



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/31201/2013

THE IMMIGRATION ACTS

**Heard at Field House, London
On 10 February 2015**

**Determination Promulgated
On 11 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

FAWAD AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr M Iqbal, instructed by Pride Solicitors

For the respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is Fawad Ahmed, a national of Pakistan. He appealed to the First-tier Tribunal against the decision of the Secretary of State dated 13 August 2013 to refuse his application for leave to remain as a Tier 4 (General) Student Migrant under the Points Based System of the Immigration Rules. Judge of the First-tier Tribunal Turquet dismissed his appeal. He now appeals with permission to this Tribunal.
2. On 6 January 2015 I set aside the decision of First-tier Tribunal Judge Turquet for the reasons set out below;

- *The issue in this case relates to the English language requirement. The appellant sat a Pearson English test and provided a certificate but, because he had not provided website access to the UKBA to verify the English score by the date of the decision, the respondent did not award him the required points for his CAS.*
- *It is the respondent's case that the appellant was required to make his Pearson test scores available for the Home Office to view on the Pearson online verification system. It is contended that the respondent emailed the appellant on 4 July 2013 requesting that he assign the Pearson test score to the respondent within 7 days but that he did not do so and when the respondent checked the Pearson website on 11 July 2013 the score had not been assigned as required. The appellant's case is that he did not receive the email and that when he received the decision he assigned the score report to the Home Office on 22 August 2013.*
- *The First-tier Tribunal Judge was not satisfied that the appellant had submitted evidence that his test score was available to view by the Home office on the Pearson online verification system with the application or within the time requested. The Judge considered that the appellant said that he had checked his hotmail email address but that this was not the same as the livemail address on his application form.*
- *The appellant contends in the grounds of appeal that the First-tier Tribunal Judge erred in relation to the email addresses because it is contended that livemail and hotmail are the same. It is also contended that the Judge erred in failing to consider whether the respondent had complied with paragraph 245AA of the Rules in light of the appellant's assertion that he did not receive the email.*
- *In granting permission to appeal Upper Tribunal Judge Pitt pointed out that the First-tier Tribunal Judge did not make an entirely clear finding as to whether the email was correctly sent or as to whether the appellant's evidence that it was not received was reliable. She noted that the First-tier Tribunal Judge suggested that the appellant checked the wrong email account [14] however it is asserted that livemail and hotmail are the same.*
- *The problem so far in this appeal is that the respondent has not provided a copy of the email alleged to have been sent to the appellant. The Upper Tribunal hearing was previously adjourned to enable the respondent to produce a copy of the email but at the resumed hearing only a record of a case note was available.*
- *Mr Ehtesham Khan relied on the Upper Tribunal decision in Syed (curtailment of leave - notice) [2013] UKUT 00144 IAC. He submitted that the principles in that case were the same here. He referred to paragraph 28 where the tribunal said;*

- o "28. In the absence of an order made by statutory instrument under section 4(1) of the Immigration Act 1971 dealing with the giving of notice of variation of leave where there is no right of appeal, the Secretary of State has to be able to prove that notice of a decision varying leave to remain under section 3(3)(a) of the Immigration Act 1971 where there is no right of appeal was communicated to the person concerned for it to be effective. Where there is no "immigration decision" the Immigration (Notices) Regulations 2003 do not apply. Communication would be effective if made to a person authorised to receive it on that person's behalf, see Hosier v Goodall [1962] 1 All E.R. 30, but the Secretary of State cannot rely upon deemed postal service."
- *This situation is not directly comparable as an email request for further information does not have the status of a notice of a decision varying leave. However it could rarely be possible to even find deemed service of an email without a copy of the email. As Mr Ehtesham Khan pointed out the email could have been sent to the wrong email address or the sender could have misspelt the email address given. In a case such as this where the decision turns on whether the appellant provided requested information there must be more evidence than just an assertion that an email had been sent.*
 - *Mr Nath submitted that the appellant should have made his Pearson scores available at the time of the application. However Mr Ehtesham Khan contended that neither Appendix O, submitted by the Mr Walker at the previous hearing, nor the application form told the appellant how to do this. It is not clear whether the appellant could have made his scores available at the time of his application. It may be that the Pearson website told him how to do this, however there is no evidence to indicate that this is the case. If the appellant should have made his score available online at the date of the application then it is not clear why the respondent did not check the Pearson website upon receipt of the application before emailing the appellant on 4 July 2013. It is not clear whether the email said to have been sent to the appellant on 4 July 2013 was the first time it would have been explained to the appellant how to make the scores available.*
 - *I further note that the version of Appendix O provided by Mr Walker at the previous hearing dates from 20 November 2013 whereas the application in this case was made on 7 June 2013 and the decision was made on 13 August 2013.*
 - *I am satisfied that there is a lacuna in the evidence in relation to this issue. The First-tier Tribunal Judge appears to have decided that the appellant could have made the scores available online at the time of his application and that he failed to respond to the email which was properly sent. However there was insufficient evidence on which to base such findings. In these circumstances I am satisfied that the First-tier Tribunal Judge made an error of law. I therefore set aside the First-tier Tribunal Judge's decision.*

- *In light of the gaps in the evidence as to the procedures to be followed in relation to the respondent accessing the Pearson test scores online and the lack of evidence as to the content of the email of 4 July 2013 I agreed to adjourn the hearing to allow the parties to obtain further evidence to enable me to remake the decision.*

3. I directed that the parties file further evidence as follows;

- all witness statements and documentary evidence upon which it is intended to rely at the hearing
- a copy of the relevant Immigration Rules applicable at the date of the application and decision in this case
- information in relation to the procedures applicable for making the appellant's Pearson test scores available to the respondent at the relevant time.
- The respondent was further directed to provide a copy of the email sent to the appellant on 4 July 2013 or alternatively information in relation to the respondent's procedure for accessing Pearson test scores at the relevant time.

4. At the resumed hearing on 10 February 2015 Mr Nath submitted a copy of the appellant's Pearson Test scores which he has accessed online and a copy of Appendix O as it applied at the date of the decision appealed against. Mr Nath advised that he has been unable to obtain a copy of the email recorded as having been sent to the appellant on 4 July 2013. He also said that he understands that the Pearson Test scores are assigned by way of a system between the Home Office and the institution.

5. It seems that there is no further evidence available in relation to this issue. I therefore determine the issue on the basis of the evidence before me.

6. There is no evidence before me to establish that the appellant was informed when making his application that he needed to assign his Pearson Test score to the respondent. There is nothing in the Rules or on the application form to advise him that he needed to do so. There is no evidence that the respondent checked the Pearson website before sending the appellant the email on 4 July 2013, this is a further indication that the appellant was not expected to assign his scores at the time of the application.

7. Whilst there is a case record that a caseworker emailed the appellant there is no copy of the email to provide evidence that it was sent to the right address and I cannot therefore be satisfied that the appellant received the email in light of his contention that he did not.

8. In these circumstances the respondent made the decision of 13 August 2013 without evidence which could have been available at the time of the decision had the appellant known to make it available. The respondent's

decision is therefore not in accordance with the law. Accordingly I allow the appeal to the extent that the application for leave to remain remains outstanding before the Secretary of State.

Conclusion:

The making of the decision of the First-tier Tribunal did involve the making of an error on point of law.

I set the decision aside and remake it by allowing it only to the extent that the application remains outstanding before the Secretary of State.

Signed

Date: 10 February 2015

A Grimes

Deputy Judge of the Upper Tribunal