



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08393/2018
HU/08400/2018
HU/08397/2018

THE IMMIGRATION ACTS

Heard at Field House
On 28th June 2019

Decision & Reasons Promulgated
On 1st August 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

RAJA [S] - FIRST APPELLANT
INDIRA [N] - SECOND APPELLANT
[IS] (A MINOR) - THIRD APPELLANT
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Nadeem, Counsel
For the Respondent: Miss A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are all citizens of Nepal. The first Appellant was born on 11th May 1985, and the second and third Appellants are respectively his wife and child being born on 25th April 1986 and 22nd February 2017. The Appellants sought leave to remain in the UK on the basis of family and private life by way of an application

dated 20th November 2017. That application recited the extensive immigration history beginning when the first Appellant was granted leave valid from 29th November 2007 as a student. The Appellants' applications were refused by Notice of Refusal dated 28th March 2018.

2. The Appellants appealed and the appeals came before Judge of the First-tier Tribunal Swaniker sitting at Taylor House on 7th November 2018. In a decision and reasons promulgated on 8th April 2019 the Appellants' appeals were dismissed on human rights grounds.
3. On 22nd April 2019 Grounds of Appeal were lodged to the Upper Tribunal. On 14th May 2019 Judge of the First-tier Tribunal P J M Hollingworth granted permission to appeal. That grant of permission is extensive and runs to two pages albeit in one paragraph. The judge refers to the test centre at West Link College not being in London where the second Appellant lived and it was not by her account in a place or area she was familiar with. Judge Hollingworth considered that it was arguable given the lapse of time that the judge attached too much weight to that which the Appellant could not recollect set against the backcloth depicted by the judge and it was arguable that the boundary between inability to recall and evasiveness has not been linedated with sufficient clarity set against the chronology. Further he considered it was arguable that insufficient attention had been paid to the layout internally of the room in which the Appellant sat the test in relation to the question of how many people were in the room given the methodology adopted at test centres to separate those taking the tests and to making due allowance for the equipment required. Therefore, in granting permission the judge considered that it was arguable that the weight attached by the judge to the factors identified at the opening of paragraph 24 was insufficient and it was arguable that the analysis of the absence of a satisfactory rebuttal of the Respondent's allegation of fraud was flawed. Thereafter he considered that the approach towards credibility expressed by the judge may be erroneous.
4. It is on this basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellants appear by their instructed Counsel Mr Nadeem. Mr Nadeem is very familiar with this matter having appeared before the First-tier Tribunal. The second Appellant is also in attendance. She fully understands the proceedings and presented as an articulate and intelligent person. Mr Nadeem appears on behalf of all three Appellants. The Secretary of State appeared by her Home Office Presenting Officer Miss Fijiwala.

Submissions/Discussion

5. Mr Nadeem points out that it is for a Tribunal to assess whether or not an Appellant can speak a language. He reminds me at paragraph 22 the First-tier Tribunal Judge found that in the light of the second Appellant's fluency/command of the English language during oral evidence and external/objective evidence, namely the production of her academic qualifications, there was a prima facie case that she did

not use a proxy to take her TOEIC test. He reminds me that her academic qualifications consist of an award from Sunderland University in April 2013 graduating with a Masters Degree in Business Administration, the Association of Business Practitioners Postgraduate Diploma in Management Studies which was awarded in April 2012 and the Institution of Administration Management Diploma awarded in 2011 after successfully passing each of the three relevant levels. Further he points out that the British Council endorsed IELTS certificates awarded in 2008 and that all these courses were taught in English.

6. It is his submission the judge at paragraph 22 fails to consider material evidence pointing out that the Institute of Administrative Management Diploma was sufficient to secure her admission onto the degree programme and that notwithstanding this the second Appellant submitted her TOEIC certificate with her application for an extension of her visa. He submits that it begs the question why the Appellant would have submitted her TOEIC certificate with her immigration application if indeed she had acquired it by deception and that this was a material consideration and the one that favours her credibility that she did not use a proxy. He reminds me that when the Appellant's leave decision was certified she sought to challenge this by way of judicial review and did not decide to pack up her bags and leave the UK and that the only reason why her judicial review application was refused was because at the time, the law as it stood, did not allow for an in-country right of appeal. He submits that the judge has failed to provide a proper analysis of the Appellant's credibility.
7. He further submits that the second Appellant had not misled the Tribunal with regard to the test centre merely stating that she could not remember and that this is hardly surprising bearing in mind that it was seven years since she had been in the centre. He reminds me that the Appellant only put her TOEIC certificate in with her papers for completion of documentation and that it was not necessary for her to do so as it was not needed. Thereafter he points out she spent £1,000 on judicial review as she wanted to clear her name but this was not considered by the judge. He submits that there are material errors of law in the decision of the First-tier Tribunal Judge in that the judge failed to consider material evidence and that the judge had failed to give any consideration of this fact even to the extent that it was a mitigation bearing in mind the length of time that had passed. Mr Nadeem submits that the Appellant was being honest and that this is a question of balance which the judge has failed to approach.
8. So far as the reference the judge makes at paragraph 23 to the appellant's demeanour is concerned he rejects that and reminds me that this is a judge that has taken some five months to promulgate his decision. He submits there are material errors of law and that this case needs reconsideration and he asked me to remit it back to the First-tier Tribunal for rehearing with none of the findings of fact to stand.
9. In brief response Miss Fijiwala submits that what has been put is merely a disagreement and that the judge has taken into account the oral evidence. She refers me to paragraph 8 of the decision and that the Appellant had been advised that she should provide the TOEIC and that the burden of proof fell upon her. She further

submits that paragraphs 23 to 25 of the judge's decision set out why her evidence had not been accepted. The judge she submits concluded this was not an innocent explanation and that there had been an attempt to mislead the Tribunal. She asked me to dismiss the appeal.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

12. As a starting point I take into account the fact that the First-tier Tribunal Judge for reasons unknown to me took nearly five months to produce his decision. Guidance has been given on this point by the Court of Appeal in *The Queen on the application of SS (Sr Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391*. Therein Lord Justice Leggatt comments that where the credibility of an Appellant is in issue, there is no such Rule that a delay of more than three months between the hearing of oral evidence and the date of the First-tier Tribunal's decision renders the decision unsafe and that the correct approach is to ask whether the delay has caused the decision to be unsafe so that it would be unjust to let it stand. So far as that aspect of this appeal is concerned I do not consider the delay in promulgating alone would be sufficient to show that there is any material error of law in the decision of the First-tier Tribunal Judge albeit that the Tribunal is entitled to be critical of a judge who without explanation, has taken as long as this First-tier Tribunal Judge has to produce his determination.
13. The question arises as to whether or not therefore the judge in this decision has reached findings on credibility which contain material errors of law. I have heard,

albeit not in oral testimony, from the second Appellant and it is clear both from her academic qualifications and having heard her speak that she would on the face of it appear to speak and understand English very well. It does beg the question as to why she would even contemplate admitting a false TOEIC certificate. A proper approach to credibility would require an assessment of the evidence and of the general claim. In asylum claims relevant factors are firstly the internal consistency of the claim, secondly the inherent plausibility of the claim and thirdly the consistency of the claim with external factors of the sought typically found in country guidance. Theoretically I acknowledge that it is correct that all a claimant need do is to state his claim but that claim still needs to be examined for consistency and inherent plausibility and in nearly every case as here external information against which the claim could be checked would be available. In this case such information would be the documentary evidence provided by the second Appellant both as to academic qualifications – which have been produced – and the evidence she produced on her judicial review albeit that that was aborted for legal reasons.

14. Grounds given by the judge indicate criticism of the Appellant's demeanour. This is of course a factor which may well have been recorded by him in his notes to which I am not privy but that apart it has still taken him some five months to recall call such factors in his decision. In addition, it seems strange to accept that the failure by an intelligent and articulate Appellant to be able to recall the internal structure of the test centre being evidence that should be held against her.
15. I agree with the approach adopted when granting permission by Immigration Judge Hollingworth in that the boundary between the inability to recall and evasiveness has not been created with sufficient clarity set against the chronology and that the weight attached by the judge to the factors identified at the opening of paragraph 25 are insufficient as are the matters referred to in this context at paragraph 25 to the extent that too much weight has been attached to what was described as a failure/omission. The end product of such analysis is that the Respondent's allegation in the absence of satisfactory rebuttal is flawed and the approach of the judge to credibility is also flawed.
16. In such circumstances there are material errors of law in the decision of the First-tier Tribunal Judge and in the interests of fairness and justice the correct approach is to set aside the decision and remit the matter back to the First-tier Tribunal with none of the findings of fact to stand.

Notice of Decision

The decision of the First-tier Tribunal Judge contains material errors of law and the appeal is allowed and the decision is set aside. The following directions will apply:

- (1) On the finding that there are material errors of law in the decision of the First-tier Tribunal Judge, the decision of the First-tier Tribunal is set aside with none of the findings of fact to stand.

- (2) The appeal is remitted to the First-tier Tribunal sitting at Taylor House on the first available date 28 days hence with an ELH of three hours.
- (3) The appeal is to be heard before any Judge of the First-tier Tribunal other than Immigration Judge Swaniker.
- (4) There be leave to either party to file and/or serve an up-to-date bundle of objective and/or subjective evidence upon which they seek to rely within seven days of the restored hearing.
- (5) That in the event an interpreter is required at the restored hearing then the Appellants' solicitors must notify the Tribunal within seven days of receipt of these directions.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

25th July 2019

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

25th July 2019