Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00017/2020 (V)**

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Friday 19 March 2021	**On 31 March 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SUKUMAR GUNASEKARAN

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bellara, Counsel instructed by Legend solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Burnett promulgated on 19 October 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 5 December 2019 refusing a human rights claim based on his private life.

2. The Appellant's claim was made in the context of an application to remain in the UK based on his long residence. He asserts that he has spent ten years

living lawfully in the UK. The Appellant came to the UK as a student on 24 July 2009 with leave to 28 May 2011. His leave was subsequently extended as the dependent of his partner who had leave first as a student and then as a Tier 2 migrant until 24 August 2019. The Respondent contends that the leave of the Appellant's partner and the Appellant's own leave was validly curtailed to end on 27 November 2018. Thus, she says that, at 24 July 2019 when the ten year period ended, and at 22 August 2019 when the Appellant made the application which led to the decision under appeal, he did not have leave to remain. A further fact of significance (for reasons I will come to) is that the Appellant and his partner separated in 2016. It appears that the Appellant's partner returned to India and the Appellant continued to live in the UK, as I understand it, at the address where he previously lived with his partner.

3. The Judge observed at [11] of the Decision that "[t]he central issue was whether there had been a valid and lawful notice served in September 2018 to curtail the appellant's leave to remain". The Judge concluded that there had been an effective termination of leave at that point in time and went on to dismiss the appeal on human rights grounds.

4. The Appellant challenges the Judge's reasoning in relation to the finding that leave had been effectively curtailed. It is said that the reasoning is inconsistent with case-law and guidance, is speculative and ignores relevant evidence. In short, the contention is that the Judge was not entitled to reach the conclusion he did.

5. Permission to appeal was granted by Designated First-tier Tribunal Judge McClure on 23 November 2020 in the following terms so far as relevant:

> "… 2. The curtailment was effected by email being sent to the partner at the email address given by the partner and appellant to the respondent previously. The judge considered the fact that as the appellant had not given notice that he was separated from his partner that was valid service of curtailment on the appellant.
> 3. Issue is taken in the grounds with the fact that the judge admitted computer evidence at the hearing to show service of curtailment. The judge admitted the evidence of service by email as a computer record and gave the appellant and his representative an opportunity to apply for an adjournment. The representative did not apply for an adjournment. In the circumstances if that were the only ground I may not have granted permission as the judge was entitled to proceed with the hearing and take account of the evidence before him. However I consider that the remaining ground of appeal is arguable.
> 4. The judge considered the appropriate case law and the requirement of the rules. The appellant had not been served in person. The appellant had in 2018 provided his own address and email address to the respondent. The issue being whether the respondent should have separately served the appellant and if so at what address or at what email address.
> 5. I grant permission on all grounds."

6. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

7. The hearing took place remotely via Skype for Business. It was also attended by the Appellant. There were no technical issues affecting the conduct of the hearing.

8. At the start of the hearing, Mr Bellara and Ms Everett informed me that it was agreed that there was an error of law in the Decision. As I will come to and as I indicated at the hearing, I agree that there is an error of law in the Decision.

9. Ms Everett also informed me however that, as a matter of fact, it was incorrect to say that the Appellant had not been personally informed of the curtailment as an email was also sent to the Appellant's own email address. She could not explain why the Presenting Officer before Judge Burnett had not drawn attention to that as it was visible on the computer record alongside reference to service by email on the Appellant's wife. She accepted that this further evidence could not be used to impugn the Decision. Clearly that is correct. However, as I noted, this is the Appellant's challenge to the Decision and, since it is accepted that there is an error of law in the Decision, it falls to be set aside. Accordingly, the appeal will have to be heard afresh with whatever evidence is then available.

10. I also noted that it appeared to be the position of the parties before Judge Burnett that the issue of curtailment and length of residence was determinative of the question whether the Appellant satisfies paragraph 276B of the Immigration Rules ("Paragraph 276B"). I questioned whether that accurately recorded the Respondent's position as there are of course other considerations within Paragraph 276B which might be relevant to the Appellant's case, particularly in light of his failure to notify the Respondent that he was no longer living with his wife and was therefore no longer entitled to remain as her dependent for about two years prior to the curtailment and three years prior to his application.

11. Following discussion, it was agreed that, because of the new evidence and so that any other issue arising in relation to Paragraph 276B could be considered in a manner which was not unfair to the Appellant, the appeal should be remitted to the First-tier Tribunal so that it could be heard entirely afresh and so that the parties' evidence and submissions could be fully reconsidered.

12. I therefore found there to be an error of law in the Decision. I set the Decision aside in its entirety and remitted the appeal to the First-tier Tribunal. I indicated to the parties that I would give short reasons in relation to the error of law and next steps which I now turn to do.

DISCUSSION AND CONCLUSIONS

13. The relevant part of the Decision is at [25] to [36]. I do not need to set that out in full in light of the concession. It is however appropriate to set out parts of it. At [25] of the Decision, the Judge summarised the issue and the parties' position as follows:

> "The issue in this appeal is a fairly narrow one. The respondent accepts that if the curtailment notice was not validly served the appellant qualifies for 10 years long residence and the appeal ought to be allowed. The appellant accepts that if the curtailment notice was validly served the appeal ought to be dismissed. It was not argued on behalf of the appellant at the hearing that the appeal ought to be allowed on any other basis. I have thus concentrated on the question of whether the curtailment notice was validly served on the appellant."

14. I have already drawn attention to a reason why the curtailment notice issue may not be determinative of the question whether the Appellant meets Paragraph 276B (although it does not appear to have been the stance of the Presenting Officer before Judge Burnett that other issues needed to be considered by the Respondent even if the Appellant had completed ten years' residence). Equally, the only basis on which the Judge could allow or dismiss the appeal is on human rights grounds (as the Judge recognised). The curtailment issue, whilst important if determined in the Appellant's favour, did not necessarily mean that the Appellant would fail if that issue were determined against him. Nonetheless, no issue is taken with [38] and [39] of the Decision where the Judge, having determined the factual issue against the Appellant carried out an Article 8 balancing assessment and dismissed the appeal. In other words, it is not suggested that the Appellant can succeed on Article 8 grounds if he fails on the factual issue.

15. The Judge referred to relevant case-law and statutory provisions. In particular, he had regard to the case of Mahmood (R (on the application of Mahmood) v Secretary of State for the Home Department (effective service – 2000 Order) IJR [2016] UKUT 00057 (IAC) ("Mahmood") and to article 8ZA of the Immigration (Leave to Enter and Remain) Amendment Order 2013 ("the 2013 Order"). The guidance in Mahmood and the 2013 Order are concerned with the giving of notice of curtailment. As is said in Mahmood however "[w]here Art 8ZB [of the 2013 Order] applies, both delivery and the date of delivery are rebuttably presumed".

16. The Appellant's evidence and the Respondent's position in relation to the curtailment notice are set out at [29] to [31] of the Decision. That passage is worth setting out to put the Judge's reasoning in context:

> "29. The appellant told me during the hearing that he had separated from his wife in 2016. The appellant was residing in the UK on the basis of being a dependent partner of his wife. It is clear that as the appellant was no longer a dependent partner of his wife from 2016, he did not have a basis of stay in the UK as a dependent partner. The appellant told me that he had not informed the Home Office of this fact. This sets in context the service of the notice upon the appellant's partner. It also sets in context what the appellant accepted at the hearing, that he did not have access to his wife's email. He thus did not ever see the email sent to his wife. He stated, and I have no reason not to accept what he says, that he hadn't spoken to his wife and didn't know what she was doing since they had separated. The notice was served by the Home Office in 2018 to his wife's email address. The appellant confirmed at the hearing that he had not asked the Home Office to only serve him personally in respect of his leave. The appellant did

> not dispute that the email address which the respondent identified was his wife's email address. The appellant did not dispute or suggest that his wife had not given the email address for the purposes of correspondence.
> 30. I note from documents served by the appellant (see page 7 of the bundle), that the GCID entry states that an ICD letter was served on the appellant to his wife's email address in November 2015. In my judgment this demonstrates that the email address had been provided for the purposes of correspondence. I should note here also that the entries provided also showed that the respondent was aware of the appellant's postal address as other notices were served on the address.
> 31. Mr Beer did not suggest at the hearing that the respondent did not know the appellant's postal address or his email address in September 2018. The GCID record demonstrates that the respondent only served the person they considered was the 'lead applicant' (the appellant's wife). It is not stated by the respondent or asserted that they ever served the appellant (personally or individually) at his postal address or via his own email address."

As I have already noted, the latter assertions in [31] of the Decision appear not to be accurate but that was because the Judge was not informed of the evidence which Ms Everett told me exists to show that the Appellant was indeed served at his own email address. That assertion cannot undermine the Decision as Ms Everett accepted. The Judge's summary of the evidential positions of both parties at that time therefore appears to be accurate.

17. The Judge then set out his reasoning and conclusion on the factual issue as follows:

> "33. The skeleton argument provided did not identify the above provisions [of the 2013 Order]. The argument identified older cases such as **SYED**. It was not drawn to my attention any specific provision regarding the service upon dependents (of other people who have leave to remain). The 1971 Act and the order refer to the service of the notice on a 'person affected' by the decision. The question that may potentially arise is 'was the email address of the appellant's wife an email address which was '*provided for correspondence by the person or the person's representative'*?
> 34. The appellant, by not notifying the respondent of his separation from his wife and requesting that all notices should be sent to him, lost an opportunity to receive the notice to his postal address, or to his own email address. The appellant cannot show that the email was not received in his wife's email address to rebut the presumption of service. By virtue of the Order the email is deemed served when it was sent. This is rebuttable but the appellant has failed to rebut this service as he had no access to the email address, as he had separated from his wife. The appellant chose to keep quiet and not inform the respondent as to the basis of his stay in the UK and that it was no longer applicable to him. I have stated above that the appellant's wife's email address had been used for the service of other notices. I am satisfied that it was provided for correspondence by the appellant.
> 35. I turn to a consideration of the IDI provided by Mr Bellara. The IDI (Immigration Directorate Instruction) is the IDI for December 2019. It is the latest version of the guidance. I was not provided the guidance that existed in September 2018. The IDI states that the respondent's preference is to serve to a postal address if the applicant is in the UK or to an email address if not in the UK. There is nothing before me to show that the person who

> took the decision followed the guide. However, from the information before me the 'lead applicant' was refused entry at port and she returned to India. In such circumstances it is not surprising that the curtailment notice was sent via email. In my judgment the IDI does not assist the appellant's case.
> Conclusions paragraph 276B Curtailment notice
> 36. My findings are set out above. I conclude that the notice was served upon the appellant via his wife's email address. This email address had been provided by the appellant for the service of correspondence. The appellant did not see or know of the service of the notice. Following the case of Mahmood, the appellant did not need actual notice of the service of the decision. I find that the appellant chose not to notify the respondent to serve only his postal address or email address as he had no basis of stay in the UK, from the point in time when he separated from his wife (in 2016). I conclude that there was a valid and lawful service of the notice of curtailment. I hence dismiss the appeal."

18. Although the grounds are lengthy, the error made by the Judge can be explained relatively shortly. The question which the Judge asks himself at [33] of the Decision is only part of the relevant consideration. The fact that an address is given for correspondence is relevant to the issue whether service has been effected in accordance with the 2013 Order. However, that is not the end of the matter. The question still arises whether the presumption created by service to that address has been rebutted.

19. The Court of Appeal has recently grappled with this issue in the cases of Alam and Rana v Secretary of State for the Home Department [2020] EWCA Civ 1527. Having reviewed relevant case law, Floyd LJ said this:

> "29. In my judgment, the giving of notice for the purposes of section 4(1) of the 1971 Act and the 2000 Order does not require that the intended recipient should have read and absorbed the contents of the notice in writing, merely that it be received. 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. Receipt, and thus the giving of notice, can plainly be effected by placing the notice in the hands of the person affected. So much is recognised by Article 8ZA(2)(a). In my judgment, however, receipt in the case of an individual is not so limited. Receipt of an email, for example, will be effected by the arrival of the email in the Inbox of the person affected. Likewise, documents arriving by post will normally be received if they arrive, addressed to the person affected at the dwelling where he or she is living, at least in the absence of positive evidence that mail which so arrives is intercepted. A document received at an address provided to the SSHD for correspondence is received by the applicant, even if he does not bother to take steps to collect it.
> 31. It follows that the burden of proving the negative, non-receipt, in the fact of convincing evidence leading to the expectation of receipt, will not be lightly discharged. In particular it will not be discharged by evidence, far less by mere assertion, that the notice did not come to the attention of the person affected."

20. The Judge accepted that the Appellant had no access to his wife's email. As such, although service complied with the 2013 Order, on the Judge's analysis, the Appellant did not receive it and was unaware of it.

21. It may be that the Judge's reasoning is based on the Appellant's wife's leave having been effectively curtailed so that the Appellant's leave fell away. That is certainly a possible interpretation of what is said at [33] to [36] of the Decision. I would not wish to express any firm opinion on that possible construction without hearing argument. However, the Appellant still had leave in his own right even if that was as a dependent. Speaking for myself, therefore, I am not persuaded without more that this is a correct analysis (if indeed that did form part of the Judge's reasoning).

22. Of course, if the Appellant had provided no means of communication other than via his wife, that might cast a different complexion on matters. It is understandable that the Respondent would give notice via the Appellant's wife's address in ignorance of the fact that the parties had separated and in the knowledge that she had returned to India. The Respondent might well be entitled to consider that this was the appropriate method of service of both notices if the parties were, as she thought, still living together. However, the Judge accepted that the Appellant had given another email address for correspondence. As it now appears, the Respondent may also have given notice via that address. If that is the position, it will fall to the Appellant to provide evidence that he did not receive it.

23. However, based on the evidence which the Judge had before him as recorded in the Decision, his analysis is erroneous. The fact that the Appellant's wife could not have rebutted the presumption of service of the notice on her does not mean that the Appellant could not rebut the presumption of service of curtailment of his own leave.

24. For those reasons, I conclude that there is an error of law disclosed in the Decision. I therefore set the Decision aside in its entirety.

25. For reasons I have already explained, I remit the appeal to the First-tier Tribunal for redetermination. The First-tier Tribunal may wish to give directions for the filing of further evidence given what I say above regarding further evidence in the possession of the Respondent to which the Appellant will need to respond. The Respondent obviously should not wait to be directed to provide what is clearly relevant evidence and should ensure that this is provided to the Appellant as soon as possible so that he can consider it and give instructions to respond to it.

DECISION

The Decision of First-tier Tribunal Judge Burnett promulgated on 19 October 2020 involves the making of an error on a point of law. I therefore set aside the Decision. I remit the appeals to the First-tier Tribunal for re-hearing before a Judge other than Judge Burnett.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 23 March 2021