Neutral Citation Number: [2019] EWHC 2952 (Admin)

Case No: CO/4874/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 November 2019

Before :

HHJ BLACKETT

SITTING AS A JUDGE OF THE HIGH COURT

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Between :

The Queen	**Claimant**
on the application of	
Mizanur Rahman	
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Ms Hafsah Masood (instructed by Lawdale Solicitors) for the Claimant
Mr Colin Thomann (instructed by the Government Legal Department) for the Defendant

Hearing date: 22 October 2019

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Approved Judgment

HHJ J Blackett sitting as a Judge of the High Court:

1. This application concerns the rights and obligations provided by articles 8ZA and 8ZB of the Immigration (Leave to Enter and Remain) (Amendment) Order 2000 as amended in 2013 (the "2000 Order") and in particular what is meant by (a) the term "given" in the sense of how a decision is communicated to the person affected (in relation to service of a curtailment notice) and (b) "unless the contrary is proved" in relation to the notice being sent. The points matter in the present case because it is argued that if the curtailment notice was not validly "given" to the Claimant, then a subsequent decision by the Defendant to refuse an application for Leave to Remain on 21 June 2017 was unlawful and should be quashed.

2. On 22 May 2019 permission was granted to the Claimant to pursue a single ground for judicial review: that the presumption in article 8ZB of the 2000 Order was rebutted in respect of the curtailment notice dated 29 January 2016; and the Defendant's decision of 21 June 2017 did not properly take this into account.

3. The Claimant now seeks an order from the Court quashing the Defendant's decision of 21 June 2017.

The Agreed Facts

4. The Claimant entered the UK on 11 October 2008 with entry clearance as a Tier 4 student valid until 28 April 2010. He was pursuing a CIMA course at the London School of Business and Finance (LSBF). His leave was subsequently extended three times until 24 February 2017. Until July 2014 the Claimant lived at 13 Genoa House, Ernest Street, London E1 4RD, after which he moved to 14 Alton House, Bromley High Street, London E2 2BB. He informed the LSBF by updating his personal details electronically. He did not inform the Defendant of his change of address.

5. On 4 September 2015 the Claimant received an email from LSBF advising that its licence had been suspended. On 29 January he received a further email from LSBF informing him that they could not continue sponsoring existing students, that he would be contacted by UK Visas and Immigration (UKVI) giving details of next steps, and that his right to remain legally in the UK would be curtailed 60 days after the date of that letter. On 29 January 2016 the Defendant sent a curtailment letter by recorded delivery to the Claimant at his old Ernest Street address informing the Claimant that his leave to remain expired on 3 April 2016. On 1 February 2016 the letter was delivered. The proof of delivery shows a printed name of RAHMAN as the recipient and has some sort of indecipherable marking as a signature. This letter was returned by Royal Mail on 8 February marked 'returned – moved – this person not living here anymore.' The Defendant's log entry is annotated: 'as the letter has been signed for by the applicant or family member decision is deemed as served.'

6. The Claimant states that he did not receive a curtailment letter but became aware that friends of his in a similar position had, so he telephoned the UKVI and emailed the LSBF several times without any success. Eventually, on 23 March 2016, he emailed the UKVI noting his Bromley High Street address, stating that he had not received a curtailment letter and asking them to send one so that he could gain admission to a new institution to continue his studies. The Defendant responded by letter the following day enclosing a copy of the original curtailment letter and stating: 'we are

unable to issue a new curtailment letter as Royal Mail track and trace shows that this letter was delivered and signed for from Whitechapel delivery office on 1 February 2016.'

7. On 30 March the Claimant wrote to the Defendant stating he had not signed for or received the original curtailment letter, having moved home two years before, and he requested a fresh curtailment letter to provide him reasonable time to find a sponsor. He received no immediate response and, on 1 April 2016, applied for leave to remain on compassionate grounds. That application was refused on 29 March 2017. The Defendant reconsidered that decision and refused it on 21 June 2017. Subsequently there were a number of further applications culminating in an application for indefinite leave to remain on the basis that he had 10 years' lawful residence and on compassionate grounds. That application was refused by the Defendant on 2 April 2019.

Issue to be determined

8. The issue to be determined is whether the curtailment notice of 29 January 2016 was 'given' to the Claimant. If it was, as is argued by the Defendant, this application for judicial review should be dismissed, noting that an alternative remedy exists in that he can appeal the 2 April 2019 decision. If it was not, the Court should consider whether the Defendant's decision to refuse the Claimant's application for Further Leave to Remain on compassionate grounds was unlawful and whether it should be quashed.

The Legal Framework

9. The Immigration Act 1971 section 4 states that the powers to (inter alia) vary or revoke leave to remain shall be exercised "by notice in writing given to the person affected."

10. The meaning of section 4 was considered in *Shoukath Ali Syed v SSHD [2013] UKUT 00144 IAC* and in *R(Javed) v SSHD [2014] EWHC 4426 (Admin).* Both of those cases predated the coming into force of the 2000 Order. In *Syed* Upper Tribunal Judge Spencer said:

> "In the absence of an order made by statutory instrument under section 4(1) of the Immigration Act 1971 dealing with the giving of notice of variation of leave here there is no right of appeal, the Secretary of State has to be able to prove that notice of a decision varying leave to remain under s3(3)(a) of the Immigration Act 1971 where there is no right of appeal was communicated to the person concerned for it to be effective…….. Communication would be effective if made to a person authorised to receive it on that person's behalf…..but the Secretary of State cannot rely upon deemed postal service."

11. This was reinforced in *Javed* by Neil Graham QC, DHCJ, who said at paragraph 25:

> "In my judgment however, merely to send a curtailment of leave letter to the person's address and rely on the receipt signed by another individual who happens to be present when

> the letter was delivered is manifestly insufficient. Such a letter is no 'given' to the person concerned as required by the statute. The burden of proving receipt lies on the Secretary of State; it is not for the person concerned to disprove receipt.
>
> In those circumstances it seems to be entirely unsurprising that the regulations have now been amended so as to permit reliance on postal service."

12. The 2000 Order addresses how notices of decisions are to be given. Article 8ZA provides for notice to be given by (inter alia) being "sent by postal service to a postal address provided for correspondence by the person or the person's representative." Article 8ZB states "(1) where a notice is sent in accordance with article 8ZA, it shall be deemed to have been given to the person affected, unless the contrary is proved."

13. In *R (Khurram) v SSHD [2019] EWCA Civ 80* the Court of Appeal was concerned with the meaning of "the last place of abode" in the 2000 Order. Coulson LJ said (at paragraph 28):

> "*Javid* and *Syed* were cases which arose under earlier, different rules. Indeed, those cases were part of a background which led to Articles 8ZA and 8ZB, with which this case is concerned. They are therefore irrelevant. *Mustafa* addressed only the presumption under Article 8ZA, not the rebuttal point in 8ZB, and was decided on wider public law grounds. It is again of no materiality to the present case."

14. The issue of giving notice of a decision was considered in *R (Mahmood) v SSHD 1JR [2016] UKUT 57 (IAC)* in which Upper Tribunal Judge Grubb observed (at paragraph 56):

> "The Order contemplates, for example, notice being given when it is sent to an individual by post or electronically by e-mail. The natural consequence of that is, in my judgment, that notice will be 'given' when the relevant method results in the notice being delivered. In the case of the ordinary post that would be when the postman leaves the letter containing the notice at the relevant address permitted under the Order. When the notice is sent by recorded delivery notice will have been 'given' when the relevant letter is signed for in accordance with the recorded delivery procedure and left at the relevant address permitted by the 2000 Order"

15. This was also considered in *R (Shoaib) v SSHD [2015] EWHC 2010 (Admin)* in which Neil Cameron QC said:

> "In my judgment the question for the Court to decide is whether the decision maker was entitled to conclude that the necessary facts were established to enable him or her to rely upon the deeming provision. Normal administrative law

> principles apply in determining whether the Defendant's decision that the deeming provisions did apply was unlawful"

Discussion

16. It is clear that any notice varying or revoking leave to remain under the Immigration Act 1971 must be given to the person affected so that he or she is able to take actions flowing from it, importantly where there is no right of appeal against the decision. In plain language, as was stated in *Syed* and *Javed* that must mean that it is brought to the notice of the person affected so that he or she can act upon it. From a policy perspective, further elucidation became necessary in relation to methods by which notice may be transmitted and presumptions which can be made so that persons affected are unable to avoid the consequences of any notice by arguing that they did not receive it and placing an obligation on the Home Office to prove that they did. That elucidation is contained in the 2000 Order article 8ZA with the presumptions in article 8ZB. The effect of these provisions is that notice shall be deemed to have been given if the Secretary of State has complied with article 8ZA, unless the contrary is proved. That is, once the Secretary of State has shown that she has acted in accordance with the Order the burden of proof shifts from the Secretary of State to the Claimant to prove that notice was not given.

17. The purpose of articles 8ZA and 8ZB is to prevent persons affected from being able to deny receipt and then require the Secretary of State to prove receipt as was the case in *Syed* and *Javed*. By reversing the burden of proof those persons who act in bad faith are prevented from abusing the system and putting the Secretary of State to additional and unnecessary work. However, those who act in good faith are not thereby disadvantaged because they are afforded the opportunity to prove that they were not given, and therefore unable to take necessary action upon, the decision.

18. As well as placing the burden of proof on a Claimant to prove non receipt, there is a further safeguard to procedural fairness provided by the Home Office guidance on "Curtailment of leave". On page 124 the guidance to Home Office officials states:

> "You must make 2 attempts to serve a curtailment decision to a UK postal or email address, where available, before serving the decision to file. If only one address is available, you must make both attempts to serve to that address. If you attempt to serve to the migrant's correspondence address and the notice is returned, you must make your second attempt to serve the notice by sending it to the migrant's or representative's correspondence email address. If that is not available or is defective, use the last known or usual home address, place of study or place of business, or their representative's business address, if one is recorded on CID."

19. Here, the Defendant sent the curtailment notice to the address "provided for correspondence by the person" (article 8ZA (2)(c)). Although the Claimant had informed LSBF of a change of address in July 2014 (and states that he believed LSBF would inform UKVI), he had not informed the Secretary of State. However, the notice was returned and officials failed to comply with their own guidance by not making a second attempt to serve it, instead treating it as deemed served.

Notwithstanding that failure, the Defendant argues that there is no requirement for the Claimant to have actually received the notice for it to be validly given. That was envisaged by Upper Tribunal Judge Grubb in *Mahmood* where he said (at paragraph 65):

> "the interpretation of 'given' I have accepted could, in some circumstances, potentially produce harsh results for an individual. For example, where an individual has moved away from the address held on file by the Home Office delivery by post or recorded delivery to that address will, nevertheless, amount to notice have been 'given' to that individual. Whilst I was told that there was currently no obligation upon an individual subject to immigration control to notify the UKVI of a change of postal or e-mail address, nevertheless any sensible individual who wishes to deal with the Home Office bona fide would inform the Home office of any change. In that sense, any harshness would, at least in part, be of an individual's own making."

20. In ordinary course, the Secretary of State is, therefore, entitled to presume that, provided the notice is given in accordance with article 8ZA, the notice has been given to the person affected and it can be presumed that the recipient thereby becomes aware of the contents. That is the case for good policy reasons. However, the presumption that it was "given" can be rebutted if the contrary is proved. In my view proving the contrary is not limited to proving that the notice was not sent to the address provided for correspondence. In my view "proving to the contrary" means that, where the person has not acted in bad faith (that is for example by moving address to avert detection and deliberately not informing the Home Office), demonstrating that he was not given, in the sense of being made aware of the notice, would be sufficient to prove the contrary. As the whole purpose of section 4 of the Immigration Act 1971 is to ensure that a person affected must be told the decision so that he or she may be able to act upon it, such a narrow interpretation would frustrate that purpose. In that respect the interpretation of 'given' in *Mahmood* is too narrow.

21. In this case there is no evidence that the Claimant was attempting to hide his whereabouts from the UKVI or otherwise acting in bad faith. He informed his sponsor of his change of address, he approached the UKVI when he had not received a curtailment notice (providing up to date details of his email and postal addresses) and he requested that the 60-day period started from the date of his actual notification. He did wait for over five months from the first notification from the LSBF that the licence had been suspended before approaching the UKVI, but he was not aware that his Leave to Remain might be revoked until alerted to the fact by the LSBF on 29 January 2016. Even then he was advised that he did not have to do anything until he received notification from UKVI. In reality he waited for less than two months before asking UKVI for clarification of his position and he did so before the original expiry of the 60 day period. In short, the Claimant acted in good faith at all times. On the other hand, the Defendant became aware that the notice may not have not reached the Claimant when it was returned to the UKVI, and made an assumption that it had been signed for by him or a family member. When the notice was returned with an annotation that it had not reached the recipient, there was no second attempt at service

as required by Home Office policy, and no further enquiries were made. A second attempt at service could have been to the LSBF or through that establishment to the Claimant's new residential address.

22. 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.

23. 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.

Decision

24. The Defendant's notice curtailing the Claimant's Leave to Remain on 29 January 2016 was not 'given' to the Claimant when it was delivered to his previous address, and was invalid. It follows that the Defendant did not have all the relevant facts before her when she refused his application for Leave to Remain on 21 June 2017. That decision was, therefore, unlawful and I hereby make an order that it be quashed.

Costs

25. The Claimant's costs will be paid by the Defendant, which are to be assessed if not agreed within 28 days of this judgment being handed down.

Permission to Appeal

26. The Defendant is ordered to file any application for leave to appeal within seven days of this judgment being handed down.