Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06062/2015

THE IMMIGRATION ACTS

Heard at Field House	Decision & Reasons Promulgated
On 6 July 2016	On 11 July 2016

Before

Upper Tribunal Judge
John FREEMAN

Between

USMAN KHALID
(ANONYMITY DIRECTION NOT MADE)

appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

respondent

Representation:
For the appellant: Mr A Maqsood, counsel
For the respondent: Miss Julie Isherwood

DECISION AND REASONS

1. This is an appeal by a citizen of Pakistan, born on 25 August 1989, against the decision of Judge M A Khan, sitting at Hatton Cross on 13 November 2015, dismissing his student appeal in his absence. The point on which the appellant was given permission to appeal is his contention that he never received a notice of hearing. I heard his oral evidence

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about that, which was in line with what he says in his own very clear and well-drafted grounds of appeal.

2. The appellant relates in the second paragraph of his grounds occasions on which post had reached him during his dealings with the Tribunal immigration authorities, including the judge's decision, and goes on to say this:

> "Receiving the notice of hearing was very important for me, my case and my future. Looking at the above records we can clearly understand that I receive all of the important documents that I need to receive. However, I did not receive the notice of hearing; I fail to understand why and how I did not receive something as important as the notice of hearing. The only reasons I can think of are that royal mail lost the mail or I was not sent the notice of hearing by mistake. I was not at fault in any of these situations, yet the loss is mine."

3. What had happened, according to the file, which there is no reason to believe did not represent the true order of events, was that on 16 June 2015 notice of hearing for 13 November was sent out to the appellant at the address that he had used all along, by ordinary second class post.

4. The appellant was cross-examined on the basis that he had produced no written evidence from the post office to confirm either that any such letter had gone missing, or that he had made the enquiries about it which he says he did in person. It is clear on the authorities that the presumption that a document posted to someone's address will reach him there is only a presumption. It may be displaced by oral evidence. In the case of a letter sent by ordinary post, there is nothing to show that it has been received, and I am prepared to consider the appellant's evidence on this point strictly on its own merits.

5. After the judge's decision was sent out on 8 December, the appellant obviously took some time to set out his case with supporting documents, and his grounds of appeal are dated 20 December. They were received on 22 December. He had had no reason before that to suppose that anything had gone wrong and, in the absence of a recorded delivery sending of the notice of hearing, it seems to me there was not likely to be any documentary evidence which could be of any real help as to whether that notice of hearing had gone out or not.

6. While it might have helped the appellant's case to get some written confirmation from the post office that he had made enquiries, it does not seem to me that those enquiries could reasonably have been expected to lead to any definite evidence as to whether the notice of hearing had been delivered or not. So, on this point, I accept the appellant's evidence and, on that basis, without of course the judge being in any way to blame for not knowing what the appellant would say, it seems to me that the appellant did not have a proper opportunity to put his case, and the decision will have to be re-made.

7. In passing, I should say this. The judge dealt with the notice point in this way: "Having considered the file I have decided to proceed in the appellant's absence. I hear oral submission from the respondent's representative all of which are set out in the record of proceeding" it being a very simple matter for the judge to have set out the facts shortly as I have done about the date on which the notice of hearing had been sent and to the address which had been used by the appellant before.

8. Mr Maqsood relied as a further basis for challenging the judge's decision to proceed in the appellant's absence on what is for this field a very ancient authority, called *Probath Chandra Deb* [1990] ImmAR at paragraph 14. That was a decision of the Immigration Appeal Tribunal in a case when the appellant had also not appeared before the adjudicator. The appeal was dismissed for other reasons; but the Tribunal went on to say:

> "Leave to appeal was granted because the Tribunal wish to stress that when Adjudicators are faced with a situation such as that which arose in this case which is by no means uncommon, it is necessary to set out that they are satisfied that the requirements of the Procedural Rules and Notices Regulations where appropriate have been complied with, and why they are so satisfied. Only by doing so is it apparent that justice is being done."

9. Those were days when the practice of the Immigration Appeal Tribunal was to make decisions involving far more respect for technical formalities than the Upper Tribunal now does. If this had been the point on which I had been deciding the notice ground, then I should have taken the view that, while it would have been desirable for the judge to have given the details of notice of hearing had been sent out, there was certainly no need for him to refer to specific provisions of the Tribunal Procedure Rules 2014. Those are in any event now much shorter than their 1984 equivalent, considered in *Deb* had been, and as they stand provide this:

> '28. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal –
>
> (a) is satisfied the parties have been notified of the hearing or that reasonable steps have been taken to notify the parties of the hearing, and
>
> (b) considered that it is in the interests of justice to proceed with the hearing.'

10. While the way in which the judge treated this point, simply on the basis that he had considered the file, was not on the face of it as clear as it might have been, it certainly allowed this appellant to see exactly what the problem had been, because he dealt with it himself, very clearly as I have already pointed out, in his grounds of appeal and there was no need, as a matter of law, for the judge to say more.

11. As for (b), about its being in the interests of justice to proceed, it does not seem to me legally necessary for any first-tier judge, faced with a case in which notice of hearing has apparently been sent out, but no appellant has appeared, to make any further enquiries unless there is something to put him on notice that that ought to be done. Mr Maqsood, who has been most industrious in his researches, referred me to *Karagoz* [2003] AllER D 237 which is a decision of Wilson J, sitting in the Administrative Court. It makes it clear that evidence of non-receipt of a notice of hearing has to be considered on its merits which I have done in this case and goes on to say *obiter* "Although not required by law, where a claimant fails to appear, the adjudicator should seek to obtain explanation of that absence by asking the clerk to phone the claimant's solicitors".

12. That is a counsel of perfection. Wilson J makes it quite clear that it is not required by law, and those with any experience of first-tier hearings will be well aware that there are often times when it would serve no useful purpose. However for the reason I have given, which is that I accept the appellant's evidence that he did not receive the notice of hearing, the judge's decision has to be set aside and re-made.

13. As I made clear to the parties at the outset, the salient ground on which the appellant had been refused leave to remain as a student was a false answer which he had given in his application form. The history of the case was this. On two occasions, in July and September 2009, this appellant had been refused entry clearance in Pakistan on the basis that he had failed to produce the necessary supporting evidence. However, on a third occasion in March 2010, there had been another refusal: this time the basis was that he had produced a visa letter issued by a college in this country and "Several attempts have been made by this office to verify the authenticity of visa letters issued by St. Georges College. All such attempts have been unsuccessful, as detailed in the document verification report".

14. The appellant's evidence about that refusal is that this college had lost its sponsorship status for one reason or another by the time those attempts had been made, and that is why they had been unsuccessful. The document verification report form is not before me, so that is as far as the evidence on this point goes.

15. In 2011 the appellant arrived in this country with leave to remain as a student until 28 October 2013, and on 27 October 2013 he sent in his application for leave to remain. As the on-line form makes it clear, it had been completed the previous day, 26 October. The relevant passage comes at page 5 of 11. There are a number of main headings which appear in bold type. The first is headed 'Entry clearance/visa'. There the appellant answers, entirely correctly, the questions relating to his current successful obtaining of a student visa to come to this country, and its validity.

16. The next section is headed 'Previous leave in the UK', and contains a number of questions, to all of which the appellant answers 'no'. The first asks "Have you ever stayed in the United Kingdom beyond your period of leave?", and 'no' was of course the right answer to that. The second asks whether the appellant had ever knowingly used deception when seeking leave, or entered this country illegally. Again 'no' was his answer to that. The final question referred to his being removed from this country, once more 'no' was the right answer.

17. However the third question was "Have you ever been refused entry clearance, leave to enter or leave to remain in the UK? ", and here the answer 'no' was quite clearly not only wrong, but wrong three times over. I have considered the appellant's oral evidence on this point very carefully. As I have found already, he is an intelligent, well-educated young man who, so far as the notice point was concerned, gave straightforward evidence, and quite clearly.

18. Looking at the appellant's evidence on the deception point again, he said he did not have any help filling out this form. He had done it on both previous occasions in its printed version; but this was his first time doing it on line. The only reasonable assumption I can make is that the form appeared on line in the same way as it does in the printed copy in front of me.

19. On that basis there might have been some temptation for a careless or uneducated appellant or applicant at that point simply to look at the second heading on page 5 of 11 'Previous leave in the UK', and to conclude that, since he had never had leave to be here, it did not apply to him, and all those questions could safely be answered 'no'.

20. I am not satisfied that this is what happened in this appellant's case. Bearing in mind that that form was filled in when he had only been in this country for two or 2½ years, rather than five as he has now, it seems to me that, even by then, he would have been quite capable of reading an on-line form and dealing with the questions it posed, as he had dealt with the previous ones. There is nothing whatever unclear about the question "Have you ever been refused entry clearance, leave to enter or leave to remain in the UK?".

21. Mr Maqsood suggested that the appellant would have had nothing to gain by giving the false answer 'no' to that question. I do not accept that point: although, despite what had happened before, the appellant had been given a student visa in 2011, he might well have supposed that, once that he had got it, the previous refusals had been forgotten. On that basis, it could not have helped his case to mention them, and that may have been why he failed to do so. However, that was a deliberate false answer on which the decision-maker and the judge were entitled to refuse this application, and to dismiss the appeal. Although I have re-made the decision, for the reasons I gave earlier, that is also the result I have reached.

Appellant's appeal against first-tier decision allowed: decision set aside
Decision re-made: appellant's appeal against Home Office decision dismissed

(a judge of the Upper Tribunal)
11 July 2016