

Appeal No: SC/117/2012
Hearing Date: 24th July 2012
Date of Judgment: 2nd August 2012

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

**THE HONOURABLE MR JUSTICE MITTING (Chairman)
UPPER TRIBUNAL JUDGE JORDAN
SIR STEWART ELDON, KCMG OBE**

‘E2’

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant:
Instructed by:

Ms C Robinson
Rahman and Co Solicitors

For the Respondent:
Instructed by:

Ms M Cumberland
The Treasury Solicitor

Special Advocates:
Instructed by:

Mr D Lewis
The Special Advocates’ Support Office

OPEN JUDGMENT

MR JUSTICE MITTING :

1. The appellant is a 36 year old national of Afghanistan. He arrived in the United Kingdom in 1999 or thereabouts and claimed asylum, which was refused. He was, however, granted exceptional and then indefinite leave to remain and in 2009 became a British citizen by naturalisation. It has not been contended that he thereby lost his Afghan citizenship. He has operated a mobile telephone sales business under the trading name East Street Communications from 2 East Street, London SE17 2DN and occupied a flat above the shop premises.
2. On 14th January 2012, the appellant bought a return ticket from London Gatwick to Kabul, via Dubai on 25/26th January 2012 and from Kabul to London Heathrow, via Dubai on 25th May 2012. His ticket did not permit those dates to be varied. He took the outward flight and, in a witness statement dated 4th July 2012, states that he went to visit relatives in Afghanistan and then to see his wife and children in Pakistan. We have no reason to doubt, and accept, that he did so.
3. By a decision taken personally by the Secretary of State on a date unknown to us in March 2012, she decided to deprive the appellant of his British citizenship. Notice of that decision, together with accompanying explanatory and appeal documents, was sent by first class post to 2 East Street, London SE17 2DN on 28th March 2012. The evidence of Philip Larkin an officer of UKBA in Liverpool, which is not disputed, is that that was the last known UK address of the appellant.
4. Section 40 of the British Nationality Act 1981 sets out the sequence which must be followed if the Secretary of State is to make an effective decision to deprive a British citizen of his citizenship. First, she must be satisfied that deprivation is conducive to the public good: section 40 (2). Secondly, she must be satisfied that an order depriving a person of British citizenship will not make him stateless: section 40(4). Thirdly, she must, before making a deprivation order, give to the person concerned written notice specifying that she has decided to make an order, the reasons for the order and the person's right of appeal, in this case, to SIAC: section 40(5). When it is proposed to make an order under section 40, and the person's whereabouts are not known, notice of the decision to deprive him of citizenship may be served by sending it by post in a letter addressed to him at his last known address: regulation 10(1)(b) of the British Nationality (General) Regulations 2003 SI 2003 No. 548. In that event, notice is deemed to have been given, unless the contrary is proved, on the second day after it was sent by post from and to a place within the United Kingdom: regulation 10(3)(a). Once notice of the decision has been served, a deprivation order may be made. That was done in this case on 30th March 2012 and served by post on the appellant on 3rd April 2012.
5. The deprivation notice stated, correctly, that under rule 8(1)(b)(ii) of the Special Immigration Appeals Commission (Procedure) Rules 2003, the appellant had 28 days after service of the notice in which to give notice of appeal to SIAC. On the most generous interpretation of that time limit, it expired on 30th April 2012. Notice of appeal was not in fact given until 8th June 2012. The notice was therefore out of time.

6. SIAC can extend the time for giving a notice of appeal under rule 8(5) of the procedure rules, but only “if satisfied that by reason of special circumstances it would be unjust not to do so”.
7. Miss Robinson, for the appellant, accepts that the deprivation notice was duly served on the appellant by post on 30th March 2012 and that his notice of appeal was given out of time. She submits that special circumstances exist which would make it unjust not to extend time. The basis of her submission is the appellant’s claim that he did not learn of the deprivation decision until 25th May 2012 at Dubai Airport. In a witness statement dated 4th July 2012, the appellant states that he first learnt of the decision when told by a British Embassy official at Dubai Airport on his return flight on 25th May 2012 that his nationality had been revoked. He says that nobody was checking his mail at 2 East Street and as a result did not know that letters from UKBA had been delivered there. After he had flown back from Dubai to Afghanistan, he asked relatives to go to East Street to see if there were any letters there for him. They found the letters from UKBA and faxed copies to him in Afghanistan on 28th May 2012. He then instructed solicitors, who gave notice of appeal on his behalf on 8th June 2012.
8. If those facts are true, we would readily accept that exceptional circumstances would exist and that it would be unjust not to extend the time limit so as to permit us to determine his appeal on its merits. The issue which we have to decide is whether the appellant’s account is true or whether, contrary to his account, he knew that notice had been given of the Secretary of State’s decision to deprive him of British citizenship on or by a date which would have permitted him to give notice of appeal in good time.
9. The appellant’s account was supported by the written and oral evidence of a cousin-in-law, Mohammad Bilal Khan. He says that the appellant telephoned him on 27th May and asked him to go to 2 East Street to look for documents. He did so on the same date and located the unopened envelope containing the deprivation notice and appeal papers, amongst other post, in the letterbox of the flat above the shop. He sent copies of the documents to the appellant by fax from a shop which had a fax machine available to the public. He did not keep a record of the fax confirmation report, because the appellant had confirmed receipt. At the appellant’s request, he took the documents to the firm of solicitors who gave notice of intention to appeal on his behalf, Rahman and Co of 33 West Green Road, London N15 5BY. They have confirmed that it was Mohammad Bilal Khan who gave them instructions on the appellant’s behalf. We accept that he did so.
10. Miss Robinson accepts that it is for the appellant to demonstrate that by reason of special circumstances it would be unjust not to extend the statutory time limit for giving notice of appeal. Given the nature of the issue which will determine the answer to that question, she also accepts, correctly, that the burden of proving that the appellant did not learn of the decision on a date which would have permitted him to give notice of appeal in good time, is on him and must be discharged on the balance of probabilities.

11. For the reasons set out below, and in the closed judgment, we are satisfied that he has not discharged that burden. Indeed, if the burden were on the Secretary of State to prove that he did know, we would be satisfied on the balance of probabilities that he did.
12. We do not accept that the appellant, as the proprietor – or at least a proprietor – of an active business trading from 2 East Street, would not have made arrangements for post received there to be opened and its contents communicated to him. We do not believe his statement that nobody was checking his mail at 2 East Street. It is, in our view, inconceivable that, if his mail was being checked, he would not have been told about the contents of this important set of documents within, at most, a day or two of its delivery to East Street. In that event, the envelope containing the documents would have had to have been opened. We are satisfied that it was and that, accordingly, the evidence of Mohammad Bilal Khan that he first opened it on 27th May when he examined the letterbox in the flat cannot be true. Further, although he is a distant cousin of the appellant, he does not readily fit the description used by the appellant of those who went to 2 East Street and found the UKBA letters: “my relatives”. Further, if that event did occur, the appellant would immediately have realised the need to prove when he first received the documents – according to him, by fax on 28th May. He would have appreciated the need to produce the fax copies which, as printed out by the fax machine on which they were received by him, would have contained the date and time of transmission and the fax number from which the documents were sent. He has not done so. All of these considerations, together with the material referred to in the closed judgment, satisfies us that his account of how he first came to learn of the decision is not true and that he knew about it on a date which permitted him to give notice of appeal within the statutory time limit.
13. For those reasons, we are not satisfied that special circumstances have been established which would make it unjust not to extend the time limit for giving notice of appeal and decline to do so.