UTIJR6

JR/2200/2019

# Upper Tribunal
# Immigration and Asylum Chamber

# Judicial Review Decision Notice

The Queen on the application of Muhammad Shoaib

**Applicant**

v

Secretary of State for the Home Department

**Respondent**

**Before Upper Tribunal Judge Jackson**

**Application for judicial review: substantive decision**

Having considered all documents lodged and having heard the parties' respective representatives, Mr M Biggs and Mr A Rehman of Counsel, instructed by My Legal Limited Solicitors, on behalf of the Applicant and Mr Z Malik of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 30 September 2019.

**Decision: the application for judicial review is refused**

1. The Applicant, a national of Pakistan born on 25 March 1986, was granted permission to apply for Judicial Review of the notice issued to him on 23 January 2019 stating that he has no leave to remain in the United Kingdom and is liable to removal to Pakistan.

2. The Applicant's immigration and application history is as follows. He first arrived in the United Kingdom on 1 May 2011 with entry clearance as a Tier 4 (General) Student valid to 30 October 2014. Following the revocation of the sponsor's licence on 20 February 2014, the Respondent made a decision on 5 March 2014 to curtail the Appellant's leave to remain to expire on 4 May 2014.

3. So far as relevant, that decision stated as follows:

*"CURTAILMENT OF LEAVE*

*…*

*You were granted leave to enter as a Tier 4 General Student until expiry of 30 October 2014 in order to undertake a course of study at International School of Business Studies.*

*On 20 February 2013 the sponsor licence for International School of Business Studies was revoked.*

*Home Office records have been checked and there is no evidence you have made an application to change your sponsor or made a fresh application for entry clearance, leave to enter or leave to remain in the United Kingdom in any capacity.*

*It is not considered that the circumstances of your case are such that discretion should be exercised in your favour. The Secretary of State therefore decided to curtail leave to enter or remain as a Tier 4 Migrant so as to expire on 04 May 2014.*

*Your leave has been curtailed under paragraph 323A(b)(i) of the Immigration Rules.*

*Before your current leave to enter or remain expires you must either leave the United Kingdom or submit a fresh application for leave to remain.*

*…*

*RIGHT OF APPEAL*

*You are not entitled to appeal this decision. Section 82 of the Nationality, Immigration and Asylum Act 2002 does not provide a right of appeal when Applicant still has leave to enter or remain in the United Kingdom and so is entitled to stay here.*

*You are not required to leave the United Kingdom as a result of this decision. You still have leave to enter or remain where your current conditions continue to apply until 04 May 2014. Please ensure that you understand the conditions of your stay.*

*Although you are not required to leave the UK at this time your leave to enter or remain in the UK is due to expire on 04 May 2014. You need to make arrangements to plan your departure before your leave expires. If you intend to remain in the UK after this time you should make a further application for leave before your current leave expires. …"*

4. It is not in dispute between the parties that that decision was not physically served on the Appellant when it was made, but at that time, the Respondent's position was that the decision was deemed to have been served on the Applicant under Article 8ZA(4) of the Immigration (Leave to Enter and Remain) Order 2000.

5. On 2 June 2014, the Applicant was encountered, detained and served with removal notices; his removal subsequently being stayed following the issue of an application for Judicial Review. On the same date, the Applicant was handed a copy of the decision dated 5 March 2014.

6. On 18 June 2014, the Applicant issued an application for Judicial Review to challenge the deemed service of the decision dated 5 March 2014, resulting in the decision of R (Shoaib) v Secretary of State for the Home Department [2015] EWHC 2010 (Admin).

7. In this previous application for Judicial Review, the following matters were challenged. First, the decision to remove the Applicant dated 2 June 2014 pursuant to section 10(1)(a) or (b) of the Immigration and Asylum Act 1999. Secondly, the removal directions dated 11 June 2014. Thirdly, the lawfulness of the Applicant's detention from 2 June 2014 to 22 August 2014. Finally, the lawfulness of the Respondent's decision to serve a notice of curtailment of his leave to remain dated 5 March 2014, by hand on 2 June 2014. The Applicant's position was that if the decision to remove dated 2 June 2014 was unlawful, then the remaining decisions were also vitiated by material errors of law.

8. At the substantive hearing of the previous Judicial Review, the following two grounds of claim were relied upon:

    1) The Defendant failed to serve notice on the Claimant of the decision made on 5 March 2014 to curtail his leave to remain as a Tier 4 migrant, and was not entitled to rely upon Article 8ZA(4) of the Immigration (Leave to Enter and Remain) Order 2000 as inserted by the Immigration (Leave to Enter and Remain) (Amendment) Order 2013, which provides that notice shall be deemed to have been given.
    2) In the absence of proper notice of the decision to curtail leave, the Defendant's decision to detain the Claimant on the 2 June 2014 was unlawful.

9. Judgement was handed down by Neil Cameroon QC, sitting as a Deputy High

Court Judge on 13 July 2015, granting the application for Judicial Review. For present purposes the following paragraphs are relevant:

*"28. Mr Harland accepted on behalf of the Defendant that if she was not entitled to rely upon the deeming provision in Article 8ZA(4) of the 2000 Order, the decision made under section 10 of the Immigration and Asylum Act 1999 … that the Claimant be removed from the United Kingdom was unlawful, and therefore his detention pursuant to paragraph 16(2) of schedule 2 to the 1971 Act was unlawful.*

*29. Mr Biggs submitted that the Claimant's detention was unlawful as no effective notice had been given curtailing leave. Mr Biggs also submitted that the service of the Decision Notice on the Claimant at the time of his detention on 2 June 2014 was ineffective as it was served after the date on which it was said to take effect, alternatively if it took effect immediately, the consequence would be that the Claimant's leave to remain would be extended by section 3D of the 1971 Act, as an appeal could be bought under section 82(1) of the Nationality, Immigration and Asylum Act 2002.*

*30. Given Mr Harland's concession it is not necessary for me to make a ruling on the submissions made by Mr Biggs in relation to the effect of section 3D of the 1971 Act. The central matter in issue between the Claimant at the Defendant is whether the Defendant was entitled to rely on the deeming provisions of Article 8ZA(4) of the 2000 Order."*

10. In conclusion, it was found that the Defendant was not entitled to rely upon the provisions of Article 8ZA(4) of the 2000 Order, nor to conclude that it was not possible to give notice to the Claimant in accordance with paragraph (2) of the same. For these reasons, the first ground of challenge succeeded and as a result the second ground also succeeded. The resulting Order included that the decision dated 2 June 2014 to remove the Applicant from the United Kingdom pursuant to section 10(1) of the Immigration and Asylum Act 1999 was quashed and the Applicant's detention from 2 June 2014 to 22 August 2014 was unlawful. The Order did not contain any reference to the curtailment decision dated 5 March 2014, handed to the Applicant on 2 June 2014, and no remedy was granted in relation to it.

11. On 23 July 2014, whilst in detention and whilst the previous application for Judicial Review was pending, the Applicant made a human rights claim based on his right to respect for private life in the United Kingdom under Article 8 of the European Convention on Human Rights. The claim was made on the basis of the Applicant's claimed relationship with a Hungarian national and his private life established in the United Kingdom.

12. The Respondent refused and certified the claim as clearly unfounded pursuant to section 94 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") on 4 August 2014. First, there was no evidence that the Applicant was in a genuine and subsisting relationship as claimed. Secondly, the Applicant did not meet the requirements of paragraph 276ADE of the Immigration Rules because he had not lived in the United Kingdom for long enough and there were no particular obstacles to him returning to Pakistan. The Respondent considered whether there were any compassionate or compelling circumstances to warrant a grant of leave to remain outside of the Immigration Rules but none were found. The Applicant has not challenged the decision dated 4 August 2014.

13. On 10 October 2018, the Applicant's representatives wrote to the Respondent, requesting a period of leave to remain for 60 days within which to find a sponsor. The Respondent's reply on 7 December 2018 was to the effect that the Applicant was an overstayer and would need to make an application for leave to remain to reside in the United Kingdom. A pre-action protocol letter was sent on 4 January 2019.

14. On 23 January 2019, the Respondent notified the Applicant that he had no leave to remain in the United Kingdom (his leave to remain having ended on 30 October 2014) and was liable to removal to Pakistan. The Applicant was served with a notice stating that he would not be removed for the first seven calendar days after he receives this notice, following which he could be removed for up to three months without further notice. The Applicant was warned that he should tell the Respondent of any reasons why he should be allowed to stay in the United Kingdom as soon as possible, if not there was a risk of certification of his claim under section 96 of the 2002 Act. He was similarly warned that he should identify any reasons why he should not be expected to appeal any human rights refusal after he had left the United Kingdom for the purposes of section 94B of the 2002 Act.

15. Also on 23 January 2019, the Applicant was served with a statement of additional grounds under section 120 of the 2002 Act, inviting him to set out any reasons why he should be allowed to stay in the United Kingdom. As at the date of the substantive oral hearing, the Applicant had not substantively responded to this notice, or otherwise set out any basis for stay in the United Kingdom outside of the matters relied upon directly in this application for Judicial Review.

16. The present application for Judicial Review is bought on the following three grounds. First, that the Respondent could not lawfully issue any notice of liability to removal to the Applicant because he is residing lawfully in the United Kingdom with continuing leave to remain under section 3D of the Immigration Act 1971. Secondly, that the Applicant's removal from the United Kingdom would be a disproportionate interference with his right to respect for private and family life under Article 8 of the European Convention on Human Rights. Finally, that the Applicant's removal from the United Kingdom would be substantively unfair.

*Applicant's submissions*

17. The Applicant's claim on the first ground of challenge is that he had continuing leave to remain pursuant to section 3D of the Immigration Act 1971, such that no notice of liability to removal could lawfully be served by the Respondent.

18. Section 3D of the Immigration Act 1971 (the "1971 Act") provides as follows:

> *"(1) This section applies if a person's leave to enter or remain in the United Kingdom –*
>
> *(a) is varied with the result that he has no leave to enter or remain in the United Kingdom, or*
>
> *(b) is revoked.*
>
> *(2) The person's leave is extended by virtue of this section during any period when –*
>
> *(a) an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 could be bought, while the person is in the United Kingdom, against the variational revocation (ignoring any possibility of an appeal out of time with permission),*
>
> *(b) an appeal under that section against the variational revocation, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 that Act), or*
>
> *(c) and administrative review of the variation or revocation –*
>
> *(i) could be sought,*
>
> *(ii) is pending.*

19. The basis of the submission is that the decision curtailing the Applicant's leave to remain dated 5 March 2014 was only legally valid on 2 June 2014 when the Applicant was handed a copy of it and had actual knowledge of the decision and could only take effect on that date such as to end the Applicant's leave immediately. By virtue of the transitional provisions for decisions made before

6 April 2015[1], the rights of appeal in Part V of the 2002 Act were preserved, specifically giving this Applicant a statutory right of appeal under section 82(2)(e) of the same, which included within the definition of "immigration decision", variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain.

20. The Applicant's case is that the decision to curtail his leave to remain took effect retrospectively, as the decision dated 5 March 2014 was for the Applicant's leave to remain to be varied to end on 4 May 2014, prior to the date on which the decision was validly served. It was said that the practical effect was therefore that the Applicant's leave was curtailed immediately on 2 June 2014 once notice of the decision was given. This was therefore an appealable decision under section 82(2)(e) of the 2002 Act because when the variation took effect, the Applicant had no leave to remain.

21. Mr Biggs submitted that there was no restriction on the power to curtail leave to remain such that it could only be prospective. To the contrary, the Respondent enjoyed a broad discretion to vary or revoke leave to remain in accordance with sections 3A, 3B and 4(1) of the 1971 Act and the order making powers there under; with reliance placed on paragraph 44 of the Supreme Court's decision in R (Munir & Anor) v Secretary of State for the Home Department [2012] UKSC 32.

22. In any event, Mr Biggs stated that the statutory scheme in place provided adequate protection for individuals against any prejudice caused by the retrospective effect of curtailment of leave to remain, primarily through the extension of a person's leave to remain pursuant to section 3D of the 1971 Act and a statutory right of appeal. The fact that a retrospective decision to curtail leave to remain would be draconian does not mean that the Respondent has no power to make such a decision, but rather that the consequences and impact of this are considered and a person is protected by public law and the statutory scheme in place.

23. It is the Applicant's case that the decision of 5 March 2014 must be given some effect once validly served in accordance with the doctrine of regularity and the effect it should be given, in accordance with the primary intention of the decision, is to curtail the Applicant's leave to remain, or at least to curtail his

[1] Article 9(1)(d) of the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 (SI 2014/2711) as amended by the Immigration Act 2014 (Commencement No.4, Transitional and Saving Provisions and Amendment) Order 2015 (SI 2015/371).

leave to remain by a certain date. Mr Biggs accepted that it could also be said that the Respondent's intention was to give the Applicant 60 days' notice of the curtailment of his leave to remain, but this was not the primary intention and as a secondary matter was not sufficient to render the curtailment a nullity in its entirety.

24. The final part of the submission on the first ground of challenge is that leave to remain continues to be extended under section 3D of the 1971 Act and time has not yet started to run for the Applicant to bring an appeal because he has not yet been served with a valid notice of appeal in relation to the decision of 5 March 2014. Although accepted that the Applicant could in any event waive the requirement to be given a valid notice of appeal, he is not required to do so and is entitled to continue to rely on the absence of a legally valid notice of appeal to extend his leave to remain in the United Kingdom potentially indefinitely. Mr Biggs submitted that the Applicant's extended period of inaction does not alter the legal position by which his leave to remain has been extended. In any event, it has always been open to the Respondent to serve a notice of a right of appeal on the Applicant.

25. The second and third grounds of challenge were taken together on half of the Applicant and in the alternative to the first ground of challenge. In essence, Mr Biggs submitted that given the length of time the Applicant has spent in the United Kingdom since 2011, he has inevitably established private life that would engage Article 8 of the European Convention on Human Rights and that the Respondent was under a duty to carefully consider this prior to removal and in particular, to take into account the consequences for the Applicant of the illegality by the Respondent in 2015, established in the previous application for Judicial Review. It was submitted that the Respondent is under a duty to take appropriate steps to unwind the historic injustice caused to the Applicant before any steps to remove him are taken. The Court of Appeal's decisions in Ahsan and Ors v Secretary of State for the Home Department [2017] EWCA Civ 2009 (at paragraph 86 to 88 and 120) and Balajigari and Ors v Secretary of State for the Home Department [2019] EWCA Civ 673 (at paragraph 80 and 83-91) were specifically relied upon.

26. Further, the Respondent was required to acknowledge and address the failure to provide the Applicant with a 60 day period in which to find a new sponsor, which caused him prejudice, before seeking to remove him. The prejudice was said to be the Applicant being deprived of the opportunity to find an alternative sponsor. It is submitted that the Respondent has not taken into

account or considered any of these factors.

27. In oral submissions, Mr Biggs did not advocate any particular disposal or course of action which the Respondent should adopt to resolve the historic injustice the Applicant claims, merely that these matters should have been considered prior to removal action and that this encompassed a procedural obligation under Article 8 of the European Convention on Human Rights as well as a substantive aspect. It was acknowledged that the Applicant has not put forward any evidence of his private (or indeed family) life in the United Kingdom, but Mr Biggs suggested that the letter from the Applicant's solicitors dated 10 October 2018 amounted to a human rights claim which would need to be determined in any event.

28. I asked Mr Biggs whether the Applicant was inviting the Upper Tribunal to determine the Applicant's substantive claim that his removal would breach his right to respect for private and family life under Article 8 of the European Convention on Human Rights, or only the procedural aspects more specifically relied upon in oral submissions. It was accepted that it could be for the Upper Tribunal to make the assessment in this case, but in the first instance it was submitted that it should be for the Respondent to decide the appropriate redress for the historic injustice in this case. It was not accepted that in the absence of any evidence at all from the Applicant as to the nature or quality of his private and or/family life in the United Kingdom, such a claim would be substantively unable to succeed before the Upper Tribunal or the Respondent.

29. In relation to the third ground of challenge, Mr Biggs accepted that there is no concept of a ground of substantive unfairness in Judicial Review proceedings following the Supreme Court's decision in R (on the application of) Gallaher Group Ltd & Ors v The Competition and Markets Authority [2018] UKSC 25, nor was there any claim made as to procedural unfairness.

*Respondent's submissions*

30. The Respondent's position is that the decision to curtail the Applicant's leave to remain dated 5 March 2014 was not effective in law because, as held by the High Court in a previous application for Judicial Review, there was no effective service of it. The Appellant's leave to remain therefore continued and expired on 30 October 2014 pursuant to his last grant of leave to remain. There were four points in response to the Applicant's construction to the contrary of the effect of the decision dated 5 March 2014.

31. First, Mr Malik submitted that the argument now relied upon by the Applicant is directly contrary to the primary argument he made in his previous application for Judicial Review, that the decision dated 5 March 2014 was ineffective as it was served after the date on which it was said to take effect. It was submitted that the fact that the decision was handed to the Applicant on 2 June 2014 was too late for it to have any legal effect (once found that it did not comply with the deemed service provisions) because this was after the date on which curtailment would have taken effect and it is not possible for leave to be curtailed retrospectively.

32. Secondly, it cannot be said that the primary or only intention of the Respondent was to curtail the Applicant's leave to remain. It was never intended that the Applicant's leave to remain would be curtailed with immediate effect, it was an integral part of the decision that the Applicant would have a further 60 days leave to remain before curtailment. This is entirely consistent with the Respondent's policy to give such a period of time before curtailment takes effect and in accordance with the findings in Patel (revocation of sponsor licence – fairness) India [2011] UKUT 211 (IAC). On this basis and in the alternative, the earliest that effect could have been given to the notice of curtailment if valid at all, would be to curtail the Applicant leave to remain to end on 1 August 2014, i.e. 60 days after service.

33. Thirdly, even if, contrary to the Respondent's position, section 3D of the 1971 Act benefited the Applicant from 2 June 2014, Mr Malik admitted that it would be absurd to suggest that the Applicant's leave to remain had been extended for an indefinite period and continued to the date of the oral hearing and beyond, some five years later. On the Applicant's case, he could simply continue to reside in the United Kingdom indefinitely because time has not yet started to run on an appeal to the First-tier Tribunal against the decision. This would be contrary to the statutory scheme in sections 3C and 3D of the 1971 Act which seek to prohibit indefinite extensions of leave to remain.

34. Mr Malik submitted that the words "could be brought" in section 3D(2)(a) of the 1971 Act, does not exclude a person who knows that there is a right of appeal, but decides not to appeal so as to prolong his residence in the United Kingdom for an indefinite period. The Applicant could have appealed the curtailment decision at any time on or after 2 June 2014.

35. Fourthly, the mere fact that the Respondent gave the Applicant a copy of the decision dated 5 March 2014 on 2 June 2014 did not and could not change the

character of the decision to become one to curtail leave with immediate effect and therefore make it an appealable decision. A curtailment decision cannot be made retrospectively given the extreme consequences for an individual.

36. Finally in relation to the first ground of challenge, Mr Malik suggested that it would be necessary to look at whether the outcome would be highly likely to be the same, whether or not a valid notice of appeal was given when the decision was handed to the Applicant on 2 June 2014. He submitted that there was nothing to suggest that the Appellant would have pursued an appeal at that time, nor that he had any prospect of success on appeal either. The Applicant has never put forward any basis upon which he could or would have challenge the substance of the curtailment decision and he has never challenged the refusal and certification of his human rights claim in 2014. In these circumstances, it was submitted that there was no proper basis upon which an Article 8 claim by the Appellant could have succeeded in 2014, nor in the absence of any evidence at all from the Applicant to the Respondent or before the Upper Tribunal, could it succeed now.

37. In relation to the second and third grounds of challenge, Mr Malik highlighted that the Applicant has not put forward any substantive Article 8 claim at all, either to the Respondent in response to the one-stop notice given to him, or otherwise in the course of this application for Judicial Review. He has not, other than the argument pursued in ground one, put forward any substantive basis upon which he should be granted leave to remain in the United Kingdom, despite being given the opportunity to do so and being issued with a one stop notice. The letters from the Applicant's legal representatives at the end of 2018 and beginning of 2019, do not raise any of the Article 8 claim, nor any of the historic injustice points now relied upon by the Applicant.

38. The Applicant's belated request on 10 October 2018 for the issue of a 60 day letter for him to find a new sponsor, was misplaced, as confirmed by the Court of Appeal in R (on the application of Raza) v Secretary of State for the Home Department [2016] EWCA Civ 36, such a letter was only available to those who had leave to remain at the relevant time, which the Applicant did not. It was perfectly proper for the Respondent to reply to this letter inviting the Applicant to make an application for leave to remain or apply to the one-stop notice given to him.

39. Mr Malik submitted that there was no unfairness to the Applicant in this case, no historic injustice given that there has never been any challenge to the substance of the curtailment decision, no breach of any procedural obligations

and in any event the outcome for the Applicant is inevitable in circumstances where there is no evidence at all from him as to private and/or family life actually established in the United Kingdom. For these reasons it would not be appropriate for relief to be granted in this application for Judicial Review in any event.

40. In reply, Mr Biggs submitted that if the Applicant succeeds on the first ground of challenge, relief cannot be denied on the basis that the outcome would be the same. If the application is granted on this basis it would be material as it would mean that the Applicant is not liable to removal from the United Kingdom. Further it was submitted that any appeal would not inevitably fail because of the much wider rights of appeal that would still apply to the Applicant, to the contrary, the appeal would be bound to succeed as the decision would be contrary to the findings in Patel and the Respondent's own guidance to give a period of 60 days' notice prior to curtailment.

*Discussion*

Ground 1

41. The key issue in the first ground of challenge is what is the effect, if any, of the decision to curtail leave the Applicant's leave to remain dated 5 March 2014? It is somewhat unfortunate that this issue was raised in the previous application for Judicial Review, but not determined, even though this decision was, at least initially, specifically challenged as part of those proceedings with the arguments now relied upon by the Applicant raised, at least in the alternative, in those proceedings.

42. There is no dispute between the parties that, following the findings in a previous application for Judicial Review, the decision dated 5 March 2014 to curtail the Applicant's leave to remain so as to expire on 4 May 2014, was not validly served at the time and was not effective on or after 5 March 2014, up to the point at which the Applicant leave to remain was to expire. The parties differ as to whether the Applicant being handed a copy of the decision on 2 June 2014 gave it any subsequent legal effect, and if so, what effect.

43. The Respondent's primary position is that service of a notice of curtailment after the date upon which it was to have effect is ineffective, such that there was no valid decision to curtail the Applicant's leave to remain, such that it expired on 30 October 2014 in accordance with the previous grant of leave to remain. A decision to curtail leave to remain cannot be taken retrospectively.

44. To the contrary, the Applicant's position is that a decision to curtail leave to remain can be taken retrospectively, however it can only be legally effective once the decision is served, at which point the primary intention of the decision, to curtail leave to remain, should be given immediate effect.

45. First, although as the Supreme Court confirmed in Munir, the Respondent has a broad power to grant, vary or refuse leave to remain, that cannot be read as including a power to take action retrospectively. The issue has in any event being directly addressed in NM (No retrospective cancellation of leave) Zimbabwe [2007] UKAIT 00002, which confirms that leave which has been granted and is current may be curtailed, but only with prospective effect. This is entirely in accordance with normal public law principles against retrospective action, which are all the more important given the severe consequences for a person of being left without any leave to remain in the United Kingdom. Although Mr Biggs submitted that the statutory scheme provided adequate protection against such adverse consequences, that submission only holds good for the time at which the decision under challenge was made and would no longer apply given the changes to appeal rights brought about by the amendments to Part V of the 2002 Act in 2014. As a matter of general principle, the previous existence of a right of appeal on the specific facts of this case does not support the submission that a decision to curtail leave to remain can be taken retrospectively.

46. Secondly, even if the decision dated 5 March 2014 was not retrospectively valid when handed to the Applicant on 2 June 2014, on the Applicant's case, it was in any event prospectively valid from the date of actual service to curtail leave to remain with immediate effect. However, I do not accept that it is possible to separate out from the Respondent's decision dated 5 March 2014 a distinct primary intention to curtail leave to remain which can and should be given effect in isolation from a secondary intention to give a period of notice for a future date for curtailment. A decision to curtail leave to remain with immediate effect is of a fundamentally different character to a decision to curtail leave to remain on a future date. The latter includes a period of notice to the individual to get their affairs in order, either by making a further application for leave to remain or making arrangements to leave the United Kingdom voluntarily, whereas the former places immediate and significant adverse consequences upon an individual. As is highlighted by the nature of the arguments in this application for Judicial Review, there was also at the time of decision a fundamental difference in consequences in that the former gave

rise to a statutory right of appeal whereas the latter did not.

47. Further, the circumstances of the curtailment decision in relation to this Applicant relate to what was at the time a common scenario of an individual who had leave to remain as a Tier 4 student but whose sponsor had lost their licence, through no fault of the individual. In such cases, in accordance with the decision in Patel and the Respondent's own guidance, as a matter of procedural fairness, an individual was usually given a period of 60 days' notice before curtailment of leave to remain took effect, within which they could seek a new sponsor to continue their studies, or otherwise put their affairs in order.

48. In this context, it cannot be inferred or deduced that the Respondent's primary intention was only to curtail the Applicant's leave to remain, as to do so would be contrary to her own policy and the requirements of procedural fairness and for that reason would not conflict with any doctrine of regularity, even if it could be said that it applied in this case. The decision to curtail the Applicant's leave to remain dated 5 March 2014 can only be viewed as a whole, as a decision to curtail leave with a period of notice before leave to remain is actually curtailed and clarity is provided by the decision letter by giving the end date upon which leave would expire.

49. Where a decision to curtail leave to remain with notice of a future date of curtailment has not been validly served on an individual before the date upon which leave to remain is due to expire, that decision has no effect. I find that in the present case the decision of 5 March 2014, was not effective on the date it was made, in the following period after the date upon which leave to remain was to expire on 4 May 2014, or at any time on or after 2 June 2014. The fact that a copy of the decision was handed to the Applicant on a date after which it would have already curtailed his leave to remain, if it had been validly served originally, does not create a valid or effective curtailment decision on different terms to that which are contained on its face. The effect for this Applicant is that his leave to remain was never curtailed and therefore expired on 30 October 2014 in accordance with his previous grant of leave to remain in the United Kingdom.

50. The conclusions set out above are consistent with the decision in R (on the application of Mizanur Rahman) v Secretary of State for the Home Department [2019] EWHC 2952 (Admin), in which the validity of service of a notice of curtailment was in issue. The conclusion in that case was as follows:

*"23. The Claimant became aware of the curtailment letter on or about 30 March 2016 on receipt of a further letter from the Defendant dated 24 March 2016. It was at that point that the curtailment letter was given to the Claimant and he became aware that his Leave to Remain expired on 3 April 2016.*

*24. Taking all of those factors together, my view is that when the Defendant became aware of all that had occurred, the proper conclusion was that the curtailment notice had not been 'given' to the Claimant until 26 March 2016 (two days after the letter was posted – article 8ZB(1)(a)(i)). At that point it was unreasonable to determine that the Claimant's Leave to Remain would expire 8 days later on 3 April 2016 and a new curtailment notice should have been issued extending Leave to Remain for 60 days from the date of issue of the new letter."*

51. In Rahman, the Applicant was served with a notice of curtailment including a 60 day notice period only shortly before the expiry of that period and even in those circumstances, it was not given effect and the finding made that the Respondent should have issued a new curtailment notice including a further 60 day notice period. In the present case, by the time the first application for Judicial Review had concluded resolving the issue of whether the notice had been validly served, the Respondent could not issue a new curtailment notice as the Applicant's leave to remain as originally granted had already expired.

52. For the reasons set out above, there was no valid or effective decision to curtail the Applicant's leave to remain with immediate effect (or in fact at all) and therefore no statutory right of appeal exists under section 82(e) of the 2002 Act. The Applicant cannot therefore benefit from section 3D of the 1971 Act and has been an overstayer since 30 October 2014.

53. As I have found that section 3D of the 1971 Act does not apply to this Applicant, it is not necessary in relation to the first ground of challenge to go on to consider in any detail the further arguments from the parties about whether section 3D of the 1971 Act could apply for an indefinite period in the absence of a valid notice of appeal rights given to an individual or whether the Applicant could reasonably be expected to have waived his right of appeal given that this was first raised as an issue in 2014, no action at all was taken by the Applicant until it was raised again in correspondence with the Respondent in late 2018 and in the absence of any explanation at all for this in action.

Grounds 2 and 3

54. The second and third grounds of challenge relate to the Applicant's right to respect for private (and potentially family) life protected by Article 8 of the

European Convention on Human Rights and to a significant extent on the Applicant's history and the findings in his previous application for Judicial Review that the decision to remove him on 2 June 2014 was unlawful, as was a period of detention from that date; to which can be added that there was no legal or effective decision to curtail his previous leave to remain.

55. These are however issues which are raised as a matter of principle and/or procedural rights rather than ones which contain any factual substance whatsoever. The Applicant, for reasons which are entirely unexplained in these proceedings, has chosen not to put forward any evidence at all about his private or family life in the United Kingdom to the Upper Tribunal in the course of these proceedings, or to the Respondent since his last application on 23 July 2014. This is despite being served with a one-stop notice and being invited by the Respondent to set out his case and despite the Applicant's contention in the current proceedings that his removal would be a disproportionate interference with his right to respect for private and family life contrary to Article 8, a matter which Mr Biggs accepted could be substantively determined by the Upper Tribunal in the present proceedings (albeit preferable to be considered by the Respondent in the first instance).

56. In the absence of any evidence at all from the Applicant, Mr Biggs invited the Upper Tribunal to assume that Article 8 was engaged primarily because of the length of time that the Applicant has been in the United Kingdom. Reliance for such a proposition was placed on the decisions in Ahsan and Balajigari. However, in Ahsan, it was accepted that Article 8 was engaged in relation to each of the appellants and the Court only went so far as accepting that earlier authorities on the Article 8 rights of students found that persons admitted to the United Kingdom to pursue a course of study are likely, over time, to develop a private life of sufficient depth to engage Article 8, but the mere fact that a student is part-way through a course leading to a professional qualification is not sufficient of itself. Whilst it can readily be accepted that in most cases, a person would develop some degree of private life over the passage of time, that is not to say that it exists in every case, nor that it should be automatically assumed to have been established for the purposes of engaging Article 8 of the European Convention on Human Rights. That is consistent with paragraph 86 of the decision in Balajigari in which Lord Justice Underhill stated:

> *"86. Pausing there, once those arguments are disposed of it seems to us inescapable that, as Mr Biggs submitted, in the generality of cases a T1GM ILR applicant is likely to have built up a sufficient private life for his or her removal to engage article 8; and*

*we will proceed on that basis. But that must be subject to the caveat that the engagement of article 8 is of its nature a question of fact to be determined on the facts of the particular case, and there may be cases in which for particular reasons that general conclusion does not apply."*

57. The only matters known about the Applicant in this case are that he entered the United Kingdom on 1 May 2011 with valid entry clearance as a Tier 4 (General) Student and that he had ceased studying, at the latest, on 20 February 2013 when his sponsor's licence was curtailed. The Applicant was working in a butchers in June 2014 when encountered by the Respondent. The Applicant has not provided any information on what he has been doing in the United Kingdom since 2014 or as to his current circumstances.

58. As at 4 August 2014, the Respondent found that the Applicant was not in a relationship nor did he have any children in the United Kingdom and he did not meet the requirements of paragraph 276ADE of the Immigration Rules. In consideration of compassionate and compelling circumstances, there is nothing recorded in the decision letter to show that the Applicant had established family or any significant private life in the United Kingdom and in fact, the claim was considered to be so lacking in merit that it was bound to fail and was certified under section 94(2) of the 2002 Act. The Applicant did not challenge that decision.

59. It is on these very limited facts and the time that the Applicant has been in the United Kingdom (over eight years) that the Upper Tribunal is invited to assume that Article 8 of the European Convention on Human Rights is engaged at all. I find that in accordance with paragraph 86 of Balajagari set out above, this is one of those cases which on the facts, the general conclusion that Article 8 is likely to be engaged does not apply. There is simply no information relied upon by the Applicant which could lead to even an inference that Article 8 is engaged. Further, there is no rational, or in fact any explanation at all by or on behalf of the Applicant as to why he has not set out any substantive human rights claim to the Respondent or the Upper Tribunal since the summer of 2014 and it is reasonable to infer that if he had established private or family life, he would have responded to the express invitations made to him by the Respondent to set this out; particularly given the risk of certification of a future human rights claim under section 96 of the 2002 Act for not raising such a claim at an earlier date. The application for Judicial Review on the second ground of challenge fails for this reason alone.

60. As in Ahsan and Balajagari, the Court of Appeal has recognised that the

determination of disputed issues of fact and human rights matters is generally better determined on appeal to the First-tier Tribunal, but that the Upper Tribunal can, if it has to, determine the matter. In the present case, for whatever reason, the Applicant has failed to avail himself of any of the options to pursue his human rights which would have generated a right of appeal; including, on his case that the curtailment decision was appealable, waiving his right to a notice of appeal and lodging the same with the First-tier Tribunal; challenging the refusal and certification of his claim in 2014; responding to the one-stop notice; raising any human rights grounds against the notice of liability to removal (save for the limited submissions made in the course of these proceedings) and perhaps most pertinently; not making any human rights (or any other) application in over five years. For the avoidance of doubt, the letter dated 10 October 2018 from the Applicant's solicitors did not expressly or impliedly raise a human rights claim on his behalf.

61. In all of these circumstances, including that that the Applicant has specifically challenged the decision on the basis that his removal is contrary to Article 8 of the European Convention on Human Rights in these proceedings, it is appropriate to consider whether in any event, even if Article 8 were engaged, relief could have been granted on this basis.

62. Even if on the facts set out above this Applicant has established sufficient private life in the United Kingdom to engage Article 8, it is impossible to see how his removal could in any event be a disproportionate interference with the right to respect the same on the facts relied on by him. At its highest, it is assumed that the Applicant has established private life through historic studies and some work in the United Kingdom over five years ago and having been in the United Kingdom for more than eight years. In 2014, the Applicant did not challenge the decision that his human rights claim was so lacking in merit that it was bound to fail and there is no further information as to his circumstances since then other than the passage of time. On any view, that is a very weak human rights claim. Even if one gets to the proportionality balancing exercise for the final Razgar question and attaches weight to the claimed historic injustice to the Applicant for the unlawful decision to remove and detention in 2014; the Applicant's right to respect for a very weak private life could not possibly outweigh the public interest in his removal in accordance with the factors in section 117B of the 2002 Act and taking into account all of the circumstances.

63. As to the claimed historic injustice, it is difficult to see in substance what

detriment the Applicant has suffered in this case (save for matters already remedied in the previous application for Judicial Review, in particular for the unlawful detention) or what action could or should be taken to restore him to the position he would have been in had there not been a failure to serve the notice of curtailment; an unlawful removal decision and unlawful detention in 2014. Absent those events, the Applicant's leave to remain expired in October 2014 and he would have been required to take some steps to regularise his stay in the United Kingdom. That is essentially what has happened and there is nothing to suggest that he has, because of events in 2014, been unable to make any further application for leave to remain nor been unable to secure, for example, a CAS to pursue further studies; nor that he has otherwise been prejudiced or suffered any detriment at all in relation to his ongoing status in the United kingdom. There is simply no evidence in support of the Applicant's proposition, nor that in any event, a historic injustice would strengthen his Article 8 claim nor even arguably reduce or outweigh the public interest in removal.

64. The Applicant's challenge on the basis that his removal would be a disproportionate interference with his right to respect for private and family life under Article 8 of the European Convention on Human rights is therefore dismissed. That of course does not preclude the Applicant from making a full application to the Respondent on human rights grounds which sets out his current circumstances and any proposed consideration by the Respondent in that context of the claimed historic injustice; it is simply that on the facts as they have been presented to the Upper Tribunal to date, there is no basis upon which a human rights challenge could succeed. For the same reasons, nor is there any basis upon which, in accordance with section 31(2A) of the Senior Courts Act 1981, relief could be granted for the Respondent's failure to expressly consider Article 8 or the claimed historic injustice prior to issue of the notice of liability to removal as the result would inevitably be the same.

65. The Applicant did not pursue any separate claim of substantive unfairness that would amount to unreasonableness as originally set out in the third ground of challenge; properly accepting that no such ground can legitimately be pursued following the Supreme Court's decision in the Gallaher Group case.

**Order**

I order, therefore, that the judicial review application be dismissed.

**Costs**

The Applicant shall pay the Respondent's reasonable costs of this application, summarily assessed in the sum of £5092.

**Permission to appeal to the Court of Appeal**

The Applicant sought permission to appeal on two grounds, first, that it was procedurally unfair for the Upper Tribunal to rely on NM (No retrospective cancellation of leave) Zimbabwe [2007] UKAIT 00002 and R (Mizanur Rahman) v Secretary of State for the Home Department [2019] EWHC 2952 (Admin) which were not cited by the parties nor referred to during the hearing; and secondly, that the Upper Tribunal erred in finding that the curtailment decision dated 5 March 2014 did not have retrospective, or even immediate effect once served.

First, the additional authorities referred to were not central to the reasons for the application being dismissed but were merely consistent with the findings made and reasons given for them, such that there was no procedural unfairness in the reference made to them.

Secondly, it is unarguable, in accordance with the previous statutory scheme, the doctrine of irregularity or otherwise, that the Respondent has power to retrospectively curtail leave to remain.

For these reasons, permission to appeal to the Court of Appeal is refused because there is no arguable error of law in the decision above.

Signed: _____

**Upper Tribunal Judge Jackson**

Dated: **15th November 2019**

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**Applicant's solicitors:**
**Respondent's solicitors:**
**Home Office Ref:**
**Decision(s) sent to above parties on:**

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**Notification of appeal rights**

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of

proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3.

UTIJR6

JR/2200/2019

# Upper Tribunal
# Immigration and Asylum Chamber

# Judicial Review Decision Notice

The Queen on the application of Muhammad Shoaib

**Applicant**

v

Secretary of State for the Home Department

**Respondent**

**Before Upper Tribunal Judge Jackson**

**Order**

Having considered all documents lodged and having heard the parties' respective representatives, Mr M Biggs and Mr A Rehman of Counsel, instructed by My Legal Limited Solicitors, on behalf of the Applicant and Mr Z Malik of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 30 September 2019.

**IT IS ORDERED THAT:**

1. The Applicant's application for Judicial Review be dismissed.

2. The Applicant shall pay the Respondent's reasonable costs of this application, summarily assessed in the sum of £5092.

3. Permission to appeal to the Court of Appeal is refused.

Signed: _____

**Upper Tribunal Judge Jackson**

Dated: **15th November 2019**

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**Applicant's solicitors:**
**Respondent's solicitors:**
**Home Office Ref:**
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