Neutral Citation Number: [2024] EWCA Civ 1380

Case No: CA-2024-000023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE BLUNDELL
CASE NO. JR-2023-LON-000104

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 November 2024

Before:

SIR KEITH LINDBLOM
(Senior President of Tribunals)

LORD JUSTICE LEWIS
and

LORD JUSTICE HOLGATE

- -

Between:

THE KING (on the application of ZAKOAN AHMED CHOWDHURY	**Respondent**
- and –	
(1) THE FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)	
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**

- -
- -

Nicholas Ostrowski (instructed by the **Government Legal Department**) for the **Appellant, Secretary of State for the Home Department**
Zane Malik KC (instructed by **Chancery Solicitors**) for the **Respondent**
The First-Tier Tribunal was not represented and did not appear.

Hearing date: 8 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 8 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the time limit for appealing to the First-tier Tribunal (Immigration and Asylum Chamber) against certain decisions of the Secretary of State for the Home Department. The question is whether the 14-day period within which an appeal notice must be lodged begins to run from the time when the Secretary of State sends the individual concerned a notice of a decision which complies, or substantially complies, with, the requirements governing the content of such notices set out in the Immigration (Notices) Regulations 2003 ("the 2003 Regulations").

2. The issue arises in the context of an appeal which the respondent, Mr Chowdhury, sought to bring against a decision of the Secretary of State refusing to issue him with a residence card as an extended family member of an EU national under the regulations then in force, namely the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). Notice of that decision, dated 30 November 2016, was sent to Mr Chowdhury. That notice did not comply with regulation 5(3)(a) of the 2003 Regulations as it did not inform him that he had a right of appeal against that decision. Indeed, it told him that he had no right of appeal. At that time, the Upper Tribunal had held in *Sala v Secretary of State for the Home Department* [2016] UKUT 411, [2017] Imm AR 141 that there was no right of appeal against a refusal of a residence permit to a person claiming to be an extended family member. In November 2017, just under a year after the notice of decision was sent in Mr Chowdhury's case, that decision was reversed by the Court of Appeal in *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755, [2018] 1 WLR 1256. The Secretary of State did not send a notice correcting the earlier notice of decision and informing Mr Chowdhury that he did have a right of appeal. We were told that it was not the practice of the Secretary of State to do so.

3. On 13 November 2022, Mr Chowdhury lodged a notice of appeal against the decision of 30 November 2016. By a decision of 7 December 2022, the First-tier Tribunal held that the appeal was out of time as it was lodged more than 14 days after the notice of the decision dated 30 November 2016 was sent to Mr Chowdhury. It declined to extend the time for bringing the appeal. The Upper Tribunal allowed a claim for judicial review of a decision of the First-tier Tribunal and held that the time limit for bringing an appeal had not begun to run as Mr Chowdhury had not been sent a notice which complied with the requirements of the 2003 Regulations.

4. The Secretary of State was granted permission to appeal on one ground, namely that the Upper Tribunal erred in concluding that the appeal had been brought in time. There was a respondent's notice which sought to uphold the decision of the Upper Tribunal that the appeal was brought in time and also sought to argue, in the alternative, that the First-tier Tribunal had erred in not exercising its discretion to extend time.

THE LEGAL FRAMEWORK

The 2006 Regulations

5. Regulation 17(4) of the 2006 Regulations provided that the Secretary of State could issue a residence card to a person who was not an EU national but was an extended family member of an EU national and the Secretary of State considered it appropriate to issue such a card. An extended family member was defined in regulation 8, which provided, so far as material:

> "(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and —
>
> (a) the person is residing in [a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household;
>
> (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
>
> (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household."

6. Regulation 26 of the 2006 Regulations provided that a person could appeal against an EEA decision. That, in turn, was defined in regulation 2 as including a decision concerning a person's entitlement to be issued with a residence card. The Upper Tribunal had held in *Sala* that a decision refusing a residence card to a family member was not an EEA decision as there was no entitlement to a residence card and, therefore, there was no right of appeal. The Court of Appeal held in *Khan* that that was wrong and that such a refusal was an EEA decision and a person did have a right to appeal to the First-tier Tribunal against a refusal.

7. The 2006 Regulations were subsequently replaced by the Immigration (European Economic Area) Regulations 2016. Those regulations have now been repealed following the departure of the United Kingdom from the European Union.

The Provisions Governing Notices of Decision

8. The Secretary of State is required to give notice of any appealable decision to the individual concerned. Section 105 of the Immigration, Nationality and Asylum Act 2002 ("the 2002 Act") provides that:

> "(1) The Secretary of State may make regulations requiring a person to be given written notice where an appealable decision is taken in respect of him.
>
> (2) The regulations may, in particular, provide that a notice under subsection (1) of an appealable decision must state —
>
> (a) that there is a right of appeal under section 82, and
>
> (b) how and when that right may be exercised.

> (3) The regulations may make provision (which may include presumptions) about service.
>
> (4) In this section *"appealable decision" means* a decision mentioned in section 82(1)."

9. Regulation 26(7) of the 2006 Regulations provided that the provisions of section 105 applied to appeals against EEA decisions brought under the 2006 Regulations.

10. The relevant regulations are the 2003 Regulations. At the material time, regulations 4 and 5 provided that:

> "**4. — Notice of decisions**
>
> (1) Subject to regulation 6, the decision-maker must give written notice to a person of any decision taken in respect of him which is appealable under section 82(1) of the 2002 Act or any EEA decision taken in respect of him which is appealable.
>
> **…**
>
> (3) If the notice is given to the representative of the person, it is to be taken to have been given to the person.
>
> **5. — Contents of notice**
>
> (1) A notice given under regulation 4(1) —
>
> (a) is to include or be accompanied by a statement of the reasons for the decision to which it relates …
>
> …..
>
> (3) The notice given under regulation 4 shall also include, or be accompanied by, a statement which advises the person of —
>
> (a) his right of appeal and the statutory provision on which his right of appeal is based;
>
> (b) whether or not such an appeal may be brought while in the United Kingdom;
>
> (c) the grounds on which such an appeal may be brought; and
>
> (d) the facilities available for advice and assistance in connection with such an appeal.
>
> (4) The notice given under regulation 4 shall be accompanied by information about the process for providing a notice of appeal to the Tribunal and the time limit for providing that notice."

11. There are also provisions governing service of a notice. Regulation 7 provided that:

> "**7. — Service of notice**
>
> (1) A notice required to be given under regulation 4 may be —
>
> (a) given by hand;
>
> (b) sent by fax;
>
> (c) sent by postal service in which delivery or receipt is recorded to: –
>
> (i) an address provided for correspondence by the person or his representative; or
>
> (ii) where no address for correspondence has been provided by the person, the last-known or usual place of abode or place of business of the person or his representative;
>
> …
>
> (d) sent electronically;
>
> (e) sent by document exchange to a document exchange number or address;
>
> (f) sent by courier; or
>
> (g) collected by the person who is the subject of the decision or their representative.
>
> (2) Where —
>
> (a) a person's whereabouts are not known; and
>
> (b) (i) no address has been provided for correspondence and the decision-maker does not know the last-known or usual place of abode or place of business of the person; or
>
> (ii) the address provided to the decision-maker is defective, false or no longer in use by the person; and
>
> (c) no representative appears to be acting for the person,
>
> the notice shall be deemed to have been given when the decision-maker enters a record of the above circumstances and places the notice on the relevant file.
>
> (3) Where a notice has been given in accordance with paragraph (2) and then subsequently the person is located—

> (a) he shall be given a copy of the notice and details of when and how it was given as soon as practicable; and
>
> (b) the time limit for appeal under the Procedure Rules shall be calculated from the date the notice is deemed to have been given in accordance with paragraph (2).
>
> (4) Where a notice is sent by post to a place outside the United Kingdom in accordance with paragraph (1)(c) it shall be deemed to have been received on the twenty-eighth day after it was posted, unless the contrary is proved.
>
> (5) For the purposes of paragraph (4) the period is to be calculated —
>
> (a) excluding the day on which the notice is posted…
>
> (7) A notice given under regulation 4 may, in the case of a minor who does not have a representative, be given to the parent, guardian or another adult who for the time being takes responsibility for the child."

12. The reference in regulation 7(3)(b) to the Procedure Rules is a reference to rules made under section 22 of the Tribunals, Courts and Enforcement Act 2007. The relevant rules are the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the Procedure Rules").

The Procedure Rules

13. The relevant provisions of Rule 19 provide that:

> "**19. — Notice of appeal**
>
> (1) An appellant must start proceedings by providing a notice of appeal to the Tribunal.
>
> (2) If the person is in the United Kingdom, the notice of appeal must be received not later than 14 days after they are sent the notice of the decision against which the appeal is brought.
>
> …
>
> (4) The notice of appeal must —
>
> (a) identify which of the available statutory grounds of appeal are relied upon;
>
> (b) be signed and dated by the appellant or their representative;
>
> (c) if the notice of appeal is signed by the appellant's representative, the representative must certify in the notice of

> appeal that it has been completed in accordance with the appellant's instructions .
>
> (5) The appellant must provide with the notice of appeal —
>
> (a) the notice of decision against which the appellant is appealing or if it is not practicable to include the notice of decision, the reasons why it is not practicable;
>
> (b) any statement of reasons for that decision;
>
> (c) any documents in support of the appellant's case which have not been supplied to the respondent;
>
> (d) an application for the Lord Chancellor to issue a certificate of fee satisfaction;
>
> (e) any further information or documents required by an applicable practice direction."

14. Rule 20 of the Procedure Rules deals with late notices of appeal, that is notices lodged outside the time limit prescribed by rule 19. It provides:

> "**20. — Late notice of appeal**
>
> (1) Where a notice of appeal is provided outside the time limit in rule 19, including any extension of time directed under rule 4(3)(a) (power to extend time), the notice of appeal must include an application for such an extension of time and the reason why the notice of appeal was not provided in time.
>
> (2) If, upon receipt of a notice of appeal, the notice appears to the Tribunal to have been provided outside the time limit but does not include an application for an extension of time, the Tribunal must (unless it extends time of its own initiative) notify the person in writing that it proposes to treat the notice of appeal as being out of time.
>
> (3) Where the Tribunal gives notification under paragraph (2), the person may by written notice to the Tribunal contend that —
>
> (a) the notice of appeal was given in time; or
>
> (b) time for providing the notice of appeal should be extended,
>
> and, if so, that person may provide the Tribunal with written evidence in support of that contention.
>
> (4) The Tribunal must decide any issue under this rule as to whether a notice of appeal was given in time, or whether to

> extend the time for appealing, as a preliminary issue, and may do so without a hearing.
>
> (5) Where the Tribunal makes a decision under this rule it must provide to the parties written notice of its decision, including its reasons."

THE FACTUAL BACKGROUND

Mr Chowdhury's Immigration History

15. Mr Chowdhury is a national of Bangladesh born on 31 December 1983. He entered the United Kingdom as a student in 2008. He was subsequently granted leave to remain as a student on three occasions. On the last occasion, he was granted leave to remain until 25 May 2016.

16. On 23 May 2016, two days before his leave to remain as a student expired, Mr Chowdhury applied for a residence card on the basis that he was an extended family member of his great-uncle who was an Italian national.

17. Mr Chowdhury was notified by a letter dated 30 November 2016 that his application had been refused. The letter said, so far as material:

> "Your application has been refused for the reasons set out in the enclosed notices.
>
> The notices inform you of whether there is a right of appeal and, if so, how this may be exercised, and sets out any time limit for an appeal to be made. The notices also explain whether and when you are required to leave the United Kingdom."

18. A notice of decision, also dated 30 November 2016, stated that the application had been refused and set out the reasons for refusal. In brief, the notice said, amongst other things, that Mr Chowdhury had not provided any evidence to support the claim that he was dependent on his great-uncle prior to coming to the United Kingdom or that he was dependent on him whilst living in the United Kingdom. Further, he had produced evidence that he could maintain himself in the United Kingdom when he came as a student and on each of the three occasions on which his leave had been extended. In addition, there was no evidence that Mr Chowdhury had resided with his great-uncle in the United Kingdom (or that his great-uncle was exercising rights of free movement under European Union law). The Secretary of State concluded that Mr Chowdhury had failed to satisfy any of the required criteria in regulation 8(2)(a), (b) or (c) of the 2006 Regulations.

19. The notice of decision also dealt with the question of appeal and said this in bold type:

> "You do not have a right of appeal against this decision. Appeals under the EEA Regulations can only be made against an 'EEA decision'. An EEA decision does not include a refusal

> to issue a residence card to an extended family member. This position is in line with Upper Tribunal's judgment in *Shemsi Sala v Secretary of State for the Home Department* (IA/44409/2013)."

20. That statement reflected the law as it was understood at the time that the notice was sent in November 2016. However, that understanding of the law was wrong. As the Court of Appeal held in *Khan*, a refusal to issue a residence permit to an extended family member was an EEA decision and there was a right of appeal against that decision. The notice of decision did not therefore advise him of his right of appeal as required by regulation 4(2) of the 2003 Regulations (albeit that was through no fault on the part of the Secretary of State).

21. It seems that Mr Chowdhury remained in the United Kingdom after 25 May 2016 albeit that it appears that he had no leave to do so. On 24 October 2016, he applied for leave to remain on human rights grounds. That application was subsequently varied to be an application for indefinite leave to remain. That application was refused on 1 July 2019. Mr Chowdhury lodged an appeal to the First-tier Tribunal on 10 July 2019. That appeal was dismissed on 12 May 2020 and subsequent attempts to appeal against that decision were unsuccessful. Mr Chowdhury also applied for asylum on 14 November 2022. We were told that that application has not yet been determined.

The Appeal to the First-tier Tribunal

22. On 13 November 2022, Mr Chowdhury lodged an appeal in the First-tier Tribunal against the decision of 30 November 2016 refusing his application for a residence card as an extended family member. On 7 December 2022, the First-tier Tribunal held that Mr Chowdhury had a right of appeal, but that the appeal had been brought out of time and it declined to extend the time for bringing an appeal. The material parts of the decision are as follows:

> "5. In light of the authority of Khan, I have little hesitation in concluding that the respondent's decision to refuse an EEA residence card, dated 30th November 2016, was indeed appealable, contrary to the assertion made by the respondent therein. To that extent, this is a valid appeal.
>
> 6. However, the appeal can only proceed to a substantive hearing if the Tribunal agrees to extend time, given that the appeal has been received very nearly 6 years after the decision was served upon him, and therefore a very long way past the 14-day timeframe provided for in Rule 19(3)(a) of the First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014.
>
> 7. In deciding whether I should grant an extension of time under Rule 20, I apply the process and principles set out by the Upper Tribunal in R (on the application of Onowu) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing principles) IJR [2016] UKUT 00185 (IAC).

> 8. Firstly, I find that the delay in this case is both serious and substantial.
>
> 9. Secondly, I do not accept that the appellant has provided a good explanation for his failure to comply with the time limits set down in the procedure rules. While I accept that the first year of the delay is explained by the fact that Sala was not overturned until November 2017, there is simply no explanation at all for the failure to lodge this appeal for a further 5 years thereafter.
>
> 10. Finally, weighing all relevant factors together, I have concluded that it would be wholly unreasonable to extend time and allow this appeal to proceed. In reaching this conclusion I have attached significant weight to both the extreme length of the delay, and the lack of good explanation for that delay, and found that they firmly outweigh both the significance of the issues in the appeal, and the consequences for the appellant if time is not extended."

23. Consequently, in a section of the decision headed "Notice of Decision" the First-tier Tribunal recorded its decision as:

> "The appeal is valid, having been brought against an appealable decision.
>
> The appeal is out of time, and time is not extended.
>
> The appeal is not permitted to proceed further."

The Claim for Judicial Review of the First-tier Tribunal Decision

24. Mr Chowdhury brought a claim for judicial review of the decision of the First-tier Tribunal. The sole ground of claim was that the First-tier Tribunal had erred in holding that his appeal was out of time. The Upper Tribunal reviewed the authorities. It considered that they established that there was a distinction between an appealable decision (including an EEA decision) and notice of that decision and that the time within which an appeal must be lodged did not start to run if an individual had not been sent a notice of decision or if that notice did not comply with the provisions of the 2003 Regulations. It considered the argument of the Secretary of State that the EEA decision in the present case was not invalid, and that the statement in the notice of decision that Mr Chowdhury did not have a right of appeal was an accurate reflection of the law at the time as stated in *Sala*. It concluded at paragraph 40 of reasons that:

> "It is now accepted by the Secretary of State that the decision was an EEA decision which carried a right of appeal. But the authorities I have considered above make it quite clear that time did not start to run from the date of the appealable decision: it was only a notice of decision which had that effect. The notice of decision in this case did not comply with the Notices

> Regulations in several respects and could not cause time to start to run for the purpose of an appeal. The Secretary of State might have made a valid decision but she issued no valid notice which caused time to run".

25. The Upper Tribunal considered whether the decision of this Court in *Marepally v Secretary of State for the Home Department* [2022] EWCA Civ 855, [2022] Imm AR 1341 compelled a different answer. It concluded that it did not, as the question of when time for appealing began to run was not an issue in that case. The Upper Tribunal made an order quashing the decision of the First-tier Tribunal and declaring that:

> "The Applicant's appeal lodged on 13 November 2022 against [the Secretary of State for the Home Department's] decision of 30 November 2016 was brought in time."

THE APPEAL AND SUBMISSIONS

The Ground of Appeal

26. The Secretary of State has permission to appeal on one ground, namely that:

> "The Upper Tribunal erred in holding that the authority of *Marepally v Secretary of State for the Home Department* [2022] EWCA Civ 855, [2022] Imm AR 1341 does not address the question of when time for appealing against the decision starts to run in circumstances when a notice was defective (because not compliant with the Immigration (Notices) Regulations 2003) is served."

Submissions

27. Mr Ostrowski, for the Secretary of State, submitted that the time for appealing would begin to run from the date when a notice of decision was sent, even if the notice did not comply with the requirements of regulation 5 of the 2003 Regulations if (1) Parliament did not intend the consequences of a failure to comply with the requirements to result in total invalidity, or (2) when non-compliance with the relevant procedural requirement did not have an adverse material impact on the recipient of the notice, or (3) when remedying the defect would cause adverse procedural or other consequences. Mr Ostrowski relied on the analysis of Lord Woolf MR in *R v Secretary of State, ex parte Jeyeanthan* [2000] 1 WLR 354, especially at pages 359E to 362G, and the decisions of this Court in *OS ((Russia)) v Secretary of State for the Home Department* [2012] EWCA Civ 357, reported as *R (E (Russia)) v Secretary of State for the Home Department* [2012] 1 WLR 3198, especially at paragraph 42, and *CM (Jamaica) v Secretary of State for the Home Department* [2010] EWCA Civ 1060, as support for his approach to the validity of notices of decision and the interpretation and application of rule 19(2) of the Procedure Rules.

28. Mr Ostrowski submitted that the 2003 Regulations did not provide that a failure to comply with the requirements in regulation 5 would result in the notice having no effect and that was a significant indicator that Parliament did not intend notices which

were non-compliant to have no effect in all cases (relying on the decision of the Supreme Court in *Shahid v Scottish Ministers* [2015] UKSC 58, 2016 AC 479).

29. Mr Ostrowski accepted that there had not been substantial compliance here as the notice of decision did not inform Mr Chowdhury that he had a right of appeal. However, he submitted that there were no materially adverse consequences for Mr Chowdhury in not being given that information as his appeal was doomed to fail in any event. Further, there would be procedurally adverse or other consequences in finding that the notice of decision to be invalid.

30. Mr Ostrowski submitted that the First-tier Tribunal should have considered those questions in deciding whether the notice of decision was invalid and whether or not the time for appealing had begun to run. It had not done so and its decision was therefore flawed. The Upper Tribunal erred by holding that the First-tier Tribunal had erred in finding that the appeal was within time when those issues had not been addressed. He submitted that the appeal should be allowed, to enable the First-tier Tribunal to consider whether or not the notice was invalid, having regard to those matters, in order to determine whether the notice of appeal was lodged in time.

31. He submitted that that conclusion was consistent with observations by this Court in *Marepally*. Although he accepted that that case was not dealing with the time-limit for bringing an appeal, it considered matters germane to that issue including in particular the consequences of a failure to comply with the requirements of the 2003 Regulations.

32. Mr Malik KC, for Mr Chowdhury, submitted that rule 19(2) of the Procedure Rules provided that an appeal had to be received no later than 14 days after the notice of decision was sent. The phrase "notice of decision" was a term of art, which referred to a formal notice which complied with the requirements of the 2003 Regulations. The notice of decision sent to Mr Chowdhury was not compliant as it did not advise Mr Chowdhury of his right of appeal. Consequently, the time within which an appeal must be brought had not begun to run. That conclusion was consistent with a number of authorities in the Asylum and Immigration Tribunal which had held that time for appealing does not start to run until the service of a notice which complies with the 2003 Regulations.

33. Furthermore, Mr Malik submitted that there was no basis for the First-tier Tribunal to consider the merits of an appeal when deciding whether or not an appeal was in time. Nor were there any adverse procedural consequences here. The position was that a notice of decision complying with the 2003 Regulations had not been sent to Mr Chowdhury. The time within which an appeal had to be brought had not therefore begun to run. Mr Chowdhury could waive the non-compliance and lodge a notice of appeal (which he did in November 2022 once he learnt that he had a right of appeal). There were no adverse procedural consequences. There was no need to unravel any earlier decisions. All that Mr Chowdhury sought to do was to appeal against that decision refusing a residence card on the merits to demonstrate that it was wrong, not that the decision was invalid.

DISCUSSION

The Context

34. The Secretary of State takes decisions on whether applicants qualify for leave to enter or remain in the United Kingdom under the Immigration Rules and, as in this case, formerly took decisions on whether they should be issued with a residence card under the 2006 Regulations. Certain of the decisions taken by the Secretary of State may be appealable. Section 105 of the 2002 Act provides that the Secretary of State may make regulations requiring a person to be given "written notice where an appealable decision is taken in respect of him" (and that provision applies to EEA decisions which include decisions refusing a residence card under the 2006 Regulations). Section 105(2) provides that the regulations may, in particular, provide that a notice "must state" that "there is a right of appeal" and "how and when that right may be exercised".

35. The 2003 Regulations make provision for the issuing of notices of decisions. Regulation 4(1) provides that the Secretary of State must give "written notice of any immigration decision or EEA decision which is appealable". Regulation 5 then sets out that a notice is to include or be accompanied by information on a number of matters. The relevant requirement in this case is that it must include or be accompanied by a statement "which advises the person" of "his right of appeal": see Regulation 5(3)(a). Other parts of Regulation 5 deal with the provision of other information concerning rights of appeal but those requirements do not arise for consideration in this case.

36. The purpose underlying the requirement is to ensure that an individual is provided with sufficient information to enable the individual to know about and exercise any right of appeal against a decision. The importance of the requirements in regulation 5(3) was considered in *OS (Russia)* which dealt with a failure to inform the individual that he had a right to appeal from within the United Kingdom against a decision cancelling his indefinite leave to remain. Sullivan LJ observed that:

> "41. The importance of compliance with the notification requirements in paragraph (3) of regulation 5 is underlined by paragraphs (6) and (7) which provide for re-service of the notice containing the advice required by paragraph (3) in those cases where, initially, paragraph (3) need not be complied with. Against this statutory background, applying Lord Steyn's approach in *Soneji* [2006] 1 AC 340 (see para 21 above), I consider that Parliament would have intended that a failure in a notice of decision to comply with the requirement to advise an claimant that he was entitled to an in-country right of appeal would render the notice invalid.
>
> 42. The court's response to such invalidity would normally be to quash the notice, unless it was satisfied that there had been substantial compliance with the requirement: e.g. because the claimant had been made aware by other correspondence from the respondent that he did, in fact, have an in-country right of appeal, because the First-tier Tribunal had accepted an in-country appeal from the claimant, or because he had been allowed to present his appeal in the UK having been permitted to re-enter the country to do so."

37. Those observations apply, with equal or greater force, to a failure to inform the individual that he has a right of appeal against the decision in question.

Appeals

38. Part 3 of the Procedure Rules deals with proceedings before the First-tier Tribunal. Rule 19(1) provides that an appellant must start proceedings by providing a notice of appeal to the tribunal. Rule 19(2) provides that the notice of appeal "must be received not later than 14 days after they are sent the notice of the decision against which the appeal is brought".

39. The reference in rule 19(2) to a notice of decision is a reference to a notice issued in accordance with the 2003 Regulations. That, in context, means a notice which substantially complies with the requirements of the 2003 Regulations in that it provides sufficient information to enable the individual to exercise his right of appeal. Where, as here, the notice of decision does not comply with regulation 5(3)(a) because it fails to advise the individual concerned that he has a right of appeal, that notice does not comply, or at the least does not substantially comply, with the requirements of regulation 5(3)(a). Consequently, the 14-day period within which an appeal must be brought ("not later than 14 days after they are sent the notice of decision") does not begin to run until a notice of decision is sent which complies with regulation 5(3)(a) by informing the individual that he has a right of appeal. An individual who knows, or learns, that he has a right of appeal may choose to lodge a notice of appeal, thereby, in effect, waiving any non-compliance on the part of the Secretary of State.

40. I do not accept Mr Ostrowski's submission that the time for appealing may begin to run if there would be no adverse consequences for the individual because the appeal would be bound to fail. In the context of rule 19(2), the question is what are the time limits within which an appeal must be brought. That is a logically separate and prior question to whether an appeal, if it is brought within time, will succeed. Nor do I accept that rule 20, which provides for a procedure whereby the First-tier Tribunal may consider whether a notice of appeal was lodged in time, and may receive written evidence for that purpose, alters matters. That rule is concerned with the procedural question of whether or not an appeal is within time. That may involve consideration of whether there has been compliance with the relevant requirements concerning the notice of the decision and whether the time for appealing has expired. It does not include consideration of matters relevant to the outcome of an appeal if it has been brought within time.

41. Similarly, I do not consider that the application of rule 19(2) involves any adverse procedural or other consequences in this case. The simple question in this case is whether the individual was sent a notice of decision which informed him of his right to appeal against the decision. If not, the time within which an appeal against must be brought will not have started to run and the individual can appeal against that decision.

42. The decisions on which Mr Ostrowski relied arise in a different context. Mr Ostrowski placed particular reliance on the decision in *R (CM (Jamaica)) v Secretary of State for the Home Department* [2010] EWCA Civ 160, where an individual was told he could only appeal against a particular decision from outside the United

Kingdom but it was subsequently established that, in fact, he had a right of appeal from within the United Kingdom. Mr Ostrowski relied upon that decision as an example of a situation where a notice would not necessarily be invalid even if it contained incorrect information. He relied, in particular, upon the observations of Jackson LJ at paragraph 37 of his judgment, where he said this:

> "37. Let me now draw the threads together. Whenever a new right or remedy is established in the Court of Appeal, other litigants who might have taken advantage of that right or remedy, if only they had known about it earlier, will be disappointed. However, that is not normally a good reason to go back to earlier cases and unscramble decisions made by the parties on the basis of the law as previously understood".

43. The context in which Jackson LJ made those observations needs to be borne in mind. In *CM*, the Secretary of State had made a decision on 7 October 2004 to deport CM to Jamaica. An appeal against that decision failed. The Secretary of State then made a deportation order. CM made further submissions contending that removal would breach his rights under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Secretary of State refused that application and decided in November 2006 that the representations did not amount to a fresh claim within the meaning of the Immigration Rules. At that date, it was understood that an appeal against the decision to reject the human rights claim was only available from within the United Kingdom if the representations amounted to a fresh claim within the meaning of the Immigration Rules. In December 2006, CM therefore applied for judicial review of the decision that his representations were not a fresh claim, with the purpose of establishing that they were a fresh claim so that he could appeal from within the United Kingdom rather than being deported to Jamaica and appealing from there. In October 2008, the Secretary of State again rejected further representations by CM and decided that they were not a fresh claim. Shortly thereafter, the Secretary of State formally decided not to revoke the deportation order. The notice of decision stated that CM could only appeal from outside the country. CM did not appeal because he did not want to leave the United Kingdom in order to do so. He therefore continued his claim for judicial review of the November 2006 decision that the representations were not a fresh claim. That claim was dismissed. CM was deported to Jamaica. CM then sought to appeal against the dismissal of his claim for judicial review. Before the appeal was heard, the Court of Appeal in other litigation held that an appeal based on human rights grounds could be brought from within the United Kingdom whether or not the human rights claim was a fresh claim within the meaning of the Immigration Rules. CM therefore amended his grounds of appeal to contend that the Secretary of State had asserted that any appeal had to be brought from outside the United Kingdom and that assertion had now been shown to be incorrect. He sought an order that the Secretary of State should use his best endeavours to return CM to the United Kingdom to that he could pursue an appeal against that decision.

44. The Court of Appeal dismissed the appeal. First, *CM* concerned a claim for judicial review of a decision that certain representations did not amount to a fresh claim. It was not concerned with the time limits for appealing against an appealable decision. Secondly, the basis for the dismissal of the appeal was that "the judicial review

proceedings brought by the appellant served no useful purpose" (see paragraph 38). The aim of the judicial review proceedings had been to enable CM to remain in the United Kingdom and bring an appeal from within the United Kingdom. CM had, however, been lawfully deported to Jamaica. He could appeal from Jamaica and, while that would be more difficult, he would be able to pursue an effective appeal from Jamaica. It was in those circumstances that the Court of Appeal decided that the judicial review proceedings served no purpose and dismissed the appeal. The decision in *CM*, therefore, does not assist in resolving the question of the applicable time limits for bringing appeals in the First-tier Tribunal.

45. Finally, the decision in *Marepally* does not lead to a different conclusion. That case did not, as the Upper Tribunal rightly observed, concern the time limits for bringing an appeal. On 29 March 2017, the Secretary of State decided to refuse an application for leave to remain as Mr Marepally did not satisfy the criteria for a grant of leave as a charity worker. The notice of decision did not inform Mr Marepally that he had a right of appeal but only said, erroneously, that he had a right of administrative review. Mr Marepally was not, however, seeking to appeal against the March 2017 decision: he had brought a claim for judicial review of the decision and permission was refused as the decision that he did not qualify for leave to remain as a charity worker was correct. He later applied for indefinite leave to remain on the basis that he had 10 years' continuous lawful residence. By a decision dated 6 June 2019, that application was refused. Mr Marepally appealed against that later, June 2019, decision. He argued before the Court of Appeal that the error in the notice of decision relating to the earlier, 29 March 2017, decision meant that the March 2017 decision was invalid and the application for leave to remain as a charity worker had not been determined. Before the First-tier Tribunal, he argued that he had suffered an historic injustice because he had not been told about his right of appeal against the earlier, March 2017, decision. Both of those arguments were rejected. The case was not, however, dealing with the question of the time limits within which an appeal must be brought.

The Present Case

46. In the present case, the Secretary of State took a decision on 30 November 2016 to refuse a residence card. A notice of that decision was also sent on 30 November 2016 but, as a minimum, it did not substantially comply with the requirements of regulation 5(3)(a) of the 2003 Regulations as it did not advise Mr Chowdhury that he had a right of appeal against that decision. The time-limit within which an appeal had to be brought had not started to run. Mr Chowdhury was, therefore, entitled to lodge an appeal on 13 November 2022. In those circumstances, it is not necessary to consider the respondent's notice.

CONCLUSION

47. I would dismiss this appeal, as the Upper Tribunal correctly held that the appeal brought by Mr Chowdhury was lodged within time.

LORD JUSTICE HOLGATE

48. I agree.

THE SENIOR PRESIDENT OF TRIBUNALS

49. I agree that the appeal must be dismissed, for the reasons given by Lewis L.J.. His simple analysis, which reflects the observations of Sullivan L.J. in *OS (Russia)* (at paragraphs 41 and 42), withstands the Secretary of State's argument here and below.

50. As the Upper Tribunal recognised, and as Lewis L.J. has emphasised, the requirements for the giving of notice of the Secretary of State's decision on an application of the kind made by Mr Chowdhury in this case are not optional. They must be complied with, and the tribunal is entitled to expect such compliance. A failure to comply – for example – by omitting to inform the applicant of his right of appeal or, as here, by telling him in error that he has none is likely to be fatal to the validity of the notice itself. But that is not all. The invalidity of the notice will have its consequence for the time within which an appeal against the Secretary of State's decision can be brought. The tribunal must be alert to that consequence.

51. In this case the Upper Tribunal was right to conclude that the time within which an appeal had to be brought against the Secretary of State's decision of 30 November 2016 would not have started to run until a valid notice of decision, which complied with regulation 5(3)(a) by informing Mr Chowdhury that he had a right of appeal, had been served upon him. That was not done. So, as Lewis L.J. has explained, the appeal lodged on 13 November 2022 was brought in time.