Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Mahmood) v Secretary of State for the Home Department (effective service – 2000 Order) IJR [2016] UKUT 00057 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Birmingham Civil Justice Centre
On 5 November 2015

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE QUEEN (ON THE APPLICATION OF ARSLAN MAHMOOD)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Mr Z Jafferji and Mr N Ahmed instructed by DV Solicitors
For the Respondent: Mr S Skinner, instructed by the Government Legal Department

(1) Notice of a decision (not falling within the Immigration (Notices) Regulations 2003) is "given" for the purposes of s.4(1) of the Immigration Act 1971 when it is (a) "sent" in accordance with Art 8ZA of the Immigration (Leave to Enter and Remain) Order 2000 (SI 2000/1161) as inserted by the Immigration (Leave to Enter and Remain) Amendment Order 2013 (SI 2013/1749) with effect from

12 July 2013 and (b) according to the method used, is delivered to the individual's postal or e-mail address according to that method.

(2) Where Art 8ZB applies, both delivery and the date of delivery are rebuttably presumed.

(3) There is no requirement that the individual has actual knowledge of the notice or its contents.

(4) Consequently, subject to rebuttal, a notice of a curtailment decision attached to an e-mail sent to an individual's e-mail address will be "given" on the day it is sent and is delivered to that individual's e-mail address.

JUDGMENT

JUDGE GRUBB:

Introduction

1. The applicant is a citizen of Pakistan who was born on 12 November 1989. He challenges the Secretary of State's decision of 4 April 2014 refusing him further leave to remain as the spouse of a British citizen under Appendix FM of the Immigration Rules (Statement of Changes in Immigration Rules, HC 395 as amended).

2. In refusing the application, the Secretary of State concluded that the applicant was an overstayer for a period of more than 28 days and so could not meet the requirement in E-LTRP.2.2. of Appendix FM.

3. The Secretary of State concluded that the applicant's leave to enter as a Tier 4 (General) Student granted until 25 August 2014 had been curtailed by a decision dated 1 October 2013 so as to expire on 30 November 2013. That decision was sent as an attachment to an e-mail sent to the applicant's e-mail address given on his visa application form.

4. The basis of that curtailment was that the licence of the applicant's sponsor institution had been revoked on 23 July 2013 such that curtailment was justified under para 323A(b)(i) of the Rules.

The Claim

5. The applicant argues that his leave was not lawfully curtailed by the decision dated 1 October 2013. Consequently, he made an in-time application for further leave as a spouse on 11 February 2014 and so at the date of decision he had leave and so met the requirements of the Rules, in particular E-LTRP.2.2.(b) of Appendix FM.

6. The applicant's grounds argue that the respondent has failed to give notice of the curtailment decision in accordance with Articles 8ZA and 8ZB of the Immigration (Leave to Enter and Remain) Order 2000 (SI

2000/1161) of ("the 2000 Order") as inserted by the Immigration (Leave to Enter and Remain) Amendment Order 2013 (SI 2013/1749) with effect from 12 July 2013.

7. In the amended grounds the applicant relies on essentially two grounds:

   (1) The respondent has failed to prove in accordance with Article 8ZA(2)(d) of the 2000 Order that the curtailment notice was: "sent electronically to an e-mail address provided for correspondence by the person or the person's representative;...";

   (2) The applicant has, on the evidence, rebutted the presumption in Article 8ZB(1)(b) of the 2000 Order that notice has been given to him on the day that the e-mail was sent.

8. In addition, the applicant argues that the respondent must prove as a 'precedent fact' that his leave was lawfully curtailed. It is not enough that the decision survives challenge on public law Wednesbury principles, i.e. a rationality challenge. Following the hearing, both counsel submitted additional skeleton arguments on this issue.

The Background Facts

9. The applicant entered the United Kingdom on 1 May 2013 with entry clearance as a Tier 4 (General) Student and leave valid until 25 August 2014.

10. On 23 July 2013, the respondent revoked the Tier 4 Sponsor Licence of Camelot College at which the applicant was a student. The respondent's General Cases Information Database ("GCID") Case Record Sheet for 14 August 2013 in relation to the applicant records, having noted the revocation of the college's licence:

> "please contact Tier 4 Curtailment Team if a UK address is obtained."

11. Then on 1 October 2013, the GCID Record (at page 221 of the bundle) contains the following entry relating to the curtailment of the applicant's leave:

> "There is no evidence that the migrant has been complicit in any non-compliance of the sponsor, so leave is to be varied to 60 days, in accordance with paragraph 527 of the Tier 4 Sponsor guidance. Therefore, leave falls to be curtailed with No Right of Appeal under paragraph 323A(b) of HC395 (as amended) so as to expire on 31/11/2013.
>
> No UK address available for the migrant, so unable to serve decision to a postal address.

Curtailment notice therefore to be served via e-mail.

ICD.3971 created on doc gen. Curtailment notice converted to PDF format and e-mailed to the migrant from Home Office Curtailments mailbox to "arslanmehmood321@gmail.com".

The GCID record sheet (page 219 of the bundle) includes the following:

"Case Type: Curtailment Consideration – T4 General Student

Case Outcome: Curtail – No R.O.A.

Outcome Date: 01-Oct-2013
....

Expiry Date: 30-Nov-2013"

The decision is stated to have been made by "[AC]". The GCID record then continues (page 220 of the bundle) :

"Despatch Details:

Despatch Method: By E-mail	Despatched By User[AC]
Despatch Address: Applicant – Tier 4	Despatched By Unit: MAN Team 3 Curtailment
Outgoing Delivery Number: 09:22"	Despatch Date/Time: 01-Oct-2013

12. The curtailment decision is at pages 221-212 of the bundle. It is headed: "Served Via E-mail" and is signed by "AC" on behalf of the Secretary of State.

13. The applicant claims never to have received the e-mail of 1 October 2013 attaching the curtailment decision to which the GCID Record refers. He says he has no access to the e-mail account which was opened and controlled by the agent.

14. On 14 November 2013, the applicant wrote to the respondent making enquiries about his status. The respondent says that letter was not received. It was sent again on 8 January 2014 and was received but no reply was made and the GCID records "letter already sent".

15. On 11 February 2014, the applicant made the application for further leave to remain on the basis of his marriage to a person present and settled in the UK. That application was refused by the Secretary of State on 4 April 2014. The notice of that decision indicated that the decision did not attract

a right of appeal. It is the decision challenged in these proceedings.

16. On 15 May 2014, the applicant's solicitors wrote to the Secretary of State in response to the refusal decision of 4 April 2014 pointing out that the applicant had never been served with any curtailment decision and, in the absence of proof of service, the refusal decision was not lawful.

17. On 3 August 2014, the Secretary of State wrote to the applicant's solicitors refusing to reconsider the refusal decision.

18. On 12 August 2014, the applicant's solicitors sent a pre-action protocol letter to the respondent.

19. On 26 August 2014, the Secretary of State sent a response to the pre-action protocol letter.

20. Thereafter, on 15 October 2014, these proceedings were filed challenging the respondent's decision of 4 April 2014.

The Legal Framework

21. The central issue in this case is whether the notice of the curtailment decision dated 1 October 2013 was properly given to the applicant.

22. The relevant legal provisions concerned with the giving of notice of an immigration decision are as follows.

23. Section 4(1) of the Immigration Act 1971 ("the 1971 Act") requires notice in writing to be given of a decision, inter alia, to vary a person's leave under section 3(3)(a) of the 1971 Act. So far as relevant s.4(1) provides as follows:

> "The power under this act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) (whether as regards duration or conditions), shall be exercised by the Secretary of State; and, unless otherwise allowed by or under this act, those powers shall be exercised by notice in writing given to the persons affected, except that the powers under section 3(3)(a) may be exercised generally in respect of any class of persons by order made by statutory instrument."

24. Section 3(3) of the 1971 Act provides power to vary an individual's limited leave to enter or remain by, inter alia, "restricting…the limitation of its duration…" That power, therefore, includes the power to curtail an individual's leave.

25. Section 4(1) provides that "notice in writing" of such a decision to curtail an individual's leave shall be "given" to the person affected.

26. Section 3A of the 1971 Act empowers the Secretary of State by order to make provision with respect to varying leave to enter in the UK (s.3A(1)) and, in particular, to provide for the "form or manner" in which leave may be varied (s.3A(2)(a)). The latter includes the "form or manner" in which notice of a decision may be given. Similar powers can be found in s.3B of the 1971 Act in respect of varying leave to remain.

27. In relation to decisions appealable under the Nationality, Immigration & Asylum Act 2002 (the "NIA Act 2002") the relevant provisions are contained within the Immigration (Notice) Regulations 2003 (SI 2003/658 as amended). Those regulations, however, have no application to a decision which is not appealable under the NIA Act 2002. A decision to curtail an individual's leave to a point in time in the future, and so not with immediate effect, is not an appealable decision under s.82(2) the NIA Act 2002 (see s.82(2)(e) - and "immigration decision includes a "variation...[of leave]...if when the variation takes effect the person has no leave to enter or remain). Consequently, the 2003 Order has no application to the giving of notice of a curtailment decision such as in this case where the individual's leave is shortened but not immediately ended.

28. Until 2013, there were no specific regulations dealing with notice in respect of a non-appealable immigration decision. Nevertheless, the House of Lords has recognised in R (Anufrijeva) v SSHD [2003] UKHL 36 that, based upon the constitutional principle requiring the rule of law to be observed, an administrative decision "takes effect only upon communication" (*per* Lord Steyn at [30]). In that case, in determining a person's entitlement to income support as an asylum-seeker, a decision to refuse a person's asylum claim was not determined (and effective) where the decision has been simply noted on the internal departmental record as refused without communication to the individual.

29. At [28], Lord Steyn identified the "constitutional principle requiring the rule of law to be observed." Applying that principle, he continued:

> "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. I accept, of course, that there must be exceptions to this approach, notably in the criminal field, e.g. arrests and search warrants, where notification is not possible. But it is difficult to visualise a rational argument which could even arguably justify putting the present case in the exceptional category."

30. Lord Steyn concluded (at [30]) :

> "Until the decision in *Salem* [*R v SSHD ex parte Salem* [1999] QB 805] 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....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."

31. Although Anufrijeva arose in the context of entitlement to income support, it nevertheless provides the applicable legal approach, absent any equivalent to the 2003 Regulations, in respect of non-appealable decisions: to have legal effect, notice of a decision must be given (see, e.g. R (Mehmood and Ali) v SSHD [2015] EWCA Civ 744 at [43] *per* Beatson LJ).

32. In Syed (curtailment of leave – notice) [2013] UKUT 00144 (IAC), the Upper Tribunal concluded, applying Anufrijeva, that a non-appealable curtailment decision did not take affect until it was "communicated to the person concerned" (see [28]). In Syed, the decision had been sent through the post by recorded delivery but had been returned by the post office undelivered. The respondent thereafter served it "on file". The Upper Tribunal concluded that none of the methods of giving notice set out in the 2003 Regulation applied including service, presumptions of deemed service and, as a last resort, service "on file". Further, as s.4(1) of the 1971 Act did not, itself, authorise service by post, the deemed service provisions in s.7 of the Interpretation Act 1978 also did not apply.

33. At [28], the Upper Tribunal said this:

> "In the absence of an order made by statutory instrument under section 4(1) of the Immigration Act 1971 dealing with the giving of notice of variation of leave where there is no right of appeal, the Secretary of State has to be able to prove that notice of a decision varying leave to remain under section 3(3)(a) of the Immigration Act 1971 where there is no right of appeal was communicated to the person concerned for it to be effective. Where there is no "immigration decision" the Immigration (Notices) Regulations 2003 do not apply. Communication would be effective if made to a person authorised to receive it on that person's behalf, see Hosier v Goodall [1962] 1 All E.R. 30, but the Secretary of State cannot rely upon deemed postal service."

34. In the result, the Upper Tribunal, perhaps not surprisingly, concluded that notice of the curtailment decision had not been "given" as the letter had clearly not been served and "communicated to the appellant" (see [16]).

35. Subsequent to Syed, the 2000 Order was amended with effect from 12 July 2013 to contain provisions dealing with the giving of notice and presumptions in respect of receipt including in respect of non-appealable immigration decisions such as the curtailment decision in this case. The provisions are in Articles 8ZA and 8ZB of the 2000 Order as amended.

36. Article 8ZA sets out the methods and means by which a notice in writing may be "given":

> "**Grant, refusal or variation of leave by notice in writing**
>
> (1) A notice in writing -
>
> (a) giving leave to enter or remain in the United Kingdom;
>
> (b) refusing leave to enter or remain in the United Kingdom:
>
> (c) refusing to vary a person's leave to enter or remain in the United Kingdom: or
>
> (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 in under 18 years of age 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."

37. As will be seen, Art 8ZA(2) provides a number of methods by which a notice "may be given to the person affected" as required by s.4(1) of the 1971 Act. Notice may be given by hand; sent by fax; sent by post to the address provided by the individual or his representatives for correspondence or electronically by e-mail to the e-mail address given "for correspondence" by the individual or his representatives. Art 8ZA(3) provides that where no postal or e-mail correspondence address is given, the notice may be sent by post or electronically to a number of other possible addresses relating to the applicant or his representatives such as the last known place of abode or study or e-mail address. Finally, by virtue of Art 8ZA(4) where attempts to give notice by these methods have failed or are not possible, then the decision may be served "on file" and is deemed to have been given. Although in this latter situation, where the person is subsequently located he must be given a copy of the notice as soon as is practicable (Art 8ZA(5)).

38. Article 8ZB provides for certain rebuttal presumptions of when notice has "been given" when a notice is sent in accordance with Art 8ZA. So far as relevant, it is in the following terms:

"**Presumptions about receipt of notice**

(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….."

39. Article 8ZB creates a presumption that a notice sent by recorded delivery (but not ordinary post) to a place in the UK is "given" to an individual two days after it is sent. Likewise, a notice sent by e-mail is "given" on the day it is sent.

Discussion

1. The "Sent" Point: Art 8ZA

40. The applicant's first ground of challenge is that the respondent has not established that the curtailment notice was "sent" in accordance with Art 8ZA of the 2000 Order.

41. Mr Jafferji, who represented the applicant, submitted that the burden of proving that the curtailment notice had been sent electronically to the applicant's e-mail address provided for correspondence was upon the Secretary of State. However, he submitted that GCID entries were insufficient for the respondent to discharge that burden of proof. He relied upon a passage in the decision of R (Domi) v SSHD [2008] EWHC 571 (Admin) at [15] where, he submitted, the type of evidence required for the Secretary of State to discharge her burden of proof, albeit in the context of postal service, was set out. He submitted that that included a witness statement from the responsible UKVI Officer that no such statement was included in the evidence before the Tribunal. He submitted that the Secretary of State had not established that the e-mail was sent, that it was sent to the applicant's e-mail address or that the curtailment notice was attached to it. He submitted that without evidence on those issues the Tribunal could not be satisfied that the notice was sent as required by Article 8ZA(2)(d) of the 2000 Order.

42. I do not accept Mr Jafferji's submissions. 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. Mr Jafferji

referred me to what was said in Domi at [15] where the evidence was somewhat fuller, including a witness statement from the responsible officer. The Judge in Domi was not, in my judgment, seeking to lay down any 'hard and fast' evidential rule and to doubt the self-evident proposition that each case must necessarily turn on the specific evidence available. It is unlikely, in any event, that AC would have any specific recollection of events and so his evidence could only in reality be based upon his reading of the GCID record itself. There is, in truth, no contrary evidence to that contained in the GCID record. The applicant, of course, claims no knowledge of whether the e-mail is or is not held in the relevant e-mail account. I see no conceivable basis to doubt the GCID record.

43. For these reasons, the respondent has, in my judgment, established on the evidence that the curtailment notice was sent. The applicant's claim fails on this basis whether the standard of review is on a 'precedent fact' or Wednesbury basis.

44. Before turning to the applicant's second challenge, there is one final matter I should refer to. Mr Jafferji did not maintain in his oral submissions a point raised in the grounds that the e-mail (even if it had been sent to the applicant) was not sent to an e-mail address provided "for correspondence" by the applicant or his representatives as required by Art 8ZA(2)(d). Mr Jafferji was right, in my view, not to pursue this point. The e-mail clearly was sent to a "correspondence" address. The e-mail address was provided in the applicant's visa application of 15 April 2013 either by himself or his representatives - the terms of the 2000 Order make plain either would suffice - under the heading "Visa Applicant Contact Details" (see page 213 of the bundle). What else is this other than an e-mail address provided for correspondence? It was kept as part of the applicant's records and, in the absence of notification of change which only occurred after the curtailment decision was sent, it was the e-mail address provided for correspondence.

2. The "Given" Point: Art 8ZB

45. Secondly, Mr Jafferji submitted that, even if it was established that the e-mail had been sent, it nevertheless had not been received by the applicant and, as a matter of law, that was required before it could be said notice was "given". He pointed out that the applicant's evidence was that, although he had included the e-mail address in his visa application, this was an address provided by the agent and he had never had the password to it and could not access this e-mail address. Mr Jafferji submitted that, applying Article 8ZB(1), the applicant had rebutted the presumption that notice had been given by e-mail.

46. In relation to the issue of what constituted notice being "given", Mr

Jafferji submitted that it was insufficient that, for example, a letter was received at a postal address unless the individual had the letter, effectively in his hands. Further, it was insufficient that an e-mail had arrived in an individual's inbox. Notice by e-mail would only be given if the individual had both received the e-mail in his inbox and had also read it. Mr Jafferji relied upon the fundamental principle in Anufrijeva that a notice of a decision was ineffective unless communicated to the individual. Communication meant, he submitted, that the decision notice must have been received by the individual. He placed reliance for that proposition on a number of cases, including Syed, Saleem v SSHD (1999/1119/C), especially at page 12 and the unreported decision of the Upper Tribunal in Ravindranath & Jigu (UTJ Deans) (29 May 2015) (Appeal No. IA/29685/2014) at [18].

47. The requirement in s.4(1) of the 1971 Act means that the applicant must have been "given" notice of the curtailment decision of 1 October 2013 for it to take effect. Art 8ZA of the 2000 Order sets out, as has already been seen, the methods by which notice "may be given". For example, the notice may be sent by post to the individual postal address for correspondence or electronically to his e-mail address provided for correspondence. However, simply because a notice has been sent does not, in my judgment, mean that the notice has necessarily been "given". That, in my judgment, follows for at least two reasons.

48. First, if all the respondent had to do was to send a notice in order for it to be "given" that would, in my judgment, offend the fundamental constitutional principle recognised by the House of Lords in Anufrijeva that a decision must be "communicated" to an individual in order for it to be effective.

49. Secondly, in any event, the legislative scheme particularly in Arts 8ZA and 8ZB of the 2000 Order is, in my judgment, indicative that more is required in order for a notice to be "given" than it is merely sent. Take, for example, the service "to file" provision in Art 8ZA(4) of the 2000 Order. That provision contemplates, inter alia, situations where attempts to "give notice" in accordance with Art 8ZA(2) and (3) have failed. That is not concerned with a failure to "send" the notice whether by post or electronically or otherwise as permitted but rather because, having been sent, it cannot be said that it has been "given" because, for example, it has been returned undelivered. That, in my judgment, points strongly towards a conclusion that notice, in order to be "given" has to be both sent and in some sense "delivered" or "received" by the method lawfully chosen to send it.

50. Article 8ZB itself clearly contemplates that, in order for a notice to be "given", more than it being sent is required. The presumption provisions

in Art 8ZB would, in truth, be irrelevant unless it was important in order to determine whether a notice had been "given" both that it had been sent and that it had been "delivered". There would be no point in a deeming provision that a notice sent by recorded delivery is deemed to have been "given" on the second day after it was sent unless proof of receipt is part and parcel of establishing that the notice had been "given". Likewise, in relation to a notice sent by e-mail the presumption that it was "given" on the day it was sent would be equally irrelevant.

51. Although Mr Skinner, on behalf of the respondent, initially submitted that Art 8ZB(1) only permitted an individual to rebut the presumption of when a notice was received, as I understood his submissions as they developed, he accepted that implicit within that was the potential for an individual not only to rebut the date on which the notice is deemed to be received but whether it was received at all. That position seems to me to be entirely correct. It would be incongruous that an individual was entitled to show that the postal service, perhaps through industrial action or otherwise, did not deliver the notice within two days of it being sent but could not, if the appropriate evidence were available, demonstrate that the notice had never, in fact, been delivered to him. It seems to me that Art 8ZB(1) permits an individual, by evidence, to rebut both the time and fact of "delivery" or "receipt" of a notice.

52. That, however, does not resolve the issue – which lies at the heart of the respective submissions of the parties – as to when it is proper to say that a notice has been "given" because – to use my words – it has been "delivered" or "received". Mr Jafferji relied upon the principle and statements made in Anufrijeva that it was only given when the notice was "communicated" to the individual. Mr Jafferji, as I understood his submission, accepted that a notice sent by post would be "communicated" if the letter was received and in the hands of the individual. More importantly for the purposes of this case, his submission was that notice by e-mail would only be given if the individual had both received it in the sense of it being in his inbox and had also read it.

53. Mr Skinner submitted that it was sufficient that the notice had been delivered by post to the relevant address or the e-mail had arrived in the individual's inbox. In those circumstances, Mr Skinner submitted the individual would have an "opportunity to know that a decision has been made in respect of him and to deal with it".

54. In my judgment, Mr Skinner's submissions are to be preferred to those of Mr Jafferji.

55. First, the underlying requirement that notice be "given" must be seen in the context in which Parliament in the 2000 Order has permitted notice to

be "given". The true gravamen of the term "given" is properly seen as being the consequence flowing from the method of sending a notice which is permitted by the legislation.

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

57. In relation to a notice sent by e-mail, the equivalent is, in my judgment, when the relevant e-mail is delivered in the sense of held in the individual's e-mail system, in the usual case within his inbox.

58. Whilst Mr Jafferji drew no distinction between postal and electronic giving of notices, at least in the sense that an individual should not be required to have read either, his acceptance that a person who had "in his hands" a letter containing a notice could properly be said to have been "given" notice despite ignorance of its contents would, in my view, strongly suggest (contrary to Mr Jafferji's actual position) that an e-mail received in an inbox but unread would equally satisfy the requirement that notice had been "given." In my judgment, being given notice is not the same as the individual having actual knowledge of the notice or of its contents.

59. Secondly, this view is entirely consistent with the case law, in particular Anufrijeva. In that case, Lord Steyn [at 29] referred to the European law that it was a:

> "fundamental principle in the Community Legal Order ... that a matter adopted by the public authorities shall not be applicable to those concerned before *they have the opportunity to make themselves acquainted with it*." (my emphasis)

60. To like effect, Lord Millett at [43] stated that:

> "the determination must have been made and appropriate steps must have been taken to communicate it to the Claimant before it can lawfully be recorded so as to have the effect contended for."

61. In other words, actual knowledge by the individual is not required; the individual must have an "opportunity" to know that a decision has been

made in relation to them. Thus, in Anufrijeva, the Home Office had not provided the individual with an opportunity to know that a decision had been made against him in respect of his refugee status by placing the notice "on file". In Syed, the notice sent by recorded delivery was returned undelivered. Consistently with what I have concluded is now the true position under the 2000 Order, there it could not be said that notice had been "given." Nothing in Anufrijeva or Syed requires that s.4(1) of the 1971 Act and the 2000 Order should be understood as requiring actual knowledge that a decision has been made before it can be said that notice of that decision has been "given" to an individual.

62. Thirdly, Mr Jafferji also relied upon the Court of Appeal's decision in Saleem v SSHD (13 June 2000) (Tab 7 of the authorities' bundle). There, the Court of Appeal held to be unlawful the (then) relevant rule dealing with service of an adjudicator's determination which provided for no possibility of proving that the determination had not been received (which was irrebuttably presumed on the second day after it was sent) and providing for no discretion to extend time (within a tight time limit) for bringing a further appeal against the decision. In my judgment, Mr Jafferji can obtain no real traction for his arguments from Saleem. The Court was not concerned with the requirement at issue in this case that notice be "given" or with the effect of Arts 8ZA and 8ZB of the 2000 Order. It was not, therefore, concerned with the central issue I have to decide. Further, the Court was not concerned with the nuanced arguments in this case reflected in the differences between the parties' contentions. The court was more baldly concerned with whether it was unlawful not to permit an individual to show the notice had not reached him at his postal address later than presumed because, for example, of a postal strike or had not reached his address at all because it had been lost (see, e.g. p12 of the transcript). It is perhaps worth noting that the court confined itself to the context of notice of determinations and further appeals, excluding consideration of the effect in respect of other "notices" (see Roch LJ at p9 with whom Mummery LJ agreed; and Hale LJ at p16).

63. On the other hand, the Upper Tribunal's decision in Ravindranath and Jiju (Tab 4 of the authorities' bundle) is, at first blush, more promising for Mr Jafferji's contentions. There, the Upper Tribunal accepted that the presumption that notice had been "given" was rebutted under Art 8ZB where it was shown that the individual did not "know about the notice of curtailment of his leave" which had been sent to the address of his employer who had gone out of business (see [18]).

64. I accept that the Upper Tribunal's decision lends some support to Mr Jafferji's contentions as to the proper application of Art 8ZA and 8ZB. However, there are difficulties with the decision. It is not entirely clear to me how the appellant's employer's address even fell within the

permissible ones in Art 8ZA(2) or (3). Although it is not entirely clear from the determination, it would appear that that the appellant's home address was provided "for correspondence" – other documents had been sent there - and consequently that was a proper address to which the notice should have been sent by virtue of Art 8ZA(2) rather than, if no correspondence address had been provided, sent in accordance with Art 8ZA(3) to his employer's address. That said, his employer's address does not seem to have fallen within Art 8ZA as his "place of business" anyway: he was an employee and it was not his place of business rather his place of work. Further, the nuanced differences raised by the parties' arguments in this case do not appear to have been raised in that case. In any event, the decision is not binding upon me and to the extent it requires an individual to have "actual knowledge" of a notice or its contents I respectfully decline to follow it for the reasons I have given.

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

66. By contrast, if Mr Jafferji's submissions are correct and knowledge of a notice (*a fortiori* its contents) were required, that would facilitate discreditable individuals falsely claiming that they had never been "given" notice simply because it was unopened, unread or they had moved address. Similar situations can easily be envisaged where notice by electronic means is used. It would be only too easy for an individual to say that he had not opened any relevant e-mail so as to be aware of the notice of decision made in respect of him. I do not accept that subterfuge of this kind should be allowed to prevent the lawful provision of notice of immigration decisions under the legislation.

67. Mr Skinner, albeit briefly, drew my attention to aspects of the applicant's immigration history and the circumstances in which he came to the UK as a student which, he submitted, should remove any sense that the applicant is beyond reproach. Mr Jafferji strongly disputed that any adverse inference should be drawn. In the result, I have not considered the matters raised which have not assisted me in reaching my decision on the law and its application to the applicant.

68. In my judgment, for the reasons I have given, notice of the curtailment decision was "given" to the applicant when it was sent by e-mail on 1 October 2013 and delivered in his e-mail system presumptively on that date. The applicant is entitled to rebut the presumption under Art 8ZB(1)(b) that it was delivered on that day or at all. He is unable to do so. The fact that he claims that he has no access to this e-mail account because it was set up by his agent and he does not have a password does not defeat that conclusion. The e-mail address he provided was the address at which he should have expected the UKVI to correspond with him. Any harshness is, in large measure, of his own making, as he had given this e-mail address as a correspondence address in his visa application and had made no efforts, at least before the curtailment decision was made, to provide the Home Office with an address to which he did have access.

69. For these reasons, the respondent has established that notice of the curtailment decision of 1 October 2013 was "given" to the applicant on that date and that, therefore, his leave was curtailed with effect from 30 November 2013. As a result, the applicant became an overstayer from that latter date and at the date of application, namely 11 February 2014 had overstayed for more than 28 days and so could not meet the requirement in E-LTRP.2.2. of Appendix FM. He also, as a result, had no right of appeal against that decision.

3. Precedent Fact or Wednesbury?

70. One final point: given my conclusion that the respondent has established, on the evidence, that the applicant's leave was lawfully curtailed, it is unnecessary for me to resolve the question of whether that issue should properly be determined by the Tribunal as a matter of 'precedent fact' or whether the Secretary of State's decision can only be challenged on Wednesbury principles, in particular, irrationality. I am grateful to both counsel for their written submissions made following the hearing. Clearly, given my conclusion the decision was properly open to the respondent and not irrational. Whichever approach is correct, the applicant has failed to make good his claim.

71. I note that in R (Shoaib) v SSHD [2015] EWHC 2010 (Admin), Neil Cameron QC (sitting as a Deputy High Court Judge) concluded that public law principles should be applied (see [41]). That approach is, in my judgment, consistent, and in accordance, with the Court of Appeal's recent decision in R (Giri) v SSHD [2015] EWCA Civ 784. The issue of curtailment in this case arose in the context of the exercise of the power whether to grant the applicant leave rather than in respect of a matter upon which the existence of that power depended and so is challengeable only on Wednesbury principles (see [19]-[20] and [29]-[30] *per* Richards

LJ). However, since the applicant cannot succeed on either basis in establishing that the respondent's decision was unlawful, I need not reach a concluded view on this issue.

Decision

72. For these reasons, this judicial review claim is dismissed.

Signed: _____

Upper Tribunal Judge Grubb