



Neutral Citation Number: [2020] EWCA Civ 49

Case No: C6/2016/2806

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE KOPIECZEK
Case No JR/15998/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/20

Before :

LORD JUSTICE HICKINBOTTOM

Between :

**THE QUEEN ON THE APPLICATION OF
MUHAMMAD SHAHEED UZ-ZAMAN MUNIM**

Applicant

- and -

**THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

Respondent

**The Applicant appeared in person
The Respondent neither appeared nor was represented**

Hearing date: 28 January 2020

Approved Judgment

Lord Justice Hickinbottom :

1. On 6 April 2017, Master Meacher dismissed this appeal because of the continuing failure of the Applicant to comply with the Civil Procedure Rules and file a transcript of the judgment being appealed. On 22 May 2019, on the papers, I refused the Applicant's application for reconsideration of that dismissal under (old) CPR rule 52.16 (which applied because the notice of appeal to this court was issued prior to 3 October 2016); but I granted the Applicant express permission to seek a reconsideration of that refusal at an oral hearing. The Applicant sought such a reconsideration, which is now before me. The Applicant appears in person.
2. I refused the application for reconsideration on the papers because I considered that the Applicant's appeal stood no real prospect of success on its merits, so that there would in any event be no purpose in interfering with the Master's Order; and, in this renewed application, I propose again considering the merits of the appeal first.
3. The Applicant is a national of Bangladesh, born on 31 August 1990. He first entered the United Kingdom on 15 December 2009 with entry clearance as a Tier 4 (General) Student, which was in due course extended to 30 January 2015. The Applicant applied for further leave, but the licence of the sponsor upon which he relied was revoked; and, in the usual way, he was given 60 days to make a new application with a valid sponsoring educational establishment. That application was made, in time, on 18 July 2015.
4. On 6 September 2015, the Applicant received an email from UK Visa and Immigration ("UKVI") on behalf of the Secretary of State notifying him that that application was still under consideration. That email was sent from email address "DoNotReply@homeoffice.gov.uk".
5. On 13 October 2015, when he was checking his email junk box folder, the Applicant found an email dated 16 September 2015 from email address "tminterviewhub@homeoffice.gsi.gov.uk", requiring the Applicant to attend an interview in respect of his application on 23 September 2015.
6. The Secretary of State's response to the judicial review claim explained that UKVI was not satisfied from the written application that the Applicant was a genuine student as required by paragraph 245ZX(o) of the Immigration Rules; and therefore he was sent invitations to attend an interview on 1 and again on 16 September 2015. The first invitation plays no part in this application, and I need say no more about it.
7. The Secretary of State said that the 16 September 2015 invitation was sent by email to the email address given by the Applicant, and also sent by post. The Applicant failing to attend the interview, or otherwise respond, UKVI had refused the application for leave on the basis that the Applicant had failed to satisfy the criteria for a Tier 4 (General) Student set out in paragraph 245ZX(a) of the Rules. In doing so, it relied upon paragraph 322(10) of the Rules which provided, as one of the "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused", "Failure, without providing a reasonable explanation, to comply with a request made on behalf of the Secretary of State to attend for interview". A refusal letter was sent to the Applicant at his given postal address on 2 October 2015 but, according to the chronology in the tribunal below (where both parties were

represented by Counsel), that was returned marked “Addressee gone away”. At the Applicant’s request, made after he had found the interview email on 13 October, it was re-sent by recorded delivery on 20 October 2015, when it was again not delivered, but held by the Post Office from where the Applicant apparently recovered it.

8. On 31 October 2015, the Applicant sought an administrative review of the refusal of his claim for leave to remain which, on 9 November 2015, was refused – in the sense that the refusal decision was maintained – on the basis that the notice of interview had been sent to and received by the Applicant by email, and it was his responsibility to check any folders of his into which such an email might go; and the notice was also sent to his given postal address.
9. Following pre-action protocol correspondence, on 30 December 2015 the Applicant issued judicial review proceedings in the Upper Tribunal (Immigration and Asylum Chamber) seeking to quash the Secretary of State’s decision to refuse his claim for leave to remain, on four grounds (settled by Counsel), namely:

Ground 1: The Applicant did not receive the interview request letter, which should have been sent by post. The failure to send it by post was “unfair and unreasonable”.

Ground 2: The request for interview was not “given to” the Applicant, because it was not sent in the proper way and in any event it was not received until too late, i.e. after the interview date.

Ground 3: The decision to refuse the claim for leave to remain breached the common law duty of fairness.

Ground 4: There is an expectation that the Immigration Rules will be interpreted “with a degree of flexibility and common sense”; and, under paragraph 322(10), there was a discretion whether to refuse the claim for leave or not. In the circumstances of the case, the Secretary of State erred in not exercising that discretion in favour of the Applicant.

10. On 29 February 2016, Upper Tribunal Judge Allen refused permission to proceed with the judicial review claim on the papers. The Applicant, still represented by solicitors and Counsel, renewed his application for permission at an oral hearing. At that hearing on 9 June 2016, Upper Tribunal Judge Kopieczek also refused the application.
11. By the time of that hearing, it was (rightly) not contended on behalf of the Applicant that the notice of interview could not properly be sent by email to an email address given by the Applicant. It was uncontroversial that the email had been sent, and received by the Applicant albeit in his email junk box folder. The judge found that it was no excuse that the Applicant may not have seen the email which he had received, because it had been diverted into his email junk box: it was the Applicant’s responsibility to monitor that folder, and he acted unreasonably in not monitoring it. In any event, the Secretary of State had said in his summary grounds of opposition that the notice was also sent by post, and there was no reason to believe that it was not so sent. The judge considered that the return of the UKVI’s 2 October 2015 letter might reflect a failure of the Applicant to monitor postal mail too, although that did not contribute to the judge’s reasoning. The failure of the Applicant to respond to the notice of interview properly sent to him by email entitled the Secretary of State to refuse the claim for leave, as he did, on the basis that he was not satisfied that the Applicant was

a genuine student with reference to paragraph 322(10) of the Rules. There was in the circumstances no question of unfairness arising; and the Secretary of State unarguably properly exercised his discretion. The decision to refuse the claim for leave to remain was, he concluded, unarguably rational and lawful.

12. The Applicant (by now acting in person although, as I understand it, with assistance from solicitors) lodged an notice of appeal against Judge Kopieczek’s refusal of permission to proceed with the judicial review with this court on 12 July 2016. It was a requirement of paragraph 3(3) of CPR PD 52C that a bundle of documents be filed including the judgment being challenged (paragraph 3(3)(h)). Despite several reminders from the Civil Appeals Office, which indicated that in default the appeal might be dismissed, that judgment was not lodged; and, by an Order of 6 April 2017, Master Meacher dismissed the appeal. The Order itself made clear that the Applicant was entitled to seek a reconsideration of the order dismissing the appeal by a Judge of the Court of Appeal but, by CPR rule 52.16(6A), any application for reconsideration had to be made within seven days.
13. All was then procedurally quiet for some considerable time. It was not until 9 March 2018 – almost a year later – that the Applicant filed an application seeking to “re-open” his appeal. On 19 March 2018, properly, Master Meacher responded by directing that the correct procedure would be for the Applicant to make an application for review of the dismissal under CPR rule 52.16 and an extension of time to do so to include submissions as to why the application was eleven months late (required to enable the court to consider whether an extension of time should be granted: Denton v T H White [2014] EWCA Civ 906).
14. The Applicant did not respond for another year, when an amended application was sent on his behalf by Shah Jalal Solicitors dated 8 March and received by the court on 20 March 2019.
15. The application bundle was incomplete. For example, it did not include the original notice of appeal, grounds of appeal or the Upper Tribunal orders refusing permission to proceed with the judicial review. Nor, still, did it include the challenged judgment of Judge Kopieczek. The application said that the Applicant’s solicitors had been told that the Upper Tribunal “do not keep judgments more than 6 months old”, so that the judgment could not be provided. That seemed unlikely. Enquiries were made by the Civil Appeals Office of the tribunal, which revealed that no request for the judgment had been made until November 2018 – 18 months after the dismissal order – but, after that length of time, the request for approval when made had unfortunately gone astray within the tribunal. As a result of the enquiry from this court, the request for approval was found, and the judgment approved by the judge. It is now available.
16. I therefore, as promised, turn to the merits of the appeal. In his skeleton argument in support of the appeal, the Applicant relies on four grounds of appeal which broadly reflect the grounds of challenge in the judicial review. I will deal with them in turn.
17. As his first ground, the Applicant complains that the Secretary of State has not produced any evidence despite being challenged on the method of service and record of service. However, leaving aside entirely the sending of the notice of interview by post, it was uncontroversial as between the parties that the notice was sent, in good time, by properly addressed email which was received at the Applicant’s email address. The Secretary of

State did not need to rely on any further evidence that the notice was properly given. By the time the matter was before Judge Kopieczek, the Applicant did not suggest that it could not properly be sent by email.

18. As his second ground, it is said that the administrative review was inadequate as it only considered information relevant at the time of the application, and not what had transpired since (notably that the email was not seen by the Applicant because it went to his email junk box). However, the fact that the Applicant accepted that the email was received was expressly referred to in the refusal of the administrative review. It was, then, clearly taken into account.
19. Third, it is submitted that Judge Kopieczek erred in accepting that the notice had been sent by post without any evidence to that effect. However, (i) as the judge said, that it was sent by post was set out in the Secretary of State's grounds of opposition, and there was no evidence to deny that, and (ii) more importantly, that it was sent by post was not crucial to the judge's analysis, which was based upon the Applicant accepting that he had received the notice by email.
20. Fourth, it is submitted that the judge erred in not concluding that the Secretary of State was wrong in law not to exercise his discretion, inherent in paragraph 322(10), in favour of the Applicant. This is a matter upon which the Applicant particularly relied in his oral submissions. However, paragraph 322(10) provides that, where an applicant for leave to remain fails to attend an interview without providing a reasonable explanation, leave "should normally be refused". The judge did not arguably err in finding that the Secretary of State was entitled to conclude that the Applicant should reasonably have checked his email junk box, and the fact his failure to do so had resulted in him not personally knowing about his interview was not a *reasonable* explanation for his failure to attend. Having properly made that finding, the Secretary of State was entitled to conclude that there was nothing in this case to affect the normal consequence prescribed by the Rules, namely refusal of the claim. These were crucial conclusions which the Applicant has sought to undermine; but, in law, they are unimpeachable.
21. Thus, none of the grounds is arguable. Therefore, whatever the position might have been about the Applicant's failure promptly to provide a copy of the challenged judgment, this application for permission to appeal was always doomed to failure. There would consequently be no point in this court now rescinding the Master's order dismissing the appeal.
22. In his application for reconsideration of the Master's order, the Applicant (by now in person and, as I understand it, entirely unassisted) relies on twelve paragraphs of grounds which more or less, but not exactly, reflect the grounds of appeal. The last two paragraphs are effectively a mere general prayer. As I have already dealt with the specific grounds of appeal, I can deal with the other paragraphs in relation to this reconsideration (Grounds 1-10) shortly.
 - i) The Applicant submits that, in refusing the reconsideration application on the papers, I failed to take into account that the notice of interview should have been sent by post (Ground 3), the implication being that Judge Kopieczek at least arguably also erred in failing to take that into account. However, (i) the evidence was that the Applicant was not regularly receiving mail sent to his given postal address, (ii) there was no requirement for the notice to be sent by hard copy

mail, (iii) the Applicant accepted that to be the case before Judge Kopieczek, and (iv) the Applicant also there accepted that he did receive the notice by email.

- ii) He submits that service requires a notice to come to the obvious attention of the recipient, and this notice did not come to his (the Applicant's) attention until 13 October 2015 (Ground 4). However, it was received by him in good time: that he did not see was considered by the Secretary of State (and in his turn Judge Kopieczek) to be the result of his own conduct, namely his failure to monitor his email junk box.
- iii) He submits that, in refusing the application on the papers, I (and by inference, before me Judge Kopieczek) failed to take into account the fact that the Applicant did not receive the email with the notice of interview (Ground 2). However, the Applicant did receive it. That he did not see it because it went into his email junk box – a different issue – was, as I have indicated, lawfully found to be due to his own (unreasonable) conduct in failing to monitor that box.
- iv) He submits that, in refusing the reconsideration on the papers, I (and again by inference, before me Judge Kopieczek) failed to take into account the “compelling and compassionate” circumstances surrounding the Applicant’s default (Ground 1). However, the response is the same: as I have indicated, the failure to attend the interview was lawfully found to be the result of the Applicant’s own (unreasonable) conduct.
- v) He submits that, whilst the Applicant had not produced any explanation for his non-attendance, he did give a reasonable explanation afterwards which was not considered by the Secretary of State (Ground 6 part). I have already dealt with that point (paragraph 18). This explanation was considered at the time of the administrative review: it was not considered to be reasonable.
- vi) He submits that his failure to attend an interview, in the circumstances, did not mean that he was not a genuine student (Ground 7). However, as he was entitled to be, the Secretary of State was unconvinced as to the genuineness of the educational ambition of the Applicant on the documentary application only. Without an interview, he was clearly entitled to maintain that view.
- vii) He submits that Judge Kopieczek should have had in mind the “evidence flexibility rule” (Ground 8). However, the Applicant failed to attend an interview without reasonable explanation: the Rules say that, normally, that should result in a refusal of leave. There is no place here for any “evidential flexibility rule”.
- viii) He submits that the judge observed that the Applicant had been awarded sufficient points, which demonstrates that he was a genuine student (Ground 9). This was again a matter particularly relied upon by the Applicant in his oral submissions. I am not sure to what part of Judge Kopieczek’s judgment the Applicant refers: but, under the Immigration Rules, understandably a conclusion that an applicant is not a genuine student results in dismissal of a claim for leave as a student.

- ix) He submits that the judge erred in not concluding that the Applicant ought to have been given another opportunity to attend an interview (Ground 10), and should have exercised his discretion not to refuse the application for leave (Grounds 5 and 6 part). However, paragraph 322(10) provides that, where an applicant fails to attend an interview without reasonable explanation (as in this case), leave should normally be refused. As I have already indicated (paragraph 20 above), the Secretary of State did not err in considering there was nothing in the Applicant's case to move him from the norm; nor did Judge Kopieczek arguably err in concluding that that was unarguably so.
23. For those reasons, the specific grounds for reconsideration of the Master's dismissal order do nothing to bolster the grounds of appeal. As I have indicated (paragraph 21 above), the application for permission to appeal was always doomed to fail. None of the grounds stood a real prospect of success. That is sufficient to deal with this application to reconsider the Master's dismissal of the appeal, by refusing it.
24. However, it would be remiss of me not to refer to the delay in this matter. I understand how difficult it can be for some individual appellants to this court to obtain legal advice or prepare their own appeal. But, the delay in making this application for reconsideration of the Master's order dismissing this appeal was extraordinary – a step for which the Civil Procedure Rules give seven days took the Applicant two years – and no good reason has been given for that delay. On the basis of the guidance in Denton, that in itself would have been sufficient to have refused the application. However, given my views on the merits, I need not dwell on the reason why, under the analysis required by Denton, the lengthy delay in this matter would in any event be fatal to both application for permission to appeal and the application for reconsideration.
25. For all those reasons, I refuse the application. The Master's Order of 6 April 2017 shall remain in place. The appeal stands dismissed.