Neutral Citation Number: [2020] EWCA Civ 1527

Case Nos: C7 2019 2272
C7 2019 1432

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER
Upper Tribunal Judges Finch and Freeman

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE HENDERSON
and
LORD JUSTICE PHILLIPS

- -

Between :

THE QUEEN (on the application of Masud Alam)	**Appellant**
- and –	
Secretary of State for the Home Department	**Respondent**

and between:

THE QUEEN (on the application of Masud Rana)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Michael Biggs (instructed by **Hubers Law**) for the **Appellants**
William Hansen (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 8 October 2020

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Approved Judgment

Lord Justice Floyd:

1. These two appeals, which we have heard together, raise the question of what is required "to give notice in writing of" a decision curtailing a person's leave to remain in the United Kingdom. In each appeal the appellant contends that he was not given notice of the curtailment decision, and that in consequence the power of the respondent, the Secretary of State for the Home Department ("the SSHD"), to curtail their leave was not validly exercised. The SSHD contends that, as she has done all that is required of her under the relevant legislation, it is for the appellants to prove that they were not given notice, and they have no real prospect of doing so.

2. The appellant in the first appeal is Masud Alam. The SSHD wrote to him on 20 October 2015 informing him that his leave had been curtailed so that it now expired on 22 December 2015 ("the October 2015 decision"). Mr Alam says that he did not receive the October 2015 decision until it was brought to his attention in connection with unrelated judicial review proceedings in 2018. On 26 September 2018 he lodged this application for judicial review in the Upper Tribunal ("UT") challenging the October 2015 decision. The proceedings ultimately came before Upper Tribunal Judge ("UTJ") Finch at an oral hearing on 3 June 2019. UTJ Finch refused permission to apply for judicial review in a reserved decision dated 17 June 2019. Permission to appeal to this court was granted by Sir Wyn Williams on 17 February 2020.

3. The appellant in the second appeal is Masud Rana. The SSHD wrote to him on 24 March 2015 informing him that his leave had been curtailed so that it now expired on 26 May 2015 ("the March 2015 decision"). Mr Rana says that he did not receive the March 2015 decision until it was brought to his attention in connection with other proceedings in 2018. On 4 November 2018 he commenced this application for judicial review in the UT which came before UTJ Freeman on the papers. By a decision dated 7 February 2019 UTJ Freeman refused permission to apply for judicial review and certified the application as totally without merit, thereby precluding an oral hearing. Permission to appeal to this court was given by Newey LJ on 8 November 2019.

Legal framework

4. The way in which the SSHD may curtail leave to remain is prescribed by section 4(1) of the Immigration Act 1971 ("the 1971 Act"), which provides, so far as material, that this power:

> "…shall be exercised by notice in writing given to the person affected".

5. In *Syed v SSHD* [2013] UKUT 00144 (IAC) UTJ Spencer pointed out that, whilst there were regulations which dealt with the giving of notice in writing of "immigration decisions"[1], there were no corresponding regulations dealing with notice in writing of a decision to *curtail* leave to remain. That was because section 82(2) of the Nationality Immigration and Asylum Act 2002 defined "immigration decision" so as to exclude a decision the effect of which was to leave the applicant

[1] The Immigration (Notices) Regulations 2003 (SI 2003/658)

with some leave to remain. The notice in writing curtailing Mr Syed's leave had been twice sent by recorded delivery to his last known address and twice returned. In the absence of applicable regulations deeming service by post to be effective, effective notice had not been given to Mr Syed.

6. Subsequently, in *R (Javed) v SSHD* [2014] EWHC 4426 (Admin), there was evidence that the notice had been sent by recorded delivery to an address which Mr Javed had provided to the SSHD when making a previous application for extension of leave to remain, but had been signed for by someone other than Mr Javed. Neil Garnham QC, sitting as a deputy High Court judge, held that, in the absence of specific regulations, it had not been established that Mr Javed had been given notice of the decision.

7. Sections 3A and 3B of the 1971 Act, which were inserted by the Immigration and Asylum Act 1999, contain further provisions about leave to remain. Amongst these are section 3B(1) which gives the SSHD power to make further provision by order "with respect to the varying of leave to remain in the United Kingdom"; and section 3B(2)(a) which provides that an order under subsection (1) may provide for "the form or manner in which leave may be … varied".

8. The SSHD proceeded to make the Immigration (Leave to Enter and Remain) Order 2000 (SI 2000/1161) ("the 2000 Order"). Article 8 of the 2000 Order as originally made provided that a notice giving or refusing leave to *enter* (as particularly defined) could, instead of being given in writing as required by section 4(1) of the 1971 Act, be given by facsimile or electronic mail; and that in the case of a notice giving or refusing leave to enter the United Kingdom as a visitor, it may be given orally, including by means of a telecommunications system. These provisions did not relate to the curtailment of existing leave to remain.

9. The 2000 Order was amended with effect from 12 July 2013 to contain further provisions dealing with the giving of notices. It was common ground that these amendments were made with a view to mitigating the effect of the decision in *Syed* and relaxing the requirements for effective service. Article 8ZA as so inserted provides how a section 4(1) notice in writing may be given to the person affected. It is headed "Grant, refusal or variation of leave by notice in writing" and provides so far as material:

> "(1) A notice in writing—
>
> …
>
> (d) varying a person's leave to enter or remain in the United Kingdom,
>
> may be given to the person affected as required by section 4(1) of the Act as follows.
>
> (2) The notice may be—
>
> (a) given by hand;
>
> (b) sent by fax;

(c) sent by postal service to a postal address provided for correspondence by the person or the person's representative;

(d) sent electronically to an e-mail address provided for correspondence by the person or the person's representative;

(e) sent by document exchange to a document exchange number or address; or

(f) sent by courier.

(3) Where no postal or e-mail address for correspondence has been provided, the notice may be sent—

(a) by postal service to—

(i) the last-known or usual place of abode, place of study or place of business of the person; or

(ii) the last-known or usual place of business of the person's representative; or

(b) electronically to—

(i) the last-known e-mail address for the person (including at the person's last-known place of study or place of business); or

(ii) the last-known e-mail address of the person's representative.

(4) Where attempts to give notice in accordance with paragraphs (2) and (3) are not possible or have failed, when the decision-maker records the reasons for this and places the notice on file the notice shall be deemed to have been given.

(5) Where a notice is deemed to have been given in accordance with paragraph (4) and then subsequently the person is located, the person shall as soon as is practicable be given a copy of the notice and details of when and how it was given.

(6) A notice given under this article may, in the case of a person who is under the age of 18 years and does not have a representative, be given to the parent, guardian or another adult who for the time being takes responsibility for the child."

10. Article 8ZB is headed "Presumptions about receipt of notice." It describes the effect of establishing that one of the methods of sending the notice in writing under Article 8ZA has been utilised:

> "(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—
>
> (a) where the notice is sent by postal service—
>
> (i) on the second day after it was sent by postal service in which delivery or receipt is recorded if sent to a place within the United Kingdom;
>
> (ii) on the 28th day after it was posted if sent to a place outside the United Kingdom;
>
> (b) where the notice is sent by fax, e-mail, document exchange or courier, on the day it was sent.
>
> (2) For the purposes of paragraph (1)(a) the period is to be calculated excluding the day on which the notice is posted.
>
> (3) For the purposes of paragraph (1)(a)(i) the period is to be calculated excluding any day which is not a business day.
>
> (4) In paragraph (3) "business day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom to which the notice is sent."

11. It is worth noting a few points about Articles 8ZA and 8ZB at this stage. First, it is clear that at least the special deeming provision in Article 8ZA(4) was an attempt to provide for valid service in a case like *Syed* where successive attempts to serve by recorded delivery had failed. It allows for what the Home Office sometimes refer to as "service to file", although it is not in any real sense service at all.

12. Secondly, the deeming provision in respect of failure or impossibility to give notice, paragraph (4) of Article 8ZA, contrasts with the methods of service in paragraphs (1) to (3) of that Article. Paragraphs (1) to (3) do not expressly deem the giving or sending (as the case may be) of the notice in writing to be effective service. In other words, they do not expressly deem the intended recipient to have received the notice. Rather, they appear simply to list permitted methods of service. In some contexts, provisions which state that service or the giving of notice may be carried out by a particular and specific method are treated as implicitly providing that service or notice by one of those methods amounts to good service or notice in law. In *Sun Alliance v London Assurance Co. Ltd v Hayman* [1975] 1 WLR 177 at 185 Lord Salmon, sitting as a member of the Court of Appeal with Stephenson LJ and McKenna J said:

> "Statutes and contracts often contain a provision that notice may be served on a person by leaving it at his last known place of abode or by sending it to him there through the post. The effect of such a provision is that if notice is served by any of

> the prescribed methods of service, it is, in law, treated as having been given and received."

13. It is possible that paragraphs (1) to (3) of Article 8ZA were intended to be treated as operating in the way described by Lord Salmon. So to treat them would be to create a deemed or presumptive giving of notice where the prescribed method is followed. I do not think, however, that this can be correct as a matter of interpretation of Article 8ZA on its own. That is not just because it is difficult to treat paragraphs (1) to (3) as implicitly deeming receipt, when deemed receipt is dealt with explicitly by paragraph (4). Quite apart from that, the methods of service provided for by sub-paragraphs (b), (e) and (f) of Article 8ZA(2) are not specific as to the fax number, document exchange number or couriered address to which the notice in writing must, in each such case, be sent. It would be odd to create a necessary implication of service or notice simply because a document is sent to the person affected at an unspecified fax number. Yet, if this is a deeming provision, the fact that the document had never in fact been delivered would be irrelevant. As UTJ Grubb pointed out in *R (Mahmood) v SSHD (effective service – 2000 Order)* [2016] UKUT 57 (IAC) ("*Mahmood*"), such an interpretation would permit the SSHD to rely on decisions which the intended recipient had never had the opportunity to consider.

14. Thirdly, and turning to Article 8ZB, Article 8ZB(1) is plainly a deeming provision, although questions arise as to its scope and effect. The deeming provision operates when "a notice is *sent*" in accordance with Article 8ZA. This language is apt to cover all the methods of giving notice in writing in 8ZA(2) and (3) except that in 8ZA(2)(a) where the notice is "given by hand" and not "sent". Further, it does not apply where the deeming provision in Article 8ZA(4) applies. Deemed service will arise under that provision when the decision-maker records the reasons for the impossibility or failure of attempts to give notice on the file. Nothing is sent.

15. Fourthly, there is a noticeable omission in the deeming provisions associated with postal delivery. Article 8ZB(1)(a)(i) deals only with post sent by recorded delivery *in* the United Kingdom. Article 8ZB(1)(a)(ii) is not confined to recorded delivery, but is limited to post sent *outside* the United Kingdom. There is thus no provision dealing with time of receipt for post sent by ordinary mail within the United Kingdom. The only explanation proffered by counsel in this case was that the omission was deliberate so as to provide an incentive to the Home Office to use recorded delivery. Leaving gaps in legislation seems an odd way of incentivising good practice by departmental officials. I cannot see any real purpose in the omission.

16. The reason this omission of UK ordinary post matters is that it would appear that, as a result, no presumption at all applies where the notice in writing is sent by ordinary mail in the United Kingdom. To reach another conclusion one would have to read Article 8ZB(1) as if it contained two parts: the first deeming notice in writing to have been given to the person affected by following any of the specified methods of sending in Article 8ZA (thus including service by ordinary post in the United Kingdom) and the second deeming it to have been given on the specified date in the restricted class of cases expressly mentioned in Article 8ZB. A model for effecting a distinction between service and timing exists in the language of section 7 of the Interpretation Act 1978, but there is no trace of an attempt to effect such a distinction here. Section 7, which it was not suggested could fill this gap, provides:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

17. Article 8ZB(1) is, in my view, not open to this disjunctive reading.

18. A separate but related question is whether the deeming language of Article 8ZB is saying anything about the effectiveness of the giving of notice, or whether it is solely confined to deeming the time of receipt in the class of cases to which it does apply. An argument along these lines was pursued by the SSHD in *Mahmood* as recorded by UTJ Grubb at [51], but appears to have been either abandoned by the SSHD or rejected by the judge. In my judgment, the argument proceeds on a false dichotomy between the giving of notice and receipt of notice, which I will touch on further below.

19. The appeal was argued on both sides, however, on the basis that the words "unless the contrary is proved" relate to both the giving of the notice in writing and the timing of its receipt. I think that agreement was correct, and its consequence is that Article 8ZB(1) only creates a rebuttable presumption which arises if one of the methods of sending in Article 8ZA is followed. In those circumstances, whilst it is true that the drafting leaves much to be desired, I proceed on the basis that Article 8ZB (a) deems the use of the methods of sending in Article 8ZA to be the valid giving of notice and (b) deems that notice to have given on the specified day, but leaves the person affected (or for that matter the SSHD if the need arises) free to prove (a) that he was not in fact given notice and/or (b) that it was not given on that day.

20. The issue which really divided the parties on this appeal was what amounts to the giving of notice. On the most generous approach (to the appellants) to this issue, the requirement for the giving of notice could mean that the person affected must become aware of the contents of the decision. On this approach the person affected must not only have the notice in his hands, but must also have opened the envelope or other medium by which it is delivered and read it. The difficulty with this approach is that those who do not trouble to open their mail, or collect recorded delivery items from the Post Office, or look at their emails, can effectively insulate themselves from being given notice. HHJ Blackett tried to explain how such an approach would work in *R (Rahman) v SSHD* [2019] EWHC 2952 at [20] where he said:

> "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."

21. Mr Biggs, who appeared for the appellants, supported this approach in his skeleton argument. In oral submissions, however, he did not support the good faith/bad faith distinction. In my judgment he was right not to do so, both because there is no basis in the language of the 2000 Order for such a distinction, and because the resultant approach is unworkable. Mr Biggs did recognise, however, that that the court would be unlikely to accept that a person affected had not been given notice when he had had the envelope in his hand but declined to open it.

22. Mr Biggs also relied on statements in the authorities that in order for notice to be given it had to be "communicated" to the person affected. Thus, in *R (Anufrijeva) v SSHD* [2003] UKHL 36; [2004] 1 AC 604, the appellant asylum seeker had been refused asylum, and consequently lost her entitlement to state benefits, without any communication notifying her of the refusal of her asylum application. The majority of the House of Lords held that the decision to refuse her asylum had not taken effect when it was "recorded" as having been determined, as the SSHD contended. As Lord Steyn explained at paragraphs [26]:

> "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice"

23. He went on to explain the importance of this principle for the rule of law at [28]:

> "This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system."

24. *Anufrijeva* was, of course, not concerned with what amounts to the giving of effective notice, because there was no question of any attempt at all having been made to communicate the decision to the appellant. Lord Steyn did, however, at [29], go on to compare the European law approach which requires that the person affected must have the opportunity to make themselves acquainted with the decision:

> "In European law the approach is possibly a little more formalistic but the thrust is the same. It has been held to be a "fundamental principle in the Community legal order … that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it":

25. It was in this context that Lord Steyn explained, at [30], that the underlying principle was one of fairness:

> "Until the decision in *Salem* [which was overruled by this decision] it had never been suggested that an uncommunicated administrative decision can bind an individual. It is an astonishingly unjust proposition. In our system of law surprise is regarded as the enemy of justice. Fairness is the guiding principle of our public law. In *R v Commission for Racial Equality, Ex p Hillingdon London Borough Council* [1982] AC 779, 787, Lord Diplock explained the position:
>
> > "Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decision."
>
> Where decisions are published or notified to those concerned accountability of public authorities is achieved. Elementary fairness therefore supports a principle that a decision takes effect only upon communication."

26. These passages do not support the notion that a communication will only be effective if the decision has been read and understood by the person affected. The European law approach described by Lord Steyn speaks in terms of the party affected being given the opportunity to make themselves acquainted with the decision. If Lord Steyn had been contemplating a requirement for the decision to have been read and understood by the person affected before it was communicated to the person affected, he could hardly have considered the broad thrust of the European law as being the same, when that law merely requires that persons affected should "have the opportunity to make themselves acquainted with" the decision.

27. Lord Millett, at [43], thought that reasonable steps to communicate with the person affected could be enough:

> "I do not subscribe to the view that the failure to notify the appellant of the decision invalidated it, but I have come to the conclusion that it could not properly be recorded so as to deprive her of her right to income support until it was communicated to her; *or at least until reasonable steps were taken to do so*." (emphasis added).

28. In *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67; [2019] PTSR 128, Lord Carnwarth cited with approval at [15] the observation of Lord Salmon in *Sun Alliance and London assurance Group v Hayman* (cited above):

> "According to the ordinary and natural use of English words, giving a notice means causing a notice to be received. Therefore, any requirement in a statute or a contract for the giving of a notice can be complied with only by causing the notice to be actually received—unless the context or some statutory or contractual provision otherwise provides…"

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.

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.

32. It is not unreasonable to assume that judges in the Administrative Court will often be faced with applications for permission to apply for judicial review based on factual allegations that litigants did not receive notices in writing or other documents curtailing their leave to remain, and that in consequence the exercise by the SSHD of her powers in relation to that litigant have not been validly exercised. Some examination of the merits is necessary at the permission stage. I think that the test which should be applied is whether the material before the court raises a factual case which, taken at its highest, could properly succeed in a contested factual hearing. If so, permission should be granted, subject to discretionary factors such as delay (compare by way of example *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59 at [6] to [9]).

33. Drawing this together, when considering permission to apply for judicial review in such cases the following points should be borne in mind in the light of the above discussion:

(a) where a method of sending within Article 8ZA (2) or (3) has been followed, the burden falls on the litigant to show he has a real prospect of establishing that the document was not received in the sense in which I have interpreted that word;

(b) at the permission stage, the litigant will need to do more than show that the notice did not come to his attention, but establish how he proposes to show that it was never actually received in the sense which I have explained;

(c) subject to discretionary factors such as delay, the question will be whether the material before the court raises a factual case which, taken at its highest, could properly succeed in a contested factual hearing;

(d) each case will nevertheless depend on its own facts.

The facts of Mr Alam's case

34. Mr Alam is a national of Bangladesh, born on 1 March 1989. He entered the UK with entry clearance on 1 October 2009 and was then granted leave to remain as a Tier 4 General Student. After successive subsequent applications and grants of leave to remain, his leave was due to expire on 30 July 2016. Before that occurred, on 24 September 2015 the sponsor licence of Bedfordshire Educational Academy where he was studying was revoked.

35. The October 2015 decision curtailing Mr Alam's leave was addressed to him at 344A Grange Road, London, E13 0HQ ("the Grange Road address") in the sense that this is the address appearing on the letter itself. The letter stated that Mr Alam's leave had been curtailed to 22 December 2015. Under "Reasons for Decision", the decision stated:

> "On 24 September 2015 the sponsor licence for Bedfordshire Educational Academy was revoked.
>
> Home Office records have been checked and there is no evidence that you have made a fresh application for entry clearance, leave to enter or remain in the United Kingdom in any capacity.
>
> It is not considered that the circumstances in your case are such that discretion should be exercised in your favour. The Secretary of State has therefore decided to curtail your leave to enter or remain as a Tier 4 Migrant so as to expire on 22 December 2016"

36. On 30 July 2016, the day his original leave was due to expire, Mr Alam applied for further leave to remain on human rights grounds, but his application was rejected as invalid by decision of 21 January 2017, which Mr Alam also claimed he never received. He sought to challenge the decision of 21 January 2017 by judicial review. Permission to apply for judicial review was refused, but permission to appeal to this court was granted by Sir Stephen Silber on 5 June 2018. In the course of negotiations to settle that appeal the appellant was provided with a copy of the October 2015 decision curtailing his leave to remain. The appeal was subsequently settled on terms.

Mr Alam contended that he had never received the October 2015 decision and on 11 September his representatives wrote to the SSHD with assertions to that effect. The SSHD replied on 25 September 2018 in a letter which included this:

> "(ii) The SSHD submits that the curtailment notice was duly served on your client at his last known address – [the Grange Road address] via recorded delivery (tracking no KX409898502GB) at the time of the notice. The SSHD further submits that the onus was on your client to keep the Home Office updated with any change of addresses.
>
> (iii) The SSHD therefore discharged his duty by serving your client with the curtailment notice at his last known address held by the home office at the time as is required under Sec 3(3)(a) and Sec 4(1) of the Immigration Act 1971."

37. On 26 September 2018 Mr Alam issued the present judicial review proceedings. At section 7 of his claim form he asserts that he "never received such notice", i.e. the October 2015 notice curtailing his leave. The SSHD filed an acknowledgment of service exhibiting the Home Office General Case Information Database ("GCID") notes. At that time these notes gave an address for Mr Alam as 30 Adelaide Gardens, Romford, RM6 6SS ("the Adelaide Gardens address"). They record that the October 2015 decision was sent to Mr Alam on 19 October 2015 at 15:08 (although the decision is dated 20 October 2015). The decision is recorded as having been despatched by Emma Matthews. The despatch address is "Applicant" and an outgoing recorded delivery number KX409898502GB is quoted. Tracking data for this number is not available, due to the passage of time. The notes record that the decision was sent to Mr Alam "at his last known address".

38. Mr Alam's amended grounds for permission dated 13 February 2019 sought to challenge the Home Office GCID records relating to sending the October 2015 decision. The grounds also criticised the absence of Royal Mail tracking confirming receipt by Mr Alam and relied on the contention that the presumption created by Article 8ZB of the 2000 Order had been rebutted. On 30 May 2019 Mr Alam applied for permission to rely on a witness statement. Paragraphs 6 and 7 of that witness statement stated:

> "6. [The Grange Road address] I resided, it was a shared accommodation. I lived here along with some other flat mates. No one however informed me whether they received [the October 2015 decision] or anyone could have received this notice but did not serve on me.
>
> 7. I however believe, as I always maintain very good relations with others, if anyone could have received the said notice, he would have informed me of receiving the said notice. However, no one informed anything in this regard."

The decision of UTJ Finch in Mr Alam's case

39. UTJ Finch first considered whether the question of whether there had been proper notice of the October 2015 decision was a question of "precedent fact" (as Mr Alam contended) or fell to be assessed by considering whether the SSHD's decision could be challenged on *Wednesbury* principles only. Having referred to a passage in *Mahmood*, she appears to have accepted the SSHD's contention.

40. At paragraph 18 the judge cited Article 8ZA(2)(c), the provision which records that the notice may be sent by postal service to a postal address provided for correspondence by the person or the person's representative. She then went on to recite that Mr Alam accepted that the Adelaide Road address, which appears in the GCID, "was the one which he provided for service". She also noted the Adelaide Road address was the one which Mr Alam gave as his home address in his recent witness statement dated 29 March 2019. The judge was in error about the facts here, as Mr Hansen, who appeared for the SSHD, accepted. The notice was sent to the Grange Road address, which is where Mr Alam resided at the time.

41. The judge held that the burden was on Mr Alam to show that the curtailment letter was not delivered ([23]), and that there was no further burden to show that the letter was actually delivered into the hands of the applicant ([24]). She also took judicial notice of the practice of leaving a card giving details of how a recorded delivery item which could not be delivered can be collected ([25]), remarking that there was no record of the letter being returned. She does not, however, go on to explain the relevance of the recorded delivery card to the facts of Mr Alam's case.

42. At [27] the judge said that she had also considered whether, in the alternative, Mr Alam's witness statement would have rendered the SSHD's decision irrational. She concluded that the witness statement went no further than to make a bare assertion that other people living at "the address" may have signed for the letter and not given it to him or that they would have told him if such a letter had been sent to "the property". Mr Alam had not named any of the individuals concerned or provided any supporting evidence.

43. She therefore concluded that the decision was not irrational or unlawful. As she had reached this conclusion on "a *Wednesbury* basis" it was not necessary for her to make any further findings as to the applicability of a precedent fact approach. She therefore refused permission to apply for judicial review.

Discussion – Mr Alam

44. The decision of UTJ Finch is coloured by the dispute as to whether the court is required to look at matters through *Wednesbury* unreasonableness spectacles, or as a matter of "precedent fact". That dispute evaporated in this court when Mr Hansen accepted that the question for us was whether it was arguable that Mr Alam had not been given notice in writing of the October 2015 decision. If that was so, then the SSHD's power to curtail leave had arguably not been validly exercised and it was a proper case for granting permission to apply for judicial review. In my judgment that concession was correct. The court is not, in this case, concerned with an issue to which the *Wednesbury* test can sensibly be applied. Whether the correct approach is properly labelled "precedent fact" as that term has been used in the authorities is not therefore a matter which needs further exploration.

45. In my judgment permission to apply for judicial review was nevertheless correctly refused in this case. The SSHD's case that notice of the October 2015 decision had not merely been sent to Mr Alam but delivered to him at the place where, as he accepted, he was living was a powerful one which had been fully particularised and supported by contemporaneous documents, in particular the GCID notes. In addition, Mr Hansen drew our attention to contemporaneous guidance to Home Office officials which suggested that a second attempt at service must be undertaken if a curtailment decision is returned undelivered. There was no suggestion in the GCID notes or elsewhere that the notice had been returned. That all amounts to a strong case that it was received at the address where Mr Alam was living.

46. Against this there was nothing positive to rebut the SSHD's case. On the view which I have expressed as to the requirement for the giving of notice, it does not avail Mr Alam to say that that the notice did not come to his actual attention. Indeed, to be fair, there is some corroboration for his assertion that he was unaware of the decision in the fact that his application to extend his leave was not made until 30 July 2016, the date when his original leave expired. Had he been aware of the curtailment he would have been likely to apply for further leave within the period of curtailed leave. The focus of the enquiry, however, is on whether the notice had been received. As to that, there is only Mr Alam's assertion that it would have come to his attention had it been delivered. This was based on his belief that, because he always maintained good relations with others, his flatmates would have informed him had they received the notice.

47. In his skeleton argument Mr Biggs submitted that the effect of this evidence was that Mr Alam had undertaken enquiries as to what might have happened to the notice. In his oral submissions he spontaneously corrected that: but the correction demonstrates the poverty of what is actually said, which amounts to little more than Mr Alam's good relations with his flatmates.

48. It seems to me that, on the material before the judge, three possibilities needed to be examined. These were (a) that the notice had not in fact been delivered to Mr Alam's address at all; (b) that the notice had been delivered but intercepted by a flatmate and not handed to Mr Alam; (c) that the notice had been delivered but been overlooked or left unopened by Mr Alam himself. There was no evidence of any value to prove non-delivery under (a) and much convincing evidence the other way. Mr Alam had himself discounted the possibility of (b) on the basis of his good relations with his flatmates. That pointed to (c) as a likely explanation. In a flat in multiple occupancy there are ample opportunities for envelopes (even those signed for on receipt) to go unnoticed unless proper care is taken. There is no evidence that Mr Alam conducted any enquiries as to whether any document was delivered at around the relevant time. There is no evidence as to what steps Mr Alam habitually took to ensure he became aware of deliveries. Mr Alam does not even describe his movements at or around the time the delivery would have occurred.

49. Mr Biggs reminded us that if the judicial review proceeded, Mr Alam would be able to obtain disclosure and apply to cross-examine someone from the Home Office. Given the materials already produced by the SSHD, the prospect that that course might prove to be fruitful in this case seem to me to be vanishingly small. In my judgment, taking the evidence before the judge at its highest, Mr Alam did not have a

real prospect of showing that the notice had not been delivered to him, and permission to apply for judicial review was rightly refused. I would dismiss his appeal

The facts of Mr Rana's case

50. Mr Rana is a national of Bangladesh born on 7 September 1989. He entered the United Kingdom on 25 October 2009 with entry clearance as a Tier 4 (General) Student. In January of 2012 he was granted leave to remain as a Tier 4 (General) Student enrolled with BPP University College of Professional Studies ("BPP") until 30 September 2015. On 15 December 2014, BPP contacted the Home Office to notify them that "the applicant has been withdrawn from the programme due to the failure to progress academically". The applicant contacted the SSHD and asked for a "60 day curtailment letter". The SSHD in due course responded by sending a letter to the applicant at Flat 10 Weddell House, Duckett Street, London E1 4LT ("the Weddell House address") dated 24 March 2015 ("the March 2015 decision"). The March 2015 decision curtailed Mr Rana's leave to expire on 26 May 2015.

51. According to the GCID notes for his case, the March 2015 decision was sent by recorded delivery with a number KR791845689GB. The notes record: "issued ICD 3971 to migrant at: Flat 10 Weddell House" and that "Royal Mail track and trace shows signed for 25 March 2015. Signed name Rana".

52. On 25 September 2015 Mr Rana applied for an EEA residence card pursuant to the Immigration (EEA) Regulations 2006. His appeal from the refusal of that application was heard on 10 October 2018 and was dismissed, but at the hearing he was provided with a copy of the March 2015 decision and the GCID records.

53. Mr Rana then issued a letter of claim dated 11 October 2018 in which he challenged the service of the March 2015 decision on the basis that the SSHD bore the burden of proving that Mr Rana had received the decision, and that the SSHD had not discharged this burden. The SSHD responded on 25 October 2018, relying on the GCID records to establish posting of the decision to the Weddell Street address, and its receipt by someone identifying themselves as "Rana". Mr Rana's claim for judicial review and the SSHD's response followed. The SSHD drew attention to the presumptions introduced by the 2000 Order to dispute Mr Rana's contention as to where the burden of proof lay.

54. In his witness statement Mr Rana said:

> "On 25 October 2018, the Respondent responded to the pre-action protocol and states that I signed the 60-day notice post on 25 March 2015. I deny the Respondent's claim and would maintain my position that I never received such letter."

The decision of UTJ Freeman in Mr Rana's case

55. The decision of UTJ Freeman in Mr Rana's case is short. Having set out the history he said:

> "The applicant challenges the 'decision' of 10 October [2018] [that is the date on which he was given the October 2015

> decision in the course of his residence card appeal], on the basis that service after the notice has expired was ineffective, which might have been arguable, if that were all; but the original service on 25 March 2015 was unarguably valid, in accordance with article 8ZB of the Immigration (Leave to Enter and Remain) order 2000.
>
> The applicant complains that the Royal Mail tracking reference could not be traced; but the applicant's acknowledgement of service, filed and served on 18 December 2018, points out that the tracking service is only available for 12 to 18 months after delivery. There has been no attempt by the applicant to answer this point, and there is no possible basis on which this claim could succeed."

Discussion – Mr Rana

56. The SSHD's evidence before UTJ Freeman that the notice was delivered to Mr Rana's address was compelling. There was no evidence in answer beyond Mr Rana's assertion that he did not receive it. That it is plainly not sufficient to show a real prospect of proving that the notice was not delivered. I would dismiss his appeal.

Conclusion

57. For the reasons I have given, I would dismiss both appeals.

Lord Justice Henderson:

58. I agree.

Lord Justice Phillips

59. I also agree.