



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04827/2019

THE IMMIGRATION ACTS

Heard at Field House
On 11 December 2020

Decision & Reasons Promulgated
On 7 January 2021

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SAHADEB KUNDU
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ó Ceallaigh, Counsel, instructed by Diplock Solicitors

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dismissing the appeal of the appellant against a decision of the Secretary of State refusing him leave to remain in the United Kingdom.
2. I think I can deal with the important facts justly in outline. Essentially, the appellant has been identified as a TOEIC cheat and found unsuitable to remain in the United Kingdom. The appellant denies doing anything wrong. The First-tier Tribunal was very unimpressed with the appellant's command of English and factored that into accepting that the appellant was a TOEIC cheat.
3. There are many things wrong with this approach. The first is that there is guidance given by the Tribunal, and indeed mentioned in the decision, about the need to be very cautious about a judge forming a view on a person's linguistic skills. There is a world of difference between giving evidence before a Tribunal and responding to

questions in an exam. Of course a judge can, and probably should, have regard to what is going on in the hearing room. Of course it is not to be ignored if a person has exceptionally eloquent or, alternatively, seems incapable of answering even elementary questions without an interpreter but outside these two extremes it is dangerous to take any view and even then it is only something to add to the evidential mix.

4. Certain parts of the grounds criticise the judge for making assumptions which may or may not have been justified and the grounds have merit although may well go more to weight and judicial discretion rather than fundamental error of law.
5. Ground 3, however, worries me a lot. The appellant has always identified himself as a person who has obtained a Bachelor's and a Master's degree in physics in Bangladesh that were taught in the English language. If that in fact is right then it is something to bear in mind very much when looking at the appellant's perhaps poor command of English in the hearing room and his explanation that he was nervous. The Tribunal's approach was to doubt his claim that he had indeed obtained a BSc and an MSc. This is procedurally unfair. The appellant had claimed for a long time that he had achieved these standards. He had no reason whatsoever to think that this claim had not been believed until he was cross-examined and I accept the thrust of the grounds that if this point was going to be taken then notice should have been given so he could have dealt with it.
6. Mr Whitwell responded that an objection could have been made at the time, either by the Tribunal or by Counsel asking for an adjournment, and he is right, it could have been. I do not know why it was not but certainly Mr Whitwell does not contend that there is anything in the papers that suggests that there was doubt about the appellant having achieved these qualifications and in the absence of some doubt about that, whilst the problem could possibly have been dealt with more efficiently, it is still unfair to take the point without notice and it is quite plain that the concern over that infected the general adverse findings, which were possibly less than entirely satisfactory anyway. Certainly the approach was wrong. The judge really should not have been concerned with his own views of the appellant's ability to speak English.
7. I am satisfied that this is one of those cases where there has not been a proper hearing because the conduct was procedurally unfair.
8. At the start of the hearing I was asked to rule on an application to adduce further evidence. This is evidence which goes some way to showing that the appellant has indeed achieved the qualifications that he says he has. I did not admit that evidence because I did not see how it could illuminate the question of whether there was an error of law. As I am sending the case back to the First-tier Tribunal it is not for me to rule on that application will be answered. However it does seem to me that now the point is known to be in issue the Secretary of State might want to look very carefully at the evidence that has been served and either make a formal concession or give notice of a further challenge to it before the hearing. I am not directing that she should follow either of those courses but it would be helpful if she opted for one or the other.

9. For the reasons I have given this is an unsatisfactory decision. I set aside the decision of the First-tier Tribunal. I find that the error goes right to the root of the fact-finding and I direct that the case be determined again in the First-tier Tribunal.

Notice of Decision

The appeal is allowed to the extent that I set aside the decision of the First-tier Tribunal and direct that the appeal be heard again in the First-tier Tribunal.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 17 December 2020