appellant, recording in addition that the Respondent's evidence also acknowledged doubts as to effective service. The Respondent's evidence included references to the Appellant's then-legal representatives being under investigation in 2013, ultimately becoming the subject of regulatory intervention.

7. The Judge accepted at [13] that, on the balance of probabilities and on the evidence before him, the Appellant had never been served with a Notice of Decision and accordingly, the Appellant's application for leave to remain submitted in June 2012, had remained underdetermined. On the basis of those findings of fact, the Judge found that the Appellant had had his leave to remain consistently extended by the operation of s.3C Immigration Act 1971 ('the 1971 Act'). The Judge carried this forward into his assessment of the balancing exercise under Article 8 ECHR and found in the Appellant's favour: the Respondent's decision was a disproportionate interference with the Appellant's private life.

The Respondent's appeal

8. In his permission to appeal application, the Respondent argued that the Judge had made a material error of law when finding that the Appellant's leave had been extended by virtue of s.3C of the 1971 Act. The Respondent relied upon and cited from the Respondent's guidance '*Leave extended by section 3C (and leave extended by section 3D in transitional cases)'* (version 11), specifically the section entitled '*Appeal finally determined'*. In summary, this section addresses the operation of s.3C while an appeal is pending and while a party to that appeal is permitted to bring an on-ward application for permission to appeal against the decision disposing of the appeal.

9. Applying the guidance, the Respondent argued that the Appellant's leave, extended by s.3C, had in fact come to an end 14 days after the date of the Judge's determination was promulgated on 1st March 2013. The Respondent did however accept that the Appellant did not receive his Biometric Residence Permit ('BRP') (in 2013 or subsequently) as found by the Judge at [13]. The Respondent described this as *"an unfortunate administrative error"*.

10. The Respondent submitted that the Appellant's residence was therefore considered to have been broken thereafter with him having failed to make any subsequent applications until February 2020. It was argued in the grounds of appeal that the Appellant's lawful residence would have ended when the period of leave, that he applied for, ended on 13th May 2014. Lastly, the Respondent argued that the Judge had also failed to consider whether the Appellant met the Immigration Rules by meeting the test of very significant obstacles to his re-integration in Bangladesh.

11. Permission to appeal was granted by Upper Tribunal Judge Kebede on 2nd November 2023 on the basis that it was arguable that the Judge had erred by finding that the fact that the Appellant was not served with a grant of leave after his allowed appeal in 2013 had the effect of extending his leave pursuant to s.3C of the 1971 Act.

12. The matter now comes before us to determine whether the First-tier Tribunal Judge erred in law, and if so whether any such error was material and whether the decision of the First-tier Tribunal should be set aside.

13. We note briefly at this juncture that the Respondent's appeal was previously adjourned following a hearing on 5th August 2024. At that hearing, a query had been raised by Deputy Upper Tribunal Judge Welsh as to whether Art 8ZA of The Immigration (Leave to Enter and Remain) Order 2000 had any application to this matter. Directions were issued at that hearing providing for the Respondent to file and serve a note addressing this statutory instrument and if relevant, its application to this matter, and for the Appellant to respond thereafter. The Respondent did not file and serve any such note and Mr Walker confirmed at the hearing before this panel that the Respondent was not seeking to rely on Art 8ZA in any event. In the circumstances, we did not hear any oral submissions from either party on Art 8ZA.

The parties' respective submissions and our conclusions

14. Mr Walker confirmed that the Respondent was not seeking to challenge the finding of fact that the Appellant had not been served with any notice informing of the conditions of any leave to remain granted to him following his allowed appeal in 2013. Mr Walker helpfully took us through the sub-sections of s.3C and argued that s.3C(2)(c) had clearly stopped to apply once Judge Wallace's determination was promulgated on 1st March 2013 and the 14-day period to lodge any on-ward permission to appeal applications with the FTT had expired. He submitted that the appeal was no longer 'pending' at that point.

15. In response, Mr West relied upon the Rule 24 Reply, which he had settled on 4th August 2024. He maintained that the findings at [13], albeit brief, were ones that were open to the Judge. Mr West also submitted that the Respondent's position as pleaded in the grounds of appeal - that the Appellant would have known that his leave had expired on 13th May 2014 (because this was the leave that he had applied for) - could not be right. The Appellant had never been served with a decision informing him that his leave expired on 13th May 2014 and this, he submitted, had effectively been accepted by the Respondent.

16. Mr West continued to place reliance on a different section of the (updated) s3C guidance of the Respondent (version 12), helpfully extracted at [17] of his Rule 24 Reply. However, it was not immediately clear to us how it could be said that s.3C(5) had any application to the Appellant's circumstances, notwithstanding the

guidance given by the Respondent in the section *'Position following an allowed appeal'*.

17. It is worth re-producing s.3C of the 1971 Act, as in force between 31 August 2006 and 19 October 2014, in full:

> 3C Continuation of leave pending variation decision
> (1) This section applies if—
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
> (b) the application for variation is made before the leave expires, and
> (c) the leave expires without the application for variation having been decided.
>
> (2) The leave is extended by virtue of this section during any period when—
> (a) the application for variation is neither decided nor withdrawn,
> (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought [, while the appellant is in the United Kingdom]2 against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or
> (c) an appeal under that section against that decision [, brought while the appellant is in the United Kingdom,]3 is pending (within the meaning of section 104 of that Act).
>
> (3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.
>
> (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
>
> (5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).
>
> (6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section; and the regulations–
> (a) may make provision by reference to receipt of a notice,
> (b) may provide for a notice to be treated as having been received in specified circumstances,
> (c) may make different provision for different purposes or circumstances,
> (d) shall be made by statutory instrument, and
> (e) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

18. Judge Wallace's decision in the Appellant's earlier appeal was promulgated in 2013. This was prior to the coming into force of the Immigration Act 2014, which limited the types of decision

carrying a statutory right of appeal to the FTT as well as the grounds of appeal upon which such an appeal could be brought.

19. Judge Wallace's decision was before Judge Symes and confirmed at [12] of that decision that the Appellant's appeal was allowed because the Respondent may have overlooked a document, which the Appellant maintains was included at the time of his application. The Appellant's student application had fallen to be considered against mandatory criteria contained in the then-Points-Based-System and Judge Wallace had found that the Respondent had not afforded the Appellant opportunity to provide the missing specified evidence, pursuant to the Respondent's evidential flexibility policy, as practiced at the time. Judge Wallace made express reference to the authority of *Rodriguez* [2013] UKUT 00042 (IAC) 11.

20. From Judge Wallace's decision, we are satisfied therefore that the Appellant's appeal in 2013 was allowed on the basis that the Respondent's decision was not in accordance with the law, a ground of appeal available to the Appellant at the time. This had the effect of setting aside the Respondent's decision on the Appellant's application lodged with the Respondent in June 2013. A new decision therefore needed to be taken on the Appellant's application and since there was no evidence of the Respondent having done so in the appeal before Judge Symes, the Judge was entirely correct to find that the Appellant's application remained undetermined thereafter [13]. In turn, the Judge correctly applied s.3C to find that the Appellant's leave was automatically extended by virtue of that provision. Whilst Judge Symes did not expressly identify what sub-section of s.3C applied, the Appellant's status reverted to being extended, as a matter of law, under s.3C(2)(a).

21. Furthermore, where the Respondent has accepted never to have served the Appellant with a valid Notice of Decision after Judge Wallace's determination was promulgated, we do not understand the Respondent's submission that the Appellant should have understood his leave as having been valid until 13th May 2024. The Respondent states that this is because it is the period for which he applied. This appears to be wholly devoid of any consideration of the Respondent's obligations as far as notices are concerned and Mr West is correct in his reliance on *Mehmood & Anor, R (on the application of) v Secretary of State for the Home Department* [2015] EWCA Civ 744 at [42], looking at the duties that arise by virtue of s.4 of the 1971 Act:

> (…) What is legally relevant is the date and time of the service of notice in writing to the person affected. Until then there is legally no decision.

22. In fairness to Mr Walker, he accepted in his reply that the Respondent's appeal could not succeed for the reasons we have

set out above. He accepted that the Appellant's leave had been extended whilst the appeal before Judge Wallace was pending and that it was pending thereafter under s3C(2)(a). He conceded, in the circumstances, that Judge Symes had been correct in his analysis and that his decision to allow the appeal should stand. We record our clear view that those concessions were properly made.

23. For all of the reasons above, we find that the Judge's analysis of the relevant statutory provisions was correct and there was no challenge before us to the Judge's evidential assessment.

24. In the circumstances, we dismiss the Respondent's appeal and order that the decision of the Judge shall stand.

Decision

25. The Respondent Secretary of State's appeal is dismissed. The Judge's decision to allow the Appellant Mr Ahmad's appeal stands.

Sarah Pinder

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26th September 2024