



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/09770/2015

THE IMMIGRATION ACTS

Heard at Field House
On 28 June 2016

Decision Promulgated
On 05 July 2016

Before

Upper Tribunal Judge King
Deputy Upper Tribunal Judge Pickup

Between

Suresh Chaudhary
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr P Richardson of counsel, instructed by Bespoke Solicitors
For the respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Kelly promulgated 25.9.15, dismissing his appeal against the decision of the Secretary of State, dated 17.2.15 to refuse his application for leave to remain on the basis of private and family life, and to remove him from the UK pursuant to section 10 of the Immigration and Asylum Act 1999. The Judge heard the appeal on 4.9.15.

2. First-tier Tribunal Judge Hollingworth granted permission to appeal on 25.2.16.
3. The appeal was first listed in the Upper Tribunal before Deputy Upper Tribunal Judge McGinty, who adjourned the error of law hearing to enable the appellant to submit an application to amend grounds of appeal and gave directions for service of the same and any Rule 24 reply by the Secretary of State.
4. We have before us the amended grounds of appeal and application, dated 4.5.16, drafted by Mr J Butterworth of counsel, together with Mr Duffy's Rule 24 reply, received on 20.5.16.
5. Thus the matter came before us on 28.6.16. as an appeal in the Upper Tribunal. We heard submissions of the representatives for the appellant and the Secretary of State and reserved our decision, which we now give.

Error of Law

6. For the reasons briefly summarised below, we find such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Kelly to be set aside and remade in the First-tier Tribunal.
7. Insofar as permission is required to advance additional grounds of appeal, we consider it in the interests of justice to grant permission, notwithstanding the application and amended grounds are out of time, as pointed out by Mr Duffy.
8. In granting permission to appeal, Judge Hollingworth considered it arguable that the First-tier Tribunal adopted an incorrect approach to the assessment of evidence in relation to the issue of the appellant's credibility.
9. The primary concern arises from the way in which §18 of the First-tier Tribunal decision is worded. There, having relied on additional evidence only submitted by the respondent at the appeal hearing, the judge reached the conclusion that the "appellant is not a credible witness and that his evidence cannot be accepted as reliable." With that crucial finding, the judge then went on to consider "whether there is any other evidence to corroborate his claim to be homosexual. However, I find that there is not."
10. In effect, the judge made a preliminary finding that the appellant was not telling the truth about his sexuality, based on the late disclosure of information by the Secretary of State's representative at the appeal hearing. This information related to the previous application in 2014 for an EEA Residence Card on the basis of a durable relationship with a female EEA citizen, which is referred to in the refusal decision, but also information that was not referred to in the refusal decision, comprising an Immigration Officer's Report as to the interview of the appellant and his alleged partner Mr Patel at the Registry Office on 27.2.15, on an attempt to enter into what the Secretary of State considered to be a sham civil partnership. The record of the interview with the appellant was adduced, but not that of the interview with Mr Patel, which was only referred to in the summary in the Immigration Officer's report.

In summary, the information suggested that the EEA application was a sham and that the appellant was no more than friends with the EEA national. It was also asserted that the appellant admitted that there was no genuine relationship, and that Mr Patel admitted that he was not in a relationship with the appellant, did not live with him, and in fact was heterosexual and had a girlfriend. The notes also suggest that the appellant told the Immigration Officer that he had been advised that it would be easier to obtain a visa if he entered into a sham marriage.

11. Although the appellant's representative at the appeal hearing raised concerns about the late service of this important information, he did not seek an adjournment to counter this information by the calling of other evidence, or seek production of the interview notes of Mr Patel's interview.
12. At §16 the judge reached the conclusion that notes and interview record were reliable and attached significant weight to them, finding the officers involved had no reason to be anything other than honest and accurate in representing what the appellant and Mr Patel told them on 27.2.15.
13. The first concern raised in the grounds of appeal and advanced in the submissions before us is that rather than taking a holistic approach, assessing the appellant's credibility by taking into account the evidence as a whole, in the round, the judge reached this early conclusion that the appellant was not credible and assessed the remaining evidence in the light of that conclusion on credibility.
14. It can be seen that after reaching his conclusion as to the appellant's credibility, the judge went on at §19, §20, §21, §22, and §23 to address the evidence relied on by the appellant, including: photographs; text-style messages; donations to a LGBT group; the alleged absence of documentary evidence to confirm cohabitation with Mr Patel; and the absence of any supporting witness evidence to confirm the appellant's alleged involvement in the gay community or at same-sex venues. However, it is clear that the judge's approach to this evidence was to view it in the light of credibility findings already made. For example, at §19 in relation to the photographs, the judge stated, "I have already concluded that the appellant and Mr Patel have never in fact been in a physical relationship with each other and that their attempt to enter into a civil partnership was for the sole purpose of trying to establish immigration rights in this country. Against this background, I find that that the photographs were taken as part of the appellant's overall plan to mislead the immigration authorities...I therefore do not attach any weight to these."
15. In effect, the judge's view of this evidence was tainted by the already-reached conclusion that the appellant's claim about his sexuality was not credible. We find that the correct approach should have been to view this evidence as part of the evidence as a whole going to the appellant's overall credibility, rather than dismissing the evidence because it was inconsistent with the credibility findings already made.

16. We have considered whether it might be possible to view the decision of the First-tier Tribunal on the basis that the judge did make an assessment of the evidence as a whole before making any of the credibility findings, recognising that the judge has to start somewhere when addressing evidence in relation to credibility. However, there are ways in which a judge can make clear that the evidence has been addressed as a whole before reaching any of the findings of fact, but this was not made clear in the decision of the First-tier Tribunal. In the circumstances, we find there is an error of law in the way in which the First-tier Tribunal approached the credibility findings.
17. We have also considered whether the error in relation to the credibility findings are in fact material in the light of the alternative finding at §24 of the decision that even if the appellant is homosexual he does not meet the requirements of paragraph 276ADE(vi) in relation to his private life, because on the background evidence the judge found that he could return to live in India without any significant risk of arrest or persecution. In those circumstances, the appellant would not be able to show that there are very significant obstacles to his integration in India.
18. We bear in mind that no ground of appeal in either the original grounds nor the amended grounds of appeal take issue with the judge's conclusion at §24 as to 'very significant obstacles.' However, it is clear from §24, §25 and §26 that the conclusion in relation to paragraph 276ADE(vi) is at least to some degree tainted by the flawed credibility findings. For example, at §25 where the judge considered the claim that the appellant's father would try to kill him on return to India, the judge stated, "However, given my adverse credibility findings in respect of the appellant and my conclusions about his claim generally, I find this assertion to be self-serving and I do not attach any weight to it."
19. It follows that we are driven to conclude that the error of law in relation to the approach to the appellant's credibility is material and sufficient to require the decision to be set aside.
20. Returning to the issue of the late service of crucial information about the attempt to enter into the civil partnership at the Registry Office on 27.2.15 and Mr Patel's alleged admission that this was a sham, as stated above, we take into account that the appellant's representative did not seek an adjournment to address this important evidence. However, in the light of Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC), we reach the conclusion that the reliance on this evidence at the last minute at the First-tier Tribunal appeal hearing, especially when it was not raised at all in the refusal decision, was procedurally unfair, even though there was no application to adjourn.
21. In Miah and in other similar cases the President and the Upper Tribunal have held that disclosure of such material, such as the interview record of Mr Patel, should be made as a matter of course in the interests of the appellant's right to a fair hearing. The appellant is entitled to know in advance the case he has to meet. He would have been totally unaware before the First-tier Tribunal appeal hearing that the Secretary

of State was going to adduce evidence in which Mr Patel apparently admitted that the claimed sexual relationship with the appellant was a sham.

22. Mr Duffy was not able to explain to us why that interview record was not disclosed at the First-tier Tribunal appeal and never has been; it was not within his case papers at the hearing before us. Even if there are some third-party privacy disclosure issues they could be dealt with appropriately by directions of the Tribunal, including for redaction of sensitive information, as suggested by the President in Miah. Further, the President stated, "While there may be cases where it can be demonstrated that non-disclosure of this document did not contaminate the fairness of the Tribunal's decision making process, one would expect these to be rare."
23. In the light of the case law, we reach the conclusion that the appeal hearing before the First-tier Tribunal was also flawed for procedural unfairness.
24. Given the information that was disclosed by the Secretary of State's representative, both in relation to the EEA Residence Card application, and the answers in interview of the appellant and Mr Patel at the Registry Office on 27.2.15, at any future re-hearing of the decision in the appeal the appellant is likely to face considerable difficulties in establishing his credibility. However, he should be accorded the opportunity to address the evidence fairly and for his credibility to be assessed in the light of the evidence as a whole.
25. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
26. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, we do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, we find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

27. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

We set aside the decision.

We remit the making of the decision in the appeal to the First-tier Tribunal to be made afresh.



Signed

Deputy Upper Tribunal Judge Pickup

Dated 5th July 2016

Deputy Upper Tribunal Judge Pickup

Consequential Directions

- 28. The appeal is remitted to Hatton Cross to be heard afresh with no findings preserved;
- 29. The appeal may be listed before any First-tier Tribunal Judge with the exception of Judge Kelly and Judge Hollingworth;
- 30. The estimate length of hearing is 2 hours;
- 31. An interpreter in Hindi will be required;

Anonymity

We have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, we make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, we have considered whether to make a fee award.

We have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

We make no fee award.

Reasons: The outcome of the appeal remains to be decided.

A handwritten signature in black ink, appearing to be 'James L. Pickup', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

5th July 2016