IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25621/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 18 February 2015	**On 17 April 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAFEER AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr M Diwinycz, a Senior Home Office Presenting Officer
For the Respondent: Mr R Harris, UK Immigration Advisors

DECISION AND REASONS

1. The respondent, Safeer Ahmed, was born on 31 December 1987 and is a male citizen of Pakistan. I shall hereafter refer to the respondent as the appellant and the appellant as the respondent (as they appeared respectively before the First-tier Tribunal).

2. The appellant appealed against the decision of the respondent to refuse him leave to remain as a Tier 4 (General) Student. The decision was taken on 17 January 2014.

The First-tier Tribunal (Judge Hillis) in a determination promulgated on 4 November 2014, allowed the appeal. The respondent now appeals, with permission, to the Upper Tribunal.

3. The findings of fact of the First-tier Tribunal were as follows:

> "8. It is agreed that the Appellant submitted his application online on the 18th December, 2013. As it was made online it required the Appellant send the original mandatory documentation by post. The Appellant sent this documentation to the UKBA Office at Durham by recorded delivery and the letter from Royal Mail shows that it was delivered on the 23rd December, 2013.
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> 9. It was not until three days later, namely, the 26th December, 2013 (I bear in mind that this was the Christmas holiday period) that a letter was sent from the UKBA Office at Bootle to the Appellant stating that his documents had not been received, namely, the required photographs and evidence of identity documents that are required to enable his application to be considered. There is no agreed date for the receipt of this letter but I bear in mind that the 26th December, 2013 was a bank holiday and the period between the 26th December, 2013 and the 10th January, 2014 included the New Year period and a weekend on the 28th and 29th December, 2013 and the 4th and 5th January, 2014. It is, therefore, not clear that the Appellant had seven working days from the date of the request being made to him which I infer must mean the date it would normally be received by him through the postal system.
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> 10. The letter from the Bootle Office dated 26th December, 2013 was clearly sent after the Appellant had sent his documents to the UKBA Durham Office. There is no submission before me that prior to the receipt of that letter the Appellant was on notice that the documents were required to be sent to the Bootle Office and not any other UKBA Office. I do not appear to have a copy of the Appellant's original Tier 4 online application before me and infer that it did not state that the mandatory documents must be sent to the Bootle Office of the UKBA. The Home Office Guidance of making Tier 4 student visa applications in the Section entitled "Documents you will need to send with your application" does not appear to specify that they be sent to the Bootle Office. It states, the Home Office will refuse any application where a request is made for the supporting documents to be submitted, if the specified documents are not provided to us within the period specified in that request."
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> 11. The Respondents wrote a letter to the Appellant on the 29th January, 2014 from their Bootle Office stating, "You were sent a document reminder letter dated 26th January, 2013, reminding you to send in the required documents by 10th January. We received your documentation on the 14th January, 2014 as you had sent them to the incorrect address. However your case had previously been rejected due to not receiving the required documents in time. We, therefore, cannot process your application."
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> 12. There is no acknowledgment in that letter that the documents had, in fact been received at the Durham Office on the 23rd December, 2013, three days prior to the date on the document reminder letter of the 26th December, 2013, nor that it took the Durham Office 22 days to forward the documents to the Bootle Office. I also note here that the 10th January, 2014 was a Friday and that the documents were received by the Bootle Office from the Durham Office two working days after they should have been.
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> 13. I find that the Appellant, on the evidence before me, had, in fact, submitted the required documents to the UKBA at the Durham Office on the 23rd December, 2013. I

also conclude that paragraph 245 AA cannot apply to this Appellant's application as the letter of the 26th December requesting documentation to be sent to the Bootle Office was after the UKBA had, in fact, received the documents.

14. I find that had the Appellant contacted the Durham Office to have his documents returned to him to meet the requirements of the letter of the 26th December, 2013 it is highly unlikely he would have received them back in time to then send them to the Bootle Office on the 10th January, 2014 as it took them 22 days to forward them directly to the Bootle Office."

4. The grounds of appeal state:

"Nowhere in the determination does the judge identify what he considers to be an immigration decision appealed against, that gives him jurisdiction to hear an appeal under Section 82(1) of the 2002 Nationality, Immigration and Asylum Act 2002 (sic). He has respectively submitted that the rejection of an invalid application does not quality as an immigration decision within the terms of Section 82(2) of that Act and so the judge was not entitled to hear an appeal against it."

5. Judge Hillis concluded his decision as follows:

"15. There is no submission before me that anything in the Home Office Guidance on making a Tier 4 Student Visa application or the application form itself instructing the Appellant that he was required to send the required documents only to the Bootle Office. I, therefore, find that the Appellant had submitted the mandatory documents with his online application by sending them by recorded delivery to the UKBA at the Durham Office and her decision to refuse to accept the Appellant's application as valid pursuant to paragraph 245AA is not in accordance with the relevant Immigration Rules and law.

Conclusions

16. The burden of proof is on the Appellant and the usual civil standard of balance of probabilities applies. I conclude, on the evidence taken as a whole, that there is an error in the Secretary of State's decision and that this appeal is allowed to the extent that it is a valid application that must be considered on its merits pursuant to the relevant Immigration Rules."

6. As regards the grounds of appeal to the Upper Tribunal, I find that these do not have merit. I say that having regard to the decision of the Upper Tribunal in *Basnet (validity of application – respondent)* [2012] UKUT 00113 (IAC). It is clear from *Basnet* that the appeal was properly before the Upper Tribunal:

"The first matter for us to consider was whether the appellant had a right of appeal to the Upper Tribunal against the First-tier Tribunal's decision declining jurisdiction. The Presenting Officer, no doubt advisedly, did not dispute that the appellant has such a right of appeal. The case is on all fours with *Abiyat*. The First-tier Tribunal reached its decision to decline jurisdiction not by way of a Rule 9 notice, but following full consideration of the matter at a hearing, and expressed its conclusion in the form of a determination. The appeal was therefore validly before the Upper Tribunal. [16]"

7. The Tribunal in *Basnet* went on to consider what constituted a valid application to the respondent:

"The next question was whether the First-tier Tribunal was right to decide that it had no jurisdiction. The jurisdiction of the First-tier Tribunal turned on whether a valid application had been made prior to the expiry of leave on 28 May 2011. That leads to the Immigration & Nationality (Fees) Regulations 2011 (2011 No 1055), which provide at Regulation 37:

> Consequences of failing to pay the specified fee.
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> Where an application to which these Regulations refer is to be accompanied by a specified fee, the application is not validly made unless it has been accompanied by that fee.

The question whether the first application was valid therefore depends not upon whether the payment was successfully processed, but on whether the application was accompanied by the fee.

BE was concerned with the terms of the 2007 Regulations, but there is no practical distinction for present purposes. As held in that case, an application is "accompanied by" a fee if it is:

> "… accompanied by such authorisation (of the applicant or other person purporting to pay) as will enable the respondent to receive the entire fee in question, without further recourse having to be made by the respondent to the payer."

Accordingly we conclude that the Judge erred at paragraph 32 in considering that non-payment, for whatever reason, even if the fault of the respondent, was fatal to the validity of the application and of the subsequent appeal. Validity of the application is determined not by whether the fee is actually received but by whether the application is accompanied by a valid authorisation to obtain the entire fee that is available in the relevant bank account."

8. The facts in the present case, of course, are different for *Basnet* in that it is not disputed that the appellant paid the required fee to the respondent. The question here is whether or not the appellant had failed to make a valid application because he sent his supporting documents to the "wrong" address. Mr Harris, for the appellant, provided me with a copy of the Home Office guidance (specified application forms and procedures) valid from 30 May 2014. At page 7 of 76 it is stated that:

> "Valid online application under the standard route.
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> The applicant must:
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> - Submit any supporting documents specified 'mandatory' within fifteen working days from the date the application was submitted. The 'mandatory' documents are:
>   - Passport and/or travel document.
>   - Passport-style photographs.
>   - Biometric residence permit (if owned).
>   - Police registration certificate (if applicable).
> - Attend an appointment to provide biometric information if requested they must provide the biometric information in the timescale set out by the request."

9. The respondent's officers are instructed to carry out a validation check when an application has been submitted in particular checking "mandatory documents were submitted within fifteen working [days] of the application being submitted." The guidance indicates that "if [the requested mandatory documents] have not [been submitted within fifteen working days of the application] the application must be rejected as invalid."

10. The point made by Mr Harris is that nowhere in this guidance, even less in the Immigration Rules themselves, does it state that the documents must be submitted to a particular address of the respondent. In the present case, the appellant was particularly quick off the mark and sent the documents to what he assumed to be the correct address in Durham. By the time that he was subsequently told to send the documents to an address in Bootle, he was left in the impossible position of being unable to meet the deadline for submission of the documents, given that he would have had to have received them back from Durham and then resubmitted them to Bootle. There would have been no time to do so before the deadline was reached.

11. In these particular and unusual circumstances, I agree with Judge Hillis that there was no requirement on this appellant to submit the documents to the Bootle office. There was no suggestion that the appellant acted incorrectly by sending the documents to Durham before he received the letter directing him to send them to Bootle; indeed, it is difficult to see why the appellant should be criticised for his alacrity. What is even more problematic from the point of view of the respondent is the fact that the Durham office did not simply reject the documents and return them to the appellant but rather forwarded the documents to the Bootle office. Having decided to do this on behalf of the appellant but having taken 22 days to do so, it seems extraordinary that the respondent should then reject the application because the appellant had failed to meet the deadline. I find that the respondent's case is significantly weakened by the reason of the Durham office having agreed to forward the documents to Bootle rather than return them to the appellant. If the Durham office had acted at with greater efficiency the documents would have been received in Bootle before the expiry of the deadline.

12. In conclusion, therefore, I find that: (a) there is a valid appeal before the Upper Tribunal; (b) given that there was no requirement in the Immigration Rules to send the specified documents to a particular address of the respondent, the appellant complied with the requirement to submit to the respondent the specified documents by sending then to the Durham office; (c) even if there remains some doubt as to (b), the Durham office effectively acted as the appellant's agent by agreeing to forward the documents to the office in Bootle. Any failure to ensure that those documents reached Bootle before the expiry of the deadline for submission of the documents was the fault of the respondent's officers at Durham, and not the appellant himself. In any event, it is my primary finding that Judge Hillis was right to conclude that the appellant had complied with the requirement by sending the documents to Durham; (d) as noted above, Judge Hillis allowed the appeal but only to the extent that the application of the appellant should be considered by the respondent on its merits. That, in my view, was entirely the appropriate outcome. It is now for the respondent

to consider the application and the documents to make a decision on the merits; (f) in my decision I have gone beyond the grounds of appeal as pleaded to the Upper Tribunal by the respondent. Those grounds deal exclusively with the question of whether there was an immigration decision validly before the First-tier Tribunal. Following the Tribunal's determination in *Basnet*, I find that Judge Hillis was right to conclude there was a valid application made to the respondent and that this only ground of appeal, therefore, is without merit.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed Date 15 April 2015

Upper Tribunal Judge Clive Lane