



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: VA/04485/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 27th January 2014

Determination Promulgated
On 20th February 2014
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Before

The Hon. Mr Justice McCloskey, President

Between

NAJMA ASLAM

and

ENTRY CLEARANCE OFFICER, NEW YORK

Appellant

Respondent

Representation:

For the Appellant: Aziz Bhatti , of JUST Immigration Services
For the Respondent: Ms Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION

1. This appeal has its origins in an unsuccessful application by Najma Aslam (hereinafter "*the Appellant*") for a family visitor's visa enabling her to enter the United Kingdom. This application was made on 13th December 2012 and specified

a projected date of travel to the United Kingdom of 7th January 2013. The application was refused by decision of the Entry Clearance Officer (“the ECO”) dated 23rd January 2013. The ECO determined that the application was non-compliant with paragraph 320(7A) of the Immigration Rules, in that the Applicant had falsely represented that she had not previously been refused entry to the United Kingdom, whereas according to records there had been an earlier refusal in 2008. The ECO noted further that the application did not include the expired passport which would have displayed a refusal stamp. The application was refused on this sole ground.

2. The Appellant appealed to the First-Tier Tribunal (the “FtT”). By its determination promulgated on 23rd August 2013, the FtT dismissed the appeal under both the Immigration Rules and Article 8 ECHR. The Appellant now appeals, with permission, to the Upper Tribunal.

THE CONTOURS OF THIS APPEAL

3. Permission to appeal was sought on six grounds. It is clear appears to me that four of these – grounds 1, 2, 4 and 5 – amount to little more than a disagreement with the Judge’s assessment and weighing of the evidence. The remaining two grounds – numbers 3 and 6 – are, however, of a different *genre*. The 3rd ground states:

“The procedural error consisted of the legal representative not being afforded the opportunity to read or to question the last minute submission of the appeal document of 2008 of which the IJ somehow had the prior notice as it was in her hands before we were finally allowed to enter the Court room.”

Ground 6 states:

“And because of the events that had preceded the hearing as well as hostile and toxic atmosphere that developed during the hearing, it was quite clear that IJ Gladstone will [sic] refuse the appeal. Therefore, she went through the determination with a forensic tooth comb in order to justify the outcome. Were the IJ to be [sic] in a calm and relaxed mood, she may have come to a different decision ...

It is requested that the permission to appeal be allowed by calling the witness to prove or otherwise the misconduct of the Learned Immigration Judge.”

The author of the grounds of appeal is the person who represented the Appellant before the FtT, Mr Bhatti of JUST Immigration Services. Enquiry on the part of this Tribunal at the appeal hearing elicited that Mr Bhatti is the holder of a Law Degree who, though not a practicing barrister or solicitor, has been providing legal advice and representation in immigration and asylum cases for many years and does so with the necessary authorisation from OISC, the regulatory authority.

4. Mr Bhatti is the author of a witness statement which, apparently, was submitted with the Grounds of Appeal. This contains Mr Bhatti's account of events at the hearing. The statement contains particularised instances of alleged discourtesy and aggression on the part of the Judge. It is asserted, firstly, that the Judge loudly and discourteously, ordered the representative and the sponsor to "*get back and wait until you are called in*" when, having knocked the door, they entered the hearing room at what they believed to be the appointed time. Secondly, it is alleged that at the outset of the hearing, the Judge -

".... waved a document saying in a sort of taunting manner 'you all say there was no appeal, here it is' and then addressed me saying 'This is the determination of the 2008 appeal', as regards which I was not given the opportunity to read. Mr Coyle [Respondent's representative] got up and gave me the copy as it was not in the Respondent's bundle"

Next, it is asserted that during questioning of the sponsor, Mr Ashraf, by the Respondent's representative, the sponsor -

"..... intimated something to the effect that he was aware that some appeal documents were served at their home but he did not know what had happened thereafter."

Mr Bhatti's statement continues:

"At this point, IJ Gladstone interjected and went ballistic [sic] by asking the sponsor three times in a forceful voice with a scowl of disapproval on her face 'Why you did not say that in a statement when the appeal was lodged? Why didn't you put it in your statement? ... Why didn't you put it in your statement?' ...

The environment in the Court room became toxic and outcome [sic] of the appeal absolutely predictable [sic] negative."

Finally, there is an assertion that at the beginning of Mr Bhatti's closing submissions, the Judge -

"..... ordered me in no uncertain terms 'You must not refer to anything that is already in the skeleton'".

The representative's statement embodies the following omnibus complaint:

"Regrettably, IJ Gladstone's decision being disrespectful, discourteous and intolerant falls well short of the high standards set by the Lord Chancellor and the Lord Chief Justice respectively. In this respect the misconduct of the IJ is at issue."

5. The sponsor, Mr Ashraf, also made a written statement. It is evident from the terms thereof that this too was compiled soon after the hearing. It contains the following passages:

“ My legal representative, Mr Bhatti, knocked on the door and before he could enter he was told in a strongly harsh voice by a lady inside sitting at the desk ‘Get back and come in when you are called’.”

Mr Ashraf asserts that the Judge, at the outset of the hearing, addressing him in “a very terse commanding voice”. He corroborates Mr Bhatti’s claim that the Judge produced a copy of the 2008 appeal decision. He confirms that, in response to questioning, he admitted to recalling the service of some papers at his family home

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“But [I] know nothing more what had happened to them as, traditionally and culturally, it is the oldest member of the family who deals with all the matters and in this case it was my father who did whatever despite his ill health and I knew nothing about the appeal.”

Mr Ashraf’s statement continues:

“The Immigration Judge interrupted by asking me in an almost shrieking and uncontrollable rage ‘If you knew papers were served on you, then why you did not say that when the appeal was lodged?’ I gave the reasons the best I could, but she would have none of it. She kept screaming and shouting at me with very aggressive and agitated tone of voice and kept repeating ‘Why didn’t you put that in your statement?’ I couldn’t make out why she was shouting and bullying me

She definitely seemed terribly irritated, aggressive and disrespectful to the point that I thought she was racist

I am sure she will refuse the appeal as that is quite apparent from her aggressive attitude but this experience in a judicial environment leaves me baffled and confused.”

It is agreed that this statement also formed part of the materials considered at the permission to appeal stage.

6. At this juncture, it is appropriate to note the terms in which permission to appeal to this Tribunal was granted:

*“The grounds contain a number of complaints about the behaviour of the Judge in respect of the conduct of the hearing which it is suggested prevented the appeal from being properly presented. **The complaints made are serious and justify further investigation.** That is not to say the appeal will succeed on its merits **but the grounds raise sufficient concerns that permission to appeal is granted.**”*

[My emphasis.]

Accordingly, permission to appeal has been granted solely on the basis of the conduct of the hearing at first instance. Although not articulated in this way, the substance of the grant of permission is that it is arguable that the Appellant was deprived of her right to a fair hearing.

7. It is apparent from the papers that the various claims and assertions ventilated by Mr Bhatti and the sponsor are currently being processed under the formal judicial complaint procedures. The hearing of this error of law appeal intervenes at a stage when the complaint process remains uncompleted. I would emphasise that the sole question for this Tribunal is whether the decision of the FtT is vitiated by error of law, within the compass of the grant of permission to appeal. This is **not a judicial misconduct investigation or determination**.
8. The available evidence includes a comprehensive response compiled by the Judge, spanning three documents. Whilst it is somewhat unorthodox for the Upper Tribunal to receive a response from the FtT to the grounds of appeal, there was no objection to this being considered. Moreover, given the basis on which permission to appeal was granted, I consider that this was appropriate in this particular case. I thus consider because there must be fairness to both protagonists viz the Appellant (on the one hand) and the Judge (on the other). Furthermore, this is not precluded by any rule of practice or relevant principle. Finally, this course has the important benefit of ensuring that this Tribunal determines the appeal on a properly informed basis.
9. The FtT's response attaches the Judge's record of proceedings. This confirms that, as regards the conduct of the hearing, the following matters are **not** in dispute:
 - (i) The Appellant's representative was not in possession of the 2008 decision prior to the hearing.
 - (ii) The Appellant's representative was first provided with a copy of this decision after the hearing had commenced.
 - (iii) The representative did not request any accommodation or facilities, such as a brief adjournment and did not raise any issue of being taken by surprise.
 - (iv) In his closing submissions, the Appellant's representative highlighted the late production of the 2008 decision.
 - (v) The sponsor gave evidence at the hearing that the responsible family member concerning the 2008 process was his father. He also attested to his father's ill health, asserting that a genuine error had been made in the visa application.

(vi) The Judge stated to the Appellant's representative that the skeleton argument was not to be repeated and that submissions were to focus on other matters.

10. At this juncture, it is appropriate to consider the sponsor's written statement. This was contained in a bundle prepared for the first instance hearing and lodged three days in advance. In his statement, the sponsor describes himself as a British citizen by birth and states that he has been operating a busy take away food outlet, the family business, for some years. The sponsor is the nephew of the Appellant. He confirms that his father, then ill, had acted as sponsor in an application to bring the Appellant to the United Kingdom for a visit in 2008. His statement continues

"The Appellant's entry clearance application was refused by Islamabad and my father suffered a stroke at the end of 2008 and his medical condition worsened to the extent that he was hospitalised for 8 weeks. In view of his health, we didn't think it appropriate to put our father through the ordeal of an appeal even though, if we had appealed, it may have been allowed on compassionate grounds".

Following this, the sponsor's wife and two of their children visited the Appellant, who was then in Pakistan, in 2010. Subsequently, the Appellant went to live with a son in the USA. She is now aged 69 years and in declining health.

11. This statement disclosed the Appellant's unsuccessful application for entry clearance in 2008, thereby confirming the factual correctness of the central reason for the ECOs later refusal decision of 23 January 2013. The sponsor's statement asserts quite clearly that there was no appeal against the 2008 refusal. However, this is incorrect. The appeal number is VA/39169/2008 and the appeal was dismissed by a determination of the FtT promulgated on 5 January 2009. This followed a hearing at which the Appellant was not represented. There was evidently some doubt about whether the appeal was to be determined following an *inter-partes* hearing or on paper. The Judge, by the terms of Determination, clearly gave the appeal careful consideration before dismissing it for the reasons elaborated.

12. It is agreed that the document to which the Judge was referring at the outset of the hearing conducted on 15 August 2013 is the earlier FtT Determination of January 2009. Certain passages in the FtT's determination have some bearing on this issue and others. Firstly, it is apparent from paragraph [7] that the Appellant's representative was not, initially, in possession of the earlier Determination. It is recorded that the representative *"was provided with a copy"*. I shall return to this discrete issue as at a later stage. In paragraph [34] it is stated:

"I indicated to Mr Bhatti that, on the basis of the [sponsor's] statement, I did not expect a great deal of evidence in chief. However, I indicated some matters on which I sought clarification. The sponsor gave unsworn evidence before me in English. I outlined the format of the hearing to him, I advised the sponsor that if he did not

understand, know, hear or remember anything, he should let me know. I also advised him of my independence in the matter and [that] any questions raised by me were by way of clarification."

Having summarised the sponsor's evidence in response to the Respondent's questioning, the Judge continued, in paragraph [42]:

"Before asking the sponsor some questions, I reminded him of my independence and the reason for my questions. I note that the sponsor's evidence above was that he knew that there had been an appeal in 2008, but did not know if it had gone ahead. I queried, therefore, why he had not said this in his statement. The sponsor told me that he did not know 100% if there had been an appeal. Again, I queried why he had not said this in his statement. He told me that he should have done so. The 2008 sponsor was living with this sponsor, at the same address, in 2008."

In paragraph [46], the Judge directed herself, correctly, that the issue to be determined was whether there had been a deliberately false representation about the absence of any relevant previous refusal of entry to the United Kingdom in the completed application form. In the paragraphs which follow, the Judge highlighted certain significant concerns and shortcomings pertaining to the appeal materials. The assessment undertaken in these passages is commendably detailed and coherent. This culminated in the following omnibus conclusion, in paragraph [67]:

"... I cannot accept that so many false representations were made by way of innocent misrepresentation. I am therefore satisfied that the Appellant made false representations under paragraph 320(7A) and thus refusal of her application, and appeal, is mandatory."

13. There are two discrete assertions in Mr Bhatti's statement which I would highlight. The first is that, at the hearing, he received a copy of the January 2009 FtT Determination from the Respondent's representative. Given his description of certain surrounding events at the hearing, this creates a negative impression of the Judge. However, this assertion has been demonstrated to be incorrect. Having questioned Mr Bhatti carefully about this matter, and others, I elicited from him that it was the Judge, and not the Respondent's representative, who provided him this document. This confirmation was provided by Mr Bhatti after he had initially maintained to this Tribunal his assertion that the provider of the document was the other representative. He then retracted this quite abruptly, when questioned about it. The second noteworthy feature of Mr Bhatti's written statement sounding on this issue is the claim:

"..... I was not given the opportunity to read [this document]"

This Tribunal's questioning of Mr Bhatti confirmed the following matters clearly:

- (a) Mr Bhatti did not request a pause or recess to consider the 2009 FtT Determination.
- (b) He did not do so because he did not need to do so: he was aware of what the document contained and represented.
- (c) He could have asked the sponsor questions about the 2009 Determination and related issues, but chose not to do so. The Judge did not prevent him from asking such questions either in examination in chief or re-examination.
- (d) Everything contained in paragraphs 34 and 42 of the Judge's Determination is correct.

14. Mr Bhatti represented to this Tribunal that if he had not been flustered (as he claimed) he would have questioned the sponsor about the family business, in an attempt to justify the sponsor's (undeniable) misstatement that there had been no appeal against the 2009 Determination. Mr Bhatti was driven to agree, however, that the sponsor's family business activities, coupled with his personal lack of involvement in the unsuccessful 2008 application, were clearly expressed in his statement. Furthermore, Mr Bhatti did not suggest that the Judge failed to take this statement into account. Finally, he agreed with the verbatim record of the Judge's question to him

"Do you have any re-examination Mr Bhatti?"

It is unnecessary to elaborate at this juncture of the analysis.

CONSIDERATION AND CONCLUSIONS

15. In my opinion, this appeal raises two distinct, though somewhat inter-related questions of law. The first is whether the Appellant had a fair hearing. The second is whether the ultimate outcome of the hearing, which entailed the appeal being dismissed, was pre-determined, the product of a closed, prejudice on judicial mind.
16. I consider that three main principles are engaged. The first is that every litigant has an inalienable right to a fair hearing. The second is that justice must not only be done but must manifestly and undoubtedly be seen to be done. The third is the principle of impartial judicial adjudication, one facet whereof is that prejudgement and predetermination are impermissible.. Linked to this is the discrete judicial duty to consider the case made by all parties with an open mind. The first two of these principles were considered recently, in a different context, by the Upper Tribunal in Munir - v - Secretary of State for the Home Department [2013] UKUT.. In paragraph [14] of that decision, this Tribunal stated:

“[14] The matrix of this appeal, rehearsed above, prompts reflection on the content and reach of one of the cornerstones of the common law, namely the right of every litigant to a fair hearing. The right in play is properly described as fundamental, irreducible and inalienable.”

Four specific principles were then identified:

- (i) The defect, or impropriety, must be procedural in nature. Cases of this kind are not concerned with the **merits** of the decision under review or appeal. Rather, the superior court’s enquiry focuses on the process, or procedure, whereby the impugned decision was reached.
- (ii) It is doctrinally incorrect to adopt the two stage process of asking whether there was a procedural irregularity or impropriety giving rise to unfairness and, if so, whether this had any material bearing on the outcome. These are, rather, two elements of a single question, namely whether there was procedural unfairness.
- (iii) Thus, if the reviewing or appellate Court identifies a procedural irregularity or impropriety which, in its view, made no difference to the outcome, the appropriate conclusion is that there was no unfairness to the party concerned.
- (iv) The reviewing or appellate Court should exercise caution in concluding that the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred.

This Tribunal also noted the elevated degree of importance attributed to **appearances** in the context of every litigant’s fair hearing rights.

- 17. As regards the third of the principles identified above, I consider that the enquiry conducted by the appellate or reviewing court is not confined to issues of process or procedure. Rather, its purview extends to the merits of the first instance decision or judgment. I consider that to confine the enquiry to issues of process and procedure would be wrong in principle . Both the terms and the outcome of the judicial decision under review or appeal, together with other surrounding materials such as documentary evidence and written submissions, all considered as a whole, are likely to provide indicators of whether the ground of appeal or review under scrutiny has any merit or substance.
- 18. I conclude without hesitation that the Appellant had a fair hearing before the FtT. Fundamentally, I am satisfied that the Appellant and his legal representative had a sufficient opportunity to put forward their case. This conclusion is based on a combination of my assessment of the totality of the materials which I have considered and the representations made to this Tribunal by Mr Bhatti, together with the material facts relating to the conduct of the initial hearing, as rehearsed

above. In this context, I refer to, but do not repeat, paragraphs [3] – [13] hereof thus the first ground of appeal fails.

19. As regards the second of the central issues of law which I have identified, I have considered the determination in isolation from the Judge's subsequent responses. Disregarding these entirely, I find that the determination manifestly confounds any suggestion of unfairness to the Appellant. It is a carefully compiled, impressively detailed and logically persuasive judgment. It is, demonstrably, the work of a conscientious, industrious, impartial and independent Judge. It comfortably withstands the detailed scrutiny to which it has been subjected in this appeal process. It gives rise to no lurking suspicion of predetermination or prejudgment of any discrete issue or the outcome. The second main ground of appeal fails accordingly.
20. The outstanding complaint against the Judge will be determined by those charged with the responsibility of doing so. This Tribunal has no function or responsibility in the complaint process. I trust that the swift production of this judgment will expedite finalisation of this latter exercise.

DECISION

21. I dismiss the appeal. The decision of the FtT is hereby affirmed.

Bernard McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 12 February 2014