



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/09888/2019 (P)

THE IMMIGRATION ACTS

Decided without a hearing
On 14 December 2020

Decision & Reasons Promulgated
On 14 December 2020

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

[N S]
(ANONYMITY DIRECTION MAD)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

1. The appellant is a Pakistani national who appeals, with permission granted by Judge Wilson, against a decision which was issued by Judge Sorrell on 22 April 2020. By that decision, the judge dismissed the appellant's appeal on protection and human rights grounds.
2. It is accepted by the respondent that the judge fell into legal error and that her decision must be set aside. I agree with that concession and shall set aside the FtT's decision. My reasons for doing so may be stated succinctly in the circumstances.

Background

3. The appellant has been in the UK since 2010, when he entered as a student. An application for further leave was refused in 2012, however, and he has remained without leave since then. Another application for leave to remain was refused in 2012 and he also made two applications for an EEA Residence Card, both of which were unsuccessful. Years passed

and, in 2017, the appellant was served with various forms as a precursor to removal. This prompted him to claim asylum in December 2017.

4. Unusually, the basis upon which the appellant claimed asylum and the basis upon which he had previously sought an EEA Residence Card were closely linked. The appellant stated that he had contracted a marriage to a Portuguese lady whilst he was in the United Kingdom and that his choice of spouse had given rise to a dispute in Pakistan. The family had intended him to marry another woman, and that had been agreed when the appellant was a young boy.
5. The respondent, however, considered that the relationship was nothing more than a sham. In so concluding, she relied upon an interview with the Portuguese spouse, in which she had told an immigration officer that she had been paid a sum of money to marry the appellant and that he had assured her that they would swiftly divorce. The respondent was also concerned that the appellant had used a proxy to take a TOEIC English test in the past. Accordingly, the asylum claim was refused.

The Appeal to the FtT

6. The appellant appealed to the FtT and her appeal was heard by the judge, sitting in Glasgow, on 14 February 2020. In her reserved decision, the judge noted that the appeal proceeded on protection grounds only. She noted that the appellant denied contracting a sham marriage or cheating in an English test. She then made the following findings. Firstly, she did not accept that the appellant had entered into a genuine relationship with the Portuguese national. She based that conclusion on what had been said by the woman in question when interviewed by an Immigration Officer and on her inability to accept what had been said by the appellant in an attempt to answer those admissions. As a result, she was not satisfied that the appellant would experience any problems on return to Pakistan. She was reinforced in her conclusion as to the appellant's credibility by his failure to claim asylum more promptly.
7. In dealing with the allegation that the appellant had cheated in his English language test, at [22], the judge concluded as follows:

Furthermore, I am satisfied from the Respondent's documentary evidence lodged in their 2nd bundle that on the balance of probabilities, the Appellant's English language test taken on 22 February 2012 at Elizabeth College, London was "invalid" in that reliable evidence exists of proxy test taking and/or impersonation and that he therefore used deception in order to pass this test. ("ETS SELT Source Data" "ETS TOEIC Test Centre Lookup Tool" and "Project Façade" - criminal inquiry into abuse of the TOEIC, Elizabeth College, London).

8. The judge then summarised her conclusions at [23] before dismissing the appeal.

The Appeal to the Upper Tribunal

9. In granting permission to appeal, Judge Wilson summarised the grounds of appeal and the basis of his decision in this way:

The grounds assert that the judge erred in that the judge failed to give adequate reasons for rejecting the appellant's evidence in relation to risk on return to Pakistan; considered irrelevant matters when making credibility findings and failed to adequately assess whether the appellant used deception in his English language test.

In an otherwise careful decision, it is nonetheless arguable that the judge failed to adequately assess the use of deception in the appellant's English language test.

10. Judge Wilson's decision was sent to the parties in May, after which the file was placed before the Vice President. He formed the provisional view that the appeal might be fairly and justly determined without a hearing and he made directions for submissions on that course of action and on the merits of the appeal. Written submissions were duly made by the appellant's solicitors and by Mr Whitwell, a Senior Presenting Officer, on behalf of the respondent.
11. I should record that I consider it fair and just in the circumstances of this case to proceed without a hearing. Above all, I consider there to be no need for a hearing when the outcome is agreed between the parties.

Analysis

12. The respondent's position is set out with precision and concision in the email which was filed and served by Mr Whitwell on 7 September 2020. He accepts that the judge erred in law in the way that she resolved the dispute over whether the appellant had cheated in his English language test. Whilst the judge was correct to accept that there was sufficient material to overcome the initial evidential burden on the respondent, she failed to consider in any way at all the remaining steps of the enquiry required by cases such as Muhandiramge [2015] UKUT 675. Given that it is clear from the judge's decision that her conclusion regarding the English test was a material part of her overall conclusion on the appellant's credibility, the respondent accepts that her decision cannot stand.
13. I consider this concession to be correct. The judge was certainly entitled – as a result of Shehzad & Chowdhury [2016] EWCA Civ 615 – to conclude that the evidence presented by the respondent sufficed to discharge the evidential burden of proof. But the judge was then required to consider whether the appellant had adduced an innocent explanation which was capable of belief and whether, all things considered, the respondent had discharged the legal burden upon her of disproving that explanation. The judge failed to consider those steps in any way at all and that part of the decision which I have reproduced at [7] above is accordingly unsound.
14. I have reflected, as the respondent did, on the question of whether the remaining findings can be saved notwithstanding the judge's obvious error in relation to the English Language Test. Like the respondent, I do not consider that to be possible. The judge's conclusion that the appellant had cheated in his English test was clearly a material part of her overall assessment of his credibility. In circumstances in which a material part of that overall assessment is so plainly flawed, I do not consider that any part of the decision can stand.
15. It follows that the decision of the FtT must be set aside and the entire decision on the appeal must be remade. Given the scope of that exercise, the proper forum for it is the FtT and I will order that the appeal be remitted to be heard by any judge other than Judge Sorrell.

16. I must add this. On any proper view of this case, the appellant faces a formidable task. Quite aside from any question about the ETS test, the interview with the Portuguese national and the delay in claiming asylum present him with significant difficulty in terms of his credibility. And, as Mr Whitwell helpfully observed at the end of his written submissions, there might well be a sufficiency of protection on return to Pakistan even if all that the appellant says is true: AW (Pakistan) [2011] UKUT 31 (IAC). In light of the fact-sensitive nature of that question, however, it is necessary for the Tribunal to consider whether this appellant can secure the assistance he might require in Pakistan in light of the primary findings of fact reached: Bagdanavicius [2004] 1 WLR 1207 refers, at [55](6).

Notice of Decision

The appellant's appeal to the Upper Tribunal is allowed. The decision of the FtT is set aside and the appeal is remitted to the FtT to be heard afresh by a judge other than Judge Sorrell.

Anonymity

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. I make this decision because this is a protection appeal and it reduces the risk to the appellant in the event that his appeal is ultimately unsuccessful and he is returned to Pakistan.

Postscript

This decision was finalised and sent to the administrative staff at Field House for promulgation on 18 November. On 20 November, Fordham J handed down judgment in R (JCWI) v President of UTIAC [2020] EWHC 3103 (Admin). I have considered whether to alter the decision above in light of the Administrative Court's decision in the JCWI case. Since the result was agreed between the parties, I have decided not to do so. No useful purpose would be served by seeking further submissions or holding a hearing in the circumstances, and the proper course remains as above.

M.J. Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 January 2021