



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/37986/2014

THE IMMIGRATION ACTS

Heard at Field House
On 24 February 2016

Decision & Reasons Promulgated
On 30 March 2016

Before

THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

AMIR KHURSHID KHAWAJA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Mr S Tariq, West London Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State (the respondent) against a determination of the First-tier Tribunal promulgated on 13 August 2015. Mr Khawaja (the appellant) is a citizen of Pakistan born on 20 September 1984. He appealed to the First-tier Tribunal against the decision of the Secretary of State (the respondent) dated 11 September 2014 in which she refused to vary leave to remain.
2. The appellant entered the United Kingdom as a student in September 2003 and was granted leave until 31 October 2006. He was then given a number of extensions, the last of which expired on 20 August 2014. He made an application for indefinite leave

to remain on the basis of ten years continuous lawful residence under paragraph 276B of the Immigration Rules. That application was refused by decision of 11 September 2014. The refusal letter contained the following statement:

“Following your leave expiring on 30 September 2007, you did not seek to regularise your position in the United Kingdom with a valid application until 14 November 2007. Although your leave was granted on 3 March 2008 until 28 February 2009 it must be pointed out that any times spent following the submission of an out of time application waiting for consideration of the application is not considered lawful even if the application is subsequently granted”.

On that basis the respondent decided that ten years continuous lawful residence had not been demonstrated and the appellant could not satisfy the requirements of paragraph 276B(i)(a) of the Rules.

3. At the hearing before the First-tier Tribunal it was argued that the application, which was said by the respondent to have been received on 14 November 2007, had in fact been submitted on time. The appellant gave evidence and stated that on 29 September 2007 he had completed the application and the documentation but the application itself had been submitted by his educational establishment. Reference was made to the fourth page of the application form which bears to contain an administrator’s signature and the date of 29 September 2007. Further, a covering letter was also produced to the First-tier Tribunal from the educational establishment which was also dated 29 September 2007 which was said to be the letter which accompanied the completed application. It was pointed out therein that the appellant’s visa “will expire shortly” (it was due to expire the next day, 30 September 2007) and it was hoped that the respondent “would be able to renew it accordingly”. It was submitted that the respondent had erroneously dealt with this application as if the date upon which a fee was paid into the respondent’s account (15 November 2007) was to be taken as the date on which the application was received by the respondent. Reference was made to the policy guidance “Specified Application Forms and Procedures Version 13.0”. That policy stated

“If there is also accompanying correspondence with the application that matches the likely date of posting, and that date is earlier than postage date calculated using the above method, you must take this earlier date as the application date. If you are unsure, you must accept the date most favourable to the applicant”.

4. No representative of the respondent was present at the hearing of the First-tier Tribunal and accordingly the judge required to proceed with no *contradictor* to the appellant’s contentions. What he did at paragraph 13 was to look at the application form which shows the administrator’s signature and the date of 29 September 2007 which was supported by the covering letter of the same date. From that he inferred that the application was made in time. Having regard to the policy quoted to him he considered that the appellant should be given the benefit of the doubt. That was

particularly so in view of the fact that there had been nothing to suggest that the appellant had previously been in breach of any Immigration Rules or had overstayed. The decision of the respondent had been based solely upon the date upon which the fees had arrived. That did not mean that the appellant's application was made on that date.

5. In presenting this appeal Mr Duffy drew our attention to the terms of the Immigration and Nationality (Cost Recovery Fees) Regulations 2007 which were in force at the relevant time. Regulation 16 entitled "Consequences of failing to pay the fee specified for an application" states as follows:

“(1) Subject to paragraph (2) where an application to which Regulation 3, 4, 11, 12, 13, 14, 15 or 16 refers is to be accompanied by a specified fee, the application will not be considered to have been validly made unless it has been accompanied by that fee”.

It was not disputed before us that this particular provision applied in the circumstances of this case. Accordingly, Mr Duffy argued that, since the fee had not been paid with the application and on time, the decision of the First-tier Tribunal proceeded on an error of law.

6. Mr Tariq submitted that there were facts and circumstances which entitled the First-tier Tribunal Judge to conclude that the application was made timeously. In respect of the application form it bore to be signed by the administrator on 29 September 2007. Further it bore to be signed by the respondent himself on 29 August 2007 (see page 9 of 16 of the appellant's bundle submitted to this Tribunal). On page 10 of 16, under the applicant's checklist, the box against which appears the question "Have you completed the payment details page and made the correct payment?" is ticked. For data protection purposes the payment detail portion of the application would not be retained by the respondent in any event and was not available. Those factors, combined with the existence of the covering letter of 29 September 2007, were capable of yielding an inference that the payment was made along with the application form dated 29 September 2007. The judge had been entitled to draw that inference.
7. Also produced by Mr Tariq was a payment processing centre stream sheet at page 12 of 16 which appears to show that payment arrived from the appellant on 15 November 2007 and was made by payment from his MasterCard. However, Mr Tariq argued that was not determinative since there might have been a number of reasons why payment offered in an application form sent in September may not have been processed until November. In addition, the date stamp on page 1 of 16 of 15 November 2007 could not necessarily be said to be the date upon which that application was first received by the respondents.
8. It is apparent from the way in which this application has been dealt with by the respondent that it was considered that no valid application had been made by the appellant until 14 November 2007. That is the date that was stated in the refusal

letter of 11 September 2014 as the date upon which the appellant had submitted an out of time application for leave to remain as a student. Why that date is mentioned is not clear especially since the only date stamp appearing in the application form is that of 15 November 2007. It may be that in view of the policy brought to our attention, the Secretary of State has concluded that a November date was the date that the application was received because on 15 November 2007 payment was made of the accompanying fee as demonstrated by the payment processing centre's stream sheet. We note that the policy guidance states that

"If the envelope in which the application was posted is missing or the postmark is eligible you must take the date of posting to be at least one day before it is received. You must take the date of processing on the payment contractor's stream sheet as the date the application was received".

While the Secretary of State apparently applied that policy in this case (although relying on 14 not 15 November), the First-tier Tribunal had before it a number of adminicles of evidence which entitled it, in our view, to come to a different conclusion. The judge noted that the fee had arrived on 15 November 2007 but referred to other pieces of evidence which indicated that the application had been submitted at an earlier date. That included the date upon which the applicant had signed the application form (28 August 2007) and the date upon which the educational establishment signed the application form (29 September 2007). That date is also the date of the covering letter which emphasised the need for the application to be processed speedily. Furthermore, the First-tier Tribunal had regard to the fact that in 2008 Immigration Officers had visited the appellant's premises and at that time had made no mention to him that an out of time application had been made and he had at that stage no right to be in the United Kingdom.

9. Taking all these factors in combination, we consider that the First-tier Tribunal was entitled to come to the conclusion it did and to draw the inference from the evidence presented to it. It may be that a different conclusion would have been arrived at had the Secretary of State deployed a representative to argue the case differently or to provide further information to the Tribunal. However that was not the case. In the light of the factual situation presented to the First-tier Tribunal, we do not consider that it committed any material error of law and we accordingly refuse this appeal.

Decision

The appeal is dismissed.

No anonymity direction is made.

Signed

Lord Burns
Sitting as a Judge of the Upper Tribunal