JR-2024-LON-000528

In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review

In the matter of an application for Judicial Review

The King on the application of

Applicant

and

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Kamara

HAVING considered all documents lodged and having heard Mr M Biggs of counsel, instructed by Legit Solicitors, for the applicant and Mr B Seifert of counsel, instructed by GLD, for the respondent at the final hearing on 29 July 2024,

IT IS ORDERED that:

1. The application for judicial review is dismissed.
2. The Applicant shall pay the Respondent's costs, summarily assessed in the sum of £5,378.33.
3. Permission to appeal is refused.

Signed: T Kamara

Upper Tribunal Judge

Dated: 22 August 2024

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 23/08/2024

Solicitors:
Ref No.
Home Office Ref:

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 point 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).

Case No: JR-2024-LON-000528

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

Before:

UPPER TRIBUNAL JUDGE KAMARA

- -

Between:

THE KING
on the application of
SHEIKH AYATULLAH BIN SAYEED

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Mr M Biggs
(instructed by Legit Solicitors), for the applicant

Mr B Seifert
(instructed by the Government Legal Department) for the respondent

Hearing date: 29 July 2024

- -

J U D G M E N T

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Judge Kamara:

1. By way of an application lodged on 23 February 2024, the applicant challenges the respondent's decision of 14 October 2023 refusing his application for leave to remain as a Skilled Worker. The applicant also challenges the Administrative Review decision dated 30 November 2023 in which the original decision was upheld.

2. The applicant is a national of Bangladesh who entered the United Kingdom on 9 March 2022 with leave to enter as a Tier 4 migrant, which was valid until 14 June 2023. The proposed course was an MSc in

Strategic Studies and Management. On 31 May 2022, the applicant's sponsor, the University of Aberdeen, informed the Home Office that the applicant had ceased his studies.

3. What happened next is the subject of the dispute in this case. The respondent states that on 8 March 2023, the Home Office informed the applicant by email that his leave was curtailed to expire on 7 May 2023.

4. On 12 May 2023, the applicant applied for leave to remain as a Skilled Worker. The respondent wrote to the applicant, on 26 May 2023, to query why his application had been submitted out of time and was informed that the applicant had not received notice of the curtailment of his leave.

5. The Skilled Worker application was refused on 14 October 2023 because the respondent considered that the applicant could not meet the requirements of SW2.1 of Appendix SW because his application had fallen for refusal under part 9 of the Rules. Specifically, paragraph 9.8.3 of the Rules was relied upon because the applicant was considered to have previously failed to comply with the conditions of his permission. The application was further refused under SW2.2 of the Rules because the applicant was considered to be in breach of the Rules by virtue of being an overstayer in circumstances where paragraph 39E of the Rules did not apply. The respondent also maintained that the applicant had been served with the curtailment notice.

6. There are two original grounds. Firstly, that the respondent's decision is unlawful/irrational because the applicant's leave was not curtailed, and the decision was not validly and lawfully served. Secondly, the respondent's decision is unlawful/unreasonable because of the failure to exercise discretion under paragraph 39E(1) of the Rules.

7. On 16 April 2024, permission was granted, on the papers, by Upper Tribunal Judge Sheridan on renewal, on the following basis.

   (1) It is arguable that the applicant raised a factual case (as summarised in paragraph 25 of the grounds) that, taken at its highest, could succeed in a contested factual hearing. This is arguably sufficient for permission to be granted: see paragraph 33 of R (Alam) [2020] EWCA Civ 1527. Ground 1 is therefore arguable.

   (2) It is also arguable that the respondent erroneously failed to consider whether Paragraph 39E(1) of the IRs was applicable. Ground 2 is therefore arguable.

8. In the detailed grounds of defence dated 28 May 2024, the respondent's position as to service of the curtailment is maintained. As for the second ground, the respondent contends that the exceptions listed in paragraph 39E of the Immigration Rules do not apply and that no reasons are advanced for the applicant's failure to apply for further leave in time.

9. Attached to the detailed grounds was a copy of the curtailment notice, a copy of the email to the applicant and an email delivery receipt.

10. Counsel for the applicant submitted a skeleton argument dated 8 July 2024 in which issue is taken with the supporting material annexed to the detailed grounds. Permission was sought for two further grounds of challenge. The third proposed ground was that the respondent failed to afford the applicant 60 days leave from the date of the receipt of the email curtailing leave and the fourth ground being that the respondent erred in relying on paragraph 9.8.3 and SW2.1 of the Rules.

11. The Upper Tribunal granted permission on 24 July 2024 for the respondent to rely on a witness statement of Mohammed Huda dated 18 July 2024. The applicant was similarly granted permission to adduce his second witness statement and screenshots of his email inbox. The accompanying application to amend the grounds and to call live evidence was left to be addressed at the substantive hearing.

The hearing

12. Live witnesses, namely the applicant and Mr Huda were due to give evidence at the substantive hearing. However Mr Biggs confirmed that the challenge to Mr Huda's evidence had fallen away and that the applicant was no longer seeking to cross-examine him. Consequently, the applicant no longer relies on the proposed third ground, which Mr Biggs concedes is unsustainable in the light of Mr Huda's evidence. Permission was sought and granted to rely on the proposed fourth ground which concerned paragraph 9.8.3 of the Rules.

13. The hearing was delayed for a significant time as the applicant required the assistance of a Bengali (Sylheti) interpreter in order to give evidence and one had not been requested in advance.

14. The Upper Tribunal is grateful for the focused submissions from both representatives.

The law

15. There was no dispute among the parties as to the legal position as to service of a notice by email. It was uncontentious that 8ZA of The Immigration (Leave to Enter and Remain) Order 2000 (as amended), states that a notice varying leave to enter or remain in the United Kingdom can be sent electronically to a person or their representative. Furthermore, 8ZB (i)(b) of the said 2000 Order states that service of a notice sent by e-mail is deemed to take effect on the day it was sent.

16. Part 9 Paragraph 9.8.3 of the Immigration Rules:

> An application for permission to stay may be refused where a person has previously failed to comply with the conditions of their permission, unless permission has been granted in the knowledge of the previous breach.

17. Appendix SW (Skilled Worker) Immigration Rules Suitability requirements

SW2.1 The applicant must not fall for refusal under Part 9: grounds for refusal.

SW2.2 If applying for permission to stay the applicant must not be
a) in breach of immigration rules, except that where paragraph 39E applies, that period of overstaying will be disregarded; or
b) On immigration bail"

18. 39E. This paragraph applies where:

(1) the application was made within 14 days of the applicant's leave expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in-time; or

(2) the application was made:

(a) following the refusal or rejection of a previous application for leave which was made in-time; and

(b) within 14 days of:

(i) the refusal or rejection of the previous application for leave; or

(ii) the expiry of any leave extended by section 3C of the Immigration Act 1971;

19. *Alam* [2020] EWCA Civ 1527:

> 29. In my judgment, the giving of notice for the purposes of section 4(1) of the 1971 Act and the 2000 Order does not require that the intended recipient should have read and absorbed the contents of the notice in writing, merely that it be received. If it were not so, a failure to open an envelope containing the notice, for whatever reason, would mean that notice was not given. Similarly, I do not consider that the recipient must be made aware of the notice. Again, a recipient who allows mail to accumulate in a mailbox or on a hall table will not be aware of the notice. Proof of such facts should not enable the person to whom the mail is addressed to establish that the notice was not given, by being received.
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> 30. Receipt, and thus the giving of notice, can plainly be effected by placing the notice in the hands of the person affected. So much is recognised by Article 8ZA(2)(a). In my judgment, however, receipt in the case of an individual is not so limited. Receipt of an email, for example, will be effected by the arrival of the email in the Inbox of the person affected. Likewise, documents arriving by post will normally be received if they arrive, addressed to the person affected at the dwelling where he or she is living, at least in the absence of positive evidence that mail which so arrives is intercepted. A document received at an address provided to the SSHD for correspondence is received by the applicant, even if he does not bother to take steps to collect it.
>
> 31. It follows that the burden of proving the negative, non-receipt, in the face of convincing evidence leading to the expectation of receipt, will not be lightly discharged. In particular it will not be discharged by evidence, far less by mere assertion, that the notice did not come to the attention of the person affected.

20. *Marco Antonia Rodriguez Escobar v SSHD* [2024] EWHC 1097 (Admin):

29. I acknowledge that Floyd LJ did say at §30 that "Receipt of an email, for example, will be effected by the arrival of the email in the Inbox of the person affected", thereby implying that there could be no possibility of rebuttal. Nevertheless, this statement was clearly obiter as the case before the Court of Appeal was concerned with notice by mail, and it would be surprising if consideration was given by Floyd LJ to the possibility of interception of an email that had arrived in an inbox.

30. As has been highlighted in the present case, it is theoretically possible for an email to be intercepted once it has arrived in an inbox. Persons can share inboxes, or allow others to access them. The other person could delete the relevant email from the Secretary of State accidentally – when scrolling through the inbox – or deliberately. An email inbox can be interfered with by a third party even where it is password protected, and that password is not deliberately shared with others.

31. I consider, therefore, that it is permissible on the facts of a particular case for an applicant to seek to persuade the Secretary of State, and subsequently the Court or relevant tribunal, that the email was intercepted before it could be read. Of course, the burden of persuasion will be on the applicant, and the burden will not be lightly discharged. Indeed, I would expect the Secretary of State (or the Court or relevant tribunal) to be somewhat sceptical of an argument that an email was deleted from an inbox whether accidentally or deliberately without convincing evidence.

21. *R (TTT) v. Michaela Community Schools Trust* [2024] EWHC 843 (Admin)

167. Indeed, at [52] Lord Kerr went on, in effect, to reject a submission that no deference can be given to ex post facto justifications for decisions which have been made: "Obviously, if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide.

Ground one

22. Both counsel were in agreement that it was for the Tribunal to evaluate the evidence which went to the issue of service of the curtailment notice. Furthermore both asked for a clear finding that either the applicant did or did not give an honest account regarding the emailed notice of curtailment.

23. Mr Biggs explicitly accepted that there was strong evidence that the curtailment notice was sent to the email address the applicant provided to the respondent. Nonetheless he argued that the applicant had given credible evidence that, having regularly checked his messages, he did not receive the email and that this was sufficient to rebut the presumption of notice contained in 8ZB (i)(b) of the 2000 Order.

24. To bolster this argument, Mr Biggs relies on the aforementioned passages from *Escobar*.

25. In short, he argues that it is open to the applicant to adduce evidence to the effect that an email sent or received in an inbox was nevertheless not received for the purposes of 8ZB. He contends that "something" had happened to the email which led to it being deleted inadvertently without the applicant's knowledge, or that there was some technical difficulty which meant the email was destroyed. Mr Biggs argues that the discussion of 'interception' of an email as in *Escobar* could cover the applicant's circumstances including if he had accidentally deleted the 8 March email. That argument, while ambitious, is not rejected out of hand.

26. In considering the credibility of the applicant's account of non-receipt of the email attaching the curtailment notice, note has been taken of the applicant's consistently made claim that he did not receive the notice. Indeed, this was his explanation when the respondent sent an enquiry on 26 May 2023 prior to deciding the Skilled Worker application. Furthermore, that the applicant sought leave to remain as a Skilled Worker when he did, could provide a degree of support for him being ignorant of the curtailment decision, otherwise it begs the question why did he not apply before his leave expired in order to preserve his immigration status.

27. The applicant's oral evidence relating to the curtailment notice is consistent with that contained in his witness statements dated 21 February 2024 and 8 July 2024. The relevant part of the latter statement is reproduced here.

> 3. The R stated that they sent a curtailment letter to my email REDACTED on 08.03.2023, unfortunately, I have not received any curtailment letter yet. I only became aware of that issue when have received my skilled worker visa refusal letter on 14 October 2023 and then came to know that my student visa was curtailed by the R.
>
> 4. After getting the refusal, for the first time, I became aware that they sent the curtailment on 08 March 2023 although I checked the email regularly. Therefore, I again went to my E-mail (REDACTED) inbox and checked thoroughly including my inbox and spam box. However, I did not find or receive any email from the SSHD/Respondent which they claim they sent on 08 March 2023 (please see the attached screenshot of my email from 6 March to 21 March 2023).
>
> 5. In addition, I have only one email (REDACTED) that I have been using since 2011 and I don't have any other email. I have been using this email for all of my correspondence.

28. Four screenshots taken on 9 July 2024 of the applicant's Gmail 'All Mail' folder are relied upon to show the absence of an email from the respondent on 8 March 2023.

29. The respondent relies on three items of documentary evidence in support of the contention that the applicant was served with notice of the curtailment of leave. The notice itself dated 8 March 2023, the covering email of the same date and the delivery receipt for that email. It is not in dispute that the email address used for the applicant was correct.

30. The respondent further relies on the written evidence of Mr Huda.

31. Mr Huda is a Senior Operations Manager, of the Home Office, UK Visas & Immigration. He states that he reviewed documents, records and information provided by various colleagues in making his statement. In addition to clarifying matters which led to the now withdrawn third ground, Mr Huda states as follows.

> 4. The Study Notifications and Cancellation Team sent the Applicant a decision notice regarding the cancellation of his visa on 08th March 2023 via email from the email address HomeOfficeCancellations@homeoffice.gov.uk to the Applicant's personal email address at REDACTED. This is annexed hereto and marked as [WS1].
>
> 5. The Study Notifications and Cancellation Team received a delivery receipt indicating the successful delivery of the email to the Applicant's email address on 8 March 2023 at 1:06 PM. This is annexed hereto and marked as [WS2].

32. The applicant's evidence amounts to little more than assertion that the email was not received. The screenshots provided do not advance his case. Those screenshots are not contemporaneous with the time the notice was sent, having been taken over a year later.

33. By contrast, the respondent's witness took the time to review Home Office records and communicate to colleagues prior to maintaining the position that notice of curtailment was sent to the applicant as stated. Furthermore, that evidence is supported by consistent and reliable evidence in the form of the covering email, the notice of curtailment and the record of the successful delivery of the email to the applicant's email address. It is therefore understandable why Mr Biggs elected not to challenge the respondent's evidence.

34. The undisputed evidence is therefore that the Secretary of State served the applicant with the notice of curtailment by email on 8 March 2023. I reject Mr Biggs' suggestion that the applicant did not receive the email owing to some mysterious intervening event. I note that this is not a claim made in the applicant's witness statements. In reaching this decision, note is taken of the context of the curtailment and surrounding circumstances which includes the fact that the applicant stopped attending his university course within weeks of arriving in the United Kingdom and made no attempt to inform the Home Office that he was no longer studying. While the applicant states that he was unwell, no medical evidence has been provided. Nor has the applicant submitted the letter he says he sent to the University of Aberdeen to explain his absence.

35. The applicant had no credible response to the question posed in cross-examination as to his ability to undertake the demanding role of a carer by May 2023 despite being too unwell to study for his Master's degree just weeks earlier, in March 2023. There is simply no evidence to support the suggestion that something untoward happened to the email from the respondent. No expert evidence has been adduced in support of this contention and the applicant denied that any other person had access to his password or email account.

36. I find that the inference to be drawn is that the applicant deleted the email from the respondent and that this is the explanation for the absence of that email from the recently taken screenshots of his mailbox. Such conduct is consistent with the applicant's poor compliance with immigration control. The presumption of service has not been rebutted in this case.

37. It follows that the respondent's decision to refuse to grant the applicant leave to remain was lawful because the applicant's previous leave was curtailed and he was therefore an overstayer at the time he made his application for leave to remain as a Skilled Worker. The applicant cannot therefore succeed on ground one.

Ground two

38. The point made in the second ground is that the respondent could have accepted that the applicant was genuinely unaware of the 8 March 2023 decision, as had been explained by the applicant's representative's email of 6 June 2023 and had the respondent done so, the applicant could have satisfied paragraph 39E(1).

39. The comment made in the respondent's written arguments is that paragraph 39E(1) was not available to the applicant because the exceptions 'do not apply to a curtailment decision.' That is an unsustainable view which is unsupported by any legal authority. Evidently, it was open to the Secretary of State to exercise discretion and to evaluate whether or not the applicant had provided a good reason which could lead to the period of overstaying being disregarded.

40. This error of approach in the respondent's defence of the decisions under challenge is immaterial because the applicant's explanation for overstaying was sought and that explanation was invariably considered, given that the decision refusing leave as a Skilled Worker was not arrived at until after the applicant's former solicitors had replied to the respondent furnishing an explanation. Furthermore the decision refusing leave as a Skilled Worker engaged with the explanation at the outset in that the respondent stated that this had been considered but rejected.

41. It is the case that the respondent could have decided to accept the applicant's explanation under an exercise of discretion. The question is whether there was any public law error in the respondent declining to do so. In assessing this matter, I have put aside my view of the applicant's explanation, expressed in respect of ground one, having in mind Mr Biggs's submissions which were, in part, based on the observations of Lord Kerr in *In re Brewster* [2017] UKSC 8 which were, in turn, replicated in the judgment in *R (TTT) v. Michaela Community Schools Trust* [2024] EWHC 843 (Admin) at [167] and expanded upon at [268-270].

42. Notwithstanding those arguments, in view of the respondent's records showing service of the curtailment, it was equally open to the Secretary of State, acting in good faith, to decline to accept that the applicant was ignorant of the curtailment. No detailed account nor evidence was

submitted on the applicant's behalf to support his explanation that he was ignorant of the curtailment.

43. In the absence of a proper explanation, the Secretary of State made no error in concluding that he could not benefit from the provisions of paragraph 39E(1) of the Rules. That disposes of ground two.

Ground three

44. The last point raised on the applicant's behalf, formerly ground four, was that the respondent erred in relying upon paragraph 9.8.3 and SW2.1 of the Immigration Rules because on any rational view the applicant had not previously failed to comply with the conditions of their permission. Mr Biggs does not advance this as a stand-alone ground but to prevent a suggestion that the application for judicial review is academic by challenging the underlying decision under the Rules.

45. Mr Biggs's argument regarding paragraph 9.8.3 is well made given that the conditions attached to the applicant's Biometric Residence Permit did not state that he must study at the University of Aberdeen. The conditions which were stated related to the maximum hours of employment and a lack of entitlement to public funds. Mr Seifert was unable to point to any evidence which supported the reliance on paragraph 9.8.3. Accordingly, it is accepted that the reliance on part 9 of the Rules was erroneous. This error is immaterial, as the application was also refused under SW2.2(a) as the applicant was in breach of immigration laws, by virtue of being an overstayer in circumstances where paragraph 39E did not apply. Indeed, the underlying decision under challenge relied on overstaying rather than a breach of conditions as can be seen below:

> Reasons for Decision
>
> Your application has been refused for the following reason:
>
> You have overstayed and your application is out of time.

46. This ground, therefore, lacks any merit given that the respondent was unarguably entitled to refuse the applicant's Skilled Worker with reference to SW2.2(a) of the Rules.

47. This claim for judicial review is refused.

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