Upper Tribunal
(Immigration and Asylum Chamber)

Ali (permission decisions: errors; slip rule) [2020] UKUT 249 (IAC)

THE IMMIGRATION ACTS

Heard at Field House by *Skype for Business*	**Decision & Reasons Promulgated**
On 17 June 2020	
	…………………………………

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE BLUNDELL

Between

BASHARAT ALI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Maqsood, Counsel instructed by Archbold Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

(1) Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 may each be employed in order to correct an error in a decision granting or refusing permission to appeal to the Upper Tribunal. In cases of obvious error, the Upper Tribunal Immigration and Asylum Chamber can, in general, be expected in future to proceed as follows.

© CROWN COPYRIGHT 2020

(2) Where the First-tier Tribunal permission judge has granted permission when the reasons make it evident they meant to refuse, an Upper Tribunal Judge, acting as a Judge of the First-tier Tribunal, will make the necessary correction under rule 31 of the FtTIAC Rules, as soon as the matter is identified, whether that is at case management stage, as a result of communication from a party, or otherwise. Although the matter can and should (as in the present case) be raised in a rule 24 response from the respondent, it is preferable for it to be addressed earlier, since a hearing may already have been arranged before that response is received.

(3) Where the First-tier Tribunal permission judge refuses permission, but clearly meant to grant it, any renewal of permission before the Upper Tribunal should point out the error and ask for it to be corrected under rule 31. In any event, a party should inform the Upper Tribunal of the mistake.

(4) In the Upper Tribunal, where a judge grants permission when they clearly meant to refuse, the error is unlikely to be identified at a case management stage, if and insofar as that stage is undertaken by the same judge, immediately after their mistaken grant. This highlights the point, emphasised in Isufaj (PTA decisions/reasons: EEA reg. 37 appeal) [2019] UKUT 283 (IAC), that it is the responsibility of the permission judge, whether in the First-tier Tribunal or the Upper Tribunal, to make sure there is no contradiction between their decision and the reasons for it. Otherwise, the points made above in respect of the rule 24 response apply also in this situation.

(5) Where an Upper Tribunal Judge refuses permission to appeal, when they clearly meant to grant it, the decision is an "excluded decision": section 13(8)(c) of the 2007 Act and cannot be appealed to the appropriate appellate court. A party should, therefore, apply for the Upper Tribunal to exercise its power of correction under rule 42.

(6) The process just described applies only to those cases in which there is a clear and obvious contradiction between the intention of the judge who decided the application for permission and the order made on that application. In any other case, parties should proceed on the basis that the decision is that recorded in the relevant document and the Tribunal is likely to regard it as productive of delay and a waste of its resources to engage in an inter partes process in order to determine whether the slip rule should be applied.

DECISION AND REASONS

1. Both members have substantially contributed to this decision.

A. The appellant

2. The appellant, a citizen of Pakistan, came to the United Kingdom as a student in 2011 with leave to remain in that capacity until 20 November 2012. A subsequent application for extension was granted until 6 April 2014.

3. On 28 March 2014, the appellant sought further leave to remain as a Tier 4 (General) Student Migrant. He sought leave to remain so that he could pursue a course of

studies at Stanfords College, which was at that time based on 1393A London Road, Norbury. The appellant gave the college's address as his correspondence address in his application for further leave. The appellant continued studying at the college whilst his application was pending.

4. In August 2014, the appellant discovered that Stanfords College had lost its sponsor licence. Anticipating that the respondent would in due course make contact about this, the appellant wrote to her offices in Sheffield on 8 September 2014, notifying her that she should not write to him at the college's address, but at his home address.

5. The respondent wrote to the appellant as he had expected. On 6 February 2015, she wrote to state that Stanfords College's sponsor licence had been revoked and that he had sixty days within which to secure an alternative Tier 4 sponsor. Unfortunately, that letter was sent to 1393A London Road, and not to the appellant's residential address in East London. The appellant did not receive the letter and took no action. On 27 April 2015, therefore, the respondent refused the application, holding that the sponsor identified by the applicant had lost its licence and that he did not hold a valid Confirmation of Acceptance for Studies ("CAS"). That refusal letter, a copy of which is before us, was also sent to Stanfords College.

6. On 13 May 2015, the appellant issued judicial review proceedings in the Upper Tribunal seeking, as we understand it, a decision on his March 2014 application. It was as a result of those proceedings that the appellant came to know that letters had been sent to his college rather than his home address. The appellant duly appealed against the decision of 27 April 2015 and the judicial review claim was settled by consent on 8 July 2015.

7. The appellant's appeal to the First-tier Tribunal was heard on 10 November 2015. The only submission made was that the respondent had acted unlawfully in sending the 'sixty day letter' and the subsequent refusal letter to Stanfords College, given that he had written to the respondent to notify her of the change in his correspondence address. Unfortunately, the judge in the First-tier Tribunal overlooked the letter and the proof that it had been posted to the respondent's address in Sheffield by recorded delivery. She held, therefore, that it was the appellant who had been at fault in failing to notify the Home Office of his change of address.

8. The appellant appealed to the Upper Tribunal, relying on the failure of the judge in the FtT to consider his correspondence with the respondent in September 2014. On 14 June 2016, it was held by Deputy Upper Tribunal Judge Monson that the First-tier Tribunal had erred in overlooking that evidence; that the appellant had corresponded with the Home Office as claimed; and that the only fair course, in the circumstances, was for the appellant to be issued with a further 'sixty day letter' to enable him to find another sponsor. The respondent wrote to the appellant very shortly thereafter to acknowledge the decision that had been made in the appeal and to state that it would be implemented by a department in Sheffield.

9. For reasons which are unclear, however, nearly two years passed without any further action on the part of the respondent. On 15 May 2018, she finally sent a 'sixty day letter', informing the appellant that consideration of his application would be suspended for that length of time so that he had an opportunity to obtain a new sponsor. He was told that he would have to secure a new sponsor and make an application for leave to remain by 13 July 2018; that no further extensions would be permitted; and that a decision would be reached after sixty days had passed.

10. On 8 June 2018, the appellant's solicitors wrote to the respondent. They confirmed receipt of the letter of 15 May 2018. They set out the history of the case, including the error which had caused Judge Monson to decide as he did, and the lengthy delay following his decision. It was submitted that the appellant should receive a period of discretionary leave so as to give him a proper opportunity to regularise his status, for the following reasons:

> "It would be extremely unfair and harsh to hold the CAS for a period of 2 years without providing any cogent reasons to this effect. This has unreasonably caused our client into a stage of panic and anxiety. He is no longer able to obtain admission in any college with the 60 days letter due to the huge gap. To correct the matter it would be only fair that our client is granted with discretionary leave at least and to provide him with sufficient opportunity in order for him to carry on with his studies in the future."

11. On 20 June 2018, the respondent replied. She acknowledged receipt of the letter from the appellant's solicitors before stating that the appellant's sixty day letter had been sent to his previous address and signed for on 18 May 2018. She enclosed 'a new 60 days letter', in similar terms to the first, and stated that no further extension would be given. The respondent also sent additional documents to the appellant on that date.

12. The first of those additional documents was a letter informing the appellant that he would be required to submit a new English language test certificate in support of any future application because he had previously submitted a TOEIC certificate which had been cancelled by Educational Testing Services ("ETS") due to 'test result irregularities revealed by ETS analysis'. This letter provided additional information about how and where the appellant might take a new English test. Amongst other things, it informed the appellant that "You can use the endorsed copy of your passport enclosed with this letter to prove your identity when taking the test."

13. The second additional document was a letter which bore the heading 'Information Leaflet'. Although it was addressed to the appellant, its contents show that it was intended to provide information to a potential sponsor about the appellant's situation. In particular, it explained that consideration of an extant application was suspended so that the appellant could approach new sponsors. Amongst other things, it stated:

> “We have retained the originals of their passport and BRP while their application remains outstanding. **If you decide to sponsor this student, then you will need to issue him with a new CAS.**” [emphasis in original]

14. The third additional document was another letter to the appellant about sitting another English test. For reasons which will become apparent, we need to set that letter out in full (we have added paragraph numbers for ease of subsequent reference):

> (1) “In order to process any application you submit you may be required to sit an English Language Test in order for you to meet the Immigration Rules. Attached is a letter along with a certified copy of your passport which will enable you to do this. You will need to provide both [sic] these to the Secure English Language Test (SELT) provider. Please be aware that you will need to make it clear to the SELT provider that you have both of the attached documents from the Home Office ie certified copy of passport and letter regarding re-test otherwise any general enquiry will result in a standard reply from the SELT provider informing you that only original and valid documents can be accepted.
>
> (2) Please note the test centre you choose must match specifically to one on the list at [URL given].
>
> (3) You will need to present the enclosed letter and certified copy of your passport to the SELT provider in order for you to sit the test. You have been given 60 days in which to regularise your stay, please note no further time will be allowed.
>
> (4) If you encounter any difficulties in arranging a test, please book your test online and then notify the Home Office via email to [email address given] within 14 days of the date of this letter stating the time, date and test centre. Please note the test centre you choose must match specifically to one on the list. A list of approved test centres can be found on the following link: [URL given].
>
> (5) We will then assess whether it is appropriate to send a scanned copy of your passport to the test centre to confirm that the passport has been checked and there are no concerns about it being genuine. In the subject box of your email can you ensure you enter the following: ETS -TEST BOOKED -NAME-DOB-NATIONALITY, this process has been agreed with the test centres.”

15. The appellant attempted to contact various SELT providers with a view to arranging an English test. The emails before us from those providers show that he received the ‘standard response’, which the respondent made reference to in (1) of her letter. On 16 July 2018, for example, Reading University responded to the appellant’s email of 13 July stating ‘we are only able to accept original ID documents’.

16. The appellant also attempted to engage with various Tier 4 sponsors in order to secure a place on a course of study. He sent various documents to these potential sponsors, including copies of the correspondence from the Home Office and his diploma in Business Management and Leadership from Stanfords College. The University of Roehampton declined to consider an application from the appellant

"due to your immigration history". The University of Southampton invited the appellant to make an application via the Universities and Colleges Admissions Service ("UCAS") and noted that he would be required to "study at level 7 or above to continue staying within the UK." St Mary's University stated that there was nothing they could offer the appellant 'as you have already studied up to Level 7'. The University of Birmingham declined to make an offer because it was unable to locate a recognised institution by the name of Stanfords College UK. Newman University in Birmingham stated that they were unable to accept international students unless they already had the right to live and study in the UK for the full duration of the course applied for, plus a further year. The University of Greenwich stated that their Compliance Department had advised them not to consider an application from the appellant. Aston University replied that all applications were via UCAS and that the 2018 deadline had already passed. The University of Salford's Senior International Officer replied:

> "Thanks for sending these documents. I'm not sure we can help to be honest, you already have a postgraduate diploma so it's going to be very difficult to start an undergraduate degree…"

17. In the wake of these difficulties, on 17 August 2018, the appellant applied to vary his leave, based on asserted private and family life rights in the United Kingdom. The application constituted a human rights claim.

18. Following further correspondence between the appellant's solicitors and the respondent, on 10 April 2019 the appellant's human rights claim was refused. In the refusal, the respondent said that the appellant had used deception in his ETS English language test in 2012. As such, he could not meet the suitability requirements for leave under the immigration rules. In terms of his private life, the appellant was said not to meet the eligibility requirement in the rules because had lived in the United Kingdom for seven years at the date of the application and could not show he would face very significant obstacles to integration, if he were to return to Pakistan. There were said to be no exceptional circumstances, giving rise to a right to remain, outside the rules, by reference to the ECHR.

B. The decision of the First-tier Tribunal

19. The appellant's appeal against the refusal of his human rights claim was heard at Taylor House on 2 October 2019 by a First-tier Tribunal Judge. In a decision promulgated on 9 October 2019, the judge dismissed the appellant's appeal.

20. At paragraph 7 of the decision, the judge stated that it was "important to note that at the hearing the allegation that [the appellant] had used a proxy test taker was withdrawn". The judge noted that this meant that the appeal was resisted by the respondent on the basis that the appellant did not meet the requirements of the Immigration Rules and that there were no exceptional or compelling circumstances (which rendered his removal disproportionate under Article 8 ECHR).

21. At paragraph 8, the judge recorded the fact that the appellant sought to rely on the ground that he had formed a relationship with a person settled in the United Kingdom and that his removal would, in that regard, constitute a disproportionate interference with Article 8 family life. The Presenting Officer, however, did not give the First-tier Tribunal Judge consent to consider this "new matter" within the meaning of section 85(6) of the 2002 Act. Accordingly, the judge said that it had not been further considered.

22. The judge's consideration of the evidence and findings of fact began at paragraph 29 of the decision. The judge noted that the appellant worked in Pakistan as a graduate and had spent the majority of this life there. He spoke the local language. Although he said that he was on an antidepressant, the judge concluded that there was no evidence that the appellant's mood was so low that he could not re-establish himself in Pakistan with the support of his family. Overall, the judge concluded that there were no significant obstacles to integration on return to Pakistan.

23. At paragraph 33, the judge then turned to whether, in the light of the fact that the appellant could not meet the requirements of the rules, his removal would nevertheless constitute a disproportionate interference with his human rights. The judge examined section 117B of the 2002 Act, finding that the appellant spoke English and was financially independent. The judge considered these to be "neutral factors in balance" (paragraph 36).

24. The judge then examined section 117B(5), which provides that little weight should be given to a private life established by a person at the time that person's immigration status is precarious. The judge noted that anything short of indefinite leave to remain was "precarious" for this purpose. The appellant's private life had, as a result, been accrued when his leave had been precarious and so the judge attached little weight to it, albeit that some weight was given to the relationship he had with his partner and his friends. Those relationships would, in any event, the judge found, have been disrupted at the end of any period of the appellant's leave.

25. At several places in her decision, the judge expressed disappointment that the Home Office had not acted more quickly, following the Upper Tribunal's decision in 2016 in favour of the appellant. The judge nevertheless found the appellant could not in any event have had an expectation of being able to stay beyond his visa. The delay simply meant, according to the judge, that the appellant had remained in the United Kingdom for longer than he otherwise would have done. The appellant could, according to the judge, make a fresh application for leave on the basis of the asserted relationship with his partner.

26. At paragraph 39, the judge balanced all the relevant factors. On the appellant's side was the fact that he did not wish to return to Pakistan and blamed the respondent for his situation. In that regard, the judge concluded that the appellant "has a point". However, the judge reiterated that even if the appellant had been given leave "two

years ago", that would have been for a limited period and he would have been expected to leave the United Kingdom at the end of it. The fact that the appellant could not meet the requirements of the rules weighed on the respondent's side of the balance. Although the respondent "has behaved badly there is nothing so unfair in the conduct of the Home Office to render the decision disproportionate in all the circumstances". For these reasons, the judge dismissed the appeal.

C. The application for permission to appeal

27. The appellant's solicitors filed on his behalf an application to the First-tier Tribunal for permission to appeal. The grounds read as follows:-

"1. The impugned decision is falwed [sic] as even it does carry sympathy for the appellant but it fails to meet the requirements laid in a leading maxim; "justice should not only be done but it seems to be done as well." The appellant has clearly been held up by the Respondent for three years without any reasons. His passport was reatined [sic]. He was unable to renew his studies despite having a court decision in his favour, he has provided a number of documents to prove his genuine intent and calibre to puruse [sic] for his studies, however the honourable Judge could not respond to it adequately apart from showing some sympathy. The honourable Judge has completely failed to deliver a just and fair decision on this account.

2. The impugned decision is liable to be set aside as the honourable Judge has failed to take appropriate account of private and family life of the appellant and his girlfriend. The issue of proportionality could not be dealt unless the honourable Judge has taken the facts correctly.

3. The honourable Judge has completely failed to understand the reason as to why the couple has not been living together? The appellant and his partner clearly explained that, the appellant's girlfriend had to carry on working because the appellant does not have any right of work. She was working as a carer and the appellant would not have been allowed to stay there, that's why they have been living separately. The honourable Judge has not considered the actual circumstances of the appellant in entirety.

4. The honourable judge was incorrect, not to take the proportionality test (RAZGAR).

5. The test of 117B has not even been applied correctly.

6. Para 39 of the impugned decision is also flawed as if the appellant would have leave two years ago, he might have established his further leave to remain as he has showed his legitimate expectations (sic) while awaiting for an outcome of his case since 2014 till present."

28. The application for permission also dealt with why it was made outside the fourteen day time limit set by the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. In short, it was submitted that the decision of the First-tier Tribunal Judge had been sent to the appellant's representatives by email, but not received by them. Once this was discovered, the representatives had immediately approached the First-tier Tribunal and filed the application promptly.

D. The decision on the application for permission to appeal

29. The application for permission went before a Judge of the First-tier Tribunal. Her decision and reasons were as follows:-

"

In the First-tier Tribunal
(Immigration and Asylum Chamber)
Appeal No: HU/09140/2019
Decision by: Upper Tribunal Judge Martin

In the matter of an application for permission to appeal
First-tier Tribunal hearing at Taylor House
Before Judge Gribble

Appellant's name: Basharat Ali

Application by Appellant

Permission to Appeal is Granted

REASONS FOR DECISION (including any decision on extending time)

1. The application is out of time by 15 days. That is a very significant breach of the Procedure Rules. However, the representatives explain that the Decision and Reasons was served only on them and not on the appellant and that by email which they were not expecting and did not see. When they enquired of the Tribunal it was re-sent and they acted promptly thereafter in lodging the application. Under the circumstances I extend time and admit the application.

2. The grounds are however without merit. The appeal was advanced on private life grounds only and on the evidence could not have succeeded. The grounds argue that the judge erred regarding the appellant's relationship with his girlfriend but are misconceived as that was a new matter that the Secretary of State did not consent to being advanced and no evidence in that regard was adduced and no submissions made. The appellant was represented by Counsel at the hearing. The evidence and submissions were solely on the basis of the appellant's private life, which the Judge gave reasons for rejecting.

Signed

[Signature]
Judge of the First-tier Tribunal Date: 10 March 2020"

30. On 22 April 2020, the respondent filed a response under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In this, the respondent stated that there appeared to have been an "administrative error" in the permission: "The notice states that permission has been granted but clearly the intention of the judge [considering] the application was to refuse it on the basis that they considered it had no merit … The Secretary of State will concur with the views of the permission judge. The grounds are essentially a disagreement with the findings of the First-tier".

31. On 14 May 2020, the Upper Tribunal gave directions for the hearing of the appeal by remote means "with a view to giving guidance on what should be done, by whom and when, in a matter of this kind. The attention of the parties is drawn to SSHD v Devani [2020] EWCA Civ 612, regarding the scope of the so-called slip rule".

32. Although the directions indicated that the Tribunal was not then currently minded to use the remote hearing to decide whether there was an error of law in the decision of the First-tier Tribunal, in the event we did hear submissions from Mr Maqsood and Ms Isherwood on that matter. Before we consider those submissions, it is necessary to consider the general issue of what should follow where, as here, a permission judge's decision is at complete variance with the reasons given for that decision. Mr Maqsood filed a very detailed skeleton argument, directly addressing the issue. We wish to express our thanks to Mr Maqsood for producing this and for his equally helpful oral submissions.

E. Correcting errors in permission decisions

33. Section 22 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") provides that Tribunal Procedure Rules, governing the practice and procedure to be followed in the First-tier Tribunal and the Upper Tribunal, are to be made by the Tribunal Procedure Committee. Schedule 5 makes further provision about the content of such rules. Paragraph 15(1) of that Schedule enables rules to make provision for the correction of accidental errors in a decision or record of a decision.

34. Pursuant to that power, the following rules have been made:-

> **Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the FtTIAC Rules")**
>
> "31. The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by -
>
> (a) providing notification of the amended decision or direction, or a copy of the amended document, to all parties; and
>
> (b) making any necessary amendment to any information published in relation to the decision, direction or document."
>
> **Tribunal Procedure (Upper Tribunal) procedure Rules 2008 ("the UT Rules")**
>
> "42. The Upper Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision or record of a decision by—
>
> (a) sending notification of the amended decision, or a copy of the amended record, to all parties; and
>
> (b) making any necessary amendment to any information published in relation to the decision or record."

35. In Isufaj (PTA decisions/reasons: EEA reg. 37 appeal) [2019] UKUT 283, the Upper Tribunal held that judges deciding applications for permission to appeal should ensure that, as a general matter, there is no apparent contradiction between the

decision on the application and what is said in the "Reasons for Decision" section of the document that records both the decision and the reasons for it.

36. As was said in Safi and others (permission to appeal decisions) [2018] UKUT 388, a decision on a permission application must be capable of being understood by the Tribunal's administrative staff, the parties and the court or tribunal to which the appeal lies. In the event of an apparent contradiction or other uncertainty, the parties can expect the Upper Tribunal to treat the decision as the crucial element.

37. At the time Safi and others was decided, the view was taken that the decision, as opposed to the reasons for it, could not be changed under rule 31 of the FtTIAC Rules (or, for that matter, rule 42 of the UT Rules): Katsonga ("Slip Rule"; FtT's general powers: Zimbabwe) [2016] UKUT 228 (IAC). However, in the light of the judgment of the Court of Appeal in AS (Afghanistan) v Secretary of State for the Home Department [2019] EWCA Civ 208, the Upper Tribunal held that Katsonga was wrongly decided. Where it was manifest that the decision was at complete variance with the reasons for it, rule 31/42 could and should be employed by amending the decision to record what was plainly the intention of the judicial decision-maker: MH (review; slip rule; church witnesses) Iran [2020] UKUT 125.

38. Shortly after promulgation of MH (Iran) the Court of Appeal categorically reached the same conclusion in Devani:-

> "23. In my view *Katsonga* was wrongly decided, and the passage which I have quoted from the UT's reasons and, still more, the terms of the headnote are liable to mislead. The essential distinction to bear in mind in considering the application of the slip rule, in any of its legislative formulations, is between the case where the order in question does not express what the Court actually intended at the moment of promulgation and the case where it does express what the Court intended at the time but it subsequently appreciates that it should have intended something different: see, most recently, para. 18 of my judgment in *AS (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 208, [2019] 1 WLR 3065 (p. 3071C). As I say there, how the distinction applies in a particular case may not always be straightforward, but the concept is clear. The proposition which the UT drew from the case to which it referred and from the White Book commentary, namely that the slip rule "cannot be used to change the substance of a judgment or order", is perfectly apt as a reference to the second of the two classes of case that I have mentioned; but it appears from the UT's actual decision that it understood it to mean that the slip rule could not be used in a case where the correction would produce a decision with the opposite effect to that promulgated. With all respect, that is simply wrong. In the case of a simple failure of expression – most obviously a straightforward slip of the pen – the error can and should be corrected even if it alters the outcome (as initially expressed) by 180°.
>
> 24. As it happens, we were referred to *Katsonga* in *AS (Afghanistan)*, and I approved the UT's observations in the last two sentences of para. 8: see para. 45 (p. 3078). But I added a footnote in the following terms:

> "My citation of *Katsonga* should not be taken as implying approval of the proposition in the judicially-drafted headnote that 'the "Slip Rule"… cannot be used to reverse the effect of a decision', which if taken out of context may be misleading. If, say, a 'not' were accidentally omitted from a declaration or injunction its correction might well reverse what would otherwise be the effect of the decision, but it is hard to see why it should for that reason be illegitimate: indeed it might be thought to be the paradigm of the kind of case for which the slip rule was required.
>
> That remains my view". (Underhill LJ)

39. Although MH (Iran) and Devani were concerned with substantive decisions, we consider their reasoning is equally relevant to decisions to grant or refuse permission to appeal to the Upper Tribunal. Where, as in the present case, the actual decision is that permission is granted, but it is manifest from her reasons that the permission judge intended the opposite, at first sight it would therefore seem that rule 31 should be available to correct that error. By the same token, rule 31 should also be available where the decision is expressed as being to refuse, when the reasons explain why permission has been granted.

40. Mr Maqsood, however, raises the following issue. Rule 34(4)(a) of the FtTIAC Rules requires the Tribunal to send with the record of its decision a statement of its reasons, only where the Tribunal refuses permission to appeal. The invariable practice of the First-tier Tribunal (and the Upper Tribunal) when granting permission to appeal is, however, to give the reasons for that decision. We are satisfied that the absence of an express legislative requirement does not mean the reasons should not be scrutinised, in order to determine whether the judge intended to make the decision he or she has expressed.

41. Mr Maqsood also draws attention to rule 23 (notice of appeal) of the UT Rules. Rule 23(1A) provides as follows:-

> "(1A) In an asylum case or an immigration case in which the First-tier Tribunal has given permission to appeal, subject to any direction of the First-tier Tribunal or the Upper Tribunal, the application for permission to appeal sent or delivered to the First-tier Tribunal stands as the notice of appeal and accordingly paragraphs (2) to (6) of this rule do not apply."

42. Rule 23(2) to (6) make provision for provision of a notice of appeal within a particular timescale and for the provision of accompanying material, as well as requirements for service on the respondent.

43. In the light of rule 23(1A), Mr Maqsood submits that the grant of permission to appeal in the present case meant the appeal "became pending when the PTA was granted by the FtT at which point the FtT became *functus officio*".

44. We have serious difficulties with this submission. If Mr Maqsood is right, then in an asylum case or an immigration case before the Upper Tribunal (that is to say, on any appeal from the First-tier Tribunal), as soon as a First-tier Tribunal permission judge

has mistakenly given a decision granting permission to appeal, that mistake cannot be corrected. Such a result would create a significant anomaly between appeals in the Immigration and Asylum Chamber of the Upper Tribunal and appeals in its other Chambers, since rule 23(1A) applies only in the UTIAC.

45. In R (Commissioner of Police of the Metropolis v Independent Police Complaints Commission) [2015] EWCA Civ 1248, the Court of Appeal approved the definition of the term "*functus officio*" adopted by the Divisional Court in that case (Burnett LJ and William Davis J); namely, "a judicial, ministerial or administrative actor has performed a function in circumstances where there is no power to revoke or modify it".

46. As we have seen, rule 31 of the FtTIAC Rules states in terms that the First-tier Tribunal "may at any time correct any … accidental slip or omission in a decision …" (our emphasis). We find there can be no doubt that those words permit the use of rule 31 in order to correct the decision in a substantive appeal and in a PTA decision mistakenly refusing permission to appeal. Particularly having regard to the anomalous situation that would otherwise arise, we are quite satisfied that the words "at any time" impact upon the way rule 23(1A) of the UT Rules falls to be interpreted and that, as a result, rule 23(1A) does not restrict the power of correction in rule 31.

47. In so finding, rule 2(3)(b) of the UT Rules is of assistance. This provides that the Upper Tribunal must seek to give effect to the overriding objective when it interprets any rule or practice direction. The overriding objective would not be furthered by a reading of rule 23(1A) that rendered all mistaken grants of permission immune from correction.

48. Finally and in any event, rule 23(1A) is expressly made subject to "any direction of the First-tier Tribunal or the Upper Tribunal". It is axiomatic that a direction of the Upper Tribunal could not be made before the First-tier Tribunal had given permission to appeal in an asylum case or an immigration case. Accordingly, in order to resolve any mischief that might otherwise arise, the Upper Tribunal can direct that the mistaken grant of permission should not stand as the notice of appeal, thereby enabling rule 33 to be employed. For the reasons we have given, we do not, however, consider this course to be necessary.

49. In view of our conclusion on the *functus officio* issue, it is unnecessary to adopt Mr Maqsood's suggestion that the Upper Tribunal should employ rule 42 of its Rules to make the necessary change to the decision of the First-tier Tribunal PTA judge. In fact, we doubt whether rule 42 could be used by the Upper Tribunal to correct any decision or record of a decision of the First-tier Tribunal. Although there is no definition of "decision" in the UT Rules, rule 1(2) states that the Rules "apply to proceedings before the Upper Tribunal" except the Lands Chamber, which has its own set of Rules. It would therefore seem that rule 42 is confined to decisions etc of the Upper Tribunal's Immigration and Asylum, Administrative Appeals and Tax and Chancery Chambers.

50. Mr Maqsood’s overall practical point is, however, a good one, in that it will usually be more convenient for the correction of a mistaken grant of permission by the First-tier Tribunal to be made by the Upper Tribunal, where the mistaken grant is before the Upper Tribunal and is being scrutinised by a judge of that Tribunal. Since Upper Tribunal judges are, *ex officio*, judges of the First-tier Tribunal, they can, where appropriate, exercise the power of correction in rule 31 of the FtTIAC Rules.

51. It is now necessary to look at the reasons why the power of correction needs to be available in the case of all permission decisions, as well as in the case of substantive decisions. So far as substantive decisions are concerned, we wish to emphasise what the same panel of the Upper Tribunal held in MH:-

> “78. Applying our analysis to a case such as the present, we come to the clear conclusion that the slip rule may be used in order to correct an accidental slip in the section of a judge's decision entitled or otherwise comprising the 'Notice of Decision', even where the correction would 'reverse' the effect of the decision. To conclude otherwise, on the basis of the current authorities, would be to deprive the slip rule of the purpose recognised in those authorities, of ensuring that the decision which is issued to the parties is truly reflective of the intention of the judge. By "a case such as the present", we mean a case in which it is absolutely clear that the judge intended either to allow or dismiss the appeal but in which the concluding words of the decision do not reflect that intention.
>
> 79. There will be applications for permission to appeal pending before the FtT in which errors of this kind have been made. A judge of the FtT who considers such an application, whether from an appellant or from the Secretary of State has three options. They may grant permission to appeal. They may review the decision under rule 35, as we have considered above. Or they may use the slip rule to correct the decision, so as to reflect the intention of the judge. Like the advocates before us, we consider the last option to be the most expeditious and the most likely to further the overriding objective. Rule 36 provides the mechanism by which an application for one of these forms of relief might properly be considered as an application for another.
>
> 80. For the future, a party to an appeal who considers there to be an error such as occurred in the present case should write to the Resident Judge of the hearing centre in question, asking for the typographical error to be corrected under rule 31 of the Procedure Rules. The error may (as permitted by [2] of the Practice Statement of the Immigration and Asylum Chambers) be corrected by the Resident Judge or by the judge who issued the decision. That is likely to be a matter for the Resident Judge, and their decision is likely to be influenced, in particular, by the availability of the judge to attend to correct the error. In the event that there is any ambiguity as to the intention of the judge, the slip rule should not be used. In that eventuality, the application to correct may be treated (under rule 36) as an application for permission to appeal, leading to review of the decision or to the grant or refusal of permission. In the event that the judge declines to treat the application in this way, the parties may, if so advised, pursue alternative avenues of redress. In the event that there is no ambiguity, the

decision may be corrected and re-issued to the parties in accordance with rule 31(a)."

52. Where permission to appeal is expressed to be granted by the First-tier Tribunal, when it is obvious that the permission judge intended to refuse permission, no legitimate purpose will usually be served by allowing the case to proceed to substantive consideration in the Upper Tribunal. In enacting section 11 of the 2007 Act, Parliament cannot be taken to have intended the Upper Tribunal to deal substantively with decisions of the First-tier Tribunal that have not been found to be arguably wrong in law or otherwise worthy of being considered by the Upper Tribunal.

53. We respectfully agree with Mr Maqsood that the error by the permission judge must be "obvious" or, as was said in paragraph 78 of MH, "absolutely clear". To adopt the process we are about to describe in cases where the matter is not obvious or absolutely clear is, as Mr Maqsood puts it, to risk making the remedy worse than the disease.

54. In this regard, Mr Maqsood drew attention to PD 40B of the Civil Procedure Rules. PD 40B 4.5 states that the court "has an inherent power to vary its own orders to make the meaning and intention of the court clear". Where an application is made for a judgment or order to be corrected, the judge may deal with that application without notice, if the slip or omission "is obvious"; or may direct notice of the application to be given to the other party or parties.

55. The position under the CPR is, accordingly, that the court can be expected to act on its own initiative or on an application by one party, without engaging with the other party or parties, where the error is obvious; but that, where it is not, such engagement will be required.

56. Although such a process could be adopted under rule 31/42 by the First-tier Tribunal/Upper Tribunal in cases where the error is not obvious, to do so risks introducing delay and the possibility of collateral challenges. Accordingly, in such cases, the overriding objective is likely to be best served by permitting the matter to proceed to substantive consideration in the Upper Tribunal, by reference to what is recorded as the judge's permission decision.

57. In cases of obvious error, such as the present grant of permission, the Upper Tribunal Immigration and Asylum Chamber can, in general, be expected in future to proceed as follows.

58. Where the First-tier Tribunal permission judge has granted permission when the reasons make it evident they meant to refuse, an Upper Tribunal Judge, acting as a Judge of the First-tier Tribunal, will make the necessary correction under rule 31 of the FtTIAC Rules, as soon as the matter is identified, whether that is at case management stage, as a result of communication from a party, or otherwise. Although the matter can and should (as in the present case) be raised in a rule 24

response from the respondent, it is preferable for it to be addressed earlier, since a hearing may already have been arranged before that response is received.

59. Where the First-tier Tribunal permission judge refuses permission, but clearly meant to grant it, any renewal of permission before the Upper Tribunal should point out the error and ask for it to be corrected under rule 31. In any event, a party should inform the Upper Tribunal of the mistake.

60. In the Upper Tribunal, where a judge grants permission when they clearly meant to refuse, the error is unlikely to be identified at a case management stage, if and insofar as that stage is undertaken by the same judge, immediately after their mistaken grant. This highlights the point, emphasised in Isufaj, that it is the responsibility of the permission judge, whether in the First-tier Tribunal or the Upper Tribunal, to make sure there is no contradiction between their decision and the reasons for it. Otherwise, the points made above in respect of the rule 24 response apply also in this situation.

61. Where an Upper Tribunal Judge refuses permission to appeal, when they clearly meant to grant it, the decision is an "excluded decision": section 13(8)(c) of the 2007 Act and cannot be appealed to the appropriate appellate court. A party should, therefore, apply for the Upper Tribunal to exercise its power of correction under rule 42.

62. We emphasise that the process just described applies only to those cases in which there is a clear and obvious contradiction between the intention of the judge who decided the application for permission and the order made on that application. In any other case, the parties should proceed on the basis that the decision is that recorded in the relevant document and the Tribunal is likely to regard it as productive of delay and a waste of its resources to engage in an *inter partes* process in order to determine whether the slip rule should be applied.

F. The present case

63. Mr Maqsood's submissions on the merits of the appellant's individual case were as concise and precise as those he made on the application of the slip rule. He made no submissions on the points made in the grounds of appeal about the appellant's relationship with his girlfriend, presumably in recognition of the fact that this was a 'new matter' which the judge had been unable to consider. He sought, however, to develop points which were made at paragraph 1 of the grounds of appeal, in relation to the respondent's conduct and the prejudice it had caused the appellant.

64. Mr Maqsood submitted that the judge had failed, despite the way in which the appellant's case had been developed before her, to consider the detriment caused by the respondent's action and inaction. Her conclusion at paragraphs 38-39 of her decision – that the appellant would merely have been granted a period of further

leave after which he would have been expected to return to Pakistan – did not represent a lawful assessment of the submissions made in relation to Article 8(2) ECHR. Mr Maqsood submitted that the judge failed to give any, or any adequate, consideration to the following four points. Firstly, that the appellant failed to secure admission to a new academic course as a result of the respondent's delay. Secondly, that the respondent had only withdrawn the allegation of ETS fraud on the day of the hearing before the FtT and this had caused the appellant difficulty in securing a new place of study. Thirdly, the appellant had been prevented from taking a new English language test, or securing a new place of study, because the respondent had failed to return his passport and had provided him, instead, with only a certified copy. Fourthly, the respondent's conduct had resulted in a detriment to the appellant because he had been unable to complete his studies in the United Kingdom. In light of these multifaceted failings on the part of the judge, Mr Maqsood submitted that the correct course was for her decision to be set aside and for the decision on the appeal to be the subject of further consideration.

65. Ms Isherwood submitted that there was no material error of law in the judge's decision. This was a case in which the appellant was required to establish that his removal would give rise to unjustifiably harsh consequences because he was unable to meet the Immigration Rules. The respondent's conduct had not been to his detriment. He had not been given 60 days to regularise his position; he had been given rather more than that as a result of the correspondence exchanged in June 2018. The judge had taken the delay into account and had reached a reasoned conclusion upon it. The assertions made by the appellant had been recorded by the judge, who had reached a lawful decision on the proportionality of his removal.

66. In response, Mr Maqsood reiterated his submission that the detriment caused to the appellant by the respondent's inaction had been overlooked by the judge.

67. We accept Mr Maqsood's submission that the judge fell into legal error in failing to give adequate consideration to the appellant's submission that he had been caused prejudice by the respondent's action and inaction since his application for further leave to remain in 2014. This was, on any view, an unusual case, characterised by a series of mistakes on the part of the respondent. The appellant's witness statement was a carefully constructed document, which was cross-referenced to various sections of the bundle. Based upon those documents, the case presented to the FtT was, in summary, that the respondent had effectively prevented the appellant from continuing with his course of studies in the United Kingdom and that it would be disproportionate to remove him as a result. We agree with Mr Maqsood that the judge failed to engage adequately or at all with the submissions made in reliance on those documents. She failed, in the circumstances, to engage with material matters or to provide adequate reasons for her decision to dismiss the appeal.

68. For the reasons which follow, however, we do not find those errors to have been material to the outcome of the appeal, and we decline to set aside the judge's decision.

69. It is to be recalled that the appellant came to the United Kingdom for a temporary purpose in June 2011. Having completed his undergraduate degree in Pakistan, he had worked in the marketing department of a bank in Pakistan for three years. He then came to the United Kingdom in 2011 for further studies. He completed a post-graduate qualification at level 7 of the National Qualifications Framework and he wished to remain in the United Kingdom for the purpose of further studies. In any such case, it is necessary to recall the limited jurisdiction of the Immigration and Asylum Chambers and the limited application of Article 8 ECHR. As Lord Carnwath JSC stated at paragraph 57 of Patel v SSHD [2013] UKSC 72; [2014] AC 651, Article 8 ECHR is 'not a general dispensing power' and the "opportunity for a promising student to complete his course of study in this country … is not in itself a right protected under Article 8."

70. In Nasim v SSHD [2014] UKUT 25 (IAC), the Upper Tribunal treated these dicta as a significant exhortation 'to re-focus attention on the nature and purpose of Article 8': paragraph 20 refers. Such cases lay, in the Tribunal's view, 'at the outer reaches of cases requiring an affirmative answer to the second of the five Razgar questions' and that, even where an affirmative answer was reached on that question, it was likely that the issue of proportionality would be resolved in favour of the respondent, given her function as the guardian of the system of immigration controls, entrusted to her by Parliament: [21]. At [41], the Tribunal said this:

> "Mr Jarvis urged us to find that the *obiter* remarks in CDS regarding Article 8 were no longer good law, in the light of Patel and Others. We find that would go too far. It is true that the Tribunal in CDS made reference to the particular passage of the judgment of Sedley LJ in Pankina regarding the need for the Home Office "to exercise some common sense", which drew comment from Lord Carnwath at [57] of Patel and Others (see above). The Tribunal did, however, expressly acknowledge that it was unlikely a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes. The chances of such a right carrying the day have, we consider, further diminished, in the light of the judgments in Patel and Others. It would, however, be wrong to say that the point has been reached where an adverse immigration decision in the case of a person who is here for study or other temporary purposes can never be found to be disproportionate. But what is clear is that, on the state of the present law, there is no justification for extending the *obiter* findings in CDS, so as to equate a person whose course of study has not yet ended with a person who, having finished their course, is precluded by the Immigration Rules from staying on to do something else."

71. On any proper view, the chances of such a right carrying the day in 2020 have diminished further still as a result of the enactment of the Immigration Act 2014 and the introduction of Part 5A into the Nationality, Immigration and Asylum Act 2002. The system of immigration controls which had previously been entrusted to the respondent by Parliament has received what Lord Bingham described at paragraph 17 of Huang v SSHD [2007] UKHL 11; [2007] 2 AC 167 as 'the imprimatur of democratic approval'. It would, we think, be an unusual case in which a student was

able to establish that administrative failings on the part of the respondent rendered it disproportionate to remove him from the United Kingdom rather than providing him with an opportunity to enrol in further courses of study. We recognise, however, that it might just be possible for an applicant to establish that the weight statutorily accorded to immigration control in such a case should be reduced so as to be overcome as a result of delay on the part of the respondent if, as contended by this appellant, the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes: EB (Kosovo) v SSHD [2008] UKHL 41; [2009] 1 AC 1159, at paragraph 16, and Agyarko v SSHD [2017] UKSC 10; [2017] 1 WLR 823, at paragraph 52.

72. On close analysis, however, the evidence before the First-tier Tribunal was not capable of establishing that the appellant had been caused such prejudice by the action or inaction of the respondent. The judge in the First-tier Tribunal was rightly critical of the delay between the decision reached by Judge Monson in June 2016 and the action taken by the respondent in May 2018. That delay was unexplained before the FtT, as it was before us, and we consider it to be wholly unsatisfactory that it should have taken the respondent so long to issue a 'sixty day letter'.

73. Be that as it may, there is no evidence to show that the appellant suffered any material prejudice specifically as a result of this delay. The appellant claims at paragraph 16 of his witness statement that he was unable to enrol on a new course because of the 'huge gap' in his studies (and because he had no English Language certificate) but there is nothing in any of the correspondence from education providers which begins to support that contention. The predominant concern was that the appellant had already taken a course at level 7 of the NQF (and would therefore be unable to show academic progression, as required by paragraph 120A of the Immigration Rules). Other providers were concerned by the appellant's immigration history, or were cautioned by their compliance departments, which we take to be a reference to the allegation of ETS fraud against the appellant. There is nothing in any of the emails from academic institutions to show that the gap in the appellant's studies played any part in their refusal to entertain his applications.

74. Mr Maqsood also submits, as did the appellant's solicitors in the early summer of 2018, that it did not suffice for consideration of his application to be suspended for sixty days. His life had been on hold for so long that he needed additional time in which to get his studies back on track. That is to overlook the chronology, however. As noted at paragraphs 9-11 above, the appellant was sent a sixty day letter on 15 May 2018. That was signed for on 18 May 2018. In their letter of 8 June 2018, the appellant's solicitors acknowledged receipt of that letter and submitted that the appellant should be granted discretionary leave. The respondent's response to that letter was prompt, if rather oddly worded, and she indicated that the appellant would have a further sixty days' grace, ending on 18 August 2019. The appellant had three clear months from the date of receipt of the first letter, therefore, in order to take an English test and acquire a new CAS. We see no reason why this period should have been inadequate. We note that the earliest documentary evidence we

have of the appellant taking any action in response is dated 4 July 2018, when he sent a number of emails to education providers. We also note that the appellant did not issue or threaten judicial review proceedings in an attempt to secure more time.

75. For those reasons, we do not consider it to be established that the appellant was prejudiced by the delay in implementing Judge Monson's decision or the amount of time he was given by the respondent to find a new sponsor. However, Mr Maqsood's best points were more focused and, at first blush, more attractive. He submitted that the appellant was prevented from taking a new English test because the respondent had retained his original passport and that he could not obtain a new academic sponsor whilst the spectre of ETS fraud followed him, as it did until it was finally withdrawn before the FtT. We take those two points in order.

76. As to the first, there can be no doubt that the respondent was entitled to retain the appellant's passport under section 17 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. She was plainly conscious that her decision to retain the document might present an obstacle to the appellant taking another English test. The only English tests which are acceptable to the respondent in this context are those which are administered by the Secure English Language Testing centres ("SELTs") listed in Appendix O of the Immigration Rules. Those centres operate under strict licensing requirements, pursuant to which they are ordinarily required to check an original identity document of a specified type (one of which is a national passport). In order to overcome that difficulty, the respondent provided the appellant with a certified copy of his passport and with detailed advice about how to book an English language test. We have reproduced the letter containing that advice in full at paragraph 14 above. The appellant was told, firstly, that he needed to bring his precise circumstances to the attention of the provider. Having considered the emails sent to the various providers, we consider the appellant appears to have followed that advice. Indeed, we note that the appellant seems to have sent the providers a copy of the correspondence he received from the Home Office. Notwithstanding the fact that he had followed that aspect of the advice, the appellant received a standard response from each provider, stating that they were unable to accept a copied document and that only an original passport would suffice.

77. Thus far, Mr Maqsood's submission holds. He submitted that the appellant had ostensibly been given time to regularise his position but that he had, in reality, been deprived of the means with which to do so. Whether the appellant was given sixty or ninety days' grace, Mr Maqsood submitted, the appellant could not have secured another English test and could not have hoped to secure further leave whilst his passport was retained by the respondent. What that submission overlooks, though, is the remainder of the letter which the appellant was sent on 20 June 2018, as set out at paragraph 14 above. It was anticipated in that letter that the appellant might have difficulties in arranging a test and that, in the event of such difficulties, he should book the test online and notify the Home Office, via a given email address, so that consideration could be given to the respondent corresponding directly with the

provider. The respondent stated in terms that 'this process has been agreed with the test centres'. So much is clear from the terms of (4) and (5) of that letter.

78. Although the instructions to the appellant could not have been clearer, and although he had the benefit of legal advice at the time, there is nothing in the papers to show, or even to suggest, that he attempted to book a test online and to send an email to the Home Office in the manner suggested. His witness statement describes his contact with the test centres but does not make reference to any attempt to book a test online. We note that the appellant also asserts in his statement that he requested the return of his passport from the respondent but that assertion is unsupported by any documentary evidence, whether in the form of a Letter Before Action or otherwise. In the circumstances, we conclude that it was the appellant and his advisers who were responsible for his failing to secure an English Language test booking with a new SELT provider. The respondent had set out in the clearest possible terms what he was required to do to book a test and although he complied with the first part of those instructions, he failed to comply with the second part.

79. That was a significant failing on the part of the appellant. As was clear from the respondent's letter of 20 June 2018, and from Appendix A of the Immigration Rules in any event, the appellant could not hope to secure a CAS, or to make a successful application for leave to remain, without proof that he had passed an English Language test at the relevant level at a registered SELT provider. Paragraph 116(f)(vi) of Appendix A, as then in force, required a sponsor to enter onto the CAS the details of how the sponsor has assessed the applicant's English language ability including, where relevant, the applicant's English language test scores in all four components (reading, writing, speaking and listening). A future sponsor would be unable to do so if the appellant had not taken the test, and any CAS generated without those details would have been invalid, as is clear from paragraph 116 of Appendix A. Nor would the appellant have been able to satisfy the requirements of Appendix A which expressly required him to submit a test result from a SELT provider listed in Appendix O.

80. Mr Maqsood's remaining complaint is to be considered in light of the conclusion we have reached immediately above. He submitted that the appellant had been unfairly prejudiced by the allegation of ETS fraud which was first made, as we understand it, in 2018 and was only withdrawn at the hearing before the First-tier Tribunal in October 2019. We recall, in this connection, that the universities of Roehampton and Greenwich respectively declined to entertain an application from the appellant because of his 'immigration history' and because the compliance department had advised them to do so. We take both of these rather opaque replies to refer to the ETS allegation against the appellant. A Tier 4 sponsor might, as a result of the obligations imposed upon them by the respondent, understandably be reluctant to sponsor an individual whose copy book is said to contain a blot of that nature.

81. Had the incorrect allegation of ETS fraud been the only impediment to the appellant securing admission to an alternative college, it might well have been difficult for the

respondent to submit that it was nevertheless proportionate to remove him from the United Kingdom. Had that been the reality of the appellant's situation, then he would have shown that the only reason for his current predicament would have been an allegation which was wrongly made. But that is not the reality of the appellant's situation. Even if the allegation of fraud had not been wrongly made, the appellant's English language certificate had been cancelled and he was required to obtain a replacement. He was informed about the process for doing so in clear terms but he followed only half of the respondent's guidance. Without a new English language certificate, he would have been unable to secure a new sponsor, whether or not there was an allegation of fraud against him. Put simply, the ETS allegation was immaterial in light of the appellant's failure to follow the respondent's instructions regarding the English Language Test.

82. There are two further difficulties with Mr Maqsood's submission that it was the respondent's action or inaction which prevented the appellant from continuing with his studies. We get a glimpse of the first from the emails from the universities of St Mary's, Southampton and Salford. As suggested in those emails, it is difficult to see how the appellant could have satisfied the requirement of academic progress from one course to the next, which is imposed (now, as in 2018) by paragraph 120A of Appendix A. He had a Bachelor's degree from Pakistan and he had completed a post-graduate qualification in the United Kingdom, the certificate for which was sent to various universities when the appellant made enquiries. It was unsurprising that the Senior International Officer at the University of Salford replied to state that it would be difficult for the appellant to commence an undergraduate degree (which is at level 6 of the National Qualifications Framework) when he had already gained a level 7 qualification from the United Kingdom.

83. Nor was there any evidence before the First-tier Tribunal upon which it could properly have concluded that the appellant was in a position, between May and August 2018, to meet the requirements of Appendix C of the Immigration Rules, concerning the funding for his studies. If the appellant sought to submit that it was only the prejudice caused by the Secretary of State's conduct that prevented him from securing further leave to remain as a student, it was for him to show that there would have been no further difficulties in satisfying the requirements of the Immigration Rules. Had the appellant passed an English Language test and secured a CAS, he would still have been required to show that he had access to at least the full course fees for the first academic year and £1015 per month for the first nine months (paragraph 11 of Appendix C refers, in respect of a course outside London). There was nothing before the First-tier Tribunal to show that the appellant had access to such a sum, whether in the manner required by Appendix C or otherwise.

84. In summary, therefore, we do not accept that the appellant suffered prejudice as a result of the respondent's conduct. The delay of two years between Judge Monson's decision and the issuance of the first sixty day letter was unexplained and regrettable but gave rise to no demonstrable prejudice. It has not been shown that the three month period that the appellant was finally given in which to regularise his status

was insufficient for him to do so. Nor, critically, has it been established that the respondent's retention of the appellant's passport prevented him from taking an English Language test; it was instead the appellant's failure to follow the respondent's clear instructions that prevented him from doing so. Nor, for the reasons we have given immediately above, has it been shown that the false allegation of ETS fraud operated to prevent the appellant securing further leave to remain. Whilst two universities appeared to have been concerned by it, they could not have granted the appellant a CAS without an English Language test and it is difficult to see how they could have expressed themselves to be satisfied that any course they had to offer represented genuine academic progress in accordance with the Immigration Rules. In any event, the appellant failed to present any evidence to the First-tier Tribunal to show that he would have met the requirements of Appendix C of the Immigration Rules. He fell short by some margin, therefore, of establishing that he would have secured leave to remain but for the respondent's errors and delays.

85. Properly understood, this is not a case in which the respondent has improperly impeded the appellant's pursuit of his course of studies in the UK. It is a case in which the respondent's conduct has been deserving of reproach but in which, ultimately, the appellant cannot show that her conduct operated to his disadvantage. Neither the delay nor the errors gave rise to an inconsistent, unpredictable or unfair outcome and there was nothing, therefore, which could properly have persuaded the judge that the public interest in immigration control was outweighed on the facts of this case. In the circumstances, we conclude that the judge erred in failing to consider adequately or at all the gravamen of the appellant's case under Article 8(2) ECHR but, having considered those arguments for ourselves, we conclude that her error was not material to the outcome of the appeal.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law which was not material to the outcome of the appeal. The appellant's appeal to the Upper Tribunal is accordingly dismissed.

Signed
Mr Justice Lane 7 July 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber