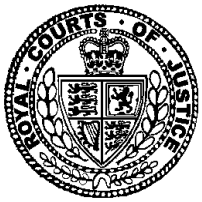

Neutral Citation Number: [2024] EWHC 1097 (Admin)

Case No: AC-2023-LON-000966

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2024

Before :

Mr Justice Sheldon

- -

Between :

MARCO ANTONIO RODRIGUEZ ESCOBAR	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Rajiv Sharma (instructed by **Ronald Fletcher & Co**) for the **Claimant**
Mark Smith (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 17 April 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 10 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Sheldon:

1. Marco Escobar, the Claimant, seeks judicial review of the decision of the Secretary of State for the Home Department refusing him entry into the United Kingdom, as well as the Secretary of State's decision to detain and remove him from the country. At the heart of the Claimant's challenge is that he was not lawfully notified that his leave to remain on account of his status as a spouse of a British citizen had been curtailed. Permission to seek judicial review was granted by Richard Clayton KC, sitting as a deputy judge, on 7 August 2023.

Factual Background

2. The Claimant is a Bolivian national. He first came to the United Kingdom in 2000 as a visitor, and subsequently obtained a student visa. Following the expiry of his student visa, the Claimant overstayed in the United Kingdom. In April 2012, the Claimant married a British national. The Claimant was granted leave to remain as the spouse of a British national on 4 June 2014[1]. Further applications for Leave to Remain were made and granted.

3. On 23 February 2020, the Claimant applied for a renewal. He gave his contact email. In the application form completed by him, the Claimant was asked "Who does this email belong to?" and he responded "The applicant".

4. By a letter dated 6 October 2020 the Claimant was informed by the Secretary of State that he was granted limited leave to remain for a period of 30 months. This would expire on 12 April 2023. The Claimant was issued with a residence permit, which stated that it was valid until that date.

5. The letter of 6 October 2020 informed the Claimant that "If your relationship breaks down or your circumstances change during the period for which you have been allowed to stay, but you want to remain in the UK, you will need to apply and qualify to stay in the UK on a different basis."

6. On 23 December 2022, the Claimant travelled to Bolivia. When he returned to the United Kingdom on 24 January 2023, he was refused entry clearance pursuant to Para 9.14.1 of the Immigration Rules[2], on the basis that the Secretary of State had cancelled his leave to remain due to a withdrawal in sponsorship from his spouse. As a result, the Claimant was considered to have arrived without a valid entry clearance. On 25 January 2023, the Claimant was served with a decision refusing entry, he was detained and served with removal directions. I am told that he was removed to Bolivia on 25 January 2023.

7. The decision letter provided to the Claimant stated that his entry clearance had been cancelled from 24 December 2022 because of a withdrawal of sponsorship from his

[1] This is the evidence of the Secretary of State. The Claimant asserts that he was first granted leave on 4 August 2012.

[2] Para 9.14.1 of the Immigration Rules provides that "permission to enter must be refused if the person seeking entry is required under these rules to obtain entry clearance in advance of travel to the UK, and the person does not hold the required entry clearance".

partner. It explained that notice of curtailment had been sent via email to the address held on Home Office records.

8. The curtailment letter had been sent on 25 October 2022. It informed the Claimant that:

> "**Your permission to stay in the United Kingdom (UK) as a Spouse of a Settled/Refugee/HP Person has been cancelled so that it now ends on 24 December 2022.**
>
> **What this means for you**
>
> You still have permission until 24 December 2022 and the current conditions of your stay will continue to apply until then. . .
>
> You now have until 24 December to either leave the UK or make another application to stay here."

(Emphasis in the original).

9. The reasons for the curtailment decision were that:

> "In view of the fact that you and Dinora Espinoza Acosta are no longer living together as spouses, the Secretary of State is not satisfied that you and Deborah Espinoza Acosta intend to live permanently with each other as spouses or that your marriage is subsisting. You accordingly no longer meet the requirements of the Immigration Rules under which your permission to enter was granted. It is not considered that the circumstances in your case are such that discretion should be exercised in your favour."

The Claimant was told that if there were other reasons why he thought he should be allowed to stay in the United Kingdom, he should tell the Secretary of State now.

10. The Claimant accepts that the notice of curtailment was sent to his email address, and acknowledges that there was no message indicating that it had not been delivered sent back to the Secretary of State. However, he says that he did not see the email message containing the notice of curtailment and, in two witness statements, he says that the email "is not in my inbox" and "is not within my inbox". The Claimant says that if he had seen the email he would have made an application for leave to remain in the United Kingdom on a different basis – he had been living in the country for more than 20 years, and worked here as a plumber. The Claimant also says that he would not have taken a holiday to Bolivia until things had been sorted out.

11. The Claimant says that "My concern is that the email containing the notice has been deleted before I had a chance to look at it. If this is the case, the only other person with access to my email account at the time was my wife." The Claimant explained as follows:

> "It pains me to consider that my wife would have deleted this email. However, there were many occurrences in the last year that have caused our separation to be difficult and spiteful. For

> example, my wife kicked me out of our family home and burnt most of my documents that were in the property. Because of this, it was difficult to provide information to my solicitors regarding my immigration history, and my solicitors have had to apply for a SAR request from the Home Office. My wife also refused to hand over my belongings (to include my clothes and work tools), and as a result I had to sleep on the street for several days in the same clothes while I tried to find a place to stay. Additionally, after I had found a place to stay, I wanted to go back home, but when I went back, my wife was living there with her ex-husband, and they kicked me out of the house again. I called the police because they had physically assaulted me, but the police told me to leave the property.
>
> . . . given the recent history between me and my wife, although I cannot personally confirm that my wife deleted the email containing the curtailment notice, I also cannot rule this out".

12. When the Claimant was interviewed by an immigration officer on 25 January 2023, following his arrival in the United Kingdom, he was asked how he qualified for his visa and answered that his wife is British, and that they had been married for 14 years. He was asked where his wife was, and he said that she lives in London, but they have been separated for 8 months. He was asked if he had any indication that his leave to stay had been cancelled: he said "No not at all. I have been here a long time. I plan to buy a house and apply for British passport".

Grounds of Challenge

13. In his Grounds of Challenge, the Claimant contends that (i) the curtailment notice was not effectively served, and (ii) there has been a breach of the duty to act fairly.

14. With respect to (i), Mr Rajiv Sharma, Counsel for the Claimant contends that although there is a statutory presumption of service where a notice of curtailment has been sent to the Claimant's email address, this presumption has been rebutted. Accordingly, the cancellation notice must be treated as if it was never lawfully given, and so the decision to refuse the Claimant entry clearance on account of the notice is unlawful.

15. With respect to (ii), Mr Sharma contends that even if the presumption of effective service is not rebutted, given that the Claimant was not aware of the content of the decision letter and the reasons for it, it was unfair of the Secretary of State not to have afforded him the opportunity to make representations as to other reasons why he should have been permitted to enter the United Kingdom. It is contended that the Claimant could have obtained leave to remain on the basis of him to satisfying the 10 year rule (or was well on his way to doing so), or on the basis of satisfying the 20 year rule. Both of these rules give effect to the applicant's Convention rights (Article 8).

Statutory Framework

16. Section 3(3)(a) of the Immigration Act 1971 ("the 1971 Act") provides that:

> "In the case of a limited leave to enter or remain in the United Kingdom, a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply".

17. Section 4 of the 1971 Act (Administration of control) provides that:

> "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 person 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".

18. The various ways in which notice of refusal or variation can be given is set out in the Immigration (Leave to Enter and Remain) Order 2000 (as amended) ("the 2000 Order"). Article 8ZA of the 2000 Order (headed "Grant, refusal or variation of leave by notice in writing") provides that:

> "(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."

19. Article 8ZB of the 2000 Order (headed "Presumptions about receipt of notice") provides that:

> "(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."

Discussion

(i) Effective Service

20. Mr Sharma contended that the presumption of proper service of the notice of curtailment could be rebutted where the email had been intercepted by a third party. He relied for this proposition on the observations of the Court of Appeal in *R (Masud Alam) v Secretary of State for the Home Department* [2020] EWCA Civ 1527. In that case, a notice of curtailment had been sent by post (recorded delivery) to the claimant's last known address, which was shared accommodation, and it was suggested that the notice had been intercepted by a third party before the claimant had seen it.

21. In his consideration of the statutory framework, Floyd LJ (with whom Henderson and Phillips LJJ agreed) held at §19 that article 8ZB(1) of the 2000 Order creates a rebuttable presumption as to both the giving of the notice in writing and the timing of its receipt. That is, where one of the methods of giving notice set out in article 8ZA has been used, article 8ZB deems notice to have been given on a specified day but leaves the person affected "free to prove (a) that he was not in fact given notice and/or (b) that it was not given on that day."

22. At §30, Floyd LJ addressed what was meant by the notice being "received", stating that:

> "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."

(Emphasis added).

23. As for the burden of rebutting the presumption, Floyd LJ stated at §31 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".

24. In oral argument before me, Mr Sharma seized on the highlighted words from §30 of the judgment in *Masud Alam*. In that paragraph, Floyd LJ had recognised that the presumption of receipt could be rebutted where mail that arrived at the address of the applicant had been "intercepted". Mr Sharma contended that the same could clearly apply to an email which had been intercepted before it was read by the applicant.

25. Mr Smith, counsel for the Secretary of State, disagreed. He contended that at §30, Floyd LJ distinguished between emails which were to be taken as having been received, that is given, to the applicant when they arrived in an applicant's inbox, and to mail arriving at an address given by the applicant. In the latter situation only was the possibility of interception envisaged by the legislation.

26. Mr Smith also contended that there were good reasons for distinguishing between the two situations. Where post was delivered to multi-occupancy premises, there was obviously a risk that it might be intercepted by another of the occupants whether deliberately or accidentally. There were no realistic measures that an applicant could take to ensure that he would actually receive the mail from the Secretary of State. The situation was very different with an email. Whilst it was possible for an email to be intercepted before it reached an inbox, it could be reasonably assumed in all cases that once it reached the inbox it was available to the applicant to read. This is particularly so as the applicant could take measures to protect an email address by the use of a password or to use an email address that only the applicant had access to.

27. In my judgment, there is no reason in principle why the two situations should be treated differently. The statutory language of the 2000 Order does not mandate that outcome. The 2000 Order deems that notice has been "given" when notice has been sent by email, and also when notice has been sent by mail, and contemplates that in both situations the presumption that notice has been given can be rebutted.

28. The 2000 Order does not state that once an email enters the applicant's inbox it should be treated as if it has been "given" to the applicant with no possibility of rebuttal. It would have been possible for Parliament to have legislated for this. Indeed, where notice is "given by hand" there is no deeming provision, or possibility of rebuttal: see

article 8ZA(2)(a). Parliament could have said the same for a notice entering an inbox but did not do so.

29. I acknowledge that Floyd LJ did say at §30 that "Receipt of an email, for example, will be effected by the arrival of the email in the Inbox of the person affected", thereby implying that there could be no possibility of rebuttal. Nevertheless, this statement was clearly *obiter* as the case before the Court of Appeal was concerned with notice by mail, and it would be surprising if consideration was given by Floyd LJ to the possibility of interception of an email that had arrived in an inbox.

30. As has been highlighted in the present case, it is theoretically possible for an email to be intercepted once it has arrived in an inbox. Persons can share inboxes, or allow others to access them. The other person could delete the relevant email from the Secretary of State accidentally – when scrolling through the inbox – or deliberately. An email inbox can be interfered with by a third party even where it is password protected, and that password is not deliberately shared with others.

31. I consider, therefore, that it is permissible on the facts of a particular case for an applicant to seek to persuade the Secretary of State, and subsequently the Court or relevant tribunal, that the email was intercepted before it could be read. Of course, the burden of persuasion will be on the applicant, and the burden will not be lightly discharged. Indeed, I would expect the Secretary of State (or the Court or relevant tribunal) to be somewhat sceptical of an argument that an email was deleted from an inbox whether accidentally or deliberately without convincing evidence.

32. On the present facts, I consider that the Claimant has not come close to demonstrating that the presumption was rebutted.

33. First, the Claimant has not expressly stated in his witness evidence that the notice of curtailment was never in his inbox. It is notable that in both of his witness statements, the Claimant uses the present tense: that the email was not in, or within, his inbox. The Claimant does not even say whether the notice of curtailment email was in his deleted items.

34. Second, although the Claimant puts forward as a possible explanation that his estranged spouse may have deleted the email, this is mere conjecture on his part. The Claimant could have sought to corroborate this speculation by, for instance, adducing evidence from a computer expert as to what had happened: it may well have been possible to interrogate the 'meta data' from the Claimant's email account to explain what had happened to the email and when. There is no suggestion in the evidence that the Claimant sought expert advice, and he does not say that he lacked the financial means to ask an expert to do this.

35. Third, the Claimant seeks to rely on the inference that had he read the email he would have sought to regularise his immigration position in the United Kingdom through other means, and would not have taken a holiday to Bolivia until that had been sorted. I accept that that is a possible inference from the evidence, but it is not the only inference, and nor is it the obvious inference. It is possible that the Claimant did not read the email at all, or that he may have deleted it by mistake (if it was deleted). The Claimant does not give much evidence about his use of email other than to say that his estranged wife was quicker at checking emails than he was.

36. There is also the possibility that the Claimant did read the email but did not act on it. That may be because he thought the matter would not be picked up by the immigration authorities when he returned to the United Kingdom after his trip, as he may have thought that the bureaucracy of the Home Office would not join the dots together. The Claimant still had his residence card which gave the expiry date as 12 April 2023, and he may have been prepared to take the risk that the curtailment would be picked up.

37. In my judgment, therefore, this ground of challenge fails.

Fairness

38. Mr Sharma contends that even if the Court concludes that the notice of curtailment was effectively served on the Claimant, he was not aware of its contents and it was unfair not to let him make submissions with respect to other routes he may have had at the time for leave to remain. Mr Sharma sought to rely for this argument on *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, and in particular the observations of Lord Steyn at §25 and §30.

39. At §25, Lord Steyn endorsed the observations of the Court of Appeal in that case:

> "… once an asylum seeker knows that her application has been refused, and that she is not to be given leave to enter the country on any other basis, and has the reasons for those decisions, she can reasonably be expected to make a choice: either to accept the decision and leave or to stay and fight but without recourse to state benefits. **But she cannot reasonably be expected to make that choice before she knows of the decisions and the reasons for them**. There is nothing in the material before us to suggest that it is consistent with the declared purpose of the regulation to expect her to do so."

(Emphasis added). At §30, Lord Steyn stated that "In our system of law surprise is regarded as the enemy of justice. Fairness is the guiding principle of our law".

40. Mr Sharma contends that, similarly in this case, the Claimant did not actually know of the decision and the reasons for it and so could not reasonably be expected to make a choice as to what actions to take. Further, that the Claimant was genuinely surprised about the decision, only learning of it from the immigration officers when he arrived back in the United Kingdom. It was unfair, therefore, for the decision to impact on the Claimant especially where he had other routes available to him for leave to remain.

41. In my judgment, reliance on *Anufrijeva* does not assist the Claimant. *Anufrijeva* was a case in which there had been no notification of an administrative decision affecting the applicant: namely, that her asylum claim had been refused. It is in that context that the House of Lords held that an administrative decision could not have legal effect until it had been communicated to the individual in question. *Anufrijeva* is not concerned with the situation where notification was provided, but the individual had for whatever reason not read it. The case is not authority for the proposition that a person who is unaware of a decision because he has been given it but not read it should have no effect.

42. Indeed, in *Masud Alam*, the Court of Appeal held that that proposition was unsound. It had been argued in that case that the "giving" of notice meant that the person affected had to be aware of its contents. This was rejected by the Court. Floyd LJ stated at §20 that "The difficulty with this approach is that those who do not trouble to open their mail, or collect recorded delivery items from the Post Office, or look at their emails, can effectively insulate themselves from being given notice". At §29, Floyd LJ held that: "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."

43. Mr Sharma also contended that fairness required the Claimant to have the opportunity to make representations as to the other routes for leave to remain that were open to him on the basis that the Secretary of State has a residual discretion when making decisions with respect to immigration control to do what is just and fair. Mr Sharma argued that the fact that the relevant immigration rules that the immigration officers were operating under (paragraph 9.14.1: see footnote 2) used mandatory language did not mean that in exceptional cases discretion could not be exercised. The Secretary of State accepted in his Guidance[3] that discretion could be exercised where section 55 of the Borders, Citizenship and Immigration Act 2009 (welfare of children), breach of Convention rights, breach of the Refugee Convention, or any exceptional compelling or compassionate circumstances, were involved. Mr Sharma contended that the present case involved the Claimant's private and/or family life under Article 8 of the Convention, as that is what the 10 and 20 year rules were designed to cater for.

44. In my judgment, this argument also fails. The premise for this scenario is that the curtailment notice was given to the Claimant but he did not read it. I am not persuaded that this premise is made out. As already indicated above at §36, there is a possibility that the Claimant did read the letter but did not act on it.

45. In any event, even if the premise for this scenario was made out, there is plainly a public policy interest in ensuring that individuals read the correspondence that is sent to them by the Secretary of State about their immigration status. There would need to be exceptional circumstances for the principles of fairness to demand that a further opportunity to make representations under the 10 year or 20 year rules (and thereby assert his Convention rights) should be afforded to the Claimant, when an initial opportunity to make these representations had already been provided to him through the sending of the email on 25 October 2022.

46. In my judgment, the Claimant's circumstances are not so exceptional, especially where he was, or should have been, aware from April 2022, when he separated from his wife, that his immigration status in the United Kingdom was precarious and yet for several months before his trip to Bolivia he took no steps to address the situation with the Secretary of State. As explained above at §5, the letter of 6 October 2020 informed the Claimant that the breakdown of the relationship with his wife would mean that he needed to apply and qualify to stay in the United Kingdom on a different basis.

[3] "Suitability: refusal of entry on arrival in the United Kingdom and cancellation of extant entry clearance and permission".

Conclusion

47. For these reasons, therefore, the application for judicial review is dismissed.