R (on the application of Mustafa) v Secretary of State for the Home Department (2000 Order – notification of representation) [2017] UKUT 00407 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Aqeel Mustafa

Applicant

v

Secretary of State for the Home Department

Respondent

Before The Honourable Mr Justice McCloskey, President
and
Upper Tribunal Judge Dawson

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr Rashid, of Counsel, instructed by Hebbar and Co Solicitors, on behalf of the applicant and Mr Adkinson, of Counsel, instructed by the Government Legal Department, on behalf of the respondent, at a hearing at Manchester on 10 July 2017.

(i) *The effect of Article 8ZA of the Immigration (Leave to Enter and Remain) Order 2000 (SI No. 2000/1161), considered in tandem with the Home Office published policy, is that where the Home Office receives notification that an applicant has instructed a representative or has a new representative and the specified requirements are satisfied, the notification must be accepted and the Home Office internal records must be updated accordingly.*

(ii) *Conversely, where the notification is rejected for non-compliance with any of the specified requirements, both the applicant and the representative must be informed.*

Decision: the application for judicial review is granted

(1) The key dates and events in this case are as follows:

(i) On 3 December 2012 the applicant obtained entry clearance as a Tier 4 (General) Student with leave to remain until 30 September 2013. That leave was extended in 2013 until 3 October 2016 to study at the University of South Wales. On 17 December 2014 the applicant made an application for further leave to remain on Form FLR(O).

(ii) The application was acknowledged by letter dated 30 December 2014 addressed to the applicant at D Avenue in Manchester. The letterhead bears the address – UK Visas and Immigration PO Box 3468 Sheffield. On an unknown date the applicant changed his address but did not notify the Home Office. In a letter dated 9 February 2015 Pride Solicitors, using the Royal Mail Recorded Delivery service, wrote to the Home Office at its address in Sheffield in these terms:

> "Application on Form FLR-O
>
> We act on behalf of the above-named client who has made his application to remain in the United Kingdom on Form FLR-O which has been acknowledged with the reference mentioned above. Please find enclosed herewith authority letter signed by our client and a copy of acknowledgment letter [sic].
>
> Please note our interest in this matter and would be obliged if you would make further correspondence to us on our head office address mentioned below."

That letter gave the full name of the applicant together with his date of birth and nationality and was accompanied by an authority dated 9 February 2015 on what appears to be a template provided by Pride solicitors signed by the applicant whose address is recorded as D Avenue Manchester.

(iii) On 10 February 2015 the Home Office refused the application under paragraph 322(1) of the Immigration Rules on the basis that variation of leave had been sought for a purpose not covered by the Rules. She explained that she also considered the claim on Article 8 grounds and gave reasons why she did not consider there was any breach. The applicant was told that he was not entitled to appeal the decision with reference to s.82 of the Nationality, Immigration and Asylum Act 2002 which did not provide a right of appeal where an still had leave to enter or remain in the United Kingdom. That letter was sent to the applicant at D Avenue and was not served on his solicitors.

(iv) On 17 March 2015 the Home Office wrote again to the applicant. The letter, addressed to D Avenue, is stated to be a decision served in compliance with the Immigration (Leave to Enter and Remain) Order 2000 (SI No. 2000/1161). Reference is made to the University of South Wales having informed the Home Office on 17 October 2014 that the applicant had ceased studying with them. In

the absence of evidence of any application to change sponsor or make a fresh application for entry clearance, leave to enter or to remain in "any capacity", leave was curtailed under paragraph 323A(a)(ii)(2) of the Rules until 19 May 2015.

(v) In a further letter also dated 19 May 2015, the applicant's solicitors wrote again to the Home Office asking for an update on the "pending application". This was in the following terms:

> "This is to inform you that we wrote you a letter dated 28 April 2015 which was posted via Royal Mail Recorded Delivery No:… [provided]. This letter was delivered to your office on 29 April 2015. The Home Office refused our client's application with a right of appeal, unfortunately this refusal along with the supporting documents were sent on our client's old address. Our client never received any Home Office refusal letter till date. Therefore we request you to please provide us a copy of the Home Office decision made in February 2015. Please note that we requested you in our letter 28 April (copy enclosed) to provide us a copy of our client's Home Office decision, but still no reply from your office. Please treat this matter as urgent and provide us with a copy urgently."

The letter does not reveal how it is the solicitors became aware of the decision of 10 February. Whatever the source, they were under a misunderstanding that there had been a right of appeal. This letter, unlike the earlier one dated 9 February, was the first indication it has to be said in oblique terms of a change of address by the applicant. The Home Office replied by letter dated 27 May 2015 on its Sheffield letterhead enclosing a copy of the letter "from February 2015" with the added comment in terms that the applicant no longer held any leave to remain and should make arrangements to leave. The Home Office Case Record Sheet has been obtained. This records the receipt of the letter from Pride on 13 February. There is also reference to receipt of the solicitors' letter on 9 February. An internal note dated 22 May records the issue of the refusal to "Reps as requested – No ROA so unaffected by dates. I note app's leave expired on 19/05/2015 so longer has leave- however this does not alter decision and fact no ROA was applicable at the date of decision-NFA".

(vi) Nothing further seems to have happened until 3 April 2016 when the applicant was detained by the Home Office Enforcement Team at O Avenue Manchester. It is suggested that they were looking for an absconder and the opportunity was taken to detain the applicant who is said to have protested that he had not been served with any curtailment letter and was awaiting a decision on his application. On the same day the Home Office made another curtailment decision so that the applicant's leave expired with immediate effect.

(vii) On 7 April the applicant was also served with Notice of Removal Window which included a notice under s. 120 of the 2002 Act. Also on the same day the applicant made a human rights claim on the basis of family life that he had established with his partner, a British citizen. The basis was set out in a letter

from Verax Solicitors dated 7 April 2016. The letter explains, *inter alia:*

1. The applicant became homeless in February 2015 and had instructed solicitors to notify the Home Office.

2. The curtailment letter had not been sent to the solicitors (in May 2015).

3. The caseworker had erred in sending the curtailment letter to the applicant's previous address when the Home Office had been updated by his solicitors "about a new address for further correspondence."

4. The applicant had established family life with a British Citizen with whom he had been living since February 2014. Both had encountered hostility from their families as to the relationship.

5. As a consequence the applicant had valid leave to remain as the curtailment decision had not been served.

The applicant is now married.

(2) Proceedings were issued on 15 April 2016 seeking permission to challenge the decision to remove the applicant, the decision to serve the Removal Notice Window and the decision to curtail leave dated respectively 3 and 7 April 2016 and 10 February 2015. The challenge did not include the new curtailment decision.

(3) The grounds argue that the first curtailment decision was not sent or served in accordance with "article 8ZA(1)(c) of s.4(1)" of (the "H.O. Guidance"). In addition, the Home Office had not followed its own published Policy (Guidance – Curtailment of Leave – version 15.0 EXT).

(4) Permission was granted by HHJ Stephen Davies on 21 November 2016. He considered that it was at least arguable that the applicant had a case based on the service of the curtailment decision being ineffective but he also observed that no such argument existed in relation to the refusal decision dated 10 February 2015 a copy of which had been sent anyway in May 2015. We shall revisit the issue of amending the applicant's challenge *infra*.

Relevant Statutory Provisions

(5) 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 s. 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."

(6) Section 3(3) of the 1971 Act confers 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. 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.

(7) 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.

(8) 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 2000 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.

Article 8ZA

(9) Article 8ZA of the 2000 Order, which is the key statutory provision in these proceedings, 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."

Home Office Guidance

(10) This was published in April 2014 under the title, POINTS BASED SYSTEM: MIGRANT CHANGE OF CIRCUMSTANCES FORM. It states, in material part:

> **"Representative's details:** The applicant should notify the UK Border Agency if he/she changes his/her representative. State the name, full address (including postcode) and telephone number of the new representative.
>
> Their Unique Reference Number, OISC reference number or details of their exemption should be included.
>
> If the representative is completing the form he/ she should confirm in this section that he/she holds a letter of authorisation from the migrant confirming the representative is acting on his/ her behalf. He/she must enclose the original letter with this form."

(11) Further Guidance by Home Office with the title, CURTAILMENT OF LEAVE version 12.0 valid from 31 July 2014 specifically deals with a change of representatives at page 135 *et seq* in the following terms relevant to the issue in this case.

> "If the applicant changes their representative, or instructs one for the first time, before you accept the instruction or change of representative, you must check the migrant has given the Home Office written authorisation for the representative to act on their behalf, and any new representative the applicant nominates is either of the following:
>
> - regulated by the Office of the Immigration Services Commissioner (OISC)
> - a solicitor
>
> If the change of representative meets the above requirements, you must accept it and update CID with the new contact details.
>
> If the representative is not appropriately regulated, or the migrant does not send the authorisation, you must write to the applicant and their proposed representative to inform them you cannot speak to the new representative or comment on the case.
>
> If you reject the migrant's change of representative this alone is not a reason to reject the error correction request."

(12) Our analysis of this instrument is as follows. Where the Home Office receives notification that an applicant has instructed a representative or has a new representative two options arise. If the specified requirements are satisfied the caseworker "*must*" accept the notification and update the internal records (The "CID", or "GCID") accordingly. Conversely if the specified requirements are not satisfied, the caseworker "*must*" inform both the applicant and the representative concerned that the notification has been rejected. We consider the clear philosophy and intent of this guidance to be that in every case where a notification is accepted all subsequent dealings and communications will, subject to any material development or relevant legal rule, be with the representative. In the typical case this will be to the advantage of the Home Office because *inter alia* it will promote efficiency and expedition and will be unaffected if, for example, the client alters his place of

residence or departs the United Kingdom. In short, the acceptance of a notification establishes a concrete mechanism for subsequent dealings and communications and promotes legal certainty.

(13) Furthermore considerations of reliance, expectation, predictability, good administration and representation arise. Our analysis above is harmonious with good administration. Further, the acceptance of a notification will normally generate in the applicant an expectation and assumption that all subsequent Home Office dealings and communications will be with the notified representative. The acceptance, in substance, constitutes a representation to this effect. A quasi-contractual arrangement, which benefits both parties, is born in consequence.

(14) Article 8ZA of the 2000 Order establishes several options for the service of a written notice. The legislature clearly intended to cater for as many situations as possible. We consider that there is a clearly ascertainable legislative intention that in cases where a notification of representative has been given by the applicant and accepted by the Home Office the latter will normally serve any written notice on the representative. This construction accords with common sense, practical reality and reasonableness. Furthermore it is reinforced by the public law framework which we have outlined in the immediately preceding paragraph.

(15) The matrix which we are addressing has a further public law dimension. We consider that in cases where a notification has been accepted the Home Office, if contemplating the service of a written notice on the applicant rather than the accepted representative, must as a minimum take into account the notification and its acceptance. It seems to us that the materiality of this factor is undeniable. It is trite law that where a choice (or discretion) exists all material factors must be considered as a matter of obligation. Where there is a failure to this effect the ensuing act or decision will normally be vitiated. Moreover, and independently, the Lumba principle applies:

> "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, para 26 Lord Steyn said:
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> > "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice." "

Per Lord Dyson in Lumba v Secretary of State for the Home Department [2011] UKSC 12 at [35].

(16) In applying the above approach to the factual matrix we identify four standout

features, namely the terms in which the solicitor's letter dated 09 February 2015 and its attachment were couched, the immediate consequential updating of the Home Office records and the failure of the Home Office to communicate to the applicant or the solicitors any rejection of the notification. Furthermore, the inference that the notification and its internal registration were simply overlooked by the case worker concerned is readily made. This is reinforced by the absence of any evidence of why the notice was not served on the solicitors. Giving effect to the public law template outlined above we conclude that the decision dated 17 March 2015 must be quashed as it was not lawfully served and involved the breach of several well recognised principles.

(17) We turn next to consider the further curtailment decision and the removal notice of 3 April 2016. As noted in [4] above the grant of permission to apply for judicial review was restricted to challenging the decision dated 17 March 2015. We are seized of an application to amend the applicant's challenge.

(18) The Tribunal invited written submissions from the parties' representatives on the issue of remedy. These have now been received and considered. On behalf of the respondent it is submitted that it will suffice for the applicant's purposes to make an order quashing the impugned decision of 17 March 2015. This is based on the premise that this decision gave rise to the applicant's outstanding Article 8 ECHR being refused on the basis that he was in breach of the Immigration Rules. The written submission continues:

> "The respondent submits that the quashing of the decision of 17 March 2015 alone would result in the applicant's outstanding Article 8 application being considered substantively as if it were an in time application. Thus quashing [said] decision would be sufficient to resolve the applicant's difficulties as outlined to the court and provide an effective remedy."

Having regard to this unequivocal acknowledgement, the Tribunal orders that the impugned decision of 17 March 2015 be quashed. The effect of this order is that there is no requirement to revisit the restrictive terms of the grant of permission and consider an enlargement thereof, as debated at the hearing. The mechanism of liberty to apply (below) will provide the applicant with effective protection.

(19) There shall be liberty to apply.

Costs

(20) Giving effect to the general rule that costs follow the event, the respondent is ordered to pay the applicant's reasonable costs, to be assessed in default of agreement.

Signed Date: 24 August 2017

Upper Tribunal Judge Dawson