Case No: SC/199/2022 and SC/200/2022
Hearing Date: 23rd & 24th May 2023
Date of Judgment: 9th June 2023

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MRS JUSTICE STEYN DBE
UPPER TRIBUNAL JUDGE GILL
MRS J BATTLEY

C17 and C18

APPLICANTS

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT

Representation:

For the Appellant C18:	Mr Ramby de Mello and Mr Edward Nicholson instructed by Luke & Bridger Law
For the Appellant C17:	Mr Danny Bazini and Ms Jessica Smeaton instructed by Fountain Solicitors
For the Respondent:	Mr Rory Dunlop KC and Ms Jennifer Thelen instructed by the Government Legal Department

ANONYMITY ORDERS were made on 14 October 2022 and 28 November 2022, in relation to C18 and C17, respectively, and in respect of both Applicants on 24 May 2023. Nothing may be published which, directly or indirectly, identifies either of the Applicants as an Applicant in these proceedings before the Commission.

A. Introduction

1. The Applicants are Chinese nationals. On 1 March 2022, the Secretary of State for the Home Department directed that each of the Applicants be excluded from the United Kingdom on the grounds that their presence was not conducive to the public good ('the Directions'). In letters dated 4 March 2022 ('the Notice Letters'), the Secretary of State informed each of the Applicants of the Direction against them and of the fact that the decision had been certified under s.2C of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act').

2. The Notice Letters were despatched by the Secretary of State on 17 March 2022, in respect of each Applicant, to two addresses, one in Cambridge and one in Hong Kong. In closing submissions, Counsel for the Secretary of State, Mr Rory Dunlop KC, relied only on the Notice Letters that were sent to the Applicants' address in Hong Kong, accepting that he could not show that it was probable they ever received the Notice Letters sent to their Cambridge address.

3. On 17 May 2022, the Applicants lodged applications for review of the Directions and each applied for an extension of time, if necessary, under rule

8(5) of the Special Immigration Appeals Commission (Procedure) Rules 2003 ('the SIAC Procedure Rules').

4. This is the judgment of the Commission following a preliminary hearing to address the questions whether the Applicants lodged their applications for review in time and, if not, whether time should be extended. The first of these questions gives rise to the following issues:

i) Do the Immigration (Notices) Regulations 2003 ('the Notices Regulations') apply to exclusion directions?

ii) If not, does common law fairness require a notice of an exclusion direction to provide information regarding the procedure for seeking review, including the time in which any such application should be lodged?

iii) If the contents of the Notice Letters sufficed to provide valid notice of the Directions, when was each Applicant served? This leads to the question whether rule 49 of the SIAC Procedure Rules applies to exclusion directions, as well as to questions of fact based on our assessment of the evidence.

iv) If, in each case, the application was lodged out of time, would it be unjust in the circumstances not to extend time?

B. Factual background

5. C17 and C18 are 60 and 62 years old, respectively. They were both born and brought up in Guangdong, China, where they married 40 years ago. In 2000,

they moved to Hong Kong with their (then) two young sons, although they retained property in mainland China. Their third and youngest son was born after the family moved to Hong Kong. The sons are now 28, 24 and 15 years old, and their eldest son has two young children. We refer to them, respectively, as 'the eldest son', 'the middle son', and 'the youngest son'.

6. In 2003, both Applicants visited the UK for two weeks as tourists. In 2010 and 2011, C17 visited the UK as a tourist, staying in 2011 for a month with her three sons, sister and a maid.

7. On 9 July 2012, C17 obtained a Tier 1 Investor Visa. In order to obtain such a visa, C17 had to invest at least £1.7 million in UK share capital or UK registered companies. C17's evidence was that she did so, and that the money was her own, not money from her husband's business. C17's Tier 1 Investor Visa was initially granted for a period of three years, but it was extended in 2015 and 2017, and then, on 19 December 2017, C17 was granted indefinite leave to remain ('ILR'). In her oral evidence, C17 said she withdrew her investment in 2017 as it was not doing well.

8. C18 was granted entry clearance into the UK in 2012, and subsequently he was granted further leave to remain in 2015 and 2017 as a dependant of a Tier 1 Investor. C18 was most recently granted an extension of leave to remain in 2019.

9. In July 2012, the eldest son came to the UK, at the age of 17, to study for A levels at a boarding and day school in Cambridge, and then to undertake a foundation course. The eldest son initially attended the school as a boarder. In 2014, after C17 bought a two-bedroom flat in Cambridge ('the Cambridge flat'),

the eldest son (who was by then 19) lived in the Cambridge flat while continuing his studies. In 2015, he went to Durham University.

10. We accept that while the eldest son was studying in the UK, the Applicants visited the UK on many occasions, initially staying in properties that they rented before they bought the Cambridge flat. However, the impression given by C17's first statement that the whole family moved to the UK in 2012 is inaccurate. C18's evidence was that he visited for two weeks, or up to a month, at a time. The Cambridge flat has two bedrooms. C17 described it as "*small*". C18 described the cost of the Cambridge flat (of £300,000 to £400,000) as "*trivial*" for him, referring to a plan they had had to buy a London property for "*10s of millions*". It is not credible that this wealthy family, who were attended in Hong Kong by servants and a chauffeur, bought the Cambridge flat intending to use it as a family home in which to live, or that they ever did so. In July 2012, the middle son was 14 years old and attending school in Hong Kong, where he was educated throughout. The youngest son began attending school in Hong Kong at the age of six, in 2014. On 24 June 2015, C17 made an application to the Home Office in which she stated her country of residence as "*Hong Kong*" and gave her address in Hong Kong ('the Hong Kong house') as her "*permanent residential address*", and it is likely that was accurate.

11. The last occasion on which C18 was in the UK was 2019. He travelled to Hong Kong on about 10 December 2019, and has not returned to the UK. The last time C17 was in the UK was for a few weeks in February 2020, when she came here with her eldest and youngest sons, and the family of her eldest son. They all returned to Hong Kong on 28 February 2020.

12. If it had not been for the Coronavirus pandemic, and the travel restrictions that were imposed as a result, it is likely the Applicants would have returned to the UK as visitors. They were considering sending their youngest son to a school in England for part of his education. In June and July 2021, C17 registered her youngest son for potential admission into year 9 (starting in September 2022) at several schools in Hertfordshire, London and Cambridge. In the event, he remained at school in Hong Kong.

13. With effect from 4 February 2022, C17 rented out the Cambridge flat on a six month tenancy, with the assistance of a letting agency.

14. The eldest son has British citizenship, while the middle and youngest sons had ILR. The eldest and middle sons work in China for the family business, and the youngest son remains in school in Hong Kong. As of November 2022, all family members were living in Hong Kong.

C. The Notice Letters

15. The Notice Letter addressed to C17 states:

> "The purpose of this letter is to inform you that on 01 March 2022, after the most careful consideration, the Home Secretary personally directed that you should be excluded from the United Kingdom due to your involvement in providing financial donations to UK political figures on behalf of the Chinese Communist Party (CCP). We therefore deem your presence in the UK is not conducive to the public good.
>
> The decision was certified by the Home Secretary under Section 2C of the Special Immigration Appeals Commission Act 1997. The effect of this is that any review of your exclusion may, on application, be undertaken by the Special Immigration Appeals Commission (SIAC).
>
> **Travel to the United Kingdom**

> You should not attempt to travel to the United Kingdom as you will be refused entry. …" (Emphasis added.)

16. The Notice Letter addressed to C18 is in precisely the same terms save for the addition of the following words after the second paragraph:

> "On the basis of the Home Secretary's decision of 01 March 2022, your Limited Leave to Remain in the UK was cancelled in accordance with Paragraph 9.2.2 of the Immigration Rules."

17. The Notice Letters were sent by post to each of the Applicants on 17 March 2022 (i) to the Cambridge flat, using the recorded delivery service and (ii) to the Hong Kong house, using Royal Mail International Economy.

18. The Notice Letters sent to the Cambridge flat were recorded as delivered on 19 March 2022. However, the Applicants were not in the UK at the time. A tenant was living in the Cambridge flat. There is no evidence that those copies of the Notice Letters were forwarded to the Applicants, and the Secretary of State accepts that the evidence does not show that they were, on the balance of probabilities, received by the Applicants.

19. There is no recorded delivery date for the Notice Letters that were sent to the Hong Kong house. However, the Applicants acknowledge that they received them. In their applications for an extension of time, dated 12 May 2022, the Applicants each stated that the Notice Letters were received "*at some point in April 2022*". We address below the evidence, and our conclusions, as to when the Notice Letters were delivered to the Hong Kong house.

D. <u>The legal framework</u>

Section 2C of the 1997 Act

20. The Applicants' applications to review the Secretary of State's directions excluding them from the UK are brought pursuant to s.2C of the 1997 Act, which provides:

> "(1) Subsection (2) applies in relation to any direction about the exclusion of a person from the United Kingdom which –
>
> (a) is made by the Secretary of State wholly or partly on the ground that the exclusion from the United Kingdom of the person is conducive to the public good,
>
> (b) is not subject to a right of appeal, and
>
> (c) is certified by the Secretary of State as a direction that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public –
>
> (i) in the interests of national security,
>
> (ii) in the interests of the relationship between the United Kingdom and another country; or
>
> (iii) otherwise in the public interest.
>
> (2) The person to whom the direction relates may apply to the Special Immigration Appeals Commission to set aside the direction.
>
> (3) In determining whether the direction should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.
>
> (4) If the Commission decides that the direction should be set aside, it may make any such order, or give any such relief, as may be made or given in judicial review proceedings.
>
> (5) References in this section to the Secretary of State are to the Secretary of State acting in person." (Emphasis added.)

Rule 8 of the SIAC Procedure Rules

21. The time limit for bringing the applications is set by rule 8(1) of the SIAC Procedure Rules, which states, so far as material:

> "Subject to the following paragraphs of this rule, … a notice of application for review under the 1997 Act must be given –

(a) …

(b) otherwise –

(i) if the appellant is in the United Kingdom, not later than 10 days; or

(ii) if the appellant is outside the United Kingdom, not later than 28 days,

after the appellant is served with notice of … the decision in respect of which he wishes to apply for review."

22. The Applicants' unchallenged evidence is that they were outside the UK when the Notice Letters were sent. Accordingly, the 28-day time limit in rule 8(1)(b)(ii) applies.

23. The Applicants acknowledge that they did not bring the applications within 28 days of the Notice Letters being delivered to their Hong Kong house. Subject to the points that we address below as to whether the contents of the Notice Letters were sufficient to constitute valid service, for the purposes of applying rule 8, we have concluded that each Applicant was served with notice of the exclusion decision on 11 April 2022. If we reject the Applicants' contention that service was invalid, then the Applicants ask us to apply rule 8(5) which provides:

"The Commission may extend the time limits in this rule if satisfied that by reason of special circumstances it would be unjust not to do so."

Other provisions of the 1997 Act that are relied on

24. Section 2 of the 1997 Act provides, so far as relevant:

"(1) A person may appeal to the Special Immigration Appeals Commission against a decision if

(a) he would be able to appeal against the decision under section 82(1), 83(2) or 83A(2) of the Nationality, Immigration

and Asylum Act 2002 but for a certificate of the Secretary of State under section 97 of that Act (national security, &c.), or

(b) an appeal against the decision under section 82(1), 83(2) or 83A(2) of that Act lapsed under section 99 of that Act by virtue of a certification of the Secretary of State under section 97 of that Act.

(2) The following provisions shall apply, with any necessary modifications in relation to an appeal against an immigration decision under this section as they apply in relation to an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 –

…

(k) section 105 of that Act (notice of immigration decision), …

…

(6) In this section 'immigration decision' has the meaning given by section 82(2) of the Nationality, Immigration and Asylum Act 2002." (Emphasis added.)

25. Section 6A of the 1997 Act provides:

"(1) Sections 5 and 6 apply in relation to reviews under section 2C, 2D, 2E or 2F as they apply in relation to appeals under section 2 or 2B.

(2) Accordingly –

(a) references to appeals are to be read as references to reviews (and references to appeals under section 2 or 2B are to be read as references to reviews under section 2C, 2D, 2E or 2F), and

(b) references to an appellant are to be read as references to an appellant under section 2C(2), 2D(2), 2E(2) or (as the case may be) 2F(2)." (Emphasis added.)

26. In broad terms, s.5 of the 1997 Act provides the power to make rules regulating the exercise of the rights of appeal conferred by s.2 or 2B, and specifies certain matters that may or must be included in such rules. Section 6 makes provision for the appointment of a special advocate to represent the appellant's interests in any proceedings from which he and his legal representative are excluded.

The Notices Regulations

27. The preamble to the Notices Regulations records that they were made by the Secretary of State in exercise of the powers conferred on him by sections 105 and 112(1) to (3) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

28. Regulation 4(1) of the Notices Regulations provides:

> "Subject to regulation 6, the decision-maker must give written notice to a person of any decision taken in respect of him which is appealable under section 82(1) of the 2002 Act, any EEA decision or any citizens' rights immigration decision taken in respect of him which is appealable." (Emphasis added.)

29. Regulation 5 of the Notices Regulations provides:

> "(1) A notice given under regulation 4(1) –
>
> (a) is to include or be accompanied by a statement of reasons for the decision to which it relates.
>
> …
>
> (3) The notice given under regulation 4 shall also include, or be accompanied by, a statement which advises the person of –
>
> (a) his right of appeal and the statutory provision on which his right of appeal is based;
>
> (b) whether or not such an appeal may be brought while in the United Kingdom;
>
> (c) the grounds on which such an appeal may be brought; and
>
> (d) the facilities available for advice and assistance in connection with such an appeal.
>
> (4) The notice given under regulation 4 shall be accompanied by information about the process for providing a notice of appeal to the Tribunal and the time limit for providing that notice." (Emphasis added.)

E. Issues 1 and 2: Do the Notices Regulations, or requirements to the same effect, apply to exclusion directions?

30. The power to exclude a person from the UK is a prerogative power of the Crown: *L1 v Secretary of State for the Home Department* [2013] EWCA Civ 906, Laws LJ, [13]. There is no statutory right of appeal against an exclusion direction. The Applicants acknowledge, and it is plainly right, that an exclusion direction is not an "*immigration decision*" within the meaning of s.82 of the 2002 Act.

31. The exercise of the power to exclude may be challenged by bringing a claim for judicial review. For those cases where the direction was made wholly or partly on the basis of information which the Secretary of State considers should not be made public on national security, international relations or other public interest grounds, Parliament has provided an alternative statutory review mechanism: s.2C of the 1997 Act. The jurisdiction of the Administrative Court is not ousted but, at least ordinarily, the statutory review would be regarded as a suitable alternative remedy that ought to be pursued instead of a judicial review claim.

32. The Applicants submit that the Notices Regulations set out basic minimum requirements regarding the information which should be given to an appellant in order to ensure the right of access to justice is unimpeded and that the appellant has an effective remedy against an adverse decision. The Applicants submit that the essence of the right to a remedy will be impaired if the subject of a decision is not provided with the information specified in regulation 5 of the Notices Regulations, including in particular the time limit for appealing.

33. C17's first and second skeleton arguments, and C18's first skeleton argument, acknowledged that exclusion directions are not governed by the Notices Regulations. However, C18 contended in his second skeleton argument that the Notices Regulations apply to a review pursuant to s.2C of the 1997 Act of an exclusion direction. Counsel for C18, Mr de Mello and Mr Nicholson, developed this argument orally, and Counsel for C17, Mr Bazini, adopted their written and oral arguments on the point.

34. The Applicants' primary submission is that the effect of s.6A(2) of the 1997 Act is that *throughout the Act* references to appeals are to be read as including reviews, and that means in particular that s.2(2) of the 1997 Act applies to a s.2C review. If that is right, then s.2(2)(k) provides that s.105 of the 2002 Act applies, and that is the provision pursuant to which the Notices Regulations were made.

35. The Applicants contend, first, that this is the proper interpretation of the provisions as a matter of ordinary interpretation. Secondly, they submit that an interpretation which has the effect that there is no statutory requirement for an exclusion decision to be accompanied by the information specified in regulation 5 of the Notices Regulations would be at odds with the scheme of the 1997 Act and absurd. It would, they contend, have the consequence of treating some groups of appellants (that is, those appealing pursuant to s.2 and 2B) more favourably than others, such as the Applicants, and so it would be incompatible with articles 8 and 14 of the European Convention on Human Rights.

36. In support of these submissions, the Applicants rely on Lord Millett's observation in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209 at [116]-[117]:

> "The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.
>
> But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it…"

37. Thirdly, the Applicants rely on the interpretative obligation in s.3 of the Human Right Act 1998, and submit that s.2(2) of the 1997 Act should be read as if it included the words "*or in relation to a direction falling within s.2C as they would apply in relation to an appeal under s.82*" after the words "*in relation to an appeal against an immigration decision under this section*".

38. In our view, this argument has no merit. It is contrary to the clear meaning of the provisions on which the Applicants rely. Section 6A(1) expressly identifies just two provisions (ss.5 and 6) which apply in relation to reviews under s.2C-2F as they apply to appeals under section 2 or 2B. It is plain that subsection (2) of s.6A is explaining further how sections 5 and 6 should be read so that those two sections apply to reviews as well as appeals. The word "*Accordingly*" at the beginning of s.6A(2) is clearly a reference back to the preceding subsection. The Applicants' interpretation of this provision is untenable. Section 6A(1) would be redundant if s.6A(2) had the effect of collapsing the distinction between a review and an appeal throughout the 1997 Act.

39. On their face, the Notices Regulations apply to certain "*appealable*" decisions. Regulation 4 of the Notices Regulations is clear. An exclusion direction is not an appealable decision and it does not fall within the scope of regulation 4. It follows that regulation 5 is inapplicable.

40. We also reject the contention that this interpretation creates distinctions and consequences that Parliament should be presumed not to have intended. It is clear that Parliament has intentionally distinguished appealable decisions from those which are subject to review. Such a distinction is not absurd or discriminatory. Many decisions of public bodies are not appealable but are subject to judicial review. In creating a statutory review mechanism for a category of exclusion decisions, Parliament has sought to maintain the pre-existing position that such decisions can be challenged in accordance with judicial review principles, while making available a closed material procedure before a tribunal with special expertise so that such reviews can be undertaken more effectively. There is no arguable basis for reading into s.2 of the 1997 Act the words proposed by Mr de Mello (see paragraph 37 above).

41. *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604 does not assist the Applicants. In that case, the issue was whether "*an internal note on a departmental file*" (Lord Steyn, [21]) had legal effect in circumstances where no decision was communicated to the individual concerned. Lord Steyn (with whom Lord Hoffmann, Lord Millett and Lord Scott agreed) held at [26]:

> "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."

42. None of the opinions in *Anufrijeva* support the Applicants' contention that the common law requires an administrative decision to be accompanied by information about how, and by what date, it may be challenged. Decisions of public authorities, which are regularly subject to judicial review, often contain no such information.

43. Regulation 5 of the Notices Regulations shows that where Parliament intended to require a decision to be accompanied by information, including as to the deadline for challenge, specific provision has been made. Similarly, paragraph 34L of the Immigration Rules, on which the Applicants rely, does not assist them. It concerns information to be provided in respect of certain, specified "*eligible*" decisions regarding the availability and time limit for "*administrative review*" (i.e. internal review).

44. Rule 8 of the SIAC Procedure Rules makes clear that the time limit begins after the applicant is served with (i) notice of the direction in respect of which he wishes to apply for review (rule 8(1)(b)) and (ii) notice of certification under s.2C(1)(a) (rule 8(4A)(a)). Consequently, the recipient of such notice is made aware of the exclusion direction and that a challenge may be brought before the Commission. This provides the subject of the decision with sufficient information to exercise their rights. The lack of notice of the time limit is not absurd, contrary to common law principles of fairness, or incompatible with Convention rights, not least given that the Commission has the power to extend time where it would be fair and just to do so: see *C11 v Secretary of State for the Home Department* (14 April 2021), [25].

45. The Notice Letters informed the Applicants of the Directions made in respect of each of them, and that the Secretary of State had certified the decisions under s.2C of the 1997 Act. Accordingly, we conclude that the content of the Notice Letters was not insufficient to effect service of notice of the Directions.

F. Issue 3: When were the Applicants served with notice of the Directions?

46. The parties initially relied on rule 49 of the SIAC Procedure Rules, which provides, so far as material:

> "(1) Any document which is required or permitted by these Rules or by an order of the Commission to be filed with the Commission or served on any person may be –
>
> (a) delivered or sent by post to a postal address;
>
> (b) sent by fax to a fax number;
>
> (c) sent by e-mail to an e-mail address; or
>
> (d) sent through a document exchange to a document exchange number or address,
>
> specified for that purpose by the Commission or the person to which the document is direction.
>
> …
>
> (5) Any document that is served on a person in accordance with this rule shall, unless the contrary is proved, be deemed to be served –
>
> (a) where the document is sent by post or through a document exchange from and to a place within the United Kingdom, on the second day after it was sent;
>
> (b) where the document is sent by post from or to a place outside the United Kingdom, on the twenty-eighth day after it was sent; and
>
> (c) in any other case, on the day on which the document was sent or delivered to, or left with, that person." (Emphasis added.)

47. If rule 49 applied, the effect would be that in circumstances where the Notice Letters were sent by post on 17 March 2022, they would be deemed, unless the contrary is proved, to have been served (a) on 19 March 2022 (in the case of the letters sent to the Cambridge flat) and (b) on 14 April 2022 (in the case of the letters sent to the Hong Kong house).

48. However, in final skeleton arguments and oral submissions it was common ground that this deeming provision is inapplicable. The wording of rule 49(1) shows that it is concerned with documents filed or served after the initiation of proceedings before the Commission. It is only after proceedings have begun that the parties will have specified addresses for service of documents for the purpose identified in rule 49(1): see rule 50 of the SIAC Procedure Rules and SIAC form 1. This is analogous to the position before the First Tier Tribunal where, as the Upper Tribunal held in *FO and others (Service of notice of decision) Nigeria* [2007] UKAIT 00093 at [3]:

> "The rules applying to service of the decision are not in the Tribunal's Procedure Rules, because the decision itself is not a Tribunal document."

Similarly, an exclusion direction is not a Commission document.

49. The effect of the undisputed conclusion that rule 49 of the SIAC Procedure Rules is inapplicable is that there is no applicable deeming provision.

50. In *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67, [2019] 1 WLR 104, Lord Carnwath (with whom all the Justices agreed) observed at [15]:

> "… In *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 WLR 177, 185 CA (a case under the Landlord and Tenant Act 1954), Lord Salmon said:

> ‘According to the ordinary and natural use of English words, giving a notice means causing a notice to be received. Therefore, any requirement in a statute or a contract for the giving of a notice can be complied with only by causing the notice to be actually received – unless the context or some statutory or contractual provisions otherwise provides…’
>
> (No distinction is drawn in the cases between ‘serving’ and ‘giving’ a notice: see *Kinch v Bullard* [1999] 1 WLR 423, 426G.) To similar effect in *Tadema Holdings Ltd v Ferguson* (1999) 32 HLR 866, 873, Peter Gibson LJ said (in a case relating to service of a notice under the Housing Act 1988):
>
> > ‘“Serve” is an ordinary English word connoting the delivery of a document to a particular person.’” (Emphasis added.)

51. In *R (Alam) v Secretary of State for the Home Department* [2020] EWCA Civ 1527, the Court of Appeal considered what was required to give notice in writing of a decision curtailing a person’s leave to remain in the UK. Floyd LJ (with whom Henderson and Philips LJJ agreed) said:

> “20. The issue which really divided the parties on this appeal was what amounts to the giving of notice. On the most generous approach (to the appellants) to this issue, the requirement for the giving of notice could mean that the person affected must become aware of the contents of the decision. On this approach the person affected must not only have the notice in his hands, but must also have opened the envelope or other medium by which it is delivered and read it. 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. …” (Emphasis added.)

52. Having quoted Lord Salmon’s observation in *Sun Alliance,* as cited with approval by Lord Carnwath in the *UKI* case, Floyd LJ continued:

> “29. In my judgment, the giving of notice for the purposes of s.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. If it were not so, a failure to open an envelope containing the notice, for whatever reason, would mean that notice was not given.

> Similarly I do not consider that the recipient must be made aware of the notice. Again, a recipient who allows mail to accumulate in a mailbox or on a hall table will not be aware of the notice. Proof of such facts should not enable the person to whom the mail is addressed to establish that the notice was not given, by being received.
>
> 30. … 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."

53. The Applicants sought to distinguish *Alam* on the basis that the Court of Appeal was addressing the interpretation of articles 8ZA and 8ZB of the Immigration (Leave to Enter and Remain) Order 2000.

54. The Supreme Court in *UKI* and the Court of Appeal in *Alam* were addressing the natural and ordinary meaning of the words to serve notice or to give notice. We are here concerned with determining when a person "*is served with notice*" for the purposes of rule 8(1)(b) of the SIAC Procedure Rules. In our judgment, there is nothing in those rules, or the broader statutory context, to indicate that we should not apply that natural and ordinary meaning. Accordingly, in determining when each of the Applicants was served with notice of the exclusion direction made against them, it is necessary to ascertain when the Notice Letters were delivered to and received at their address in Hong Kong.

55. As we have said, we are only concerned with the date of delivery of the letter addressed to the Hong Kong house, as the Secretary of State accepts she cannot show that either Applicant ever received the letters sent to the Cambridge flat.

56. We heard evidence from C17, C18, C18's driver (who we will refer to as 'TSM') and C17's personal assistant (who we will refer to as 'KTF'), all of

whom gave evidence via a video platform, with the assistance of an interpreter. We have given TSM and KTF ciphers because we are of the view that naming them could lead to the identification of the Applicants.

57. C17 was in mainland China from 22 January 2022 to 18 April 2022, following the illness and death in China of C18's mother on 24 January 2022, so she was not in the Hong Kong house when the Notice Letters were delivered. KTF was C17's part-time assistant. She did not attend the Hong Kong house from February 2022 until 4 May 2022, so she, too, was not able to give evidence as to when the Notice Letters were delivered. C18 was living in the Hong Kong house when the Notice Letters were delivered, but we accept the evidence that he and TSM gave that C18 never personally opened any post. This was consistent with his evidence that he had 200-300 employees, including "*over ten secretaries*", and the general impression he gave that he delegated such tasks to employees and servants.

58. C18 stated in his first witness statement, dated 15 May 2022,

> "My driver opened the letter and says that he would have discarded the envelope. He does not understand English at all and so he set the letter aside. <u>The driver believes that this was around late March or early April to the best of his recollection, but cannot be more precise</u>." (Emphasis added.)

59. We note that the suggestion that the Notice Letters may have been received in "*late March*" contrasts with both Applicant's Grounds, dated 12 May 2022, in which it was said the Notice Letters were received at some point in April 2022.

60. The only direct evidence as to the date of arrival of the letters was given by TSM. He was given the task of collecting post from the mailbox, opening it, and putting it on C17's desk. He recalled that during the period that C17 was in

mainland China, following her mother-in-law's death, two letters arrived that were in English. TSM does not read or speak English but the inevitable inference is that the two letters in English were the Notice Letters, given that KTF, C17's assistant, subsequently found the Notice Letters on C17's desk when she went through the post on her desk. We accept TSM's evidence that the Notice Letters arrived in early April 2022.

61. TSM was not able to be more precise about the date the letters arrived. The Secretary of State submitted – and it was not contested – that "*early April*" cannot mean in the second half of April, and so at the very latest the Notice Letters arrived at the Hong Kong house by 14 April 2022. But we were invited to conclude that they arrived earlier.

62. TSM's evidence was that he was "*tasked with opening the mailbox and checking their emails regularly on Mondays and Fridays each week*". In our judgment, it is probable that the Notice Letters arrived by no later than Monday 11 April 2022. The next occasion on which TSM would have checked the post would have been Friday 15 April 2022. It is unlikely that he would have recalled the letters arrived in "*early April*" if he first saw them on 15 April. In addition, he said that he had forgotten about the letters when C17 returned, which is more likely if they had arrived at least a week before she returned, rather than just three days earlier.

63. Accordingly, for the purposes of applying the time limit in rule 8 of the SIAC Procedure Rules, we conclude that each of the Applicants was duly served with a Notice Letter on 11 April 2022. It follows that the last day on which the Applicants would have been in time in giving notice to the Commission of their

applications to review the Directions was 9 May 2022. Their applications were in fact lodged on 17 May 2022, eight days late.

G. Issue 4: Should we extend time?

64. The remaining question is whether to extend time pursuant to rule 8(5). As the Commission observed in *C11*:

> "25. The burden is on the Appellant to demonstrate that, by reason of special circumstances, it would be unjust not to extend time. Ultimately though, the question for the Commission is whether would be fair and just to extend time: see *H2 v SSHD*, 25th July 2013, at para 4.
>
> 26. Relevant factors in determining whether to extend time include the length of and reasons for the delay, the merits of the appeal, and the degree of prejudice to the Respondent if the application were granted. National security concerns are not relevant at this stage.
>
> 27. The importance of the issue (see *L1 v SSHD* [2013] EWCA Civ 906, para 41 (per McCombe LJ)) and the impact on the Appellant and her son are relevant factors to be placed in the overall balance." (Emphasis added.)

65. The length of the delay in this case is eight days. A relevant factor in determining whether to extend time is that the extension sought by the Applicants is relatively short. The prejudice to the Secretary of State is that which applies in every case where an extension of time is sought, namely, if the extension is refused, she will be saved the time and trouble of defending the review applications: *BO and others (Extension of time for appealing) Nigeria* [2006] UKAIT 00035, [21(iv)]. The Secretary of State does not allege that the delay has caused any other prejudice on the specific facts of this case.

66. The issue is important, albeit the consequences for the Applicants are not of the same magnitude as in *L1* or *C11*, both of which concerned deprivation of British

citizenship. Nonetheless, although we do not accept the Applicants' evidence that they had lived, or intended to live, in the UK, they had visited the UK regularly, and would have continued to do so but for the impact of Covid-19, and then the Directions. Their eldest son has British citizenship and their other two sons had ILR. C17 had ILR and C18 had leave to remain. They were seriously considering sending their youngest son to a school in England, just as they had done for their eldest son. They had property in the UK and, if their youngest son had come to a school here, it is likely they would have spent more time in the UK visiting him. Although the youngest son has ILR, and so could still come to the UK for the final years of his schooling, we accept that the Applicants' inability to visit the school or to visit him in the UK, is a hindrance to their taking that course. We also accept that the Applicants are concerned that their exclusion from the UK may have an impact on their ability to travel elsewhere, albeit there is no evidence that it has had such an impact, as yet.

67. Although the extension sought is relatively short, even a short extension may not be warranted if there is no explanation, or no satisfactory explanation, for the whole period of the delay. But if "*there is an effective explanation, whether it amounts to a good excuse or a bad one is merely one of the matters to be taken into account, with all other factors, in deciding whether 'by reason of special circumstances it would be unjust not to' extend time*": *BO and others (Extension of time for appealing) Nigeria* [2006] UKAIT 00035, [13]-[15], [19]-[20] and [21(iii)].

68. The evidence of C17 and C18 is that they only became aware of the Notice Letters on 4 May 2022 when C17's part-time assistant, KTF, came back to work

and went through the pile of post on C17's desk. On C17's instruction, while she was away from home, TSM had brought the letters in from the mailbox, opened them, thrown away the envelopes, and left them on C17's desk. TSM handled any bills requiring payment but otherwise left the correspondence for C17 to deal with on her return. As he does not read English, he was not aware that the Notice Letters were of any particular importance or urgency. We accept TSM's evidence that that is what he did.

69. KTF gave evidence, which we also accept, that she stopped attending the Hong Kong house in February 2022 due to the occurrence of the fifth wave of Covid-19 in Hong Kong, and the effect on her given her caring responsibilities for her young child. The first day on which she returned to work at the Hong Kong house was Wednesday 4 May 2022. There was "*quite a substantial pile of letters*" that she had to work her way through. As soon as she read the letter from the Home Office, she "*noticed how important it was*" and told C17 "*immediately*". She and C17 then "*explained the content of the letter*" to C18.

70. KTF's evidence was that both C17 and C18 appeared to be unaware of the contents of the Notice Letters before she drew them to their attention. C17 and C18 said the first they knew of the letters was on KTF's return on 4 May 2022. Although there were aspects of C17's and C18's evidence that we found incredible, on balance, we accept their evidence that they did not read and were not aware of the contents of the Notice Letters until 4 May 2022. In reaching this conclusion, we place weight, first, on KTF's evidence that the Applicants appeared unaware of the contents of these letters, and secondly, on the

likelihood that these Applicants would have contacted solicitors quickly on learning of their exclusion from the UK.

71. In relation to the latter point, we bear in mind that the Applicants had dealt with Christine Lee & Co Solicitors on a number of occasions in relation to their own visas, entry clearance and leave to remain in the UK, as well as that of their children. They had visited the UK regularly, had property in the UK, and were seriously considering sending their youngest son to the UK for the final years of his schooling. In addition, we accept their evidence that they contacted Mr David Ho of Christine Lee & Co the same day, albeit we reject as implausible (and contrary to his witness statement) C18's evidence that he only spoke to an assistant rather than David Ho himself. We consider it unlikely that these Applicants, given their resources, contacts and interest in being able to enter the UK, would have ignored the Notice Letters for several weeks if they had been aware of them.

72. Christine Lee & Co put the Applicants in touch with other solicitors. Although we have concluded that the Notice Letters were received on 11 April 2022, and therefore the final day for making an in time application was 9 May 2022, the Applicants and their representatives were not aware of that deadline.

73. Mr Martin Bridger of Instalaw Solicitors Ltd, C18's solicitor, has given unchallenged evidence that he made contact with C18 on Friday 6 May 2022, having "*been made aware from the individual referring his case to us in the UK about his circumstances*". Mr Bridger's evidence is that on Thursday 12 May 2022 a retainer was entered into, full instructions were obtained, and a draft

statement produced. He explains the reasons instructions could not be obtained prior to this date as follows:

> "There was a delay in receiving a payment on account from the Appellant due to the Appellant's bank not authorising payment in the first instance. Following payment having been received attempts were made to arrange a telephone conversation. Due to the Appellant's location in Hong Kong, the call had to be arranged through Wechat. A profile had to be set up to enable us to make calls through this site which required verification prior to calls being able to be made. When the Wechat profile was established we then had to arrange an interpreter and the call had to be arranged at a time that was convenient to ourselves and the Appellant due to the 7 hour time difference between the UK and Hong Kong."

74. A draft statement was sent to C18 for his approval which "*due to interpreting issues and misunderstandings due to linguistics (with the Appellant referencing Chinese proverbs)*" Mr Bridger states that C18's statement could not be finalised and signed by him until Sunday 15 May 2022. Following receipt of the signed statement, Mr Bridger's evidence is that his firm urgently drafted the papers and filed the application "*as soon as reasonably practicable, on 17 May 2022*".

75. C17's evidence is that she, too, was put in touch with her representatives on Friday 6 May 2022. Her solicitor, Ms Keerum Akhtar of Fountain Solicitors, has given unchallenged evidence that she was formally instructed on Tuesday 10 May 2022, following receipt of a payment on account from C17. On Wednesday 11 May 2022, Ms Akhtar instructed counsel who proposed a list of questions in order to take more detailed instructions from C17. Ms Akhtar states:

> "Taking instructions was not, however, straightforward. The Applicant is based in Hong Kong which is approximately 7 hours ahead of the UK. That time difference made it difficult to set up

> remote appointments in order to take instructions. There is almost an entire working day between the two time-zones.
>
> On the 12th May 2022, I was able to speak with the Applicant and obtain instructions and these were subsequently forwarded to counsel to prepare grounds challenging the decision to exclude the Applicant from the UK. A weekend fell in between the 12th-16th May 2022.
>
> We had intended to prepare a witness statement with the Applicant to submit at the time of lodging the appeal, and an appointment was scheduled with the client on 16th May 2022, in order to do so, unfortunately that could not proceed as a medical appointment the Applicant was attending overran. As a result, I instructed counsel to prepare grounds without a witness statement. I believed that the application was already out of time so wanted to submit expeditiously.
>
> Counsel provided grounds on the 16th May 2022, but I was travelling to London that day for a hearing on a different case. In my absence from the office, I asked a colleague to prepare the appeal form and submit the grounds and this was submitted on the 17th May 2022."

76. The Secretary of State submits that the requirement to consider "*the whole period of delay*" means that we should consider the whole period between delivery of the Notice Letters and filing of the applications. Mr Dunlop contends that there are two important periods of delay in reacting to the Notice Letters, namely: (i) early April to 4 May and (ii) 4 May to 11 May. It follows from the conclusions that we have reached above that the first of these periods begins on 11 April.

77. The Applicants submit that the delay is only the period beyond the time limit, and so the court should only be concerned with the period of delay (which we have found to be 8 days) immediately preceding the filing of the applications. They draw attention to the fact that unlike in judicial review proceedings, there is not a requirement to act "*promptly*"; there is only the 28 day time period.

78. In our view, it is appropriate to consider all the circumstances in which the delay has arisen, which includes understanding what occurred during the whole period from 11 April 2022 to 17 May 2022. At the same time, it is important not to lose sight of the fact that more than three-quarters of that 36-day period was time that the Applicants were entitled to take to file their applications.

79. The circumstances in which C17 did not read, or become aware of, the Notice Letter addressed to her for more than three weeks following its delivery are these:

i) For the first week of that period, until 18 April 2022, C17 was in Shenzen, China. She went there on 22 January 2022, with her youngest son, on learning that C18's mother was seriously ill, and in circumstances where C18 was unable to travel for health reasons. The eldest and middle sons were already in Shenzhen. C17's mother-in-law died on 24 January 2022. Due to Covid-19 restrictions, C17 had to quarantine in a hotel for seven days and then at her home in Shenzhen for a further seven days. As C18's representative, C17 was involved in the cultural and religious rites during the traditional mourning period, including receiving condolences from family and friends, as well as in dealing with her mother-in-law's belongings and estate. C17 stayed away from Hong Kong for longer than she otherwise would have done because of the rise in cases of Covid-19 when the fifth wave hit Hong Kong.

ii) As we have said, C17's assistant, KTF, was also absent from the Hong Kong house from February until 4 May 2022.

iii) C17 asked TSM to collect the post from the mailbox in her absence, and the absence of KTF. C17's evidence was that she had asked TSM to action anything urgent and put the rest on her desk. TSM's evidence was that he would handle any bills that required paying, but it was apparent from his evidence that otherwise he was simply asked to leave the post for C17 to deal with on her return.

iv) C17 returned to the Hong Kong house on 18 April 2022, having been away from home for three months. She said, and we accept, that she had found that period emotionally draining.

v) On her return, C17 found that her husband's "*state of mind was very bad*". She described him as "*distraught and depressed*", in circumstances where he had not been able to see his mother before she died, or to attend her funeral, and he had been without his family for three months.

vi) C17's evidence was that in circumstances where she was looking after her husband, and looking after her youngest son who had to return to in-person school at this time (which entailed getting used to new processes of taking and uploading rapid Covid tests daily, as well as monitoring his homework), and who was adjusting to his grandmother's death and seeing his father's poor mental state, she did not think about looking in her study until around 26 or 27 April 2022.

vii) When C17 went into her study on 26 or 27 April 2022 she saw there was "*a pile of letters on my desk*". She said, "*I assumed there was nothing urgent on the desk but, with everything that I was dealing with at the*

time, could not face sorting through the letters myself". She asked KTF to return to work on Friday 29th April, but she was not able to return until the following Wednesday, 4 May.

viii) C17 left the pile of letters for KTF to deal with on her return, at which point KTF saw the Notice Letters and drew them to C17's attention. KTF could read the letters, but we also find that C17's English is better than she was prepared to admit, and that she was also able to read and understand at least the thrust of the Notice Letters.

80. The circumstances in which C18 did not read or become aware of the Notice Letters until 4 May 2022 are these:

i) C18 said that he owns many companies and his business, which is primarily based in the provinces of Guangdong and Yunnan, in China, mainly involves letting properties. Prior to the start of the pandemic his primary residence was in the Guangdong province, and he spent weekends at the Hong Kong house. However, since the beginning of the pandemic C18 has been living in Hong Kong, due to his health problems, and the need to see his doctors who are based in Hong Kong. He said that he has 200-300 employees, including ten secretaries. But for over two years he has delegated the task of looking after the business to his eldest and middle sons, who have gone to China to deal with the business.

ii) C18 was in the Hong Kong house, with his driver, TSM, and two people who were described as "*maids*", when the Notice Letters were delivered. None of the witnesses mentioned that C18 had any secretaries in their

statements, and C18 inaccurately referred to KTF as his or "*our*" personal assistant, whereas she was C17's personal assistant. We heard for the first time about one of C18's secretaries, Mr Wong, after he appeared on the video link, assisting C18. Mr Wong did not give evidence. C18's evidence was that his secretaries worked in Hong Kong and China, but that "*there was no secretary working beside me at that time*". He said that his secretary "*could not go to Hong Kong*", at that time, as the border was closed to people entering from China, due to Covid-19. KTF's evidence was that C18's secretaries are in China, not Hong Kong. TSM's evidence was that C18 has one secretary based in Hong Kong, Mr Wong, but he also said that during the period when C17 was away, "*only [C18] and me were in Hong Kong*". C17's evidence was that in Hong Kong it was normally her responsibility to deal with C18's post, not Mr Wong's, who she described as a personal assistant of the Hong Kong company. Although the evidence was not entirely clear and consistent, we bear in mind that all the witnesses were speaking through an interpreter. On the balance of probabilities, we accept that no secretary or personal assistant attended the Hong Kong home during the period that C17 was away, and prior to the return to work of KTF on 4 May 2022.

iii) C18's mother died on 24 January 2022. He was suffering from ill-health and unable to see her before she died, or to go to Guangdong Province to attend her funeral or receive condolences from family and friends. We accept that this, together with the impact of his physical ill-health, the consequent restraint on his ability to travel to his home in Guangdong,

and the absence of his family for three months while the fifth wave of Covid-19 hit Hong Kong, had a negative impact on his mental health which was on-going in April and early May 2022.

iv) C18 and TSM cannot read or speak English.

v) Ordinarily, C17 took responsibility for dealing with any post C18 received. As we have said, she asked TSM to collect the post from the mailbox in her absence. TSM collected the Notice Letters and put them on C17's desk. TSM could not read them, and he knew that C18 would not be able to read them either. He did not think they were important or urgent and he did not inform C18 that any letters had arrived that were in English.

vi) C18 did not expect to receive important or urgent letters by post, as business communications in China and Hong Kong were primarily by email or express delivery (for which a signature was required), although he personally did not need to use express delivery as ordinarily (that is, when there was not a pandemic on-going) he had many helpers in China and Hong Kong.

vii) C18 learnt of the Notice Letters at about midday on 4 May 2022 when C17 and KTF came to him and told him what the letters said.

81. In the period from 4 May to 11 May:

i) C17 and C18 got in touch with Christine Lee & Co Solicitors on 4 May 2022.

ii) The reasons that they chose not to instruct Christine Lee & Co to bring these proceedings, and instead to each instruct a different firm of solicitors, are unclear. C18 said that the matter dealt with by Christine Lee & Co "*did not go well*" and so he chose to find a new solicitor. At first sight, this explanation seems improbable given that the matters Christine Lee & Co had dealt with had resulted in the applications being granted and, if C18 was unhappy with the service provided by Christine Lee & Co, it is unlikely he would have immediately contacted David Ho of that firm to seek a recommendation. However, in his third statement, C18 referred to the fact that payments he had made to Christine Lee & Co had prompted an SRA investigation into that firm, and it seems likely that C18 was linking his and his wife's exclusion from the UK to their dealings with that firm. In any event, it seems to us that the exploration of their reasons for choosing alternative solicitors enters into legally privileged area, and they cannot fairly be criticised for their choice of representatives.

iii) They each made contact with their solicitors on the second working day after they became aware of the Notice Letters.

iv) C17 formally instructed her solicitors on Tuesday 10 May, four working days after she became aware of the Notice Letters. C18 formally instructed his solicitors one day later. It appears probable that if it had not been for the problem C18 encountered with his bank not authorising payment of the retainer, C18 would have instructed his solicitors the same day as C17.

v) The Secretary of State does not contend that the Applicants or their representatives can be criticised for the time taken to file the applications once they had instructed solicitors. On being formally instructed, the solicitors had to arrange remote conferences with the Applicants, instruct interpreters to attend those conferences, prepare the applications and witness statements (albeit, in the event, C17's statement was submitted later), and instruct counsel to prepare the grounds for review. The seven hour time difference would no doubt have made completing those tasks more difficult. We agree that the Applicants' representatives cannot fairly be criticised and, in any event, we would not lay any delay on their part at the door of the Applicants: see *R (Tofik) v immigration Appeal Tribunal* [2003] EWCA Civ 1138, [2003] INLR 623, [25].

82. In our judgment, the Applicants acted expeditiously from 4 May 2022. We do not consider that they can fairly be criticised, in the circumstances we have described, for the actions they each took to instruct solicitors and to file their applications in the period after they became aware of the Directions.

83. On the other hand, there is considerable force in Mr Dunlop's submission that what the Applicants did in the period prior to 4 May 2022 was strikingly similar to allowing "*mail to accumulate in a mailbox or on a hall table*" (*Alam*, [29]); although in this case it lay unread for more than three weeks on C17's desk. Nonetheless, we are of the view that given the shortness of the delay, and the importance of being able to challenge the Directions, in the circumstances we have described, the explanation for the delay is adequate. We have borne in mind, in particular, that C17's absence was unexpectedly long due to the fifth

wave of Covid-19, covering part of the period after the Notice Letters were delivered, and it was also due to Covid-19 and C17's absence that KTF did not return to work until 4 May. We accept that C17 was emotionally drained, focused on looking after her husband and youngest son and, in circumstances where she was not expecting important or urgent post, she preferred to ask her assistant to come back to work to deal with the pile of letters that had accumulated on her desk.

84. In our view, it would be unjust, in all the circumstances, not to grant each of the Applicants an eight day extension of time.

H. Conclusions

85. The Applicants filed their applications for review out of time but, for the reasons we have given, we grant each of them an extension of time pursuant to rule 8(5) of the SIAC Procedure Rules.