IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18227/2019**

THE IMMIGRATION ACTS

Heard remotely via Skype for Business	**Decision & Reasons Promulgated**
On 17 March 2021	**On 29 March 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

MUHAMMAD ILYAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Pipe
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 7 June 1968. By a decision dated 26 October 2019, the Secretary of State refused the appellant's application for leave to remain on human rights grounds (10 years' long residence/Private life). The appellant appealed to the First-tier Tribunal (Judge Lloyd-Smith) which, in a decision promulgated on 10 February 2020, dismissed his appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The first issue with which the judge was required to deal concerned refusal of the application under paragraph 322(2) of HC 395 (as amended). The judge found that the Secretary of State had failed to prove that the appellant the appellant should be refused under paragraph 322(2) for using a proxy in an English language test [29]. That part of the decision has not been challenged and the Upper Tribunal shall not revisit it.

3. As regards his claim for leave to remain on the basis of 10 years' continuous lawful residence, the background is as follows. The appellant lawfully entered the United Kingdom on 14 June 2009. He made a series of applications to maintain his lawful residence, including, on 23 May 2015, an application for leave to remain on family/private life grounds. The respondent refused the application on 4 November 2015 with an out of country right of appeal. The notice of decision was sent by recorded delivery (it was not returned unsigned for) to the appellant's solicitors. However, the solicitors had ceased trading on 31 October 2015, a fact of which the respondent was unaware. The appellant contends that he was not served with the notice of decision in accordance with the Immigration (Notices) Regulations 2003, paragraph [4] of which provides:

> 4.—(1) Subject to regulation 6, the decision-maker must give written notice to a person of any immigration decision or EEA decision taken in respect of him which is appealable.
>
> (2) ...
>
> (3) If the notice is given to the representative of the person, it is to be taken to have been given to the person.

Section 4(1) of the Immigration Act 1971 provides:

> 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 [my emphasis]

The appellant argues that, because the decision of 4 November 2015 has never been served on him in accordance with the rules, he has continued to enjoy lawful leave to remain and, as from June 2019, he had accumulated 10 years' lawful residence. In consequence, he met the requirements of paragraph 276B of HC 395 (as amended).

4. The litigation chronology after October 2015 is also relevant. About a month after the decision under challenge had been made, the appellant received at his home address a letter from the respondent dated 10 December 2015 enclosing a Form IS96 (Notification to a person who is liable to be detained) instructing him to attend Becket House Report Centre in London. The appellant then applied for permission to bring proceedings for judicial review. He asserted in that application that he had

not been properly served with the decision refusing him leave to remain. On 29 February 2016, permission was refused by Upper Tribunal Judge Coker. The judge found that the appellant, via his solicitors, had been validly served with the notice of decision. Judge Coker seems to have been unaware that the solicitors had ceased trading in October 2015. Thereafter, the appellant applied on 22 January 2016 and again in January 2019 for a residence card under the Immigration (EEA) Regulations 2016. Those applications and the subsequent appeals were unsuccessful.

5. In his decision, Judge Lloyd-Smith refers to two authorities: *R (on the application of) Rahman* [2019] EWHC 2952 (Admin) and *R (on the application of Mahmood) v Secretary of State for the Home Department (effective service - 2000 Order) IJR* [2016] UKUT 57 (IAC).

6. The facts and issues in both *Rahman* and *Mahmood* differ from those in the instant appeal. In *Mahmood*, the Tribunal held that, 'there is no requirement that the individual has actual knowledge of the notice or [the] contents' of a decision to curtail or refuse leave to remain. There is a rebuttable presumption that a notice of decision delivered by post or email to an individual's (or their representative's) address will have been 'given' for the purposes of section 4(1) of the Immigration Act 1971'. The court in *Rahman* went further, holding at [20]:

> In ordinary course, the Secretary of State is, therefore, entitled to presume that, provided the notice is given in accordance with article 8ZA, the notice has been given to the person affected and it can be presumed that the recipient thereby becomes aware of the contents. That is the case for good policy reasons. However, the presumption that it was "given" can be rebutted if the contrary is proved. In my view proving the contrary is not limited to proving that the notice was not sent to the address provided for correspondence. In my view "proving to the contrary" means that, where the person has not acted in bad faith (that is for example by moving address to avert detection and deliberately not informing the Home Office), **demonstrating that he was not given, in the sense of being made aware of the notice, would be sufficient to prove the contrary**. **As the whole purpose of section 4 of the Immigration Act 1971 is to ensure that a person affected must be told the decision so that he or she may be able to act upon it**, such a narrow interpretation would frustrate that purpose. In that respect the interpretation of 'given' in Mahmood is too narrow. **[my emphasis]**

The highlighted passage above identifies the fundamental purpose of making an individual aware of a decision of the Secretary of State: he/she must be 'given' a decision 'so that he or she may be able to act upon it'. In *Rahman*, the appellant's 'acting' upon the decision was to apply for a new educational sponsor within 60 days of cancellation of his leave. In *Mahmood*, the Secretary of State considered that the appellant could not succeed in an application under Appendix FM because he had overstayed for more that 28 days (E-LTRP.2.2); the appellant argued that he was unaware of a decision curtailing his leave to remain which had resulted in

the overstaying; by the time he found out about the decision, it was too late.

7. In the instant appeal, leaving aside the question as to whether service by recorded delivery (in the sense of the letter having been 'signed for') amounts to valid service (like Judge Coker, I consider that it does – see below) several questions arise: In what way has the appellant been prevented from acting on the Secretary of State's decision of November 2015? Was it too late for the appellant to act by the time he became aware of the decision?

8. First, the only remedy available to the appellant in respect of the decision was for him to appeal against it out of country. However, the appellant has not left the United Kingdom and so has never pursued that remedy. Secondly, time did not, as it had for the appellants in *Mahmood* and *Rahman*, run out for the appellant so as to prevent him from taking steps to regularise his immigration status before he became aware of the decision; any problem with service has not led to the irrevocable expiry of a deadline which the Secretary of State has subsequently refused to extend. The appellant became aware of the outcome of his application and changed immigration status when he was served with the Form IS96. By the time he made his application for judicial review and lodged his appeal to the First-tier Tribunal, he must have seen the notice of decision (notwithstanding what he says at [4] of his witness statement) as he responded in detail to the refusal under paragraph 322(2). During November/early December 2015, there was no action which the appellant could have initiated other than appealing out of country. It is clear that, by the time he made his application for judicial review, the appellant was fully aware of the decision to refuse him further leave to remain; his judicial review application is predicated on that refusal. To summarise, I find that the appellant (i) was given written notice of the decision sufficient to satisfy section 4(1) of the 1971 Act and; (ii) received the decision in a manner and at a time which did not prevent him from acting upon it; (iii) had been notified in writing of the decision before he had completed 10 years' continuous lawful residence.

9. Whilst I acknowledge that the appellant's solicitors had ceased trading in October 2015, I consider that the respondent was entitled to continue to regard those solicitors as the appellant's representatives until expressly notified otherwise by the representative or the appellant, and that the successful service by post (in the sense that the notice of decision was not returned to the sender) was effective service.

10. It follows from what say that I wholly agree with Judge Lloyd-Smith at [31]; in short, the Immigration (Notices) Regulations 2003 are not intended to exclude the validity of a decision which is 'given' to an intended recipient in a manner which satisfies the provisions of the 1971 Act; what matters is *actual* knowledge and that matters because 'giving' notice of a decision is necessary to enable the recipient to act on it. In this instance, the appellant had notice of the decision and was able to act on it. Accordingly,

I find that the judge was right to find that the appellant had not completed 10 years' continuous lawful residence in the United Kingdom.

11. In the light of what I say above, I do not propose to consider the remainder of the grounds of appeal in detail. Given the facts and what I have said above, the judge did not materially err in law by referring incorrectly to the Immigration (Leave to Enter and Remain) Order 2000 at [30].

Notice of Decision

This appeal is dismissed.

Signed Dated: 17 March 2021
Upper Tribunal Judge Lane