Upper Tribunal
(Immigration and Asylum Chamber)

Uddin (2000 Order – notice to file) [2017] UKUT 00408 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 July 2017	
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Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MD SHAHIN UDDIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Khan, Legal Representative
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

(i) Where the Secretary of State relies on a curtailment notice as having been deemed to have been given by being placed "on file' in accordance with article 8ZA(4) of the Immigration (Leave to Enter and Remain) Order 2000 (as amended) ("the 2000 Order"), it is for the Secretary of State to establish that that article applied.

(ii) The Immigration (Leave to Enter and Remain) Order 2000 allows for the sending of a curtailment notice to an overseas address.

DECISION AND REASONS

1. This appeal involves an issue of curtailment of leave and the application of articles 8ZA and 8ZB of the Immigration (Leave to Enter and Remain) Order 2000 ("the 2000 Order") as inserted by the Immigration (Leave to Enter and Remain) (Amendment) Order 2013 ("the 2013 Order").

2. Although the appellant's complete immigration history is not disclosed in the respondent's decision, it is apparent that he was granted leave to enter as a Tier 4 (General) Student until 30 April 2014 in order to undertake a course of study at Barbican College, London.

3. On 28 April 2014 he applied for further leave to remain as a Tier 4 student. However, that application was refused in a decision dated 3 June 2014. Although the appellant was awarded the requisite number of points for having a Confirmation of Acceptance for Studies (CAS) and for Maintenance (Funds), his application was refused with reference to paragraph 245ZX(m) of the Immigration Rules ("the Rules) on the basis that he had overstayed his leave. The decision letter states that when he submitted his application on 28 April 2014 his leave to remain had already expired, on 9 December 2013, which was more than 28 days before the making of his application. The decision letter went on to state that because the appellant did not have leave to enter or remain at the time of his application, there was no right of appeal against the decision.

4. The reason the decision states that his leave to remain expired on 9 December 2013 relates to an earlier decision dated 10 October 2013 which purported to curtail the appellant's leave so as to expire on 9 December 2013. That in turn followed from the fact that the sponsor licence for Barbican College was revoked on 9 March 2013. The curtailment decision was made with reference to paragraph 323A(b)(i) of the Rules.

5. Notwithstanding that the decision of 3 June 2014 stated that the appellant did not have a right of appeal, he nevertheless appealed to the First-tier Tribunal and his appeal came before a First-tier Tribunal Judge ("the FtJ") at a hearing on 3 November 2016. To summarise, the FtJ concluded that the appellant had been validly served with the curtailment decision dated 10 October 2013. He had overstayed his leave and accordingly paragraph 245ZX(m) applied. She therefore dismissed the appeal.

6. The further background to the appeal and the issues arising, are apparent from the grounds advanced on appeal against the FtJ's decision.

The grounds and submissions

7. Although not expressed in this way, the grounds can be divided into four. The first ground asserts that the FtJ erred in law in stating that the appellant's application for further leave to remain was refused under paras 322(1A) and 322(2) of the Rules, whereas it is plain that it was refused with reference to para 245ZX(m).

8. The second ground alleges error on the part of the FtJ in terms of the burden of proof, in that the FtJ had said that it was for the appellant to prove that he did not receive the notice of curtailment (dated 10 October 2013).

9. The third ground concerns the FtJ's assessment of the evidence of service of the notice of curtailment on the appellant given that the curtailment decision or notice itself records that it was "Served on File". The fourth ground relates to the FtJ's assessment of Article 8 of the ECHR.

10. In submissions, Mr Jarvis argued that it was permissible, with reference to art 8ZA(4) of the 2000 Order, to serve the curtailment decision 'to file'. The reason for that in this case was that the only address that the respondent had for the appellant was in Bangladesh, that being an address provided when he applied for entry clearance. It was only in 2014 that the Home Office was notified of the appellant's address of 205 High Street (in London). Art 8ZA was brought in on 12 July 2013 after the decision in *Syed (curtailment of leave – notice)* [2013] UKUT 00144 (IAC). Art 8ZA(3) applied in this case, it was said, because there was no postal or e-mail address for correspondence provided by the appellant.

11. Accordingly, the FtJ in this case acted lawfully in concluding that the respondent was entitled to serve the notice of curtailment to file.

12. So far as concerns the possibility of service at an address in Bangladesh, it was submitted that that would not come within the terms of the 2000 Order.

13. Furthermore, although it may be that the appellant's address in Bangladesh was, or still is, the family home, it might not be. It might be rented accommodation. In this case there was no communication from the appellant as to where in the UK he was living. The licence of the college had been revoked in March 2013.

14. It was accepted on behalf of the respondent that "in principle" there was a burden of proof on the respondent, at least in terms of the initial facts, to establish that there had been service of the notice.

15. On behalf of the appellant it was submitted that art 8ZA does provide for overseas service. In any event, given what is said in art 8ZB about the presumptions in relation to postal service outside the United Kingdom, by implication service at an overseas address is contemplated within the 2000 Order.

16. I was referred to the decision in *Shoaib v Secretary of State for the Home Department* [2015] EWHC 2010 (Admin), in particular at para 46.ix) in terms of the permissibility of service to an overseas postal address.

17. It was further submitted that if the curtailment notice was not validly served, the appellant's application for further leave to remain on 28 April 2014 was made in time. He therefore had a right of appeal and should have been granted leave to remain. Furthermore, there was no procedure for requiring the appellant to provide an address in the UK and he should not therefore be disadvantaged.

The decision of the First-tier Tribunal

18. The FtJ said at [1] that the application for leave to remain was refused with reference to paragraphs 322(1A) and 322(2) of the Rules.

19. At [7] she stated that she found that at the date of the application for further leave to remain the appellant had overstayed by more than 28 days, having been validly served with a curtailment notice on 10 October 2013, his leave having been curtailed to 9 December 2013. She went on to state that despite his leave having been curtailed, the appellant did not make any further application to change his sponsor or to obtain further leave to remain in the seven months after the licence was revoked. The appellant told the FtJ that his last lesson was in October 2013 but after that he went to the college but it was closed and he could not get in. He had said that he was waiting to hear from the Home Office. However, he accepted in cross-examination that he had made no effort to get in touch with the Home Office.

20. At [8] the FtJ said that she accepted the evidence of the respondent contained in the bundle to the effect that the curtailment of leave notice was served on the appellant. She rejected the argument that there was any breach of common law duty to act fairly. She noted the argument to the effect that she could not be satisfied that the curtailment notice was properly served, and that no evidence of service had been provided. She distinguished the circumstances of the appellant in the case of *Syed* on the basis that there the respondent had accepted that the curtailment notice had not been properly served. She referred to an e-mail in the bundle before her which stated that the curtailment notice was served on 10 October 2013.

21. At [10] she went on to state that it was for the appellant to prove on a balance of probabilities that he did not receive the notice. She referred to the appellant's evidence as to his having lived at 205 High Street, but then having changed address to that recorded on his witness statement. The appellant had initially said that he changed address "last week" and then said it was about two weeks ago. She noted that neither the Home Office nor the Tribunal have been notified of the change of address and when there had been an application for an adjournment of the hearing on 1 November 2016, yet a different address (in Reading) was recorded on the medical evidence in support of the adjournment application. She also referred to his evidence that he did not live at that address in Reading but that it was a friend's address where he was staying.

22. She concluded that the appellant was not a credible witness in relation to his evidence as to his addresses. She also concluded that it was not credible that he would carry on attending classes until October and that when the College shut he would do nothing about it but simply wait for the College to contact him. She then stated that in the light of her findings on credibility, she did not accept that he did not receive the curtailment notice.

23. At [11] her findings are summarised. She concluded that the respondent had not acted in breach of any duty to act fairly. The appellant did not have a valid sponsor for seven months prior to the curtailment notice, and he then took no action. She did not accept his evidence about his different addresses, and the notice of curtailment

was validly served. Thus, the appellant had overstayed and did not satisfy the requirement of paragraph 245ZX(m).

24. She then went on to deal with Article 8, concluding that the appellant did not meet the requirements of the Article 8 Rules, that there would be no interference with family or private life, alternatively that any interference would be proportionate.

Conclusions

25. As well as the decisions to which I have already referred, I directed the parties' attention to two further decisions which concern the 2000 Order, these being *R (on the application of Mahmood) v Secretary of State for the Home Department (effective service – 2000 Order)* IJR [2016] UKUT 0057 (IAC) and *R (on the application of Khurram) v Secretary of State for the Home Department (effective service; 2000 Order)* IJR [2016] UKUT 00281 (IAC), given that they are relatively recent decisions which consider aspects of the 2000 Order. However, neither party made submissions in relation to either case, and they are not directly relevant to the issues arising in this appeal.

26. Art 8ZA provides as follows:

> "8ZA.— Grant, refusal or variation of leave by notice in writing
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> (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 is 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."

27. Art 8ZB provides the following in relation to certain presumptions about receipt of a notice:

"8ZB.— 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.

…"

28. So far as ground 1 is concerned, I am not satisfied that there is any error of law in the FtJ's decision. Although she plainly did make a mistake at [1] of her decision in stating that it was paragraphs 322(1A) and 322(2) of the Rules which were the basis of the respondent's decision, it is plain from her decision from that point onwards that she recognised that the issue was one of overstaying. In the same paragraph she identified that as the issue, and referred to para 245ZX(m) at [11]. She plainly made her findings in relation to the issue of overstaying, and those findings are the very basis of the complaint in the grounds.

29. At [10] the FtJ said that it was for the appellant to prove, on the balance of probabilities, that he did not receive the notice (of curtailment) but that is at best an incomplete statement of the legal position. Mr Jarvis accepted that the Secretary of State does, in the first instance, have to "make out a case" in relation to the (method of) giving of notice, and that in that respect there is a burden of proof on the Secretary of State. I was not referred to any authorities on that distinct point. Certainly, in *Syed*, which was not itself concerned with the 2000 Order, but with the Immigration (Notices) Regulations 2003, it was decided that it was for the Secretary of State to prove that the notice of curtailment of leave in that case was communicated to the person concerned, in order for it to be effective. In *Mahmood* it was assumed that the burden of proof is on the respondent to prove notice of curtailment was given, (see for example [69]).

30. Although, of course, art 8ZB provides for certain rebuttable presumptions in terms of the giving of a notice, it is right in principle for the respondent to have to establish the facts giving rise to those presumptions, such as for example that notice was sent by post, fax, e-mail etc. Not only is that proposition 'in principle' legally justifiable, it also makes good practical sense in that the information as to whether a notice was sent is information within the respondent's knowledge and not of an appellant, who would otherwise have to prove a negative.

31. Although the FtJ recognised that the curtailment decision on its face is stated as having been "Served on File", there is no assessment by her of the basis upon which the respondent was entitled to rely on the notice having been placed "on file", and thus deemed to have been given in accordance with art 8ZA(4). Indeed, there is no reference to the 2000 Order at all in the FtJ's decision, although in fairness it is not apparent that she was referred to its provisions.

32. Although the FtJ rejected the appellant's credibility in terms of his various addresses, that was not a sufficient basis from which to conclude that the curtailment notice was properly given. This can quite simply be demonstrated with reference to the terms of art 8ZA(2) and (3). To summarise, a notice may be given by hand or may be sent by various means, and where attempts to give notice in accordance with paragraphs (2) and (3) are not possible or have failed, notice is deemed to be given when the decision-maker records the reasons for the failure of those attempts and places the notice on file, and the notice shall be deemed to have been given. However, evidence of those attempts at giving notice must necessarily therefore, form the foundation for the "notice on file". There was simply no evidence before the FtJ as to what efforts were made to give notice of curtailment to the appellant.

33. A similar situation arose in *Shoaib* which was an application for judicial review of a decision to curtail leave and to detain the claimant. He had entered the UK as a student but the sponsor licence was revoked in February 2013. The curtailment decision was placed on file. The issue in the proceedings before the Deputy High Court Judge was whether the Secretary of State was entitled to rely on the provisions of art 8ZA(4) of the 2000 Order (notice on file, deemed to have been given).

34. The argument for the claimant, materially for the purposes of the appeal before me, was that the defendant could have served the curtailment notice on the postal

address in Pakistan which the claimant gave when making his application for entry clearance. The Deputy concluded that a postal address provided for correspondence may be outside the UK. It was concluded that as there was no procedure in place, to which the deputy's attention was drawn in any event, by which a migrant is asked to provide an address for correspondence, it would be difficult to conclude that the address which was given (in Pakistan in that case) was not given, amongst other purposes, for correspondence. In that case, the defendant's General Cases Information Database ("GCID") did not provide an explanation as to why it was not possible to serve the notice on the address in Pakistan. Although the GCID case record sheet did state that the claimant's whereabouts were unknown, there was no record of a representative acting for him, the officials were unable to contact the sponsor for a last known UK address and they did not have an e-mail address. The record did not however, state that it was not possible to serve the decision notice on the address in Pakistan.

35. It was concluded therefore, that the defendant had erred when she found that it was not possible to give notice in accordance with art 8ZA(2) of the 2000 Order. The "jurisdictional pre-requisite" to permit reliance on art 8ZA(4) of the 2000 Order was not met, as it could not be said that it was not possible to give notice to a postal address provided for correspondence by the claimant, as a letter could have been sent to the address in Pakistan which had been supplied by him and was recorded as his 'local address'.

36. In the alternative, the decision that it was not possible to give notice to a postal address for correspondence was irrational, as such an address, the 'local address' in Pakistan, had been provided by the claimant. Further, the reasons, as required by art 8ZA(4) of the 2000 Order, given by the defendant for concluding that it was not possible to serve the decision notice to an address were deficient, as there was no explanation in the GCID Case Record Sheet as to why it was not possible to send the notice to the local address in Pakistan.

37. The argument on behalf of the claimant in relation to the giving of notice in accordance with art 8ZA(3) to the last known place of abode or place of study, was however, rejected.

38. In *Shoaib* the Deputy was referred to the Secretary of State's guidance on Curtailment of Leave, which is set out at [27] of that decision. Neither party relied on that guidance before me and I respectfully agree with what was said in *Shoaib* to the effect that that guidance does not assist in interpreting the effect of the 2000 Order (see also *Mahad v Entry Clearance Officer* [2009] UKSC 16).

39. Before me, Mr Jarvis referred to GCID system notes which stated that the curtailment decision was served to file because the only address was an address in Bangladesh which had been provided when the appellant had applied for entry clearance. However, no further justification or explanation appears to have been recorded. It is apparent that the respondent did have an address for the appellant, albeit an address in Bangladesh.

40. In *Shoaib* the claimant's address was described as a 'local address' which, as I understood Mr Jarvis's submissions, is said to be a relevant distinction between that case and the appeal before me.

41. The proposition that the 2000 Order does not make provision for service to an address outside the UK is inconsistent with art 8ZB which provides for a presumption about receipt of a notice where it is sent to a place outside the UK (8ZB(1)(a)(ii)).

42. I cannot see any significant distinction between the facts of the case in *Shoaib* and that in the appeal before me. The Deputy concluded that it was irrational for the defendant in that case to conclude that it was not possible to give notice to a postal address for correspondence where the address had been provided by the claimant. The fact that that address was recorded as his 'local address' hardly makes any difference, it seems to me. In the appeal before me it is evident that the respondent had an address for the appellant in Bangladesh and there was nothing to indicate that it was possibly a rented address, as hypothesised by Mr Jarvis, or that it was an address which was evidently not to be used for correspondence.

43. Art 8ZA(4) makes it clear that a prerequisite for a notice to be placed "on file" and therefore notice deemed to have been given, is that there have been attempts to give notice in accordance with paragraphs (2) or (3) which have not been possible or have failed. There is no evidence at all of any attempt by the respondent to have sent the curtailment notice by postal service to a postal address provided for correspondence by the appellant under art 8ZA(2)(c).

44. It follows therefore, that the appellant's leave to enter granted until 30 April 2014 was not validly curtailed. The further consequence is that his application for further leave to remain as a Tier 4 student made on 28 April 2014 was in time. The respondent's decision that he had overstayed was in error, and paragraph 245ZX(m) did not apply to him. The FtJ's decision to the contrary was itself therefore, in error.

45. Although the FtJ did not conclude that the appellant had no right of appeal, which should have followed from her conclusions on the facts, I am satisfied that the appellant did have a right of appeal and that the First-tier Tribunal did have jurisdiction to consider the appeal.

46. Having concluded that the FtJ erred in law in the respects to which I have referred, I set aside her decision, the errors of law being material to the outcome of the appeal. In re-making the decision I take into account that the respondent awarded the appellant the points claimed for a CAS and for Maintenance (Funds). It follows therefore, that the respondent was wrong to refuse the application for further leave to remain, no other aspect of the Rules having been in issue.

47. In the light of those conclusions, it is not necessary to consider further the ground in relation to Article 8.

48. Accordingly, I re-make the decision by allowing the appeal.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, allowing the appeal.

Upper Tribunal Judge Kopieczek 8/09/17