JR-2023-LON-000488

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

In the matter of an application for Judicial Review

The King on the application of
Nehemiah Osunde

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Kamara

HAVING considered all documents lodged and having heard Mr S Karim of counsel, instructed by Liberty Legal Solicitors, for the applicant and Mr J Fletcher of counsel, instructed by GLD, for the respondent at a hearing on 22 December 2023.

IT IS ORDERED THAT:

(1) The application for judicial review is granted for the reasons in the attached judgment.
(2) The respondent's decision of 6 January 2023 refusing a grant of indefinite leave to remain is quashed.

(3) The respondent is to pay the applicant's reasonable costs of bringing this judicial review application, to be assessed if not agreed.

Signed: T Kamara

Upper Tribunal Judge Kamara

Dated: 14 February 2024

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *15/02/2024*

Solicitors:
Ref No.

Home Office Ref:

Notification of appeal rights

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

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

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

Case No: JR-2023-LON-000488

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

14 February 2024

Before:

UPPER TRIBUNAL JUDGE KAMARA

- -

Between:

THE KING
on the application of
Nehemiah Osunde

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Mr S Karim
(instructed by Liberty Legal Solicitors), for the applicant

Mr J Fletcher
(instructed by the Government Legal Department) for the respondent

Hearing date: 22 December 2023

- -

J U D G M E N T

- -

Judge Kamara:

1. By way of an application lodged on 14 March 2023, the applicant challenges the respondent's decision of 6 January 2023 refusing indefinite leave to remain and instead granting him 30 months leave to remain. The applicant also challenged the time limit on his Biometric Residents Permit (BRP) issued on 11 January 2023 which was inconsistent with the 30-month grant of leave. That latter issue has subsequently been rectified.

2. The applicant is a national of Nigeria. He first entered the United Kingdom on 28 March 2012 with leave to enter as a Tier 4 migrant, valid until 28 July 2014. Following an in-time application, he was granted further leave to remain in the same capacity until 19 September 2016. Following an in-time application for leave to remain on human rights grounds, the appellant was granted leave to remain as a partner until 24 January 2020. The respondent states that the applicant's leave was curtailed on 15 March 2019 to expire on 14 May 2019. The applicant contends that he was unaware of this curtailment as he received neither the decision nor a notice that the respondent was minded to curtail his leave to remain. The applicant applied for further leave to remain on 11 December 2019 on human rights grounds. That application was granted on 20 August 2020 to expire on 30 July 2021. On 25 May 2021 the applicant made a further application for leave to remain. That application was granted, until 30 July 2022.

3. On 11th April 2022 the applicant applied for indefinite leave to remain as he had by then resided in the United Kingdom for over 10 years. On 6th January 2023 the Respondent refused that application because it was contended that the applicant had overstayed between 14 May 2019 and the grant of leave on 20 August 2020. The same decision granted the applicant 30 months leave to remain. The BRP issued on 11 January 2023 referred to a grant of 6 months leave until 11 July 2023.

4. Three grounds were pursued. Firstly, that the respondent's decision was unlawful/irrational because the applicant's leave was not curtailed, and the decision was not validly and lawfully served. Secondly, the respondent's decision was unlawful/unreasonable because of the failure to properly consider and exercise discretion in accordance with the rules and policy (guidance) document and there has been procedural unfairness. Thirdly**,** the respondent's issuance of 6 months leave was unlawful as the decision of 6 January 2023 confirmed that 30 months leave to remain would be granted.

5. On 22 August 2023, permission was granted by Upper Tribunal Judge Keith on renewal, on the following basis.

> I grant permission on ground (1) that curtailment was arguably not validly served and (2) that the decision was procedurally unfair because the applicant was unable to adduce evidence of the lack of service before he was refused ILR. In doing so, I considered R (Alam) & Or v SSHD [2020] EWCA Civ 1527, in particular paragraphs [30] to [33]. It is at least arguable that the applicant has a real prospect of showing that the later emails were not received, in light of the respondent's GCID records indicating, "Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server." While Ms Barhey has raised new points in submissions which the applicant may need to address (the search terms he may have used to search his email account may have excluded discovery of the emails, and mere photocopied screen shots of email pages may not be sufficient), it is at least arguable (and open to the applicant to instruct his solicitor) that on a fuller search of the applicant's email account being completed and for such a solicitor to provide a witness statement that the duty of candour has been complied with, the applicant will have been able to rebut the presumption of service.

6. On 28 September 2023, the respondent sought an extension of time to file and serve their detailed grounds of defence until the 18 October 2023. That application was agreed by consent. On the 18 October 2023the respondent applied for a further 7 days until the 25 October 2023. An Upper Tribunal lawyer granted an extension until 30 October 2023.

7. In the detailed grounds of resistance dated 25 October 2023, the following useful summary was provided in response to the grounds upon which permission was granted**.**

> **Ground 1**: the Applicant contends that the Notice was not validly served. The Respondent contends that the Notice was validly served by email as permitted by Article 8ZA(2)(d) of the Immigration (Leave to Enter and Remain) Order 2000 (as amended by The Immigration (Leave to Enter and Remain) (Amendment) Order 2013). There is a presumption of service under Article 8ZB (1) of The Immigration (Leave to Enter and Remain) Order 2000 (as amended). Upon serving the Notice by email, the Respondent received the following automated response by email "Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server nehe4peace@yahoo.com". As the automatically generated response states, delivery to the email account of the Applicant was "complete". The Applicant has failed to rebut the presumption of service under Article 8ZB (1) of the Immigration (Leave to Enter and Remain) Order 2000 (as amended).
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> **Ground 2**: the Applicant contends that the decision to deny the Applicant ILR was procedurally unfair because the Applicant was unable to adduce evidence of the lack of service of the Notice before he was refused ILR. The Respondent contends that this Ground is necessarily parasitic on Ground 1, in that if the Applicant is unable to rebut the presumption of service, then there is no possible unfairness present.

8. Attached to the detailed grounds was a witness statement dated 25 October 2023, signed by Benjamin Connolly who works at the Home Office.

9. Counsel for the applicant submitted a skeleton argument dated 30 November 2023 in which the previous grounds were reiterated. In addition, it was not accepted that the second ground was parasitic on the first, as contended in the detailed grounds of defence.

10. Both representatives fleshed out their respective arguments at the substantive hearing of this matter. Mr Karim relied upon his skeleton argument and emphasised that unusually this case turned on the evidence adduced rather than law. He made the following additional points.

11. The applicant had provided the evidence referred to in the grant of permission, in the form of a further witness statement from the appellant and a statement from Mr Hoque, the applicant's solicitor. There had been no application on behalf of the respondent to cross-examine the applicant or his solicitor.

12. In relation to the first ground, in summary, Mr Karim submitted that there was insufficient evidence of service or alternatively, the applicant rebutted the presumption of service. As for ground two, in exercising any discretion under the Long Residence guidance, the respondent failed to have regard to the full facts which could have been presented to explain an assumed period of overstaying had there been a 'minded to' process.

13. Mr Fletcher relied on the detailed grounds of defence, there being no skeleton argument adduced on behalf of the respondent. In short, in relation to the first ground he relied upon a GCID note dated 15 March 2019 and the witness statement of Mr Connolly as evidence of service and argued that the applicant's evidence was insufficient to rebut the presumption of service.

14. Mr Fletcher argued that the second ground was not freestanding because if the curtailment notice was properly served, the applicant could not complain of procedural unfairness in the refusal of his ILR application. If the notice was not validly served, it could be argued that the Secretary of State should consider any explanation.

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

16. Also relevant is *R [Alam] v SSHD* [2020] EWCA Civ 1527

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

17. The judgment in *R[Mahmood]v SSHD* (effective service 2000) IJR [2016] 00057, contains helpful guidance including, at [42] which addresses the position of GCID records.

> The GCID record is, in my judgment, persuasive and sound evidence to conclude that notice of the curtailment decision was sent as an attachment to an e-mail sent to the applicant's e-mail address on 1 October 2013. The GCID record shows that "AC" e-mailed the notice at 9.22 on 1 October 2013. That is a very precise entry. The curtailment notice itself records it was sent "via e-mail" and is also signed by "AC". Although I was told that the GCID record is updated contemporaneously and cannot be retrospectively amended, I acknowledge that is not evidence. Nevertheless, nothing before me leads me to conclude that the GCID record is not a reliable record.

18. The respondent relies on three items of evidence in support of the contention that the applicant was served with notice of the curtailment of leave. The first is the notice itself dated 19 March 2019. The second is a note on the GCID records dating from 15 March 2019 relating to the claimed service of the curtailment notice. The third is a witness statement dated 25 October 2023 from Benjamin Connolly. I make the following observations on these items.

19. The letter of 19 March 2019 advising the applicant that his leave has been curtailed contains an instruction to ‘serve via email.’ At this juncture, I note that the notice referred to in *Mahmood* was said to have included the clear statement that it had been ‘sent via email.’ In addition, the applicant’s full name, nationality and date of birth are not stated in this decision. More importantly, the curtailment letter postdates the claimed service of the notice by email by some four days. The letter itself is dated 19 March 2019 and the same date is given as the date of decision on the second page of the letter. I have carefully considered the fact that the curtailment letter refers to the applicant’s leave expiring in 60 days from 15 March 2019. Nonetheless, the respondent has put forward no evidence nor explanation as to how a decision dated 19 March 2019 could be attached to an email said to have been sent on 15 March 2019.

20. The GCID note for 15 March 2019 states as follows. ‘Curtailment notice converted to PDF format and emailed to the migrant from Home Office Curtailments mailbox to: (the applicant’s email address). The identity of the civil servant who made this entry is not apparent from the GCID records relied upon by the respondent. Mr Fletcher confirmed that the respondent had not provided a copy of the email itself which was said to have been sent from the Home Office Curtailments mailbox. I note that in *Mahmood*, the precise time of the email was provided as well as the initials of the officer who sent the email and that there also was some consistency between those details and the curtailment notice itself. That is not the case here.

21. The respondent relies upon the following entry on the GCID note; ‘Delivery to these recipients of groups is complete, but no delivery notification was sent by the destination server: (applicant’s email address). Mr Fletcher was unable to refer me to any evidence as to the meaning of this phrase. The entry itself is unclear in that it does not explain, by way of example, whether this was the understanding of the person who made the entry or whether it represented a message which had been received.

22. I compare the entry of 15 March 2019 to that of 10 October 2018 when the GCID records that a minded to curtail letter was sent. The applicant accepts that he received that document by email, indeed that item was seen by his solicitor, Mr Hoque, when he searched the applicant’s email inbox. It is of note that there is no similar entry regarding delivery to the one shown on the entry for 15 March 2019.

23. I further compare the entry of 15 March 2019 to that of 24 January 2019, where an email sent from the Home Office Mail Delivery System to Home Office Curtailments was reproduced in the GCID note in relation to a different email said to have been sent to the applicant. Had the email of 15 March 2019 been sent to the applicant as claimed, it is puzzling that the original message from the mail delivery system would not be reproduced on the GCID, given the importance of the communication.

24. The respondent further relies on the evidence of Mr Connolly, who has been employed as a civil servant in the Home Office since 04 July 2004 and currently works in the Status Review Unit Team as a Deputy Chief Caseworker, responsible for Cancellations of Limited Leave to Remain, Revocation of Indefinite leave to remain and Revocation of Refugee Status. In his witness statement, Mr Connolly confirms that the Cancellations team did not contact the applicant’s representative. He adds that the team had been provided with an email address for the applicant and no non-deliverable receipt had been received from the correspondence served to that email address and as such email was seen as a more appropriate service method. In relation to the email in dispute, Mr Connolly said as follows:

> I can confirm that the cancellations team tried to contact Nehemiah Osunde by email via the email address on record,

25. In view of the resources available to Mr Connolly to check the respondent’s records relating to the claimed service of the cancellation of leave, the content of this witness statement is not reassuring. Had Mr Connolly seen evidence to support the respondent’s contention that service was effected by way of an email sent on 15 March 2019, it is surprising that he would not have said as much and attached such evidence. Mr Connolly’s use of the term ‘tried to contact’ is ambiguous in that it raises more questions than answers. This statement does not begin to support the respondent’s case.

26. In view of the cumulative effect of the foregoing concerns, on balance, I am not satisfied that the Secretary of State served the applicant with the notice of curtailment by email on 15 March 2019.

27. While I need not comment on the applicant's evidence given my conclusion on the respondent's evidence going to service, I note that there are other indicators which tend to show that the applicant was not served with the notice of curtailment. The applicant's solicitor conducted a search of the applicant's email inbox and confirmed that there was no email relating to the curtailment, whereas an earlier email from the respondent dated 10 October 2108 was present. The applicant, who is employed as a nurse, has always made timely applications to extend his leave to remain in the United Kingdom. He successfully sought further leave to remain shortly before his originally granted leave was to expire, that is after the respondent claims that his leave had been curtailed.

28. It follows that the respondent's decision to refuse to grant the applicant indefinite leave to remain was unlawful because because the applicant's leave was not curtailed as the curtailment decision was not served.

29. Having considered all the evidence and arguments, I conclude that the first ground is made out. As accepted by Mr Karim, there is no need for any consideration of the second ground in this instance.

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