Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32885/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 March 2016	**On 27 May 2016**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DAWSON

Between

MONABEN NALINKANT PATEL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Awan, of Mayfair Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an unfortunate case, in which the judge was misled by an acceptance by the Presenting Officer of a misstatement of law by the appellant's representative (who appeared also before us). The appellant, having entered the United Kingdom as a student, she was granted further

leave, due to expire on 25 August 2014. The college at which she was studying had its licence revoked on 5 October 2012. It appears that the appellant's leave fell to be curtailed and (according to the Secretary of State) a notice of curtailment was sent to her indicating that her leave would expire on 3 February 2013: that gave her the usual 60 days to find another college. It is said that that notice of curtailment was not received.

2. On 24 May 2013 the Secretary of State received a letter from the appellant acknowledging her difficulties in relation to the college and seeking "a 60 calendar day leave curtailment letter". On review of the appellant's file the Secretary of State noted that the leave had apparently previously been curtailed, but that the Secretary of State could not say that the curtailment had been duly served on the appellant. A new notice was sent out curtailing leave from 28 July 2013. That letter was sent by recorded delivery.

3. On 17 July 2013 the appellant wrote again to the Secretary of State on the same matter, and it was apparent that she had not received the second letter either. Investigation showed that there was no evidence that this recorded delivery letter had been delivered to her. A third letter was therefore sent, dated 22 July 2013. That gave a further 60 days and curtailed the appellant's leave so as to expire on 20 September 2013. A covering letter stated as follows:-

> "Please find attached a copy of our letter curtailing your leave. This was originally sent to you back in May but it appears that it has not been delivered by Royal Mail so, in the circumstances please find attached a new letter giving you 60 days to either submit a further application or leave the UK."

4. On 7 August 2014 the appellant applied for further leave. On that date, if her original leave had not been curtailed, it had some weeks to run; but if it had been curtailed she was in the United Kingdom without leave. The application was refused on 7 August 2014 on the basis that "on 24 May 2013 your further leave to remain as a Tier 4 (General) Student Migrant was curtailed until 23 July 2013". In those circumstances the Secretary of State contended that the appellant was not at the date of her most recent application a person with an "established presence" studying in the United Kingdom and needed to meet more stringent requirements of the immigration rules in relation to maintenance, which she did not meet. As she had no extant leave at the time of her application the effect of the decision was not the termination of her leave, and she accordingly had no right of appeal.

5. Undaunted, the appellant appealed to the First-tier Tribunal on the ground that she had not had effective notice of the curtailment issued on 24 May 2013 and taking effect on 23 July 2013 and that she accordingly did have leave to remain at the time of her application, was a person with an

establish presence as student, and met the relevant requirements of the Rules.

6. At the hearing of the appeal before Judge Miles, the full "curtailment history", including the third letter dated 22 July 2013, was provided by the Presenting Officer and not disputed by Mr Awan. Mr Awan, however, relied on authority to demonstrate that leave had not been validly curtailed. The decision upon which he particularly relied was a judgment of Mr Neil Garnham QC (as he then was) in R (Javed) v SSHD [2014] EWHC 4426 (Admin). In his judgment Mr Garnham reviewed previous authorities and concluded that the Secretary of State had the burden of proving receipt of a curtailment notice. Faced with that argument, and the decision in Javed, Mr Bassi, the Home Office Presenting Officer, said that he could not establish that any of the curtailment notices had been received. He accordingly accepted that Mr Awan's grounds had merit and that the appeal should be allowed. In the circumstances and during the hearing the judge accepted that too and indicated that he would be allowing the appeal.

7. As his determination records, however, it was when he came to write it up that he read Javed in full, including the reference in that judgment at [16] to amendments to the relevant statutory instrument, the Immigration (Leave to Enter and Remain) Order 2000, taking effect on 12 July 2013. That amendment was not relevant on the facts in Javed itself, but it is difficult to see why Mr Awan did not bring it to the attention of Mr Bassi and Judge Miles, given the accepted history including a curtailment notice in the present case sent after 12 July 2013. As the determination notes, the judge carefully considered the position. It was clear to him that, contrary to what had been agreed at the hearing, the third curtailment notice appeared to have been effective; that meant that (although not for precisely the reason given in the notice of refusal) the refusal was necessarily correct and there was no right of appeal to the Tribunal and he had no jurisdiction. As his determination also records, Judge Miles considered whether to reconvene the hearing, but concluded that there was no point in reconvening a hearing before a judge who had no jurisdiction, in a case in which the result was inevitable.

8. Mr Awan's grounds of appeal to this Tribunal, on the basis of which permission to appeal was granted by Judge Holmes, are twofold. The first is that it was unfair for the judge to dismiss the appeal without hearing further from the parties, when he had indicated at the hearing that he would allow it and the parties were agreed that he should do so. The second ground is that the curtailment notice of 22 August 2013 (meaning presumably 22 July 2013) could have no effect because it specifically referred to being given under the provisions of the Immigration (Notices) Regulations 2003 rather than those of the Immigration (Leave to Enter and Remain) Order 2000.

9. Prior to the hearing before us, Mr Deller on behalf of the Secretary of State put in a skeleton argument referring to another case in the same list and indicating that he had guessed that the matter was to be heard before the Vice President and Judge Dawson. That skeleton argument produced a response from Mr Awan asserting lack of procedural fairness, requiring the Tribunal to indicate why information on the constitution of the panel was disclosed to the Home Office, disclose other correspondence, and consider that "it is impossible for this appeal to be justly determined" in the circumstances.
10. At the hearing Mr Deller confirmed that his reference to the constitution of the panel was "an informed guess". There is simply no basis for suggesting any illegitimate correspondence between the Secretary of State and the Tribunal.

11. Mr Awan addressed us on the grounds. He reminded us that the Immigration (Notices) Regulations 2003 did not apply to the decision if it was one that carried no right of appeal. He said that the 22 July decision had no effect because of the reference to the 2003 Regulations and because it purported to be a re-sending of a decision already made, which was itself ineffective. He told us (without adducing any evidence) that Mr Bassi had specifically had the amendment to the 2000 Order drawn to his attention and had confirmed his view that the amendment did not apply. Mr Awan did not tell us why the judge's attention was not drawn to that aspect of the matter. Mr Deller submitted that the content of the 22 July 2013 letter made it clear that although there had been a previous history of attempts to curtail leave, a new decision was now being made. That was evident from the date of the decision and the date of the curtailment, 60 days later. He also submitted that the reference to the wrong regulations in respect of service made no difference to the validity of the notice itself. It appears to us that on both those issues Mr Deller is clearly right. Nevertheless, Mr Deller went on to say that it was his view that it was particularly unfortunate that the appellant had had a determination dismissing her appeal following a hearing in which, because she thought the appeal was being allowed, she had had no realistic opportunity to take part.

12. In response, Mr Awan insisted that the reference in the third curtailment letter to the re-sending of the second might be sufficient to remove the third letter from the ambit of the amendment to the 2000 Order.

13. A number of aspects of this appeal cause concern. No doubt the issues would have been clear to everybody if the person making the decision against which the appellant seeks to appeal had been aware of the third curtailment notice. If the reference in the decision had been to that, rather than to the ineffective second notice, everybody would have appreciated that a decision had been sent after the 2000 Order had been amended. It was not open to Mr Awan and Mr Bassi to agree that the First-tier Tribunal had jurisdiction: that was a matter for the Tribunal. It was not open to Mr Awan to draw an issue of law to the attention of Mr Bassi, to seek his

agreement on it, and to present the appeal to Judge Miles without detailed reference to that issue. In the circumstances, the outcome, including the rethinking of the matter following the close of the hearing, is no grounds for surprise: a careful judge worked through the matter in a way that, apparently, the parties before him were not prepared to do. Unfortunately, however, the way the hearing had been conducted had deprived the judge of full argument on the terms of the third letter.

14. Before us Mr Deller accepted that setting aside the First-tier Tribunal's determination and remitting the matter for rehearing in the First-tier Tribunal so that those arguments could be aired in full would be an appropriate outcome. We are naturally cautious about accepting yet another concession by a Presenting Officer in this case. That is particularly so because, if the appellant's leave was validly curtailed, she has no right of appeal and the First-tier Tribunal has no jurisdiction to determine one. But we have concluded that the particular circumstances of this case are so likely to give rise to a feeling of unfairness that the appropriate course of action is to do as suggested.

15. We will therefore set aside the determination of Judge Miles on the ground that, having indicated that the appeal would be allowed, he should have reconvened the hearing before dismissing it. We remit the matter to the First-tier Tribunal to be heard by a judge other than Judge Miles. We direct that the issue of jurisdiction be determined first, recognising that if the curtailment decision of 22 July 2013 took effect, the decision on the later application carried no right of appeal. Only if the Tribunal is satisfied that it has jurisdiction should it proceed to consider the merits.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 28 April 2016