Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11093/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th February 2018	**On 1st March 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MD ALI AKBER KADER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Khan of Counsel, instructed by SEB Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Page promulgated on 9 November 2017, in which the Appellant's appeal against the decision to refuse his application for indefinite leave to remain dated 24 April 2016 was dismissed.

2. The Appellant is a national of Bangladesh, born on 13 April 1971, who first arrived in the United Kingdom in 2005 with entry clearance as a Tier 4 general student valid to 31 May 2009. Applications for further leave to

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remain made on 18 May 2009 and 24 June 2009 were rejected as invalid. Further to an application made on 14 August 2009, the Appellant was granted further leave to remain as a Tier 4 general student to 1 December 2012. An application made on 1 December 2012 for further leave to remain as a Tier 4 student was rejected as invalid on 14 May 2013 (albeit the Appellant disputes that he ever received notice of this). Most recently, the Appellant applied on 6 November 2015 for indefinite leave to remain on the basis of long residence.

3. The Respondent refused the latest application on 24 April 2016 on a number of grounds. First, the application was refused under paragraph 322(10) of the Immigration Rules for failure to attend an interview on 15 April 2016. Secondly, the application was refused on the basis that the Appellant did not meet the requirements of paragraph 276B of the Immigration Rules as he had not had at least ten years' continuous lawful residence in the United Kingdom. The Appellant did not have leave to remain between 19 June 2009 and 2 October 2009 (incorrectly stated as 2012 in the decision letter), nor from 14 May 2013. Thirdly, the application was refused on the basis that the Appellant did not meet the requirements of paragraph 276B(iv) of the Immigration Rules as he had not provided a satisfactory English language test certificate from an approved provider listed in Appendix O of the Immigration Rules.

4. Judge Page dismissed the appeal in a decision promulgated on 9 November 2017 on human rights grounds. In doing so, he first dealt with the Appellant's claim that he had remained in the United Kingdom lawfully until the date of refusal, his leave to remain having been extended by virtue of section 3C of the Immigration Act 1971 by his application made on 1 December 2012, of which he never received any response and therefore sought to vary his application on 6 November 2015 to one for indefinite leave to remain on the basis of long residency. Judge Page found, on the balance of probabilities, that the Respondent sent the letter dated 14 May 2013 rejecting his application made on 1 December 2012 as invalid; that the Appellant knew his application had been rejected and that the Respondent had also sent the request to attend an interview which the Appellant had also denied ever receiving. In any event, it was recorded that the Appellant's solicitor accepted that the Appellant could not meet the requirements of paragraph 276B of the Immigration Rules for a grant of indefinite leave to remain because he had not provided an ESOL certificate from a recognised test provider. The Appellant's claim in these circumstances was that the Respondent should have exercised her discretion differently.

5. In relation to Article 8 of the European Convention on Human Rights, Judge Page noted that the Appellant had not submitted any evidence to show that Article 8 outside of the Immigration Rules was engaged. The Appellant had not established any family life in the United Kingdom, although it was accepted that he had friends here. Overall, Judge Page found that Article 8 was not engaged and there was no arguable Article 8 case to consider.

The appeal

6. The Appellant appeals on the basis that the First-tier Tribunal failed to make a material finding on a significant point of law (as to whether the Respondent had proved that the notice rejecting the Appellant's application made on 1 December 2012 had been communicated to him) which was material to the outcome of the appeal.

7. Permission to appeal was granted by Judge Landes on 13 December 2017 on all grounds.

8. At the hearing, Counsel for the Appellant submitted that the error was contained in paragraphs 18 and 19 of Judge Page's decision which relied upon an assumption that there was no reason why the Respondent would not have served the notice on 14 May 2013 and that could not have led to a finding that the Respondent had discharged the evidential requirements of service. The Appellant relies on the provisions in Appendix SN of the Immigration Rules, although accepted that these were not in force on 14 May 2013 so are not directly applicable. Counsel for the Appellant was unable to specify what, if any, rules or requirements as to service of a notice of invalidity applied to the Appellant's case on 14 May 2013. In the alternative, Counsel relied on the decision of Neil Garnham QC in Javed [2014] EWHC 4426 (Admin) to the requirements of service under section 4(1) of the Immigration Act 1971 as guidance of general principles of whether something is "sent" and "given" by the Respondent. Further, reliance was placed on the Upper Tribunal's decision in Syed (Curtailment of Leave) [2013] UKUT 00144 that a decision had to be "communicated" to a person.

9. When asked how any error in the findings as to service was material to the outcome of a human rights appeal in circumstances where it was found that there was no arguable case to consider under Article 8, Counsel made no substantive submissions and instead stated that, despite the concession before the First-tier Tribunal, the Appellant's instructions were that he had submitted a valid English language test certificate and even if he did not, then evidential flexibility may have applied as the Appellant has since passed an English language test.

10. The Home Office Presenting Officer accepted that there were technical requirements as to service of a decision but that the First-tier Tribunal engaged with the evidence before it and made a finding which was open to Judge Page on the evidence that was available. Further documents from GCID together with a copy of the letter dated 14 May 2013 were available but it was accepted that these were not before the First-tier Tribunal and were therefore only relevant if an error of law was found – there was no application to rely on these documents at the hearing before me.

11. In any event, it was submitted that even if an error of law was found in relation to service, it was not material in circumstances where the Appellant conceded before the First-tier Tribunal that he could not meet the requirements of the Immigration Rules set out in paragraph 276B and had provided no evidence of family life and very little on private life such that there was no arguable Article 8 claim. This conclusion was unarguably unaffected even if there was an error in the findings in relation to service of the decision dated 14 May 2013.

Findings and reasons

12. I find that any error, if made, by Judge Page in his findings in relation to whether the Respondent served the notice of invalid application dated 14 May 2013 is wholly immaterial to the outcome of the appeal for one or both of the following reasons.

13. First, the Appellant's claim that he had continuing leave to remain pursuant to section 3C of the Immigration Act 1971 from the date of his application on 1 December 2012 (whilst he still had extant leave to remain) until a decision rejecting or refusing that application (either as it was or as varied by his application for indefinite leave to remain on 6 November 2015) was communicated to him is made on a mistaken premise. For the reasons given by the Supreme Court in Mirza v Secretary of State for the Home Department [2016] UKSC 63, an application which was invalid from the outset (for failure to comply with the requirements of paragraph 34A of the Immigration Rules, for example because of failure to pay a fee, use the correct form or as in the present case, failure to complete a mandatory part of the application form) is insufficient for the purposes of extending leave to remain pending determination of such an application pursuant to section 3C of the Immigration Act 1971. There is nothing in this case to suggest that the Appellant's application made on 1 December 2012 was anything other than invalid from the outset for failure to complete all of the mandatory sections of the application form (despite being given the opportunity to rectify the omission). As such, whether or not the notice of invalidity was communicated to the Appellant is irrelevant as either way his leave to remain ended on 1 December 2012 and at the time of his latest application, he had no leave to remain in the United Kingdom. This is the same factual scenario as found by Judge Page albeit for different reasons relating to the notice of invalid application on 14 May 2013.

14. I am however aware that neither party dealt with this point at the hearing before me and that in the reasons for refusal letter, the Respondent refers to the Appellant having no leave to remain from 14 May 2013 rather than the earlier date. For the second reason set out below, the appeal inevitably fails on human rights grounds in any event, but for completeness, I deal with the communication point in the alternative if Respondent had somehow treated the Applicant as having leave to remain until 14 May 2013.

15. At the hearing, neither party could identify the relevant requirements for communication of the notice of invalidity in this appeal. In the grounds of appeal, the Appellant relied upon Appendix SN of the Immigration Rules but that significantly post-dates the relevant date of 14 May 2013 and is not applicable. As a notice of invalidity, this is not a communication which falls under either section 4(1) of the Immigration Act 1971, nor under the Immigration (Notices) Regulations 2003.

16. At the relevant time, 14 May 2013, the only provision dealing with notice of invalidity of an application was contained in paragraph 34C of the Immigration Rules which provided (at that date) as follows:

> *"Where an application or claim in connection with immigration for which an application form is specified does not comply with the requirements in paragraph 34A, such application will be invalid and will not be considered.*
>
> *Notice of invalidity will be given in writing and deemed to be received on the date it is given, except where it is sent by post, in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day."*

17. In this instance, there is provision for deemed postal receipt, which is contrary to the factual situation in Syed and Javed in which there was no provision for service by post for notices to be given under section 4(1) of the Immigration Act 1971. The decisions in those cases turned upon statutory construction of the word "given" in section 4(1) and it is important to note that where section 4(1) applies, decisions only take effect when notice of the decision is "given". In the present case, there is a different type of communication - notice that a decision is invalid (as opposed to an immigration decision, a curtailment of leave and so on) and will not be considered, although it is likely that the fundamental principle in R (Anufrijeva) v Secretary of State in the Home Department [2003] UKHL 36 would still apply to require as a matter of fairness that a decision takes effect upon communication.

18. At the hearing before the First-tier Tribunal, there was no representative on behalf of the Respondent and the only information before Judge Page as to the 14 May 2013 notice was the reference in the decision letter to the application being refused. In addition, there was evidence from the Appellant about his address, other communication received from the Respondent, and about the Appellant's situation and whether he chased up a decision on his application made on 1 December 2012. For cogent reasons set out in paragraphs 18 and 19 of the decision, Judge Page found the Appellant not to be credible in his claim never to have received the notice dated 14 May 2013. Although there was a lack of specific evidence from the Respondent as to if and when that notice was posted and some assumption that there was no reason why the notice dated 14 May 2013 had not been sent and received when other documents were, I find that the adverse credibility findings were sufficient for the finding made. In

these circumstances, I find that Judge Page made sustainable findings, on the balance of probabilities, on the evidence before him.

19. Secondly, in any event, the only possible difference that the issue of whether the Appellant had leave to remain beyond 1 December 2012 or 14 May 2013 would be as to the weight to be attached to any private and family life established during that period pursuant to section 117B of the Nationality, Immigration and Asylum Act 2002 for the purposes of undertaking the balancing exercise under Article 8 to determine whether the decision was a disproportionate interference with the right to respect for private and family life. In the present case, that stage was not reached because of the unchallenged finding that Article 8 was not engaged on the facts. Whether or not a person had been in the United Kingdom lawfully for all of his time here, or most of it (which are the alternative situations in this appeal depending on the outcome of the 1 December 2012 application) can not affect the issue of whether he had established sufficient private life to engage Article 8 at all. At most, it goes to the weight to be attached to various factors in the balancing exercise.

20. At its highest, the Appellant's Article 8 claim before the First-tier Tribunal was that he had built a strong private life in the United Kingdom with some of his British friends and their families. There was no detail as to that private life at all and nothing to support the claimed quality or strength of it. There was also no evidence before the First-tier Tribunal as to why the Appellant would be unable to continue and/or re-establish his private life outside of the United Kingdom. In these circumstances, it is unarguable that Article 8 is not engaged at all and the appeal would inevitably be dismissed on human rights grounds as a result. Whether or not the Appellant had a greater or lesser period of lawful leave to remain in the United Kingdom is irrelevant and could not possibly have made any difference to the outcome of the appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed Date 25th February 2018

Upper Tribunal Judge Jackson