**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA241482015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 12 July 2017** | **On 14 July 2017** |

**Before**

**UPPER TRIBUNAL JUDGE CLIVE LANE**

**Between**

**AVIMANYU BHANDARI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Butterworth, instructed by Marsans Solicitors and Advocates
For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. By a decision which I promulgated on 25 April 2017, I found that the First-tier Tribunal had erred in law such that the decision fell to be set aside. My reasons for so finding were as follows:

1. The appellant, Mr Avimanyu Bhandari, was born on 3 March 1983 and is a male citizen of Nepal. He appealed against a decision of the respondent dated 15 June 2015 refusing his application for further leave to remain. The First-tier Tribunal (Judge Miller) in a decision promulgated on 13 October 2016 dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant had entered the United Kingdom as a student in August 2010 on a visa valid until April 2012. In April 2012, he made an application for further leave to remain as a student but that was refused on the basis that the CAS and sponsor licence which he had, had been withdrawn. The appellant appealed and Judge Walker in the First-tier Tribunal allowed his appeal on 18 March 2013 indicating that the appellant should be allowed a further 60 days to find an alternative college, as provided for in the respondent's policy guidance. Thereafter, the appellant claims that he heard nothing further from the respondent until September 2014 when he instructed his present solicitors to contact the respondent. The respondent emailed the solicitors in September 2014 to state that the appellant had been granted 60 days' leave outside the Rules in order to find a new sponsor but that the decision letter granting such leave had been returned by the Post Office as undelivered. In consequence, the respondent considered that the appellant had been without leave since 6 September 2013. The appellant then made a further application for leave to remain outside the Rules claiming that the decision of Judge Walker had not been put into effect as the appellant himself had not received any formal communication from the respondent to enable him to take advantage of any 60 day period of further leave granted.

3. The First-tier Tribunal acknowledged that there was a difficulty as regards the service of the respondent's decision upon the appellant. Mr Butterworth, who appeared before the First-tier Tribunal on behalf of the appellant and had appeared before Judge Miller, had relied upon R (on the application of Mahmood) (effective service – 2000 Order) IJR [2016] UKUT 00057 (IAC) in particular at [49]:

Secondly, in any event, the legislative scheme particularly in Arts 8ZA and 8ZB of the 2000 Order is, in my judgment, indicative that more is required in order for a notice to be "given" than it is merely sent. Take, for example, the service "to file" provision in Art 8ZA(4) of the 2000 Order. That provision contemplates, inter alia, situations where attempts to "give notice" in accordance with Art 8ZA(2) and (3) have failed. That is not concerned with a failure to "send" the notice whether by post or electronically or otherwise as permitted but rather because, having been sent, it cannot be said that it has been "given" because, for example, it has been returned undelivered. That, in my judgment, points strongly towards a conclusion that notice, in order to be "given" has to be both sent and in some sense "delivered" or "received" by the method lawfully chosen to send it.

4. At [22] Judge Miller wrote:

...it is difficult to see what more the respondent can do, if a letter is returned undelivered, and phone calls to an appellant are not answered or responded to.

5. The use of the words “not answered or responded to” seem to suggest that the appellant had been evading the service of documents upon him by the respondent. Indeed, it is clear from the following paragraph that Judge Miller took a dim view of the appellant’s stated wish to continue living in the United Kingdom as a student:

Of course, I appreciate that, if an appellant who generally wishes to continue his studies, through no fault of his own, does not receive a notice from the respondent, this should not be held against him and he should not be prejudiced. However, for reasons I have stated above, I do not find that this appellant has evinced any real desire to study, rather simply to continue working and living in the UK. He was aware of Judge Walker’s findings and, had he seriously intended to study, I am satisfied that he would have taken action to assure that he could do so. Accordingly, this appeal must fail.

6. It is probably fair to say that many administrative institutions encounter problems with the service of documents. The Secretary of State relies upon service by ordinary first class post and the 2000 Order seeks to provide for the continued smooth administration of business in the event that service of a document may not occur or their service may not be proved as intended. The civil courts (under the Civil Procedure Rules) have additional provisions for personal, deemed and, where appropriate, substituted service. The Secretary of State enjoys no such additional provisions. However, I am troubled (as was Judge Grubb in Mahmood) by the notion that a document may be validly served when it manifestly as not come to the attention of the intended recipient because it has been returned by the Post Office. In the present appeal, Judge Miller was fully aware of the difficulties involved but his solution (as set out in [23] quoted above) is not, in my opinion, satisfactory. On the one hand, Judge Miller finds that a “genuine” applicant should not be prejudiced if a document sent to him by the respondent does not reach him. Judge Miller’s solution is to find that the present appellant is not a “genuine” applicant and, therefore, it did not really matter whether or not the document reached him at all because he did not intend to make use of any 60 day period awarded to him to obtain a new sponsor for his studies. I find that Judge Miller has conflated the two separate issues of service of the decision on the appellant and the genuineness or otherwise of the appellant’s intentions to continue studying. I am not persuaded that the solution to the problem adopted by Judge Miller was available to him. Accordingly, I find that the decision should be set aside and the matter considered further by the Upper Tribunal which will remake the decision following a resumed hearing. I am satisfied that the appellant was not served in any proper sense with the decision granting him a further 60 days’ leave. However, I do not (as Judge Walker did previously) leave it for the respondent to grant yet a further 60 days’ leave to the appellant. The focus in the appeal now should be on the question of fairness. The focus should now be upon: (i) on the appellant’s conduct following the successful appeal before Judge Walker and (ii) his conduct after 10 September 2014 when the email was sent by the respondent to the appellant’s solicitors indicating that a 60 day period had been granted to the appellant but not taken up by him. I am aware that the appellant made a further application for leave outside the Rules, but it is unclear why he appears to have made no attempt whatever to obtain a new sponsor/CAS when he was aware (certainly from September 2014) that he needed to do

so in order to remain legitimately in the United Kingdom as a student. The Upper Tribunal expects the parties to address these issues (by filing and serving further evidence, if necessary) at the resumed hearing.

2. At the resumed hearing on 12 July 2017, Mr Jarvis, for the respondent, applied to the Tribunal to withdraw the original decision upon which this appeal had been founded and which is dated 15 June 2015. He told me, that having withdrawn the decision, the Secretary of State intended to issue 60 days further leave to remain to the appellant to enable him to find a new educational sponsor. Mr Butterworth, for the appellant, agreed with that course of action. Accordingly, I grant permission for the decision to be withdrawn.

**Notice of Decision**

The Secretary of State's decision withdrawn.

No anonymity direction is made.

Signed Date 12 July 2017

Upper Tribunal Judge Clive Lane